

SECURITIES AND EXCHANGE BOARD OF INDIA

MS. MADHABI PURI BUCH, WHOLE TIME MEMBER

Order

Under Regulation 28 of Securities and Exchange Board of India (Intermediaries) Regulations, 2008 read with regulation 7 of Securities and Exchange Board of India (Stock Brokers and Sub-brokers) Regulations, 1992

In the matter of:

Sl. No	NAME	PAN
1.	Motilal Oswal Commodities Broker Private Limited	AAACP3147N

In Re: Fit and Proper Criteria

BACKGROUND OF THE CASE:

1. Motilal Oswal Commodities Broker Private Limited (hereinafter referred to as “**MOCBPL**” / “**Noticee**”) was/ is a commodity derivative broker / member of National Spot Exchange Limited (hereinafter referred to as “**NSEL**”), Multi Commodity Exchange of India Ltd (hereinafter referred to as “**MCX**”) and National Commodity & Derivatives Exchange Limited (hereinafter referred to as “**NCDEX**”).
2. NSEL was incorporated in May 2005 as a Spot Exchange for trading in commodities. In exercise of power conferred under Section 27 of the Forward Contracts (Regulation) Act, 1952 (hereinafter referred to as “**FCRA**”), Central Government vide notification dated June 5, 2007, exempted all forward contracts of one day duration for the sale and purchase of commodities traded on NSEL from operations of the provisions of FCRA subject to certain conditions, inter alia including “*no short sale by the members of the exchange shall be allowed*” and “*all outstanding positions of the trades at the end of the day shall result in delivery*”. In October 2008, NSEL commenced its operations by providing an electronic trading platform to participants for spot trading of commodities such as bullion, agricultural produce, metals, etc.

3. It is observed that in September 2009, NSEL had introduced the concept of 'paired contracts'. Paired contracts means buying and selling the same commodity through two different contracts at two different prices on the Exchange platform and investors could buy a short duration settlement contract and sell a long duration settlement contract and vice versa at the same time viz. Trades for Buy (T+2 / T+3) and Sell (T+25/ T+36) used to happen on the exchange at the same time at different prices.
4. Pursuant to a settlement default at NSEL in 2012, Economic Offences Wing's (hereinafter referred to as "**EOW**") initial investigations / arrests and complaints received from investors against the members / brokers of NSEL (including Noticee), NSEL vide complaint letters dated March 17, 2015 and March 24, 2015 and EOW via report dated April 04, 2015 had requested Securities and Exchange Board of India (hereinafter referred to as "**SEBI**") to take appropriate/necessary action.
5. It is noted that vide Finance Act, 2015, Forward Market Commission (hereinafter referred to as "**FMC**") got merged with SEBI on September 28, 2015. Further, it is noted that as per Finance Act, 2015, an intermediary may continue to buy, sell or deal in commodity derivatives as a commodity broker, if it had made an application for such registration to SEBI within a period of 3 months from the date of merger till the disposal of such application. Pursuant to this merger, MOCBPL on November 24, 2015, had made an application to SEBI for registration as a commodity derivative broker.
6. Further, pursuant to the merger of FMC with SEBI, the regulation and supervision of the commodity derivatives brokers had been entrusted to SEBI. Therefore, in view of the abovementioned NSEL complaint letters and EOW report, SEBI had appointed M/s Gokhale and Sathe, Chartered Accountants (hereinafter referred to as "**Auditor**") to carry out a performance audit/inspection of MOCBPL.
7. Audit report along with Annexures were submitted by the Auditor to SEBI. Based on the findings of the Auditor and further analysis of the same by SEBI, it was decided by SEBI to initiate enquiry proceedings against MOCBPL in terms of the SEBI (Intermediaries) Regulations, 2008 (hereinafter referred to as "**Intermediaries Regulations**").

8. SEBI vide order dated October 06, 2016 had appointed a Bench of Designated Authorities (hereinafter referred to as “**DAs**”) to enquire into the alleged violations of various provisions of the SEBI (Stock Brokers & Sub Brokers) Regulations, 1992, (hereinafter referred to as the “**Brokers Regulations**”), SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 (hereinafter referred to as “**PFUTP Regulations**”), Forward Contracts (Regulation) Act, 1952, (hereinafter referred to as “**FCRA**”), Prevention of Money Laundering Act, 2002 (hereinafter referred to as “**PMLA**”), Central Government Notifications and various Circulars / Code of Conduct, Guidelines, Bye Laws, Business Rules etc. of FMC / SEBI / NSEL / NCDEX / MCX.
9. In terms of Regulation 27 of the Intermediaries Regulations, the DAs have submitted the Enquiry Report dated April 11, 2017 in respect of MOCBPL. Vide the said Enquiry Report, the DAs have stated that “*...in view of the seriousness of the matter, facts and circumstances of the case, the conduct of the Noticee in its functioning as a commodity broker is questionable and has certainly eroded its general reputation, record of fairness, honesty and integrity and has therefore affected its status as a ‘fit and proper person’ to be an intermediary in the securities market...*” and gave the following recommendations:
- (a) The application of MOCBPL submitted for registration as a commodity broker may not be considered in the interest of securities market and the application of MOCBPL may be rejected.
 - (b) SEBI may also consider initiating prosecution proceedings under the relevant provisions of Chapter V of FCRA for the irregularities committed by MOCBPL including the violation of the Government of India Notification issued under Section 27 of FCRA.

FIRST SHOW CAUSE NOTICE:

10. Pursuant to the submission of Enquiry Report dated April 11, 2017 in respect of MOCBPL by the DAs, SEBI issued a Show Cause Notice dated April 24, 2017 enclosing a copy of Enquiry Report dated April 11, 2017 (hereinafter referred to as “**SCN**” / “**Enquiry Report**”) to MOCBPL wherein MOCBPL was advised to reply to the SCN

within 21 days from the date of receipt of said notice. MOCBPL vide its letter dated May 15, 2017 had acknowledged the receipt of SCN. The allegations in brief as specified/mentioned/established/alleged in the Enquiry report were as under:

- 10.1. Noticee had violated the provision of the conditions prescribed vide Government Notification dated June 05, 2007 which in turn resulted in the violation of the provision of Section 27 of FCRA.
- 10.2. Noticee was carrying out financial transactions in the garb of doing commodity transactions.
- 10.3. Noticee had made false / misleading presentation in respect of assured / risk free return, arbitrage opportunity in spot market at same Exchange by way of pair contracts, trades are backed by 100% physical commodities, physical stock and substantial settlement guarantee fund availability in case of default; which are in violation of provisions of various circulars, rules and bye laws of NSEL and Section 21(g) of the FCRA.
- 10.4. Noticee had done client code modifications which shows lack of due diligence on the part of the Noticee; Noticee had done trading in clients name; which are in violation of provisions of various circulars, rules and bye laws of NSEL.
- 10.5. Noticee had failed to report suspicious transactions to Financial Intelligence Unit under PMLA thereby violated provision of NSEL circulars.
- 10.6. Noticee through its arm NBFC, had funded the clients and lured them to trade on NSEL which are in violation of provisions of bye laws of NSEL.
- 10.7. Noticee had allowed its clients to execute trades despite debit balance in their accounts and has thereby violated provisions of the Guidance Manual for Audit of Members of Commodities Futures Exchange issued by the FMC, code of conduct and business rules of MCX and NCDEX.
- 10.8. Noticee allowed its clients to use the funds in Derivatives Exchanges for operation on Spot Exchanges thereby violated circulars of FMC, MCX and NCDEX and also bye laws of NSEL.
- 10.9. Noticee has partially collected the margin from its clients; Noticee had failed to renew its insurance policy in time; which are in violation of provisions of various circulars and business rule of NCDEX and MCX.

It is alleged that the Noticee has not conducted its operations as a commodity broker at NSEL in a fair and transparent manner. The integrity, reputation and character of the Noticee is questionable from the conduct of its business at NSEL as a commodity broker. In view of the seriousness of the matter, facts and circumstances of the case, the conduct of the Noticee in its functioning as a commodity broker is questionable and has certainly eroded its general reputation, record of fairness, honesty and integrity and has therefore affected its status as a 'fit and proper person'.

ISSUE OF INSPECTION:

11. MOCBPL vide various letters/emails dated May 15, 2017, July 14, 2017, September 8, 2017, September 18, 2017, September 21, 2017, October 6, 2017, October 21, 2017, November 22, 2017, January 5, 2018 and January 19, 2018 etc. had sought inspection of documents as well as copies of documents and submitted that SEBI has not provided complete inspection of all documents to them. However, SEBI submitted that it had granted inspection to MOCBPL on August 14, 2017 and copies of all relied upon documents were also provided to MOCBPL on the day of inspection i.e., August 14, 2017 and through various letters dated August 29, 2017, November 08, 2017 and January 05, 2018.
12. In view of the stand of SEBI that it has granted inspection of all relied upon documents and the stand of the Noticee that they are entitled to get additional documents and their request that a hearing on merits be fixed only after they file detailed reply based on all the requested documents, in order to overcome the impasse resulting from the conflicting stands, opportunity of hearings on January 25, 2018 and February 14, 2018 were provided to the Noticee in respect of inspection of documents. Authorized Representatives of the Noticee appeared for hearing and made oral submissions with respect to the inspection of documents and matter was heard at length.
13. After consideration of submissions of the Noticee on the issue of inspection, a detailed order dated September 3, 2018 was passed on the issue of inspection and the proceedings related to inspection was closed.

REPLY AND HEARING ON MERIT OF THE CASE:

14. In the interest of natural justice, vide order dated September 3, 2018, Noticee was given an opportunity to appear for a personal hearing on merits on September 27, 2018 at SEBI, Head Office, Mumbai.
15. Meanwhile, MOCBPL vide its letter dated June 8, 2018 had filed an application with SEBI for withdrawal of the application for registration / surrender of deemed registration made by them vide applications dated December 16, 2015 and December 19, 2015. SEBI vide its letter dated July 9, 2018 had informed MOCBPL that enquiry proceedings under Intermediaries Regulations against it are in progress, therefore, in view of pending enquiry proceedings, its request for withdrawal of the application for registration cannot be entertained.
16. Aggrieved by SEBI's letter dated July 9, 2018, MOCBPL filed a writ petition no. 3266 of 2018 before Hon'ble High Court of Bombay challenging the said letter dated July 9, 2018 by which SEBI had not entertained the request of MOCBPL for withdrawal of the application for registration. The said writ petition before Hon'ble High Court of Bombay was mentioned on September 24, 2018.
17. The authorised representative (hereinafter referred to as "AR") of the Noticee, Shri Rahul Karnik, Advocate vide his letter dated September 26, 2018, stated the said Writ Petition before Hon'ble High Court of Bombay was scheduled to be listed before regular bench on October 01, 2018. Therefore, in view of this, MOCBPL requested SEBI not to proceed with the hearing scheduled on September 27, 2018 and to defer the hearing till the disposal of said writ petition.
18. Considering the request of the Noticee and in the interest of natural justice, SEBI vide email dated September 26, 2018 granted another opportunity of hearing to the Noticee to appear on October 09, 2018 at SEBI, Head Office, Mumbai.
19. It is noted that Hon'ble High Court of Bombay vide its order dated October 04, 2018 rejected the Writ Petition no. 3266 of 2018 filed by the Noticee.

20. On October 09, 2018, Mr. Vaibhav Ghogare, Advocate, Mr. Rahul Karnik, Advocate, along with Mr. Deibendu Mohanty and Mr. Brijesh Bhatt from MOCBPL, ARs of MOCBPL appeared for the hearing. Following *inter alia* was noted during the hearing:

“ ...

During the course of hearing, MOCBPL submitted that in the present matter they had filed petition before the Hon'ble High Court of Bombay. The Hon'ble High Court of Bombay has disposed of the said petition on October 04, 2018 and formal order from the Hon'ble High Court of Bombay is yet to come. They further stated that they are unaware about the content of the order and are yet to decide on the future course of action on the said High Court order. Therefore, in view of non-receipt of High Court order in the matter, MOCBPL sought an adjournment of today's hearing.

The undersigned noted that it is understood that the Hon'ble High Court of Bombay has pronounced as dismissed the writ petition and no evidence of stay of the enquiry proceedings in respect of MOCBPL is brought to notice. Thus, the undersigned is of the view that, the enquiry proceedings in respect of MOCBPL is to continue.

The undersigned expressed disinclination to accept the request of MOCBPL to adjourn the hearing, since notice of the hearing had been given well in advance and repeated opportunities of hearing had already been granted to them and undue procrastination has been noted in the order dated September 03, 2018. However, in the interest of disposal of case, the undersigned grants final opportunity of hearing on October 12, 2018 at 03.00 P.M. at Head Office, Mumbai.

... ”

21. On October 12, 2018, Mr. J. P. Sen, Senior Advocate, Mr. Vaibhav Ghogare, Advocate along with Mr. Deibendu Mohanty and Mr. Brijesh Bhatt from MOCBPL, ARs of MOCBPL appeared for the hearing and made the oral submissions. The matter was heard at length and the AR stated that the reply to the SCN will be filed before the next hearing which will include the oral submissions made at the time of hearing. Considering the matter was part heard, the next hearing in the matter was scheduled on October 22, 2018 at 4:00 P.M. at Head Office, Mumbai.

22. On October 22, 2018, Mr. J. P. Sen, Senior Advocate, Mr. Vaibhav Ghogare, Advocate along with Mr. Deibendu Mohanty, Mr. Neeraj Agarwal and Mr. Brijesh Bhatt from MOCBPL, ARs of MOCBPL appeared for the hearing and submitted a reply dated October 22, 2018. The matter was heard at length and the ARs made the oral

submissions in line with the reply dated October 22, 2018. Certain queries were raised to the ARs with regard to due diligence by the Noticee in respect of trading at NSEL. The ARs stated that they will answer the queries along with their additional written submissions. The Noticee was granted time till November 2, 2018 to submit their additional reply.

23. Noticee submitted its reply dated October 22, 2018 on merits to the SCN. The reply of the Noticee in brief are as under:

Preliminary objections:

23.1. Jurisdiction:

23.1.1. Since FMC {which has been dissolved by virtue of Section 29A (1) (b) of The Forward Contracts (Regulation) Act, 1952, i.e. September 28, 2015 vide notification dated August 28, 2015 issued by Ministry of Finance) had no power, authority and jurisdiction to regulate spot exchanges (including NSEL) on the date of issuance of the said notification, SEBI does not derive any powers and cannot exercise any power and jurisdiction pertaining to dealings at NSEL.

23.1.2. As per the Central Government notification dated September 19, 2014 (notification for withdrawal of exemption) and FMC 'Fit and Proper Order', NSEL was not a recognized association. As per Section 28A of Forward Contract Regulation Act, 1952 (as amended) the RECOGNISED ASSOCIATIONS under FCRA shall be deemed to be recognized stock exchange under Securities Contract Regulation Act. Thus, SEBI cannot exercise any powers pertaining to trades and transactions at NSEL platform, since it being an unrecognized association cannot be deemed to be and exchange under SCRA.

23.1.3. In furtherance amendments to FCRA, correspondence ensued between the Ministry of Finance and the SEBI. Important amongst the said correspondence are the communication dated 20th November 2015 addressed by Ministry of Finance and the communication dated 14th June 2016, addressed by SEBI. Both of the aforesaid communications in no uncertain terms and categorically set out that post the merger of the FMC with SEBI, SEBI was not expected to deal with matters which were not dealt with by the erstwhile FMC and that SEBI was not expected to take upon itself any regulatory function with regard to NSEL matters which were beyond the regulatory domain of SEBI.

