

SECURITIES AND EXCHANGE BOARD OF INDIA
FINAL ORDER

UNDER SECTION 12 (3) OF SEBI ACT, 1992 READ WITH REGULATION 27 OF THE SECURITIES AND EXCHANGE BOARD OF INDIA (INTERMEDIARIES) REGULATIONS, 2008.

In respect of:

| NOTICEE | SEBI REGISTRATION No. |
|--|------------------------------|
| Sushil Global Commodities Private Limited | INZ000025633 |

In the matter of National Spot Exchange Limited

I. Background

1. Sushil Global Commodities Private Limited ("**SGCPL**" / "**Noticee**") is registered with Securities and Exchange Board of India ("**SEBI**") as a Stock Broker bearing SEBI Registration No INZ000025633. The Noticee is a commodities derivative broker and member of National Commodity & Derivatives Exchange Ltd. ("**NCDEX**"). SGCPL was Member of the National Spot Exchange Limited ("**NSEL**") and Multi Commodities Exchange of India Ltd. ("**MCX**").
2. As the Noticee was a member of the NSEL and had participated in/facilitated trading in 'paired contracts' on the NSEL platform, SEBI initiated enquiry proceedings against the Noticee under Chapter V of the SEBI (Intermediaries) Regulations, 2008 (hereinafter referred to as the "**Intermediaries Regulations**") and appointed a Designated Authority (hereinafter referred to as the "**DA**") vide order dated October 21, 2020, to enquire into whether the Noticee was a 'fit and proper person' (hereinafter referred to as "**FPP**") to continue to hold the certificate of registration as Trading and Clearing Member

in terms of Regulation 5 (e) read with Regulation 27 (iv) of the SEBI (Stock Brokers) Regulations, 1992 (hereinafter referred to as the “Broker Regulations”).

II. Brief History of Illegal Forward Contracts on NSEL:

3. Before considering the compliance of the Noticee with the FPP criteria, it would be appropriate to have a preliminary discussion on the background of NSEL which forms the basis of the current proceedings.
4. NSEL was incorporated in 2005 as an exchange for spot trading of commodities. I note from the FMC Order No.4/5/2013-MKT-1/B dated December 17, 2013 (“**FMC Order**”), that on June 05, 2007, the Department of Consumer Affairs (“**DCA**”), Ministry of Consumer Affairs, Food and Public Distribution, Government of India, issued a Notification S.O.906(E) under Section 27 of Forward Contracts (Regulation) Act, 1952 (hereinafter referred to as “**FCRA**”) granting certain exemptions from the provisions of FCRA to NSEL subject to specified conditions. The relevant extract of the said notification is reproduced hereunder for ease of reference:

“...the Central Government exempts all forward contracts of one day duration for the sale and purchase of commodities traded on the National Spot Exchange Limited, from operation of the provisions of the said Act subject to the following conditions, namely:

- i. no short sale by members of the Exchange should be allowed;*
- ii. all outstanding positions of the trade at the end of the day shall result in delivery;*
- iii. the National Spot Exchange Ltd. 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 agency;*

.....”