23.2. Suspension of Proceedings in the light of the withdrawal Application.

23.2.1. Noticee by its letter dated 8th June, 2018 applied for withdrawal of its SEBI registration application submitted by letters dated 20th November, 2015 through NCDEX and 30th November, 2015 through MCX. In the said application the Noticee has explicitly submitted that it is not interested in commodity broking business and it has stopped doing business of commodity broking in the exchange. SEBI by its letter dated July, 9 2018, rejected the Noticee's application dated 8th June, 2018 for withdrawal of SEBI Registration application. The said letter is completely perverse, unreasonable and baseless.

23.2.2. Noticee by its letter dated 3rd August, 2018 submitted, *inter alia*, that the Noticee has discontinued its commodity broking business which it was carrying on as a broker on the commodity exchange only by virtue of the proviso to Section 28A of the Finance Act, 2015 and without prejudice, if SEBI is of the view that there is a deemed registration in favour of the Noticee, the Noticee hereby surrenders its (alleged deemed) registration as a commodity broker under Regulation 31 (1) of SEBI (Intermediaries) Regulation, 2008 since the Noticee has discontinued its commodity broking business and has no intention to revive it in future and further submitted that the application for registration has become entirely irrelevant in the light of the withdrawal of the application for registration and surrender of any alleged deemed registration in Noticee's favour.

23.2.3. Noticee states that since the Noticee has not been granted registration therefore there is no question of suspension of registration. Since the Noticee has already applied for withdrawal of its application for registration as commodity broker, the adverse outcome of suspension / cancellation has got no meaning or relevance. Therefore the proceeding should be immediately suspended and the Noticee should be allowed to withdraw its applications dated November 30, 2015 and November 20, 2015.

23.3. *Scope of enquiry beyond the scope of FCRA*

The SCN is vitiated as the scope of enquiry conducted by SEBI is beyond the scope of FCRA. In the matter under reference, SEBI has on the strength of amendments made to provisions of FCRA (i.e. Sections 29A & 29 B), has to initiate the proceedings for violation of provisions as mentioned in the said Act. Instead of initiating the proceedings for the alleged violation under the provisions of FCRA, SEBI has initiated the proceedings under SEBI Act/SEBI Regulations, which is contrary to the express provisions of the Section 29A of FCRA. Further, in the SCN, SEBI has not restricted itself to the alleged violations of provisions of FCRA, but has traversed to the violations which are outside the scope of FCRA (viz. violations

pertaining to NSEL Byelaws/Circulars, violations pertaining to SEBI Act, SEBI Brokers Regulations, SEBI FUTP Regulations etc.).

23.4. *Predetermined Action*

Notwithstanding the proceedings in SCN still pending, it was unreasonable on the part of SEBI to initiate an FIR against Noticee without giving proper hearing. It is respectfully submitted that from the facts and circumstances it is clear that the Hon'ble WTM has made up its mind and reached a definite conclusion about the alleged guilt of the Noticee at the stage of the SCN.

23.5. The purpose for filing FIR is to penalize the Noticees for similar allegations raised in the enquiry report. Under the said provision, on which the FIR is lodged, it clearly states and mentions various penalties which may be imposed if the said facts are true and correct. It is respectfully submitted that the authority has filed a FIR on the basis of the recommendation issued by the Designated Authorities. Moreover, once the authority has acted on the said recommendation, it is clear that there remains nothing further to decide on the allegations raised in the said SCN. In such situations the purpose for which the SCN is issued has served its life, on the day SEBI filed a FIR against the Noticee.

23.6. It is respectfully submitted that the issuance of the SCN by Deputy General Manager of Enforcement Department is invalid because the Designated Member, which includes the Chairman or a Whole Time Member of the Board, had no power to delegate its functions and it should have issued the said show cause notice by itself.

23.7. *Proceedings Initiated against the Noticee under Chapter V completely misconceived.*

23.7.1. Noticee had for the first time applied for the grant of certificate. Under the Intermediaries Regulations, a specific procedure has been laid for grant of certificate under chapter II. As such, the said chapter has also laid down specific procedure and given powers to Board to reject applications for Registration imposing various conditions. It is respectfully submitted that the scheme under said chapters, II and V, deal with different procedure and situations. Chapter II specifically deals with procedures on the issue of Registration of Intermediaries, whereas Chapter V deals with procedure on the issue of cancellation or suspension of registration. It is respectfully submitted that the provisions of the said chapters, II and V, cannot be read together or invoked at the same time, as such the same may lead to confusion as the authorities enforcing their powers under the said chapters are different.

- 23.7.2. It is respectfully submitted that the aforesaid chapters have been included in the Intermediaries Regulation with a specific purpose which has to be invoked for that purpose only. Invoking chapter V, while considering the application of the Noticee for Registration is completely misconceived and unwarranted.
- 23.8. The Finance Act, 2015 under Section 131 amended FCRA by inserting Sections 28A, 29 A and 29 B. It is critical to note that by introducing Section 29 A, the FCRA stood repealed in totality. FCRA stands repealed only on introduction of Section 29 A and nothing more. The effect of such amendment has completely repealed the effect and powers under FCRA, and at the present nothing survives in FCRA, even the provision which were inserted by the said amendment. It is a settled position of law that repeal connotes abrogation or obliteration of one statute by another, from the statute book as completely repealed. It is respectfully submitted that when an Act is repealed it must be considered as if it had never existed. Except the proceedings which were commenced, prosecuted and brought before the repeal, no other proceedings under the repeal statute can be commenced or continued after the repeal. Hence, the power under which SEBI is exercising its jurisdiction over the Noticee, under section 28 A, is repealed by the very Section 29 A which was inserted vide the said Finance Act, 2015.
- 23.9. It is submitted that on almost all the issues raised by SEBI, the Auditors have accepted our explanation and have not found anything adverse against us. Surprisingly, despite the favorable findings returned by the Auditors in their Report (which has been relied upon by SEBI in the SCN), SEBI has completely discarded the above referred favorable findings. It is respectfully submitted that SEBI has not given any reason for disagreeing with it.
- 23.10. Given the formidable public persona of Mr. Jignesh Shah and his entities, coupled with deafening silence of the Central Government & FMC on the operations of NSEL and the trading permitted by it on its trading platform, there was no way for anybody to suspect something amiss in the operations of NSEL. Significantly, even SEBI itself had cleared the offer document of MCX (an entity owned, controlled and operated by Mr. Jignesh Shah) pertaining to its Initial Public Offering in the year 2012. At this juncture it is worth mentioning that while our groups investment of ₹ 58.7 crore and VAT amount of ₹ 6.69 crore were blocked due to the default committed by NSEL, we had earned only around ₹ 2.77 crore towards brokerage for the trades done on the platform of NSEL. In the said circumstance, it is clear that we are also placed along with other investors who are victims of the fraud perpetrated by NSEL.

23.11. It is denied that principles of natural justice have been duly followed. On the contrary, principles of natural justice have been flagrantly breached to our utter detriment. On this short ground the Enquiry Report should be set aside. The Designated Authorities have not actually understood the matter and have gone ahead with their observations with a closed mind and based on their preconceived conclusions. Clearly the whole enquiry proceedings conducted by the designated Authorities are a big farce and an empty formality, since the conclusion of the proceedings was already predetermined.

Replies to Findings

23.12. Reply to findings on Exemption granted to NSEL vide Notification dated June 05, 2007 issued by the Ministry of Consumer Affairs Government of India

23.12.1. Fact is NSEL introduced the paired contracts on the platform of its exchange. It is respectfully submitted that as a member of the exchange amenable to regulatory remit of NSEL, we could not be expected to doubt the competence of our regulator i.e. NSEL in terms of its launching pair contracts. We had no reason to suspect that NSEL lacks competence or that it would be operating in breach of the exemptions etc. as sought by it from the Government. Significantly it is critical to note that pursuant to the exemption granted by Central Government in June 2007, NSEL had introduced the product (i.e. the alleged pair contracts), and for 6 years Central Government (the regulating authority) had not raised any objections with regard to various contracts being introduced by NSEL. It is respectfully submitted that the Central Government had in fact given the impression to the public at large, that such introduction of pair contracts was in consonance with the exemption granted by Central Government.

23.12.2. It is respectfully submitted that the alleged tweaking of business model of NSEL to allow its members to pair both short term contracts- which had no legal basis, is concerned, we submit that we were not parties to that tweaking in any manner and same was not done at our behest or on our behalf. Admittedly, the alleged pair contracts were introduced by NSEL in the year 2009, whereas we got registered on NSEL only in the year 2011.

23.12.3. It is respectfully submitted that on strict construction of Central Government Gazette Notification dated June 5, 2007, the said notification was only applicable to NSEL and further a duty of regulator was imposed by the Central Government on NSEL to see that no short sale by member of NSEL was to be allowed. For the failure of Regulator (i.e. NSEL) in not adhering to the exemption notification and introducing pair contracts on the exchange platform (which were not being

objected to by the Central Government at the relevant time), we as Regulatees cannot be penalized for the breaches committed by NSEL.

23.12.4. Without prejudice to whatever stated, it is submitted that entire purpose of GOI Notification dated June 05, 2007, u/s 27 of FCRA, is to allow dealing by NSEL in certain type of forward contracts, even though they may be barred under other provisions of the FCRA. This exemption leads to conclusion that the purpose of said notification is to allow NSEL to facilitate forward contracts which NSEL would otherwise not have been able to do.

23.12.5. In the circumstances, we deny that we have violated the provisions/conditions of GOI Notification dated June 5, 2007 as alleged.

23.12.6. With regard to Show Cause Notice issued by Department of Consumer Affairs to NSEL on April 27, 2012 is concerned it may be noted that we are not aware of the said show cause notice. It is reiterated that we became aware of the transactions being not in consonance with GOI notification only on July 2013 and post July 2013 we have not executed any such trades.

23.12.7. It is denied that we had violated the provisions of the Section 21 (b) of FCRA as alleged. Admittedly, same was not an allegation in the Notice issued by the DAs. Clearly the finding beyond the allegations in the Notice and therefore cannot be sustained and is legally untenable.

23.13. *Reply to findings on Observations on the transactions executed by the Noticee at NSEL.*

23.13.1. It is denied that we have executed any contracts that violate the concept of spot market for trading in commodities. These contracts were neither formulated by us nor approved by us but were formulated and approved by NSEL. All the features of these contracts including the returns were laid out by the NSEL and these products were offered to our clients, being members of NSEL. It may be noted that in case of NSEL contracts - buy as well as sell transaction used to take place simultaneously, settlement of which takes place on different days. Further, deliveries resulted out of buy position were marked as early pay-in against sell position and therefore clients were exempted by NSEL from only delivery margin obligation for the sale obligation and initial margin was collected from the clients as per contract specification of NSEL.

23.13.2. The entire product cycle including the verification of stocks in the warehouses is the responsibility of the NSEL, which was providing the trading

platform/exchange mechanism for this purpose. At the relevant time, we were not aware about the alleged 22 defaulters, being the sellers of T+2/T+3 contracts and buyers of T+25/T+36 contracts, to our client's trades. It is only now, post discovery of NSEL scam, we have become aware about the 22 defaulters. In this context we may point out that on the anonymous trading platform, the counter party cannot be identified at the time of execution of transaction. In so far as Paired Contracts are concerned the same were executed on the electronic trading platform where NSEL itself was the Legal Counter party, which determined the price and guaranteed trade settlement at the exchange platform.

23.13.3. PPT was made by the Regulator (NSEL) itself and it had put the same on its website for public consumption and wide dissemination, there was no occasion for us to suspect the veracity of its content or doubt its integrity in any manner. The said PPTs were forwarded/shared with the clients only for their information about the products and not given with the intention to mislead or induce any of our clients to trade on NSEL platform.

23.13.4. As a trading member/broker, we had no role in issuing any warehouse receipts. It was NSEL which used to allocate these warehouse receipts through an allocation letter to the buyers and the same were available on the NSEL website itself.

23.13.5. NSEL had set up, the support system and involvement of clearing agencies, there left no reason for us to suspect any foul play. The existence of the support system and involvement of clearing agencies rather made us believe that all the regulatory compliances are in place and NSEL is just like any other exchange operating in the commodity market.

23.14. *Reply to findings on the Noticee's violation of the provisions of SEBI PMLA Regulation and other Circulars issued by the SEBI / Exchange(s)*

23.14.1. We have as per relevant guidelines, in place surveillance monitoring, mechanism, PMLA policy and we are also registered with FIU and we have followed all the procedures pertaining to the transactions of our client.

23.14.2. It is respectfully submitted that the PPT made by us to our clients was not an advertisement as the same was neither intended to be used for newspaper, radio, magazines, periodicals television etc., nor has it actually been used for newspaper, radio, magazines, periodicals television etc. Even there is no allegation to this effect.

23.14.3. It is also pointed out that all our clients have signed a Disclaimer Letter / Risk Letter / RMS Letter which categorically mentions about the risks involved in the contracts traded on the Exchange Platform.

23.14.4. It is denied that we have not taken any prior approval from NSEL with details before issuing any advertisements/presentations as alleged. In fact, in the month of July 2013, we had issued two different advertisements for E-Series contracts only after obtaining specific prior approval from NSEL.

23.15. *Reply to Client Code Modification*

All the UCC modifications were done in a bona fide manner which inter-alia pertained to genuine punching errors. Pursuant to these UCC modifications, clients were informed through contract notes and no dispute has been raised by any of the clients. It may be noted that the alleged UCC modification did not have any economic impact on the clients. UCC modification was done in consonance with the NSEL Circular dated July 8, 2011. At the relevant time, it may be noted that no penalty was charged by NSEL for UCC modification.

23.16. *Reply to findings on Allegations regarding Circular Trading / Suspicious Transaction by Noticee*

23.16.1. While giving details to SEBI, we had mentioned that "In Individual Accounts, Networth declaration is not mandatory as per NSEL / FMC guidelines". Accordingly Networth detail is mandatory only in Non Individual account and we had provided for one such case i.e. Remi Sales & Engineering Ltd., which was asked for. Perusal of Annexure 1 & 2 to NSEL Circular "Know Your Client" dated October 14, 2008 will show that Networth details are mandatory only for Non Individual clients.

23.16.2. SEBI has erroneously compared the total cumulative turnover for the Financial Year 2012-13 vis-a-vis Annual income declared in KYC. Same is totally incorrect and flawed methodology. SEBI should consider peak turnover of the client during the period for comparing with income levels. Same would be a proper and reasonable yardstick. As per our internal norms, we allow clients to take exposure of 20 times of income declared. Said norm is also being followed in other commodity derivative Exchanges.

23.16.3. It is denied that the alleged pair contract itself would have drawn any suspicion and ought to have been reported to Financial Intelligence Unit as alleged. It is submitted that there was nothing unusual or abnormal in execution of the paired contracts as the Exchange itself had issued Circular regarding transactions in the pair contract and at the relevant time no authority (viz. Central Government

or FMC post appointment as Designated Agency) had objected to execution of the same.

23.16.4. There were no instances where it was noted that our clients were trading amongst themselves and had impacted price /volume of the Exchange.

23.16.5. In view of the aforesaid, since there was no suspicion with regard to trades carried on NSEL, none of the NSEL trades were reported to FIU for any of our clients.

23.16.6. Furthermore, it is respectfully submitted that SEBI does not have jurisdiction to hold the Noticee to be in violation u/s 12(1) of Prevention of Money Laundering Act, 2002. Under the said Act, specific powers are exercised by Director appointed under the said Act. In the said Act a power is laid out for the purpose of conducting inquiry against the reporting entity. Therefore, only the authorities under the Prevention of Money Laundering Act, have jurisdiction to hold the reporting entity/Noticee to be in violation of said Act.

23.17. *Reply to findings on Allegations of funding its clients through its NBFC or other related entities etc., against the Noticee.*

23.17.1. The 13 clients have availed funding through Motilal Oswal Financial Services Limited for their trades in the securities market through Motilal Oswal Securities Limited. Documents provided by us in the form of ledger entries have not been considered but erroneous conclusions have been drawn that there was a motive to hide bank statements whereas we have clearly specified that bank statements will be provided upon request.

23.17.2. Merely because, out of 29 clients funded by MOFSL, 13 clients have allegedly traded on NSEL, it cannot be concluded that we have "lured investors to trade on NSEL". It is reiterated that funds were not received by the Noticee for the trades in NSEL. On a perusal of the enclosed bank statements of 13 clients makes it amply clear that funds were not received by the Noticee for trades in NSEL.

23.18. *Reply to findings on Allegations of allowing its clients to execute trades despite Debit balance*

23.18.1. It is reiterated that debits mentioned in the SCN were covered by collaterals in most of the cases and that there was credit available for the same clients in other segments, i.e. MCX or NCDEX. In the absence of the same, i.e. in case of debits, further exposure was not allowed. Further, in none of the cases ageing of the debit balance has not crossed 90 days. Also clients have later cleared their debits.

23.18.2. It is submitted that the collaterals were not squared off as clients' were having sufficient margin in the form of collaterals.

23.19. *Reply to findings on Allegations of allowing its clients to use the funds in derivatives Exchange for operation on Spot Exchange against the Noticee*

23.19.1. It is reiterated that the alleged non segregation of funds was not in violation of FMC circular as alleged. The embargo is only limited to and restricted to adjustment of funds between Securities Exchanges and Commodity Exchanges and there is no restriction to adjust funds between Commodity Exchanges and Spot Exchanges.

23.19.2. It is reiterated that since the adjustment of funds has been inter-se between the Commodity Exchange and Spot Exchange and that too after obtaining requisite authorization from the clients, the same cannot be alleged to be violative of any provisions of law. The alleged transfers were done in the ordinary course for the operational convenience of the clients.

23.19.3. The instances pointed out by Auditors' with respect to the fund transfers from MCX / NCDEX to NSEL or vice versa is mainly on account of meeting Payin / Margin / settlement obligations for client's trades or taking new position in Commodity Exchanges. Such fund transfer from one Commodity Exchange to another is under one company i.e. MOCBPL within different segments; which is already allowed.

23.19.4. It is submitted that as required we have maintained separate Exchange wise ledgers for clients who are registered in separate Exchange(s) with us. Further there was no specific condition prescribed by Commodity Exchange(s) that funds cannot be transferred between Commodity Derivative & Spot Exchange(s) and the restriction was only related to cross margining which we have abided by and complied with.

23.20. *Reply to findings on Failure in collecting margins from its clients*

In few cases, we have collected only partial margin, which primarily happened under various peculiar circumstances viz. (a) Collection of increased margin portion (due to increase in volatility or increase in price of the outstanding contracts) from the client took 2 to 3 days' time; (b) Due to banking constraints money cannot be immediately remitted from far-flung areas, where banking channels is not easily available. In any event, we submit that we will take care to avoid such short fall of margin from the clients in future.

23.21. *Reply to findings on Failure in renewing its insurance policy in time*

Due to misunderstanding between Insurance Agent and us, there was a delay in depositing cheque for renewal premium with the Insurance Company and hence the renewal process of Insurance was delayed for the year 2013-14.

23.22. *Reply to findings on Other Observations*

It is reiterated that we had *bona fide* executed trades on behalf of our clients in the ordinary course *dehors* sinister intent or design. The alleged liability which has arisen has arisen because of failure of NSEL to ensure the integrity of its systems. Not only the clients but we also have suffered.

23.23. *Reply to findings on Observations / findings on the status of Noticee as a fit and proper person for holding or being granted the certificate of registration in the securities market in view of the irregularities / violations established if any.*

23.23.1. We are a fit and proper person in terms of Regulation 5(e) of the Stock Brokers Regulations read with Schedule II of the Intermediaries Regulations. We have as a broker at all times abided by the rules, regulation, bye laws of the stock exchange and Code of Conduct as specified in Schedule II of the Stock Brokers Regulations.

23.23.2. We respectfully submit that we adequately meet the criteria for fit and proper person as we enjoy impeccable reputation and character and are known for our integrity in business circles. As a broker we had carried out our operations in compliance with the applicable provisions of law. Neither we nor any of our promoters/directors have ever been convicted. Further, we are fully competent and we have adequate financial solvency and net worth.

23.24. *Reply to Recommendations*

23.24.1. Based on their erroneous understanding of the whole matter, the Designated Authorities have gone overboard with their recommendations, which are totally unjustified, unwarranted and unfair in the facts and circumstances of the case. The bias on the part of the Designated Authorities is also apparent from the fact that they have gone beyond their remit and recommended initiation of Prosecution proceedings.

23.24.2. It is submitted that in the past for similar violations of technical, venial and procedural in nature, Regulators and Exchanges have merely issued warning to the brokers.

24. Pursuant to hearing held on October 22, 2018, the Noticee made additional submissions vide its letter dated November 2, 2018. In the said additional submissions, the Noticee explained its internal process / due diligence carried out by the Noticee in respect of any product offered by any of the Exchanges of which the Noticee was a trading member and reiterated its submissions with respect to allowing its clients to use the funds in Derivatives Exchange for operation on Spot Exchange. Further, with respect to client code modification the Noticee submitted as follows:

- Orders were placed on behalf of client Motilal Oswal Securities Ltd (MOSL) and were later updated to Y04020. Erroneously dealer placed the order by entering abbreviated name i.e. "MOSL" in client code field which was not updated in UCC database. Upon noticing this error, code was modified to correct client code Y04094.
- Further all 15 instance of alleged code modifications were executed only on one single date i.e. 14th September 2012 for one contract of Paddy. Further client code Y04094 mapped to client Motilal Oswal Securities Ltd (MOSL) was registered in Exchange UCC records and we had carried out said code modification as per prevailing NSEL circular on Client code modification. Since the trade was placed in the name of MOSL and later on client code of MOSL was updated, in essence there was no client code modification.

SECOND SHOW CAUSE NOTICE, REPLY AND HEARING:

25. While the proceedings in the matter were in progress, Serious Fraud Investigation Office ("SFIO"), Ministry of Corporate Affairs ("MCA") vide letter dated November 01, 2018 had forwarded its detailed investigation report on "National Spot Exchange Limited and others" dated August 31, 2018 to SEBI.

26. Subsequent to the receipt of SFIO investigation report, SEBI issued a Second Show Cause Notice dated December 27, 2018 (hereinafter referred to as "**Second SCN**") to the Noticee. Vide the said Second SCN, Noticee was informed that reference to regulation 7(2) of SEBI (Intermediaries) Regulations, 2008 in body of the SCN dated April 24, 2017 shall be read as regulation 5(e) read with regulation 7(1) of Brokers Regulations. Further, Noticee was also called upon to show cause as to why the information/materials as brought out in the Second SCN concerning the fit and proper person criteria, should not be considered while deciding the Noticee's application for registration dated December 23, 2015, for rejection in accordance with the provisions of regulation 5(e) read with regulation 7(1) of Brokers Regulations.

27. MOCBPL was advised to reply to the Second SCN within 21 days from the date of receipt of said notice and to appear for a personal hearing on January 28, 2019 at 02:30 P.M., SEBI Head Office, Mumbai.
28. In response to the Second SCN, Noticee vide its letters dated January 21, 2019 requested for inspection of original documents (Noticee was provided with a copy of SFIO report along with its annexures) and copies of its 133 clients responses which were recorded in answer to the questionnaire raised by the SFIO. The Noticee further requested to cross examine the investigating officers of SFIO and its 133 clients.
29. On January 28, 2019, Mr. Vaibhav Ghogare, Advocate along with Mr. Anupam Agal and Mr. Brijesh Bhatt from MOCBPL, ARs of MOCBPL appeared for the hearing. They submitted an application dated January 28, 2019 reiterating their request made vide their letter dated January 21, 2019. The ARs made their oral submissions in line with their aforesaid application. ARs were granted time till February 4, 2019 to make additional submissions in the matter.
30. Pursuant to the hearing, the Noticee submitted its reply dated February 4, 2019 on merits to the Second SCN. The Noticee reiterated some of its earlier submissions (which have not been reproduced to avoid repetition) and *inter alia* submitted as follows:
- 30.1. Noticee reiterated its request made vide its letters dated January 21, 2019 and January 28, 2019 and further submitted that Non - disclosure of documents and refusing cross examination of the witness whose statement are being relied upon and cross examination of authors of the SFIO report, which is relied and referred to by the Board causes prejudice to the case of the Noticee and this would severely impair the ability of the applicant to defend itself in the proceedings before the Board.
- 30.2. The Second SCN is issued and served on the Noticee under Regulation 28(1) of the Intermediaries Regulations. It is respectfully submitted that the Second SCN served on the Noticee is bad in law, as the Board has not taken receipt of any report recommending the measures from the DA to be initiated against the Noticee under the Second SCN. It is a condition precedent that only, after considering the report filed by the DA, the Designated Member shall issue a show cause notice. In the present situation no such steps are taken by the board. On

perusal of the record, in lieu of the report from the DA, the Board has served the Noticee with a report issued from the SFIO. In such circumstances the Second SCN is bad and illegal in law as the Board has failed to comply with the conditions as mentioned under regulation 28 (1) of the Intermediaries Regulations.

- 30.3. It is pertinent to note that MCA by its order has specifically assigned the investigations into the affairs of National Spot Exchange. Financial Technologies Limited, their 18 subsidiaries & associate companies, the 20 defaulting entities and their role /nexus with the brokers, who were responsible for the payment crisis, to the SFIO. Further, Section 219 of the Companies Act, 2013 specifies the conditions under which other companies can be investigated by SFIO. It is respectfully submitted that in MCA order, the name of the Noticee was not mentioned and also the Noticee does not fall under the conditions as specified in Section 219 of the Companies Act. Thus, SFIO has exceeded its scope of investigation and finding in the report against the non-defaulting brokers including Noticee has no relevance.
- 30.4. SFIO report was prepared with preconceived notion qua Noticee. In this regard, the Noticee submitted that. SFIO in its report has taken / reproduced selective statements of Mr. Anupam Agal, while preparing the report of Noticee and has not considered his statement holistically. Further, SFIO report misconstrued and misinterpreted statement of Mr. Anupam Agal as if MOCBPL has funded more than one client for trade in NSEL.
- 30.5. As regards complaint of Shri Ketan Shah before MPID Court, it is submitted that prior to commencing trading through Noticee on NSEL (i.e. from October 2012), Shri Ketan Shah was already trading on NSEL through Philip Capital (India) Private Limited from May 2012. In the circumstances, the issue of Ketan Shah getting induced or we inducing Shri Ketan Shah to trade on NSEL, cannot and does not arise.
- 30.6. It is respectfully submitted that Shri Ketan Shah, has himself stated before the then Minister of Consumer Affairs that before investing in NSEL products he had checked out the website of NSEL and understood all the details regarding NSEL and its products. Moreover, it respectfully submitted that the said complaint filed by Shri Ketan Shah was disposed of by order dated April 16, 2105, passed by Special Judge MPID Act. In circumstances where the said complaint is rejected by the Court, the Board has to ignore the said complaint filed by Shri Ketan Shah and ignore the facts recorded in his complaint completely.

- 30.7. With reference to Para 8 of Second SCN it is submitted that, from perusal of Para 10 of the said order, it is very clear it was the NSEL and defaulting members who were responsible for the payment default.
- 30.8. Specific reliance is placed on the observation recorded in the order dated August 22, 2014, of the Hon'ble Bombay High Court in Criminal Bail Application No.1236 of 2014 in para 12 of the Second SCN. It is respectfully submitted that the said order nowhere interprets or states that the brokers were the culprits in the fraud initiated and executed by NSEL and Shri Jignesh Shah.
- 30.9. It is submitted that Shri. Rajvardhan, then ACP, EOW, submitted its report dated April 4, 2015, to Chairman, Forward Market Commission (FMC). The said report led to initiation of proceeding by SEBI against the Noticee. It is pertinent to note that in the said report no allegations were made against the Noticee.
- 30.10. The Hon'ble Bombay High Court, in Writ Petition No. 1403 of 2015 filed by NSEL, by its order dated 1st October, 2015, specifically records and concludes that NSEL and Shri Jignesh Shah were the only culprit responsible for the fraud initiated in the commodities market.
- 30.11. Besides, the Hon'ble High Court, Writ Petition No. 2743 of 2014, by its order dated December 4, 2017 held that brokers cannot be blamed.

FINDINGS AND CONSIDERATION

31. I have perused the SCN, Second SCN, replies of the Noticee, oral and written submissions made by the Noticee and other materials available on the record. I record the issue for consideration and my findings as under:

ISSUE: Whether or not the Noticee is a fit and proper person for holding / being granted the certificate of registration as a commodity derivative broker?

32. Before moving forward it will be appropriate to refer to the relevant provisions of Finance Act, 2015, FCRA, Intermediaries Regulations and Brokers Regulations which read as under:

Relevant Provisions:

32.1. Finance Act, 2015

Section 28A.

(1) All recognised associations under the Forward Contracts Regulation Act, shall be deemed to be recognised stock exchanges under the Securities Contracts (Regulation) Act, 1956 (herein referred to as the Securities Contracts Act):

“Provided that such deemed recognized stock exchanges shall not carry out any activity other than the activities of assisting, regulating or controlling the business of buying, selling or dealing in commodity derivatives till the said deemed recognized stock exchanges are specifically permitted by the Securities and Exchange Board of India:

***Provided** further that a person buying or selling or otherwise dealing in commodity derivatives as a commodity derivatives broker, or such other intermediary who may be associated with the commodity derivatives market, immediately before the transfer and vesting of rights and assets to the Securities and Exchange Board of India for which no registration certificate was necessary prior to such transfer, may continue to do so for a period of three months from such transfer or, if he has made an application for such registration within the said period of three months, till the disposal of such application.”.*

(4) All rules, directions, guidelines, instructions, circulars, or any like instruments, made by the Commission or the Central Government applicable to recognized associations under the Forward Contracts Act shall continue to remain in force for a period of one year from the date on which that Act is repealed, or till such time as notified by the Security Board, whichever is earlier, as if the Forward Contracts Act had not been repealed.

(5) In addition to the powers under the Securities Contracts Regulation Act, the Security Board and the Central Government shall exercise all powers of the Commission and the Central Government with respect to recognised associations, respectively, on such deemed exchanges, for a period of one year as if the Forward Contracts Act had not been repealed.”.

Section 29A.

(1)...

(2) On and from the date of repeal of Forward Contracts Act–

(e) a fresh proceeding related to an offence under the Forward Contracts Act, may be initiated by the Security Board under that Act within a period of three years from

the date on which that Act is repealed and be proceeded with as if that Act had not been repealed;

32.2. INTERMEDIARIES REGULATIONS:

Cancellation or suspension of registration and other actions.

Regulation 23. *Where any person who has been granted a certificate of registration under the Act or regulations made thereunder, –*

- (a) fails to comply with any conditions subject to which a certificate of registration has been granted to him;*
- (b) contravenes any of the provisions of the securities laws or directions, instructions or circulars issued thereunder;*

the Board may, without prejudice to any action under the securities laws or directions, instructions or circulars issued thereunder, by order take such action in the manner provided under these regulations.

Action in case of default.

Regulation 27. *After considering the representations, if any, of the noticee, the facts and circumstances of the case and applicable provisions of law or directions, instructions or circulars administered by the Board the designated authority shall submit a report, where the facts so warrant, recommending, –*

- (i) Suspension of certificate of registration for a specified period;*
- (ii) Cancellation of certificate of registration;*
- (iii) Prohibiting the noticee to take up any new assignment or contract or launch a new scheme for the period specified in the order;*
- (iv) debarring a principal officer of the noticee from being employed or associated with any registered intermediary or other registered person for the period specified in the order;*
- (v) Debarring a branch or an office of the noticee from carrying out activities for the specified period;*
- (vi) Warning the noticee.*

SCHEDULE II

Intermediaries Regulations

Criteria for determining a 'fit and proper person'

For the purpose of determining as to whether an applicant or the intermediary is a 'fit and proper person' the Board may take account of any consideration as it deems fit, including but not limited to the following criteria in relation to the applicant or the intermediary, the principal officer the director, the promoter and the key management persons by whatever name called –

- (a) integrity, reputation and character;*
- (b) absence of convictions and restraint orders;*
- (c) competence including financial solvency and networth;*
- (d) absence of categorization as a wilful defaulter.*

32.3. **BROKERS REGULATIONS:**

Consideration of application for grant of registration.

Regulation 5. *The Board shall take into account for considering the grant of a certificate, all matters relating to trading, settling or dealing in securities and in particular the following, namely, whether the applicant,-*

- (e) is a fit and proper person based on the criteria specified in Schedule II of the Securities and Exchange Board of India (Intermediaries) Regulations, 2008;*

Procedure where registration is not granted.

Regulation 7. (1) *Where an application under regulation 3, does not fulfill the requirements mentioned in regulation 5, the Board may reject the application after giving a reasonable opportunity of being heard.*

Preliminary Objections:

33. Further, before moving forward to the main issue in the matter, I will first address the preliminary objections raised by the Noticee.

Jurisdiction and Applicability of Intermediaries Regulations:-

34. MOCBPL stated that from the correspondence between the Ministry of Finance and SEBI, it becomes clear that post the merger of the FMC with SEBI, SEBI was not expected to deal with matters which were not dealt with by the erstwhile FMC and that SEBI was not expected to take upon itself any regulatory function with regard to NSEL matters. With respect to the issue of jurisdiction, on the basis of documents available on record, it is observed that since the Noticee has applied to SEBI, for the purpose of granting registration to the Noticee to act as a commodity derivative broker, SEBI has jurisdiction, *inter alia*, to determine whether the Noticee is a fit and proper person to act as a commodity broker. Further, the existence or absence of jurisdiction is determined by the statute as the statute can vest or oust the jurisdiction and any representations or statements made by any party are not material to the arguments on jurisdiction. Thus, I find that by virtue of the application, and the control of SEBI in

respect of intermediaries dealing with commodity derivatives pursuant to Finance Act, 2015, among other grounds, SEBI has jurisdiction to determine whether the applicant is fit and proper.

35. Noticee argued that SEBI cannot exercise any powers pertaining to trades and transactions at NSEL platform, since it being an unrecognized association, cannot be deemed to be an exchange under SCRA.

35.1. I note that SEBI can, for the purpose of ascertaining the fit and proper status of the Noticee, look into its reputation and belief in competence, fairness, honesty, integrity and character based on past conduct. Such past conduct in this case has been alleged to be in respect of its transactions in paired contracts on NSEL as mentioned in the observations of various competent court/Authority. Such assessment cannot be considered as an exercise of power under FCRA, rather such an exercise of power flows from the requirement of Noticee to have fit and proper status while applying for / acting as commodity derivative broker in the market.

36. As regards, the applicability of Intermediaries Regulations, the Noticee stated that chapters II and V of Intermediaries Regulations have been included in the intermediaries Regulation with a specific purpose which has to be invoked for that purpose only. Invoking chapter V, while considering the application of the Noticee for Registration is completely misconceived and unwarranted. With respect to the issue of applicability of Intermediaries Regulations, I note that the present matter is peculiar in nature. The ***Peculiar Facts and Circumstances*** of the present case are as under:

36.1. It is noted that the Finance Bill, 2015 was introduced in Parliament in the month of February 2015, *inter alia*, proposing the merger of Forward Market Commission (hereinafter referred to as “FMC”) with SEBI by making certain amendments in the Forward Contracts (Regulation) Act, 1952 and Securities Contracts (Regulation) Act, 1956 (hereinafter referred to as “SCRA”). The said bill was passed and Finance Act, 2015 was notified on May 14, 2015. Central Government vide notifications dated August 28, 2015, appointed September 28, 2015 as the date on which the provisions of Part – I (excluding section 132 of Finance Act 2015) and Part – II of Chapter VIII of Finance Act, 2015 (i.e. the amendments made to FCRA and SCRA) would come into effect and appointed

September 29, 2015 as the date on which the provisions of Section 132 of Finance Act, 2015 would come into effect (i.e. FCRA shall be repealed).

- 36.2. On September 28, 2015, FMC got merged with SEBI and provisions of Finance Act, 2015 as stated above came into effect from September 28, 2015 and September 29, 2015. Pursuant to the merger of FMC with SEBI, the regulation and supervision of the commodity derivatives brokers has been entrusted to SEBI.
- 36.3. It is noted that prior to coming into effect of Finance Act, 2015, the intermediaries dealing with the commodity derivatives were not required to be registered under FCRA. As per amendments / insertion of second proviso to Section 28A(1) of FCRA through Section 131B of Finance Act, 2015, *“an intermediary, who was associated with the commodity derivatives market, for which no registration certificate was necessary prior to merger, may continue to buy, sell or deal in commodity derivatives as a commodity broker for a period of three months from the date of merger or, if an intermediary has made an application for such registration within a period of 3 months from the date of merger, till the disposal of such application”*.
- 36.4. It is also noted that Section 133B of Finance Act, 2015 has included *“commodity derivatives”* within the definition of *Derivative* under Section 2(ac) of SCRA, thereby, *commodity derivatives* falls under the definition of *Securities* with effect from September 28, 2015.
- 36.5. Thus, after the Finance Act, 2015 has come into effect, it has become necessary for every intermediary, who is dealing in commodity derivatives to get registered with SEBI. As a transitory measure, three months period had been given to them, so as to enable them to get themselves registered with SEBI. Also, if within three months such persons/intermediary move an application for registration, they are entitled to continue with their activities, till their application is finally decided / disposed by SEBI. Thus, by virtue of second proviso of Section 28A(1) of FCRA inserted through Section 131B of Finance Act, 2015 such intermediaries who were dealing with commodity derivatives and who had made an application within a period of three months have been brought under the control of SEBI.

36.6. Hon'ble Bombay High Court in Writ Petition Nos. 3262, 3266, 3294 and 3295 of 2018 in the matter of *Anand Rathi Commodities Limited, Motilal Oswal Commodities Broker Private Limited, Geofin Comtrade Limited and IIFL Commodities Limited Vs. SEBI* vide Order dated October 04, 2018 observed the following:

".....It is not in dispute that prior to the coming into effect of the Finance Act, 2015, the intermediaries dealing with the commodity derivatives were not required to be registered under any of the provisions of law including the FCR Act. We find that the said mischief was noticed by the Parliament. As such, by virtue of the Finance Act, 2015, the said intermediaries dealing with commodity derivatives have been brought under the control of SEBI. We find that the reason as to why by Finance Act, 2015, the said intermediaries were brought under the control of SEBI appears to be that the Parliament found that the activities of intermediaries dealing in commodity derivatives should not remain uncontrolled and they should be brought under the control of competent authority...."

36.7. Thus, from the above, it is summarized that, prior to September 28, 2015, MOCBPL was functioning as a commodity derivative broker and was recognized as such by the exchanges. Before merger of FMC with SEBI, MOCBPL was required to be the member of recognized commodity derivative exchanges and was not required to be registered under FCRA with DCA or FMC or any other regulatory authority. The Finance Act, 2015, recognized the said fact and also that the commodity derivative brokers should now be regulated by SEBI. Considering the same, it was made mandatory for all commodity derivative brokers, who wished to continue their activities, to apply for registration with SEBI within a period of 3 months from September 28, 2015. Thus, all the commodity derivative brokers, who applied to SEBI and whose application was in process, were allowed to carry on their functions as commodity derivative brokers till the disposal of their respective application. Thus, by virtue of provisions of Finance Act, 2015 all those commodities derivative brokers, who were functioning as commodity derivative brokers after having made their application to SEBI within 3 months from September 28, 2015 were under the

supervision and control of SEBI like any other intermediary holding a certificate of registration.

36.8. It is noted that pursuant to merger of FMC with SEBI, MOCBPL on December 11, 2015 and December 16, 2015 had made applications to SEBI for registration as a commodity broker and by virtue of second proviso of Section 28A(1) of FCRA inserted through Section 131B of Finance Act, 2015, MOCBPL was permitted to continue to buy, sell or deal in a commodity derivatives as a commodity broker till the disposal of its application for registration.

36.9. It is pertinent to mention the normal circumstances in the securities market which are detailed as under:

36.9.1. Intermediaries Regulations is applicable when an intermediary is registered with SEBI and a certificate of registration is granted to them under SEBI Act and rules and regulations made thereunder, thereby operating and functioning in securities market as per the rules and regulations made under SEBI Act.

36.9.2. An entity that had applied for registration under regulation 3 read with regulation 5 of Brokers Regulations, would not normally be functioning or operating as stock broker till the disposal of application in his favor and consequent registration under regulation 7 of Brokers regulations.

36.10. However, in view of the facts and circumstances of the case discussed above i.e. prior to the merger of FMC with SEBI, an intermediary was not required to be registered under FCRA, but operating / functioning in commodity derivatives market, and pursuant to the merger of FMC with SEBI, by virtue of the Finance Act, 2015, if an intermediary had made any application of registration within a period of three months from September 28, 2015, they were permitted to continue their activities and operate in the commodity derivatives market from September 28, 2015 till the disposal of their application of registration by SEBI even though technically they were not holding a certificate of registration. An entity cannot operate in a regulatory vacuum for the period when they operate as a commodity derivative broker till the disposal of their application of registration by SEBI. Thus, they were brought under the supervision and control of SEBI, by virtue of the Finance Act, 2015, even as their application for registration was pending.

36.11. Thus, in view of the facts and circumstances of the case, the nature / status of the Noticee that it was operating and functioning in commodity derivatives market as commodity derivatives broker, prior and after the merger of FMC with SEBI, without technically holding a certificate of registration from SEBI but within the regulatory supervision and control of SEBI from September 28, 2015 and at the same time, the Noticee is an applicant for registration as a commodity derivatives brokers under Brokers Regulations.

37. Thus, MOCBPL was and continues to be under the supervision and regulatory control of SEBI from September 28, 2015 onwards till the disposal of its application for registration. Therefore, in view of aforesaid facts and circumstances of the case, I am of the view that chapters II and V of the Intermediaries Regulations is applicable to the Noticee even though technically it does not hold a certificate of registration.

Suspension of Proceedings in the light of the withdrawal Application.

38. Noticee has contended that since the Noticee has already applied for withdrawal of its application for registration as a commodity derivative broker, the extant proceedings should be immediately suspended. In this regard, it is noted that SEBI vide its letter dated July 9, 2018 had informed MOCBPL that enquiry proceedings under Intermediaries Regulations against it are in progress; therefore, in view of pending enquiry proceedings, its request for withdrawal of the application for registration cannot be entertained. Aggrieved by SEBI's letter dated July 9, 2018, MOCBPL filed a Writ Petition No. 3266 of 2018 before Hon'ble High Court of Bombay. It is noted that Hon'ble High Court of Bombay vide its order dated October 04, 2018 rejected the Writ Petition No. 3266 of 2018 filed by the Noticee upholding the stand of SEBI. Thus, the submission of the Noticee does not hold any merit.

Predetermined Action

39. Noticee has submitted that filing of the FIR by SEBI makes it clear that the Hon'ble WTM has made up its mind and reached a definite conclusion about the alleged guilt of the Noticee at the stage of the SCN.

39.1. In this regard, I note that extant proceedings and filing of FIR are parallel proceedings and are independent of each other. The current proceedings are

quasi-judicial proceedings in order to determine the fit and proper status of the Noticee for the purpose of accepting / rejecting the application of the Noticee. The other proceeding is criminal in nature addressing the issues arising out of violation of FCRA and other penal laws. The scope of both the proceedings are different and there is no overlap between them. Moreover, decision of SEBI to file a FIR, is not equivalent to the determination of the violations for which FIR is filed. Hence, the question of pre-determination of issues raised in present proceedings does not arise. In light of the same, the submission of the Noticee is untenable.

40. Noticee has further contended that the authority has filed a FIR on the basis of the recommendation issued by the DAs and that once the authority has acted on the said recommendation, it is clear that there remains nothing further to decide on the allegations raised in the said SCN. In such situations the purpose for which the SCN is issued has served its life, on the day SEBI filed a FIR against the Noticee.

40.1. Without prejudice to the findings at paragraph 39.1, it is noted that the DAs have made 2 recommendations against the Noticee. It may be noted that the DAs have only made recommendations, which by their very nature, are not final and binding on the competent authority. For the first recommendation, the Designated Member is the competent authority to determine whether the Noticee is a fit and proper person or not. However, for the second recommendation, SEBI has taken appropriate steps by filing F.I.R and further procedures would be adopted before the concerned court of law. It cannot be said that by virtue of filing of F.I.R, the present quasi-judicial proceedings have come to an end. As stated in preceding paragraph, the issue that needs to be addressed in both proceedings are different and to achieve finality, they have to be placed before separate forums, which is what has been done in the instant matter. Hence, the contention of the Noticee is not acceptable.

41. It has been submitted by the Noticee that the issuance of the SCN by Deputy General Manager of Enforcement Department is invalid because the Designated Member, which includes the Chairman or a Whole Time Member of the Board, had no power to delegate its functions and it should have issued the said show cause notice by itself.

41.1. I note that the submission of the Noticee is erroneous. The power vested with the Designated Member can be delegated to the Deputy General Manager in terms of Section 19 of the Securities and Exchange Board of India Act, 1992 by general or special Order in writing. However, in the instant matter I note that factually also, the post enquiry show cause notice had been placed for approval of the concerned Designated Member who after due consideration of the same authorized the issuance of the SCN. The same was issued by the Deputy General Manager.

Effect of Repeal

42. Noticee has submitted that by introducing Section 29A, the FCRA stood repealed in totality and at present nothing survives in FCRA, even the provision which were inserted by the amendment.

42.1. In this regard, I note that it is noted that Section 28A deals with “savings of recognised associations” while Section 29A is the repeal and savings clause. Considering the settled principles of interpretation, both the aforesaid Sections must be interpreted bearing in mind the basic underlying intent of the legislature in introducing such Sections. Post-merger of FMC with SEBI, FCRA was repealed and consequent amendments were made in Securities Contracts (Regulation) Act, 1956 and FCRA. Amendments were made to ensure that there was a smooth transition from the erstwhile FMC to SEBI and the commercial transactions / business activity is not affected as a result of the merger. Here, it will be apt to quote the order of Hon’ble Supreme Court of India in the case of *District Mining Officer vs. Tata Iron And Steel Co.* [2001 7 SCC 5] wherein the Hon’ble Supreme Court has observed that “*The process of construction combines both literal and purposive approaches. In other words, the legislative intention i.e. the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed*”. Taking support of the order of Apex Court, I note that the task of interpretation of a statute is more than a mere reading of the text of the statute. An attempt

should also be made to discover the intent of the legislature and in the given scenario if the submission of the Noticee is accepted, it will nullify / frustrate the purpose of the amendments introduced by the Finance Act, 2015. Therefore, the submission of the Noticee is untenable.

Clubbing of Proceedings:

43. The Noticee has submitted that the Second SCN which is issued and served on the Noticee under regulation 28(1) of the Intermediaries Regulations is bad in law, as the Board has not taken receipt of any report recommending the measures from the DA to be initiated against the Noticee under the Second SCN. The submission of the Noticee is not entirely factually correct. The Second SCN has been issued under regulation 28(1) of the Intermediaries Regulations and read with regulations 5 (e) and 7 (1) of Brokers Regulations. In other words, the proceedings under regulation 23 of Intermediaries Regulations and regulation 7 read with regulation 5(e) of Brokers Regulations have been clubbed together. I am of the view that, in view of the aforesaid facts and circumstances outlined in paragraph 36 and considering the fact that, pursuant to Finance Act, 2015 the Noticee was already dealing in commodity derivatives, the proceedings under regulation 23 of Intermediaries Regulations and under regulation 7 read with regulation 5(e) of Brokers Regulations are both applicable to the Noticee and can be clubbed together.

Whether SEBI had rightly initiated action against Noticee under Chapter V of Intermediaries Regulation or not?

44. Noticee has contended that invoking chapter V, while considering the application of the Noticee for registration is completely misconceived and unwarranted.
- 44.1. I note that chapter V of the Intermediaries Regulations deals with action in case of default and manner of suspension or cancellation of certificate. More precisely regulation 23 as mentioned in chapter V deals with cancellation or suspension of registration and other actions. The underlying argument of the Noticee is that it does not have certificate of registration as commodity derivative broker therefore the proceedings under chapter V of Intermediaries Regulations is not applicable against it.

44.2. With respect to the applicability of regulation 23 of Intermediaries Regulations, **Hon'ble Bombay High Court** in Writ Petition Nos. 3262, 3266, 3294 and 3295 of 2018 in the matter of *Anand Rathi Commodities Limited, Motilal Oswal Commodities Broker Private Limited, Geofin Comtrade Limited and IIFL Commodities Limited Vs. SEBI* vide Order dated October 04, 2018 observed the following:

"...

- 15] Upon the plain reading of Regulations, at first blush, the arguments made on behalf the Petitioners appear to be attractive. Regulation 23, which deals with cancellation or suspension of registration and other actions, begins with the words "where any person who has been granted a certificate of registration under the Act or regulations." It could thus be seen that on a plain reading of Regulation 23, it would appear that for invoking provisions of Regulation 23 onwards, a person against whom action is sought to be taken must have been granted a certificate of registration under the Act or regulations made thereunder. Even the words used in Regulation 31 would also show that an application for surrendering the registration has to be made by a person who has been granted a certificate of registration.
- 16] However, in the present matter, while considering the regulation, we will have to consider as to what is the effect of Finance Act, 2015. No doubt that by virtue of Section 29A, FCR Act has been repealed. While repealing the said act, the Parliament has also saved the certain things. All offences committed or existing proceedings with respect to the offences, which may have been committed under the FCR Act are provided to be continued to be governed by the provisions of the said act, as if the said act has not been repealed. A fresh proceeding related to the offences under the FCR Act, is also permitted to be initiated by SEBI, within a period of three years from the date on which the earlier act is repealed and proceeded with, as if that Act had not been repealed. It is not in dispute that the criminal proceedings have already been filed within a period of three years. However, in the present case, we do not find it necessary to go into that aspect of the matter, since the only question that falls for consideration before us is as to whether the Respondent - SEBI was bound to allow the application of the Petitioners for withdrawal of their application for registration and as to whether the continuation of the proceedings under the various regulations are permissible or not.

- 17] We find that the provisions of Section 28A of the Finance Act, 2015, would be the most relevant for determining the said issue. Undisputedly, prior to Finance Act, 2015, coming into effect, it was not necessary for intermediaries like the Petitioners, to have registration under the FCR Act. For the first time, by virtue of Finance Act, 2015, such a registration has become mandatory. By virtue of Section 28A, particularly sub section (1) thereof, all recognized associations under the FCR Act have been deemed to be recognized stock exchanges under the Securities Contracts (Regulation) Act, 1956. The first proviso thereof provides that such deemed recognized stock exchanges would not carry out any activities other than the activities of assisting, regulating or controlling the business of buying, selling or dealing in commodity derivatives till the said deemed recognized stock exchanges are specifically permitted by the SEBI.
- 18] The second proviso to Section 28A would be the most relevant one. It provides that a person buying or selling or otherwise dealing in commodity derivatives as a commodity derivatives broker, or such other intermediary who may be associated with the commodity derivatives market, immediately before the transfer and vesting of rights and assets to the SEBI for which no registration certificate was necessary prior to such transfer, may continue to do so for a period of three months from such transfer. It is further provided that if he has made an application for such registration within the said period of three months, then till the disposal of such application, he would be entitled to continue with his activities.
- 19] It could thus be seen that after the Finance Act, 2015 has come into effect, it has become necessary for every intermediary, who is dealing in commodity derivatives to get registered with SEBI. As a transitory measure, three months period has been given to them, so as to enable them to get themselves registered with SEBI. Even if within three months such persons move an application for registration, they are entitled to continue with their activities, till their application is finally decided by SEBI. It could thus be seen that by virtue of second proviso of Section 28A, such intermediaries who are dealing with commodity derivatives and who have made an application within a period of three months have been brought under the control of SEBI.
- 20] We find that in the present case, we will have to apply Heydon's rules of interpretation. It will be relevant to refer to the following observations of the Constitution Bench of the Hon'ble Apex Court in the case of Bengal Immunity Co. Ltd. Vs. State of Bihar and others (AIR 1995 SC 661):-

"22 It is a sound rule of construction of a statute firmly established in England as far back as 1584 when - Heydon's case, (1584) 3 Co. Rep. 7A (V) was decided that-

"..... for the sure and true interpretation of all Statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:-

- 1st. What was the common law before the making of the Act,*
- 2nd. What was the mischief and defect for which the common law did not provide,*
- 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth and*
- 4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and 'pro privato commodo', and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono public".*

In -'In re Mayfair Property Co.', [1898] 2 Ch. 28, at p. 35 Lindley, M. R. in 1898 found the rule "as necessary now as it was when Lord Coke reported 'Heydon's case (V)'. In -'Eastman Photographic Material Co. v. Comptroller General of Patents, Designs and Trade Marks', 1898 AC 571 at p. 576 (X) Earl of Halsbury re-affirmed the rule as follows:

"My Lords, it appears to me that to construe the Statute in question, it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the later Act which provided the remedy. These three being compared I cannot doubt the conclusion."

It appears to us that this rule is equally applicable to the construction of Art. 286 of our Constitution. In order to properly interpret the provisions of that Article it is, therefore, necessary to consider how the matter stood immediately before the Constitution came into force, what the mischief was for which the old law did not provide and the remedy which has been provided by the Constitution to cure that mischief."

- 21] It is not in dispute that prior to the coming into effect of the Finance Act, 2015, the intermediaries dealing with the commodity derivatives were not required to be registered under any of the provisions of law including the FCR Act. We*

find that the said mischief was noticed by the Parliament. As such, by virtue of the Finance Act, 2015, the said intermediaries dealing with commodity derivatives have been brought under the control of SEBI. We find that the reason as to why by Finance Act, 2015, the said intermediaries were brought under the control of SEBI appears to be that the Parliament found that the activities of intermediaries dealing in commodity derivatives should not remain uncontrolled and they should be brought under the control of competent authority.

.....”

44.3. I note that under normal circumstances as per regulation 23 of Intermediaries Regulations, SEBI can take action under Intermediaries Regulations against any person who has been granted a certificate of registration under the Act or regulations made thereunder either (a) fails to comply with any conditions subject to which a certificate of registration has been granted to him; or (b) contravenes any of the provisions of the securities laws or directions, instructions or circulars issued thereunder.

44.4. However, in view of the facts and circumstances of the case discussed above in paragraph 36, SEBI's jurisdiction, observation of Hon'ble Bombay High Court in Order dated October 04, 2018, the fact that, pursuant to Finance Act, 2015 the Noticee was already dealing in commodity derivatives and applicability of Intermediaries Regulations as already discussed in detail above, I am of the view that SEBI can take action against the Noticee under Intermediaries regulations if the Noticee has contravened any of the provisions of the securities laws or directions, instructions or circulars issued thereunder.

45. Now the question that arises is whether the Noticee has contravened any of the provisions of the securities laws or directions, instructions or circulars issued thereunder.

46. I note that SEBI was entrusted with regulatory supervision and control of commodity derivatives brokers from September 28, 2015 and Noticee had made an application to SEBI for registration as commodity derivative broker on December 23, 2015 under regulation 3 of Brokers Regulations. As per regulation 5(e) of Brokers Regulations, SEBI, while considering the application for grant of registration to the Noticee was

required to take into account whether the Noticee is a fit and proper person based on the criteria specified in Schedule II of the Intermediaries Regulations. Further, I note that “*fit and proper person*” criteria specified in Schedule II of the Intermediaries Regulations forms the part of Securities Laws. Thus, I am of the view that from September 28, 2015, SEBI was entrusted to look into the status of “*Fit and Proper*” criteria, specified in Schedule II of the Intermediaries Regulations, of the intermediary/person who had made an application for registration. As laid down by Hon’ble Securities Appellate Tribunal in ***Jermyn Capital LLC vs. SEBI*** vide its order dated September 06, 2006 that “*The Regulations apply across to all sets of regulations and all intermediaries of the securities market including those who associate themselves with the market and they all have to satisfy the criteria of fit and proper person before they could be registered under any of the relevant regulations and this criteria they must continue to satisfy through out the period of validity of their registration and through out the period they associate with the market*”. Hence, I am of the view that at the time of submitting the application for registration, Noticee is required to comply with the provisions of regulation 5(e) of Brokers Regulations read with “*Fit and Proper*” criteria specified in Schedule II of the Intermediaries Regulations. As the Noticee continued to act as commodity derivative broker pursuant to the Finance Act, 2015 and the requirement of being a fit and proper person being an ongoing requirement, in this case, Noticee is required to abide by it continuously.

47. In view of the above, I am of the view that issuance of the show cause notice against the Noticee, is sustained, since the same was issued on the allegation that it had contravened the ongoing requirement of fit and proper status, under the Brokers Regulations read with Intermediaries Regulations, which are part of Securities Laws, therefore, regulation 23 of Intermediaries Regulations is attracted and SEBI had rightly initiated action against Noticee under regulation 23 of Intermediaries Regulations.

Whether the recommendations made by Designated Authorities are in accordance with regulation 27 of Intermediaries Regulation or not?

48. I note that under normal circumstances, the Designated Authority, under regulation 25 of Intermediaries Regulations issues a notice to the concerned person requiring him to show cause as to why the certificate of registration granted to it, should not be

suspended or cancelled or why any other action provided herein should not be taken. I also note that “*any other action provided herein*” is specified under regulation 27 of Intermediaries Regulations i.e. under regulation 27 of the Intermediaries Regulations, the designated authority shall submit a report, where the facts so warrant, *recommending*, – (i) suspension of certificate of registration for a specified period; (ii) cancellation of certificate of registration; (iii) prohibiting the Noticee to take up any new assignment or contract or launch a new scheme for the period specified in the order; (iv) debarring a principal officer of the noticee from being employed or associated with any registered intermediary or other registered person for the period specified in the order; (v) debarring a branch or an office of the noticee from carrying out activities for the specified period; and (vi) warning the Noticee.

49. I note that in the present matter the Designated Authorities vide their report dated April 11, 2017 had stated that the conduct of the Noticee in its functioning as a commodity broker is questionable and its general reputation, record of fairness, honesty and integrity has eroded and therefore, the status of the Noticee as a ‘fit and proper person’ to be an intermediary in the securities market has affected and recommended that:

49.1. The application of MOCBPL submitted for registration as a commodity broker may not be considered in the interest of securities market and the application of MOCBPL may be rejected.

49.2. SEBI may also consider initiating prosecution proceedings under the relevant provisions of Chapter V of FCRA for the irregularities committed by MOCBPL including the violation of the Government of India Notification issued under Section 27 of FCRA.

50. I note that under normal circumstance, the Designated Authorities can only make the recommendations specified under regulation 27 of Intermediaries Regulation, but in the present matter the Designated Authorities had made the aforesaid two recommendations which are not specified under regulation 27 of Intermediaries Regulations. However, it is to be noted that in the facts and circumstances of the case discussed above and considering the circumstances of the matter as detailed in paragraph 36 and the fact that the Noticee was already acting as commodity derivative broker pursuant to Finance Act, 2015, I am of the view that the recommendation of

rejection of Noticee's application for registration is equivalent / similar to the recommendation of cancelation of certificate of registration that is envisaged under regulation 27 of Intermediaries Regulations.

51. With respect to the second recommendation of considering initiating prosecution proceedings by SEBI, I note that as per Section 29A(2)(e) of FCRA inserted through Section 132 of Finance Act 2015, a fresh proceeding related to an offence under the FCRA, may be initiated by SEBI under FCRA within a period of three years from the date on which FCRA is repealed and be proceeded with as if FCRA had not been repealed.
52. In the present matter, I note that the Designated Authorities had noted certain allegations / violations of FCRA committed by the Noticee. I note that by virtue of Finance Act, 2015 SEBI may initiate fresh proceeding related to an offence under FCRA within a period of 3 years from September 28, 2015 under FCRA. I also note that as per Section 24 of FCRA, no court inferior to that of a presidency magistrate or a magistrate of the first class shall take cognizance of or try any offence punishable under FCRA.
53. Hence, in the interest of investors and responsibility entrusted by the Legislature to SEBI of regulatory supervision and control of Commodity Derivatives Market, and considering the facts and circumstances of the matter as detailed in paragraph 36 and considering the fact that the Noticee was already acting as commodity derivative broker pursuant to Finance Act, 2015, I am of the view that the Designated Authorities have rightly made a recommendation for initiation of prosecution proceedings under the relevant provisions of Chapter V of FCRA although the said recommendation is not specified under regulation 27 of Intermediaries Regulations. Further, I also note that SEBI had filed the FIR dated September 28, 2018 against the Noticee.
54. Noticee has contended that the DAs have not actually understood the matter and have gone ahead with their observations with a closed mind and based on their preconceived conclusions.
- 54.1. In this regard, it is noted that the Noticee has just made bald assertions without demonstrating the same and is liable to be rejected without any consideration.

Findings on Merits of the case:

ISSUE: Whether or not the Noticee is a fit and proper person for holding / being granted a certificate of registration as a commodity derivative broker

55. I note that the **Criteria for determining a 'Fit and Proper person'** is defined under Schedule II of Intermediaries Regulation which states that *"For the purpose of determining as to whether an applicant or the intermediary is a 'fit and proper person' the Board may take account of any consideration as it deems fit, including but not limited to the following criteria in relation to the applicant or the intermediary, the principal officer, the director, the promoter and the key management persons by whatever name called (a) integrity, reputation and character; (b) absence of convictions and restraint orders; (c) competence including financial solvency and networth; (d) absence of categorization as a wilful defaulter."*

56. I note that the concept of a fit and proper person has a very wide amplitude. The said Schedule confers wide discretion on the Board in respect of what considerations it has to take into account in view of its mandate to protect the interest of investors and integrity of the securities market. The said Schedule also provides for specific considerations such as integrity, reputation, competence and character.

57. While dealing with what considerations can be looked into as relevant for the purpose of determining whether an applicant can be considered as a fit and proper person, the following observation of Hon'ble Securities Appellate Tribunal in ***Jermyn Capital LLC vs. SEBI*** vide order dated September 06, 2006 is worth mentioning:

".....

A reading of the aforesaid provisions of the Regulations makes it abundantly clear that the concept of a fit and proper person has a very wide amplitude as the name fit and proper person itself suggests. The Board can take into account any consideration as it deems fit for the purpose of determining whether an applicant or an intermediary seeking registration is a fit and proper person or not. The framers of the Regulations have consciously given such wide powers because of their concern to keep the market clean and free from undesirable elements. It can take into account the financial integrity of the applicant and its competence. Absence of convictions or civil liabilities would be another relevant consideration which could weigh with the Board.

Good reputation and character of the applicant is a very material consideration which must necessarily weigh in the mind of the Board in this regard. Reputation is what others perceive of you. In other words, it is the subjective opinion or impression of others about a person and that, according to the Regulations, has to be good. This impression or opinion is generally formed on the **basis of the association** he has with others and/or on the basis of his past conduct. A person is known by the company he keeps. In the very nature of things, there cannot be any direct evidence in regard to the reputation of a person whether he be an individual or a body corporate. In the case of a body corporate or a firm, the reputation of its whole time director(s) or managing partner(s) would come into focus. The Board as a regulator has been assigned a statutory duty to protect the integrity of the securities market and also interest of investors in securities apart from promoting the development of and regulating the market by such measures as it may think fit. It is in the discharge of this statutory obligation that the Board has framed the Regulations with a view to keep the market place safe for the investors to invest by keeping the undesirable elements out. The Regulations apply across to all sets of regulations and all intermediaries of the securities market including those who associate themselves with the market and they all have to satisfy the criteria of fit and proper person before they could be registered under any of the relevant regulations and this criteria they must continue to satisfy through out the period of validity of their registration and through out the period they associate with the market. The purpose of the Regulations is to achieve the aforesaid objects and make the securities market a safe place to invest. One bad element can, not only pollute the market but can play havoc with it which could be detrimental to the interests of the innocent investors. In this background, the Board may, in a given case, be justified in keeping a doubtful character or an undesirable element out from the market rather than running the risk of allowing the market to be polluted. We may hasten to add here that when the Board decides to debar an entity from accessing the capital market on the ground that he/it is not a fit and proper person it must have some reasonable basis for saying so. The Board cannot give the entity a bad name and debar it. When such an action of the Board is brought to challenge, it (the Board) will have to show the material on the basis of which it concluded that the entity concerned was not a fit and proper person or that it did not enjoy a good reputation in the securities market. The basis of the action will have to be judged from the point of view of a reasonable and prudent man. In other words, the test would be what a prudent man concerned with the securities market thinks of the entity. In the instant case we are satisfied that the Board was justified in debarring the appellant as a temporary measure pending

final investigations and keeping it out of the market by not allowing it to access the same because of its close association with Dharmesh Doshi and Ketan Parekh who, in the perception of the Board and in our view rightly, do not enjoy good reputation in the context of the securities market. This association, in the circumstances of the case, would be enough to hold that the appellant is not a fit and proper person.
.....”

58. Reliance is also placed on the following observations of Hon’ble SAT in **Mukesh Babu Securities Limited vs. SEBI & others** made vide order dated December 10, 2007:

“.....

*It is true that these are only allegations made in the charge-sheet and we are conscious that these are **yet to be established in a court of law** but from what is stated in the charge-sheet liaison between Shri. Mukesh Babu and the chairman of the Bank prima facie appears to be established. The CBI has alleged that there was criminal conspiracy among all the accused and that they have committed illegal acts which have resulted in wrongful loss to the depositors of the Bank and corresponding gain to the accused. The charges levelled are indeed serious and if established, they involve moral turpitude. We are unable to agree with the learned counsel for the appellant that the criminal case pending against Shri. Mukesh Babu and others has no concern with the securities market.....In these circumstances, the Board was entitled to take the view that the company was not a fit and proper person. It could not be said that Shri. Mukesh Babu or the company enjoyed good reputation within the meaning of the Fit and Proper Person Regulations.*

.....

We are of the opinion that in the facts and circumstances of the case, the Board has taken a possible view which cannot be said to be perverse. It is not contrary to the material on record and nothing relevant has been ignored nor any irrelevant material taken into consideration. Thus, neither the decision nor the process followed by the Board suffers from any legal infirmity. In our opinion, the Board was justified in keeping the company out of the market as a risk containment measure in order to maintain its integrity and in the interests of investors. In view of the aforesaid, we answer the question posed in the earlier part of the order in the negative and hold that the Board has not erred in holding that the company is not a ‘fit and proper person’.....”

59. **The Hon'ble Supreme Court** vide its order dated April 7, 2008, **confirmed** the Hon'ble SAT order dated December 10, 2007 in matter of *Mukesh Babu Securities Limited vs. SEBI & others*, by dismissing the appeal filed against the said SAT order dated December 10, 2007. Similarly, the appeal filed against the Hon'ble SAT order dated September 06, 2006 in matter of *Jermyn Capital LLC vs. SEBI* was disposed by Hon'ble Supreme Court without interfering on the law laid down by the Hon'ble SAT.

60. From the above two judgments of Hon'ble SAT, I note the following:

60.1. An applicant or an intermediary seeking registration, requires to be a fit and proper person. Equally, an entity who has received a certificate of registration or is acting as a commodity derivative broker, as in this case, by virtue of the provisions of Finance Act, 2015 should continue to be a fit and proper person. SEBI can take into account any consideration as it deems fit for the purpose of determining the fit and proper status of the above said persons. Good reputation, competence, integrity and character of the applicant are material parameters which are to be considered by the Board in this regard. Reputation is what others perceive of the applicant. It is the subjective opinion or impression or belief of others about a person and that, according to the Regulations, has to be good. In other words, the test would be what a concerned prudent man thinks of the entity. This impression or opinion or belief is generally formed on the basis of the association he has with others and/or on the basis of his past conduct. There cannot be any direct evidence in regard to the reputation of a person whether it be an individual or a body corporate. It is to be gathered from all the attendant circumstances of the case.

60.2. The Board as a regulator has been assigned a statutory duty to protect the integrity of the securities market and also the interest of investors in securities apart from promoting the development of and regulating the market by such measures as it may think fit. The purpose of the Regulations is to achieve the said objects and make the securities market a safe place to invest. In this background, the Board may, in a given case, be justified in keeping a person of doubtful reputation out from the market rather than running the risk of allowing the market to be affected.

60.3. Thus, in the present case and in keeping in mind the case laws quoted above, the following two parameters would be enough for the Board to ascertain the reputation of the Noticee in order to determine the Fit and Proper status of the Noticee:

60.3.1. The existence of material, if any, adversely impacting the reputation of the Noticee or its close associates, even if such material is *prima facie* in nature.

60.3.2. The existence of a close association or even *prima facie* evidence of a close association, if any, of the Noticee with a person who does not enjoy a good reputation.

Allegations:

61. I note that, in the present matter, two show cause notices were issued, the allegations mentioned in the SCNs are as under:

61.1. **First SCN dated April 24, 2017:** The Enquiry Report dated April 11, 2017 finds that the integrity, reputation, character, competence, compliance with law and most importantly honesty and fairness displayed by the Noticee in the conduct of its business are questionable based on the conduct of its business at NSEL as a commodity broker. The said conclusions in the enquiry report have been arrived, *inter alia*, on the basis that the Noticee had violated various provision of laws which are serious in nature, including trading in contravention of the conditions laid down in Central Government Notification dated June 05, 2007, defeating the very purpose of spot trading on the NSEL, indulging in financial transactions, indulging in forward contract transactions, short selling in violation of Government of India (GOI) Notification dated June 5, 2007, inducing directly/indirectly the clients to transact in paired contracts, making misrepresentations/mis-selling relating to transactions on NSEL, trading in client's account, misleading presentations, assuring fixed returns, giving unverified / false information regarding trades backed by collateral in the form of stock, assuring investors regarding arbitrage opportunity, UCC modification, suspicious transactions, funding the clients by way of allowing them to trade

despite debit balance, etc. The Enquiry Report dated April 11, 2017 has found the above conduct of the Noticee in violation of various provisions of laws such as FCRA, GOI Notifications, NSEL Circulars, Rules and Bye-laws, MCX and NCDEX Circulars. In view of the above findings of the Enquiry Report dated April 11, 2017, allegations to that extent have been levelled in the SCN dated April 24, 2017.

61.2. **Second SCN dated December 27, 2018:** The second SCN was in furtherance to the first SCN dated April 24, 2017. The second SCN highlights certain information/materials to the Noticee in the form of observations by various Courts/Authorities regarding paired contracts transacted on NSEL which the Noticee as a broker had participated in/facilitated. Under these observations, these paired contracts which were alleged to be designed to be in the nature of lending and borrowing transactions rather than trading in commodities. The SCN levels an allegation that in view of this observations as detailed in the said SCN, the reputation/competence/ character/integrity of the Noticee is seriously in question and thus has bearing on its Fit and Proper status.

62. Thus, the allegation against the Noticee that it is not a *fit and proper person*, rests on **twin basis**. *First* on the basis of alleged violations of various provisions of law/circulars by the Noticee mentioned in SCN dated April 24, 2017. *Second* on the basis of existence of various adverse observations by various Courts / Authorities regarding the transactions in paired contracts on NSEL and the association of the Noticee with such transactions and with NSEL. Both sets of allegation lead to serious questions about the reputation, integrity, character and competence of the Noticee.

63. In order to appreciate the allegations with the proper perspective, **certain context setting narrations** are noted hereunder.

64. I note that NSEL was incorporated in May 2005 as a Spot Exchange for trading in commodities and in exercise of power conferred under Section 27 of the Forward Contracts (Regulation) Act, 1952. Central Government vide notification dated June 5, 2007, exempted all forward contracts of one day duration for the sale and purchase of

commodities traded on NSEL from operations of the provisions of FCRA subject to certain conditions, namely:

- (i) No short sale by members of the Exchange shall be allowed;*
- (ii) All outstanding position of the trade at the end of the day shall result in the delivery;*
- (iii) The National Spot Exchange shall organize spot trading subject to regulation by the authorities regulating spot trade in the areas where such trading takes place;*
- (iv) All information or returns relating to the trade as and when asked for shall be provided to the Central Government or its designated agencies;*
- (v) The Central Government reserves the right to impose additional conditions from time to time as it may deem necessary; and*
- (vi) In case of exigencies, the exemption will be withdrawn without assigning any reason in public interest.*

65. It is noted that in October 2008, NSEL commenced operations providing an electronic trading platform to participants for spot trading of commodities, such as bullion, agricultural produce, metals, etc. and in September 2009, NSEL had introduced the concept of 'paired contracts'.

66. With regard to the transactions in paired contracts on NSEL, Hon'ble Bombay High Court in Writ Petition No. 2743 of 2014 in the matter of 63, *Moons Technologies Limited Vs. The Union of India* vide Order dated December 04, 2017 had *inter alia* noted the practice followed at NSEL Exchanges:

".....

- i. Certain Trading Clients and Commodity Sellers entered into what are called "paired contracts" – meaning thereby 2 simultaneous transactions would be entered into on the same date (i.e. 'T' day) where a Trading Client purchased commodities from a Commodity Seller under a T+2 contract, and then sold the same commodities to the same Commodity Seller under a T+25 contract at a higher price;*
- ii. Though both T+2 and T+25 contracts were independent contracts offered by NSEL through separate circulars, it seems that the Commodity Sellers, Commodity*

Seller's Brokers, Trading Clients and Trading Client's Brokers, paired the contracts, so that:

- a) both the T+2 and the T+25 contracts were entered into at the same time, on the same day, between the same Trading Client and Commodity Seller;*
- b) upon settlement of the T+2 Contract, the Trading Client received a Delivery Allocation Report from NSEL, indicating that the commodities were deposited in the warehouse (under a Warehouse Receipt), and the Commodity Seller received the purchase consideration;*
- c) the T+25 Contract (i.e. where the Commodity Seller bought back the commodities earlier purchased by the Trading Client), was thereafter settled by the Trading Client delivering the Delivery Allocation Report to NSEL so that the Warehouse Receipt representing the underlying commodities, could be handed over to the Commodity Seller, and the Commodity Seller paid the T+25 purchase consideration for the commodities purchased.*

.....”

67. From the Enquiry report dated April 11, 2017, following is noted:

“.....

We have observed that the Noticee had carried out back-to-back pair contracts at NSEL for and on behalf of its constituents. The Noticee on behalf of its constituents simultaneously entered into a 'short term buy contract' (e.g., T+2 i.e. 2 day settlement) and a 'long term sell contract' (e.g., T+25 or T + 36 i.e. settlement in 25 days or 36 days) with pre-determined price and profit for the buyer and seller, which itself violated the very concept of spot market for trading in commodities. The contracts were executed by the Noticee in such a manner that it was always ensured that these contracts were registering a profit on the long term positions. Thus, there existed a financing business where a fixed rate of return/ assured returns were guaranteed to the investors of the Noticee who had invested in these pair contracts. These paired contracts generated an assured return of 13% to 18% per annum, and therefore, in actuality, financial transactions_were taking place through these pair contracts under the garb of doing commodities trading in spot market. Apparently, every transaction of buy and sell was paired with one leg of the transaction (i.e the contracts with long duration T+25 /T + 36) were settled beyond the prescribed

settlement schedule. As already mentioned in the pre-paragraph, NSEL contracts that were settled within 11 days were defined as 'spot' and were considered as legal, but, the Noticee through the paired contracts was carrying forward the transactions beyond the prescribed time frame, with the second leg of the pair transactions extending to T + 25/T+36 days. As a result, the buyers of such contracts (who lend the funds) benefited from an increase in the value of their positions and they book profit by selling at a higher price within the T+25/T+36 cycle period and the difference in the price of the two contracts is in actuality the interest paid to defer the payment and was the return for the financier. The 'borrowers' of the funds who participated in the long term contracts also benefitted as the funds were easily available to them without going through the rigorous procedures, which they may have to undergo in case funds are borrowed from banks/NBFC...."

68. With respect to the role of members / brokers at NSEL, Hon'ble Bombay High Court in Criminal Bail Application No. 1263 of 2014, in the matter of *Jignesh Prakash Shah vs. The State of Maharashtra* vide order dated August 22, 2014 observed the following:

"...

10. Indeed, it appears that the NSEL deviated from its business model. It also appears there had been no actual physical delivery of commodities, and bogus warehouse receipts were issued. NSEL was actually supposed to trade in commodities, but instead of doing that, it permitted bogus transactions of trading to be introduced and resultantly, in effect, permitted financial transactions of lending and borrowing.

...

15. What, however, is significant is that though these illegalities or this 'fictitious trading' is sought to be highlighted as material against the applicant, the real grievance of the First Informant – and even of the other investors – is not with respect to the fact that such fictitious trading was taking place. Their grievance is that their money has been lost. A big uproar has been created by them, and for showing the magnitude of the alleged offences, it is termed as a 'scam of about Rs. 5600 crores'. In this connection, certain basic aspects of the matter cannot be lost sight of. The persons whose monies are lost, including the First Informant, are apparently, not the genuine trades for whom NSEL was supposed to provide a platform. The very fact that these persons are, as also the Investigation Agency is, freely using the terms as the 'investors', 'borrowers', indicates that the

transaction in question were not genuine transactions of sale or purchase was well known to the so-called buyers also, who now choose to describe themselves as 'investors'. It is clear that from their point of view, it was only an investment yielding high returns for their money. These investors are not middle class or lower class people, but are themselves businessmen. The transactions in question were being entered through brokers who had knowledge of the commercial market. Going by the broad probabilities of the case, it cannot be accepted that the persons who are now crying foul, were not aware of the fact that their transactions were not genuine. They were looking at these transactions clearly as an investment of their monies yielding safe returns. Their estimate or belief about the safety of the transactions has been proved to be wrong, and that is the reason for the uproar which is now being made by pointing out the illegalities in the transactions undertaken by NSEL. Undoubtedly, these wrongs appear to have taken place, and undoubtedly, it cannot be suggested that those who permitted such fictitious trading have not committed serious offences, still, the fact remains that the persons who are raising the grievance about such fictitious tradings were themselves not genuine traders, and had entered into the transactions purely as financial investments. There is every reason to believe that a sizable number of so-called 'investors' whose transactions were being entered into through brokers actually did not bother about the fictitious trades, and knowingly participated in such illegal activities, without raising any issue of illegality thereof.

16. There is great substance in the contentions advanced by the learned counsel for the applicant that the brokers through whom the so-called trade transactions were entered into, do have their own legal team and a full knowledge of how the market operates. The legalities of the transactions were quite expected to be known to the brokers and the traders who do not hesitate to term themselves as 'investors', and they were expected to assess the legalities of the transactions. The brokers being quite experienced, and the investors being informed persons, it is apparent that the issue of illegality of the transactions raised by them is not out of their concern to adhere to legalities, but in order to project the applicant as the main offender, rather the defaulting parties.

...

18. Though the case has been projected as a 'scam of Rs. 5600 crores', it needs to be kept in mind that these amounts have not been received by NSEL. As already observed, it is

difficult to accept that the brokers and / or their clients for whom they were working were 'deceived' by the NSEL inasmuch as in all probability, the brokers and the investors were well aware that they were not entering into a genuine sale and purchase contract. When there is a clear and obvious possibility that these persons knew about the transactions, the 'deception' if any, caused to them cannot be said to have been caused by the nature of the transactions and, at the most, they can be said to have been misled by a propaganda that 'investing' money in those transactions, was safe. The money invested has not come to NSEL, but has gone to the borrowers i.e. bogus sellers. It is the borrowers who have been befitted by the transactions and the money of 'investors' has gone to them. The names of 25 different companies who are the defaulters have been mentioned in the FIR itself. Thus, though projected a 'scam of Rs. 5600', the ill-gotten amount has not gone to the applicant, or for that matter, to NSEL. In fact, it is not the case of anyone.

19. The picture that emerges is as follows. Indeed, illegal and bogus transactions of sale and purchase were shown as having taken place. This has been possible because the NSEL did not stick to its business model. Instead of providing a platform for genuine buyers and trader, this platform was permitted to be used – and actually used by businessmen who wanted safe investments for their money. These investments were made through brokers who were well experienced with the working of the market. To show bogus sales, bogus documents were created by the bogus sellers/brokers, and this has been possible with the connivance of the officers and directors of NSEL. Though the applicants contention that the was not aware of the illegalities, or that he being a Non-Executed Director of NSEL was not concerned with the illegal activities, cannot be accepted, it is also clear that, that the transactions were not genuine, was in all probability, known to the 'investors' at least to a great number of them – and in any case, certainly known to the brokers who were entering into the contracts for their customers -investors. This fact is obvious to the investigating Agency also, inasmuch the buyers and sellers are freely described as 'investors' and 'borrowers'. The NSEL, by its improper and wrong working, did provide an opportunity for the unscrupulous 'borrowers' to have huge funds for themselves. However, in the zeal of opposing the applicant's application for bail, it is, perhaps, conveniently ignored that the funds had not come to NSEL, but had gone to such borrowers. Though a number of contentions showing his complicity in the whole matter are raised, on a careful consideration and scrutiny of the matter, the only real allegation against the applicant is

that he allowed NSEL to violate the rules and regulations, and its own business model which enabled the 'borrowers' to dupe the 'investors'.
..."

Observations by various courts/authorities regarding NSEL and paired contracts and findings related to them.

69. In continuation of the above, the observations made by FMC in its order No. 4/5/2013-MKT-I/B dated December 17, 2013 (hereinafter referred to as **"FMC Order"**) are *inter alia* as under:

".....

It has also come to the knowledge of the Commission from the report of the forensic auditor that a large volume of NSEL exchange trades were carried out with paired back-to-back contracts. Investors simultaneously entered into a "short term buy contract" (e.g. T + 2 – i.e. 2 day settlement) and a "long term sell contract" (e.g. T + 25 – i.e. 25 day settlement). The contracts were taken by the same parties at a pre-determined price and always registering a profit on the long-term positions. Thus, there existed a financing business where a fixed rate of return was guaranteed on investing in certain products on the NSEL.....

NSEL conducted its business not in accordance with the conditions stipulated in the notification dated 05.06.2007 granting it exemption from the operation of FCRA, 1952, with regard to the one-day forward contracts to be traded on its exchange platform. As noted in the SCN, the condition of 'no short-sell' and 'compulsory delivery of outstanding position at the end of the day' stipulated in the notification were violated by NSEL. NSEL Board allowed launching of paired back-to-back contracts on its exchange platform comprising a short-term buy contract (T+2 settlement) and a long-term sell contract (T+25 settlement) with predetermined price and profit for the buyer and seller, which violated the very concept of spot market of commodities and the transactions ultimately were in the nature of financial transactions....."

70. The observations made by the Ministry of Finance, Department of Economic Affairs (**"DEA"**) vide letter dated December 30, 2014 (hereinafter referred to as **"DEA letter"**) are as under:

*“..... NSEL has violated the first two conditions of exemption granted to it under section 27 of FCRA making it liable for appropriate action including penal action under section 21 of violation of section 27 of FCRA. Further, this department is also in agreement with the observations of Special Team of Secretaries that by offering contracts having settlement beyond 11 days, without obtaining recognition and/or registration, **NSEL has also violated the provisions of sections 5, 6 r/w 14A also making it liable for appropriate action including penal action under section 21 of FCRA.....**”*

71. The observations of **Hon’ble Bombay High Court** in Writ Petition No. 2743 of 2014 in the matter of 63, *Moons Technologies Limited Vs. The Union of India* vide Order dated December 04, 2017(hereinafter referred to as “Writ Petition No. 2743 of 2014”) are *inter alia* as under:

“.....

85] The very offer of T+18, T+25 or T+36 contracts by NSEL prima facie constituted breach of the condition that the exemption from applicability of FCRA was only in respect of contracts of one day's duration. There is really no dispute, either in facts or in law on this aspect because even FTIL in its list of dates and events at entry 4 against date 05.06.2007, accepts this position...

86] Further, apart from the note against entry 8 (November 2011 onwards) in the list of dates and events of FTIL, there is ample material on record which establishes that NSEL offered 'paired contracts' at its exchange from 2009 itself. Further, the record indicates and it has not been disputed that by the year 2013 the volume of paired contracts constituted almost 99% of the turn over at the NSEL exchange. In monetary terms, this turn over from 2009 to 2013 was in the region of Rs.1,34,000/- crores. Therefore, to say that all this was without the involvement or even knowledge of FTIL and NSEL and to attempt to blame 'certain trading clients, commodities sellers or brokers' is just not prima facie acceptable.

.....

88] The material on record, including in particular the presentations made by and on behalf of NSEL and the Grant Thornton Report establish that this modus operandi of paired contracts, was in reality, nothing but financing transactions. These contracts

were invariably at predetermined prices and the long terms sell contract, was always at a profit, the difference effectively being the cost of lending. These paired contracts were obviously in breach of the conditions of the exemption notification and consequently the FCRA itself. **Under the guise of offering spot delivery or ready delivery contracts, the NSEL Exchange indulged not just in forward trading but in financing unhindered by any regulatory checks** which would, but for the exemption notification dated 5th June 2007 have applied to such operations.

.....

90] The FTIL in its pleadings as well as the list of dates, is really in no position to factually dispute the manner in which the operations were held at the NSEL Exchange. The NSEL itself has not even instituted any petition to question the impugned order, which takes cognizance of such facts. The learned counsel for NSEL when requested to comment on the operations at NSEL Exchange simply chose to submit that since the impugned order is based only on one ground or reason, namely, facilitating NSEL in recovering dues from the defaulters, there is no point in offering any comments or explanations about the operations at the NSEL Exchange. Even otherwise, there is extensive material on record in the form of Grant Thornton Report etc. which establishes that the operations at the NSEL Exchange were inconsistent with the conditions of the exemption notification dated 5th June 2007 and consequently the FCRA itself.

.....”

72. The observations made by SFIO in its investigation report, while discussing the “Concept of Paired Contract” (hereinafter referred to as “**SFIO Report**”) are *inter alia* as under:

“....In allowing such a mechanism, the BoD and Management of NSEL knew that the scheme put in place was patently illegal and would result in violation of the terms and conditions under which it was allowed to trade, that these paired contracts were not in the nature of spot trades and that the two essential conditions in the exemption condition not allowing short sales and delivery against all open conditions at the end of the day would be violated....”

73. I now proceed to examine whether the aforesaid observations in FMC order, DEA letter, Writ Petition No. 2743 of 2014 and SFIO Report are relevant considerations against the Noticee to determine its fitness for acting as a commodity derivative broker.
74. I find that various Courts / Competent Authorities have made adverse observations that there was trading in paired contracts on the NSEL exchange, which were in reality nothing but financing transactions and such contracts were in breach of the exemption conditions of the GOI notification dated June 05, 2007 and consequently the FCRA itself. As discussed earlier, on the basis of SAT orders which were upheld by Hon'ble Supreme Court, given the serious nature of observations, even though the observations have not reached finality, SEBI is fully justified in taking into consideration the same in determining Fit and Proper status of the Noticee and would be sufficient for the same, if found relevant. These observations are adverse in nature since they indicate that NSEL which was required to perform its operations within the conditions of exemption has failed to do so. Instead these observations state that NSEL has indulged in financing transactions. Since NSEL is observed to have misused the exchange platform for purposes other than for which permission was granted, these observations are seriously adverse in nature. In view of the gravity of the adverse nature of the observations, the same would be sufficient to determine the fit and proper status of the Noticee.
75. From the submissions of the Noticee, I note that the Noticee had not disputed the existence of such adverse observations made by various Courts / Authorities qua NSEL and paired contracts. Thus, I am of the view that the aforesaid adverse observations qua NSEL and paired contracts exist. Such adverse observations made by various Courts / Competent Authorities had seriously impacted the reputation and belief in competence, fairness, honesty, integrity of NSEL and paired contracts.
76. In view of the parameters already mentioned in previous paragraph 60.3, I now proceed to examine whether there exists any close association or even *prima facie* evidence of a close association of the Noticee with NSEL and paired contracts whose reputation has been seriously eroded.

77. As per the Noticee, it, as a broker had only entered into the so-called paired contracts on behalf of its clients in accordance with the Bye laws/ Business Rules of NSEL. Noticee contented it had not no role in launching of such contracts.
78. From the submissions of the Noticee, I note that Noticee admitted that it had facilitated trading on NSEL by providing the required infrastructure and services to its clients, the role of the Noticee was limited to facilitate the investors to trade on the platform of NSEL and Noticee was only a facilitator of trades and was placing the orders on NSEL as per the instruction of the clients. I note that for the clients, the face of the NSEL and the paired contracts was the Noticee himself and the paired contracts could not have been executed in such large volumes, across the large number of clients without the actions and facilitation of the broker. In my view this facilitation is sufficient to establish the close association of the Noticee with NSEL and paired contracts. Hence, I am of the view that Noticee is closely associated with NSEL and paired contracts.
79. As already established, the reputation of the NSEL and paired contracts has been seriously impacted by the adverse observations of various Courts and Authorities. Thus, by virtue of the close association of the Noticee with NSEL and paired contracts, I find that, the reputation and belief of competence, fairness, honesty, integrity and character of the Noticee has, in turn, been seriously eroded.
80. Even though, facilitation as broker itself would be sufficient for sustaining a finding on erosion of reputation, I note that, Noticee has also admitted that they have forwarded / shared the PPT with their clients which was either provided by NSEL or downloaded from the website of NSEL.
81. All the above, clearly demonstrate an association of the Noticee with NSEL and the paired contracts that goes well beyond transacting on behalf of its clients. In essence, Noticee allowed itself to **become the channel or instrument of NSEL** in promotion of paired contracts amongst its clients. Hence, I am of the view that the Noticee is even more closely associated with NSEL and paired contracts.
82. The Noticee has contested that the observations of some of the Competent Authorities as mentioned in the SCN, are not against the Noticee. Noticee has submitted that Shri. Rajvardhan, then ACP, EOW, in its report dated April 4, 2015, submitted to Chairman,

Forward Market Commission has made no allegations against the Noticee. The Noticee also made a reference to Hon'ble Bombay High Court order dated October 1, 2015 in Writ Petition No. 1403 of 2015 filed by NSEL, specifically records and concludes that NSEL and Shri Jignesh Shah were the only culprit responsible for the fraud initiated in the commodities market. Further, the Noticee place reliance on the Hon'ble Bombay High Court order dated December 4, 2017 in Writ Petition No. 2743 of 2014 wherein its held that brokers cannot be blamed.

83. Even though it is already established, that the Noticee was closely associated with NSEL and paired contracts, in view of the submissions of the Noticee that the observations made by courts/ competent authorities are not against it, I proceed to examine whether the observations made by the Courts / Competent Authorities are relatable to or against the Noticee. I find from the observations of the FMC order, that *"....investors simultaneously entered into a 'short term buy contract' (e.g. T + 2 – i.e. 2 day settlement) and a 'long term sell contract' (e.g. T + 25 – i.e. 25 day settlement). The contracts were taken by the same parties at a pre-determined price and always registering a profit on the long-term positions. Thus, there existed a financing business where a fixed rate of return was guaranteed on investing in certain products on the NSEL..."*. It goes without saying, the adverse observations of the FMC capture both sides of the transactions; one side which is attracted to the fixed returns for their investment and the other side which receives such investments. Therefore, it is incorrect to state that the observations of FMC are not in respect of brokers such as Noticee who are on the side of the contract to invest for fixed returns. Further, FMC observations are in respect of *'short term buy contract' and 'long term sell contract'* as captioned by FMC. Similarly, the observations of the DEA are in respect of the same contracts when it observed that the conditions of the exemption have been violated by NSEL. *Similar is the case with the observations of SFIO on paired contracts when it observed that paired contracts were not in the nature of spot trades and were violative of exemption conditions.* It is not the case of the Noticee that it has not entered into such contracts on behalf of its clients at all. It has always been the position of the Noticee that he has been a broker to such kinds of contracts. The observation of FMC is that such contracts *violated the very concept of spot market of commodities and the transactions ultimately were in the nature of financial transactions.* Hon'ble Bombay High Court in Writ Petition No. 2743 of 2014 has also

made observations that *"The very offer of T+18, T+25 or T+36 contracts by NSEL prima facie constituted breach of the condition that the exemption from applicability of FCRA was only in respect of contracts of one day's duration"*. These observations are directly relatable to paired contracts and the Noticee is directly related to paired contracts, thus, the observations are **factually relatable to the Noticee**. The observation of Hon'ble High Court, Writ Petition No. 2743 of 2014 *"Therefore, to say that all this was without the involvement or even knowledge of FTIL and NSEL and to attempt to blame 'certain trading clients, commodities sellers or brokers' is just not prima facie acceptable."* only points to the role of NSEL in addition to that of other participants.

84. Further, such observations relating to paired contracts by the Courts / Competent Authorities are similar to declarative statements in nature, as the observations in effect declare that the paired contracts constituted breach of the exemption conditions of GOI Notification from applicability of FCRA and violated the very concept of spot market of commodities. Such observations are **in the nature of "in rem" observations**. In this regard the observations made by Hon'ble Madras High court in *C.L. Pasupathy v. Engineer in Chief (WRO) (2009) 2 MLJ 491*, explaining the distinction between *judgment-in-rem* and *judgment-in-persona* are of relevance.

"27. ... Historically the term judgement "in rem" was used in Roman law in connection with actio but not in connection with "jus actio in personam". The effect of "actio in rem" was to conclude against all mankind, but the effect of "actio in personam" was to conclude with regard to the individual only. After the Roman forms of procedure had passed away, the term "in rem" survived to express the effect of an action "in rem" and gradually, it came to import "generally".

28. The judgements "in rem" signified as judgements which are good against all mankind and "judgements in personam" signified the judgements which are good only against the individuals who are parties to them and their privies. The point adjudicated upon in a "judgement in rem" is always as to the status of the "res" and is conclusive against the world as to that status, whereas in a judgement "in personam", the point whatever it may be, which is adjudicated upon, not being as to the status of the "res" is conclusive only between the

parties or privies. Reference can be made to Firm of Radhakrishnan Vs. Gangabai, 1928 S 121, Ballantyne vs. Mackinson 1896 2 QB 455.

29. Courts have held that, "Judgement in rem", operates on a thing or status rather than against the person and binds all persons to the extent of their interest in the thing, whether or not they were parties to the proceedings. The judgement "in rem", as distinguished from judgement "in personam" is an adjudication of some particular thing or subject matter, which is the subject of controversy, by a competent Tribunal, and having the binding effect of all persons having interests, whether or not joined as parties to the proceedings, in so far as their interests in the "res" are concerned. In determining whether a judgement is "in rem", the effect of the judgement is to be considered and it is tested by matters of substance, rather than by measure of any particular draft or form.

...Thus with respect to the "res or status", a "judgement in rem" has to be conclusive and binding upon "all the world" that is, on all the persons, who may have or claim any right or interest in the subject matter of litigation, whether or not, they were parties to or participants in the action, atleast to the extent, that it adjudicates or establishes a status, title or res, constituting the subject matter of the action..."

85. This would assume significance, whether any of the adverse observations are in respect of any "res" in Writ Petition No. 2743 of 2014 or in the FMC order. One of the subject matters of controversy, being "res" in those proceedings, either on *prima facie* or on final basis, was whether the paired contracts are in violation of exemption conditions of Government Notification dated June 05, 2007. It is my considered view that such observations in FMC order and in Writ Petition No. 2743 of 2014 on the status of the "res" is binding on non-parties as well. The observation that the paired contracts are in violation of exemption conditions of Government Notification dated June 05, 2007 are binding on the Noticee who has an interest in the subject matter i.e., paired contracts, in this case, as broker for the same. It is also admitted by the Noticee that it has facilitated transactions in such paired contracts. Therefore, the contention that the Noticee was not a party in those proceedings and hence such observations do not bind

it, has no merit. The fact that the Noticee did not play a role in launching such contracts also has no relevance to this proceedings as what is material is the interest in such contracts, of the Noticee by virtue of its role as a broker. Since the observations are in the nature of “in rem” observations, they are binding on the Noticee also.

86. Noticee has submitted that the Noticee itself was a victim of the fraud perpetrated by NSEL.

86.1. I note that this is not the correct forum to determine whether the Noticee was a victim of fraud perpetrated by NSEL. Even for a moment, it is assumed that the Noticee was a victim to the fraud perpetrated by NSEL, it calls into question the competence of the Noticee to detect the wrongdoing regarding the paired contracts on NSEL. In that sense it would mean that Noticee not only fell victim to the fraud but also dragged its clients along with itself. In such a scenario too, the act of the Noticee would have rendered it as not a fit and proper person.

87. In respect of the SFIO Report, the Noticee contented that the contents of the SFIO report are false and the same are based on mere surmises and conjectures and are product of abject non application of mind. It was argued that the SFIO Report cannot be relied upon without the necessary cross examination sought by it. It was also submitted that SFIO report was prepared with preconceived notion qua Noticee. Further, finding in the report against the non-defaulting brokers including Noticee has no relevance.

88. Regarding the contentions of the Noticee in respect of SFIO Report, I note that the basis of contention of the Noticee is that they contest the observations made in SFIO and the same cannot be relied upon in this proceedings unless necessary cross examination sought by them is granted to them. The underlying argument is that the findings of the report are not yet tested. In this regard, as the point of law already noted in *Jermyn Capital LLC vs. SEBI* and *Mukesh Babu Securities Limited vs. SEBI & others*, as confirmed by the Hon’ble Supreme Court, is that prima facie findings in this regard would be legally valid for the purpose of consideration of fit and proper criteria of the Noticee. The enquiry by SEBI is in respect of whether the Investigation Report of SFIO renders serious findings affecting the reputation of the Noticee or not. The fact that the observations of the SFIO Report are subject to final determination before a competent authority is not material to these proceedings of assessment of reputation and

therefore, fitness of the Noticee. The present proceedings to assess the fitness of the Noticee is proceeding on the basis of the existence of the adverse observations and not on the basis of testing those observations. The same would be done before the Competent Court.

89. In this context, I note that the Noticee has sought the cross-examination of SFIO investigating officer and the clients of the Noticee referred in the SFIO investigation report. The SFIO also has recorded the statement of the some clients of the Noticee during the course of the Investigation. The contents of the complaints are denied by the Noticee. It may be noted that what is relevant in the current proceedings is the fact that SFIO has conducted investigation and rendered its findings/observations. The competent Courts have the power to determine the contested findings of SFIO investigation. SEBI has been conferred the responsibility of determining whether in view of the existence of SFIO report and its adverse observations on paired contracts reproduced in preceding paragraphs, the Noticee has become an unfit person to be a commodity derivative broker. As determined in previous paragraphs, the reputation and belief in competence, fairness, honesty, integrity and character of the Noticee has been seriously eroded and thus, the fit and proper status of the Noticee, is affected by virtue of adverse observation by SFIO on the paired contracts with which the Noticee is closely associated. As noted earlier, the fact that the contested allegations are yet to be determined by the Competent Court is not a relevant consideration for assessing the fit and proper criteria of the Noticee. Cross examination is meant for assisting the courts in final determination of contested facts. Since such determination is not relevant for assessment of fit and proper criteria, the question of cross examination does not arise. In any event the contents of the complaints/survey as such are not relied upon in the present proceedings. In view of the aforesaid discussion, the request for cross examination is accordingly disposed of.

90. Noticee has also requested for inspection of original documents i.e., SFIO Report. It may be noted that the Noticee was provided with a copy of the SFIO Report to show that there are adverse observations against it, findings of which have been arrived at by an investigating agency and as such has a bearing in the extant proceedings. In other words, SEBI has provided the Noticee with a document (SFIO Report) which shows the existence of adverse observations with respect to the Noticee. However, as discussed

in preceding paragraph, this is not the correct forum to contest the veracity of the observations of SFIO Report and therefore the request of the Noticee for inspection of original documents cannot be entertained. Moreover, SEBI is not in possession of the original SFIO Report, so the issue of inspection of original SFIO Report is futile.

91. It is also noted that the Noticee has raised certain issues with respect to SFIO Report like SFIO has exceeded its scope of investigation and finding in the report against the non-defaulting brokers including Noticee has no relevance and SFIO in its report has taken / reproduced selective statements of Mr. Anupam Agal, while preparing the report of Noticee and has not considered his statement holistically. In this regard, it may be noted that this forum is not the appropriate forum to contest the scope and findings of the SFIO Report and therefore, the same are not relevant in the extant proceedings.
92. Noticee also contended that at no point of time, the Central Government had raised any issue with regard to contracts being traded on NSEL , or their not being within the four corners of the exemption granted by it. Further, Noticee argued that it cannot be anybody's case that the Central Government was not aware of the contracts taking place for such a long duration on the platform of NSEL. It further argued that even FMC, which was substituted as a designated authority by the Central Government on February 6, 2012 and was collecting trade details from NSEL, had never ever brought to the notice of the general public, that the contracts at NSEL platform were violative of exemption notification. It was sometime in August 2013 only that FMC for the first time, raised the issue regarding the contracts on NSEL platform, that they were violative of exemption notification. Thus, as per the Noticee, NSEL as a regulator had permitted the contracts and was solely responsible for ensuring that contracts are in consonance with the Exemption Notification. This coupled with the silence of the Central Government, gave no reason for the Noticee to suspect anything amiss in the contracts permitted by NSEL.
93. I note that the allegations against the Noticee of not being fit and proper, are on twin basis as shown in the preceding paragraphs. On the second basis, what matters is whether adverse observations affecting the reputation and therefore the fit and proper status of the Noticee, exist. I have already held that such adverse observations by various aforesaid competent authorities exist and how, by virtue of such existence, the

fit and proper status of the Noticee has been affected. In view of this, the question of dealing with the contentions raised by the Noticee, which in effect question not the existence of such observations, but which give justification for participation in the paired contracts, does not arise.

Observations regarding MPID violations and findings related to them:

94. Over and above, the determination made so far, I proceed to determine whether the observations made by Hon'ble Bombay High Court in Writ Petition No. 1403 of 2015 in the matter of *National Spot Exchange Limited Vs. State of Maharashtra* vide Order dated October 01, 2015 (hereinafter referred to as Writ Petition No. 1403 of 2015) in respect of invocation of MPID Act by the Investigating Agency is independently relevant and sufficient for consideration of whether or not the Noticee is a fit and proper person. The observations made by the Hon'ble High Court are *inter alia* as under:

“...

10. The material collected by the EoW during the course of the investigation reveals that the Petitioner did not carry out its operations as per the bye-laws and permission granted to it by the Government of India. From the statements recorded by the Investigating Agency, copies of which were placed before us for our perusal, it would prima facie reveal that the Petitioner represented to the Traders / Suppliers of the goods that they would be provided security free loan. The Petitioner had assured its clients fixed returns @ 14% to 16% pa. A copy of the brochure published by the Petitioner -Exchange gives an assurance to its clients that if they enter into contract of T+2 and T+25, they would get returns in the range of 14% to 16% pa. The record indicates that the Petitioner convinced its clients that since the actual possession of the commodities will be kept in the accredited warehouses under its control, this will enable its members to trade on its platform without there being actual physical stock. The statements of various investors recorded during the investigation shows that the Petitioner had assured them a fixed returns of 14% to 16% on their investments. The statements recorded by the Agency prima facie also indicates that the Petitioner represented to them that it would provide security free loan. The record placed before us further reveals that transaction of the Petitioner and the traders / suppliers of the goods are not fully supported by the

actual delivery of goods. In many cases, the accounts of the Petitioner and the suppliers of the goods are not tallying with each other due to bogus entries. The physical delivery of the commodities has not been verified and there has been no control over the stock lying in the ware-houses. The record further indicates that there are many accommodation entries which resulted into financial mishap due to collusion between the Petitioner and its selling trading members.

*11. Section 3 of the MPID Act defines the offence, identifies the person liable and prescribes the penalty. Section imposes a penalty for fraudulent non-payment of the deposit along with benefit by the financial establishment. Section 2(d) defines the term "financial establishment" means any person accepting any deposit under any scheme or arrangement or in any other manner. Section 2(c) defines the terms "deposit". The definition is inclusive. The inclusive definition when used enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural merit but also those things which the interpretation clause declares that they shall include. The terms "deposit" defined under clause (c) of section 2 includes any receipt of money or acceptance of any valuable commodity by any financial establishment to be returned after specified period of otherwise, either in cash or kind or in the form of specified services with or without any benefit in the form of interest, bonus, profit or any other form. In the present case, **the provisions of MPID Act are invoked as the Petitioner assured its clients** if they invest in T+2 and T+25 schemes they would get assured returns of 14 to 16% pa. Hence the said receipt of money, in our prima facie view fall within the definition of "deposit"..."*

95. In respect of the observations of the Hon'ble Bombay High Court, the Noticee contended that the afore said order specifically records and concludes that NSEL and Shri Jignesh Shah were only responsible for the fraud purportedly for the purpose of contending that the observations in this Order are of no relevance to the Noticee.

96. On perusal of para 10 of the judgment of Hon'ble Bombay High Court, I note that the observations made are equally applicable to the clients, (and therefore their brokers) who were given assurance of fixed returns @ 14% to 16% pa. At para 11 of the Judgment it is further observed that the MPID Act is invoked as there is an assurance to

the clients that if they invest in T+2 and T+25, Scheme they would get assured returns. It goes without saying, the observations of the Hon'ble High court capture both sides of the transactions; one side which is attracted with the fixed returns for their investment and the other side which receives such investment. Therefore, it is incorrect to state that the observations of the Hon'ble High Court are not in respect of the Noticee as these observations are factually relatable to the Noticee as already discussed in **paragraph... of this order**. The fact that a serious charge of MPID violation has been levelled against NSEL in respect of the paired contracts seriously erodes the reputation and belief in competence, fairness, honesty and integrity of the NSEL and paired contracts. In view of the close association of the Noticee with NSEL and paired contracts as outlined earlier, and the factual relatability of the High Court's observations to the Noticee, the reputation and belief in competence, fairness, honesty, integrity and character of the Noticee has been seriously eroded on this basis as well.

97. As brought out in preceding paragraphs, the adverse observations of Courts and Competent Authorities, even if some of them are prima facie, qua NSEL and paired contracts combined with the close association of the Noticee with NSEL and the said paired contracts, seriously affects, the reputation, and belief in competence and integrity of the Noticee and are thus sufficient for determining that the Noticee is not a fit and proper person. Therefore, the question of determination of other allegations of violations of various provisions of law, does not arise in this case to determine the fit and proper status of the Noticee.

Summary:

98. In summary, I note the following :

- 98.1. Various Courts and Authorities in the country have made serious adverse observations against NSEL and Paired Contracts, observing the transactions to be violative of the FCRA and to be in the nature of financing transactions that were violative of MPID Act.
- 98.2. Even though these observations are yet to be established in law, SEBI is justified in considering them when assessing the reputation of the parties concerned for the purpose of determining their fit and proper status since it is mandated with investor protection and in that context, it is justified in keeping a person with doubtful reputation out from the market rather than running the

risk of allowing the market to be affected. The SAT order laying down this position of law, in the matter of *Mukesh Babu vs. Sebi* was confirmed by the Honorable Supreme Court in second appeal.

- 98.3. The Noticee, by virtue of being a broker, and by its own admission, has facilitated transactions in the said paired contracts for its clients on the NSEL platform. This in itself establishes a close association between the Noticee on the one hand and paired contracts and NSEL on the other. Over and above this, the Noticee, by its own admission allowed himself to become a channel and instrument for NSEL to promote paired contracts amongst its clients.
- 98.4. Given the close association of the Noticee to NSEL and the paired contracts, and the relatability of the same to the Noticee, the serious adverse observations of the various Courts and Authorities have, in turn, seriously eroded the reputation and belief in competence, fairness, honesty, integrity and character of the Noticee. The SAT order laying down this position of law as to reputation being linked to close associations in the matter of *Jermyn vs Sebi* was confirmed by the Honorable Supreme Court in second appeal.
- 98.5. Reputation is an important factor for consideration of Fit and Proper Criteria and the reputation of the Noticee has been seriously eroded. Thus, I find that the Noticee is not a fit and proper person to be granted registration/ to operate as a commodity derivatives broker.

Order:

99. Thus, I, in exercise of the powers conferred upon me under Regulation 28 of Securities and Exchange Board of India (Intermediaries) Regulations, 2008 read with regulation 7(1) of Securities and Exchange Board of India (Stock Brokers and Sub-brokers) Regulations, 1992, in the interest of investors and to protect the integrity of the securities market, declare that the Noticee is not a fit and proper person to hold, directly or indirectly, the certificate of registration as commodity derivatives broker, and hereby, reject the applications dated December 11, 2015 and December 16, 2015 filed by Motilal Oswal Commodities Broker Private Limited for registration as commodity derivatives broker. The Noticee shall cease to act, directly or indirectly, as a commodity derivatives broker.

100. In case of any existing clients of the Noticee as Commodity Derivatives Broker, the Noticee shall allow such clients to withdraw or transfer their securities or funds held in its custody or withdraw any assignment given to it, without any additional cost to such clients within 45 days from the date of this order. In case of failure of any clients to withdraw or transfer their securities or funds within 45 days from the date of this order, the Noticee shall transfer its balance clients with their corresponding securities and funds to another person, holding a valid certificate of registration to carry on such activity, within a further period of 30 days. Such person should not be directly or indirectly related to the Noticee.
101. The order shall come into force with immediate effect.
102. A copy of this order shall be served on the Noticee and upon all recognized Stock Exchanges and Depositories.

Date: FEBRUARY 22, 2019

Place: MUMBAI

MADHABI PURI BUCH

WHOLE TIME MEMBER

SECURITIES AND EXCHANGE BOARD OF INDIA