5. The aforesaid notification was amended on February 6, 2012 by DCA vide Gazette Notification S.O. 228(E) specifying “Forwards Market Commission, Mumbai” as the designated agency of the Central Government.
6. NSEL commenced operations in October 2008. It is seen from the FMC Order and the Judgement dated April 22, 2022 of the Hon’ble Supreme Court, in the matter of The State of Maharashtra Vs. 63 Moons Technologies Ltd, Civil Appeal Nos. 2748-49 of 2022, that NSEL, in September 2009, introduced the concept of ‘paired contracts’, which involved buying and selling the same commodity through two different contracts at two different prices, wherein investors could buy a short duration settlement contract and sell a long duration settlement contract or vice versa, with the same counterparty at the same time. In short, the ‘paired contract’ involved two simultaneous transactions being undertaken at the same time with the same counterparty—one being a purchase transaction (settling at T+2 or T+3) and the other being a sale transaction (settling at T+25 or T+36), at different prices on the platform of NSEL. “T” indicates the trade date, that is, the date on which the trade took place; and +2 or +3 or +25 or +36, indicates the number of business days after the trading day when the delivery of the commodity and the payment of price ought to have been made. The transactions were structured in a manner that the buyer of the short duration contract always ended up making profits.
7. Further, from Para 8 of the FMC Order, I note that the DCA on April 27, 2012 directed NSEL to explain as to why action should not be initiated against NSEL for violation of the conditions of the notification dated June 05, 2007. In response to the same, NSEL submitted a reply vide their letter dated May 29, 2012. DCA, vide its letter dated May 31, 2012, sought comments of the FMC on the NSEL reply. The FMC, vide its letter dated August 02, 2012 to the DCA provided its comments on the two main issues, which are relevant for consideration of the matter at hand, as paraphrased hereunder:
 - a. Short Sale by members of the Exchange: NSEL did not insist upon ownership of goods before allowing its members to place the sale order.

FMC was of the view that all those sale transactions which are not backed by the ownership of goods were in violation of the condition of *“no short sale by the members of the Exchange shall be allowed”*.

- b. Contracts in which settlement period goes beyond 11 days: In view of the definition of forward contract under FCRA, FMC was of the view that all the contracts traded on NSEL which provide settlement schedule for a period exceeding 11 days are Non-Transferable Specific Delivery contracts. Thus even if the gazette notification does not specify the delivery period, NSEL had to settle the delivery for all open position within a period of 11 days as NSEL was allowed to only trade in one-day forward contracts and was obliged to ensure delivery and settlement within 11 days.
8. I also note from Para 8 of the FMC Order that DCA, vide its letter dated July 12, 2013, directed NSEL to give an undertaking that:
 - a. *No further/ fresh contracts shall be launched by NSEL until further instructions from the concerned authority; and*
 - b. *All the existing contracts will be settled on the due dates.*
9. To sum up, as per the original notification dated June 05, 2007, NSEL was granted conditional exemption from the provisions of FCRA for all forward contracts of one-day duration for the purchase and sale of commodities. The two main conditions were that (i) there should be no short sale and (ii) all outstanding positions at the end of the day should result in delivery. Thereafter, FMC had observed that 55 contracts offered for trade on NSEL were with settlement periods exceeding 11 days and all such contracts traded on NSEL were in violation of provisions of FCRA. Under the FCRA, a *“forward contract”* is defined as a *“contract for delivery of goods and which is not a ready delivery contract”*. A *“ready delivery contract”* is defined as *“a contract which provides for the delivery of goods and the payment of a price therefor, either immediately or within such period not exceeding eleven days”*. In view of the said definition contained in FCRA, FMC was of the view that all the contracts traded on NSEL

which provided settlement schedule exceeding 11 days were treated as Non-Transferable Specific Delivery contracts.

10. NSEL, thus, had permitted contracts of various commodities having duration longer than 11 days and these contracts were *ex facie* in contravention of the exemption granted to NSEL vide the Government Notification dated June 05, 2007. Further, I note that the Hon'ble Supreme Court, in its Judgement dated April 22, 2022 in the matter of The State of Maharashtra Vs. 63 Moons Technologies Ltd, Civil Appeal Nos. 2748-49 of 2022, while drawing reference to the presentations made by NSEL in respect of 'paired contracts' had *inter alia* held that:

“44.... NSEL in the course of its brochures has held out representations about the trading and investment opportunities available for:

- a) corporate clients*
- b) high net worth individuals; and*
- c) retail investors*

45. Under the head of “contract specifications”, the following representation has been held out :

| <i>Commodity</i> | <i>Duration</i> | <i>Investment (lacs.)</i> | <i>Yield</i> |
|----------------------------|-----------------------|---------------------------|--------------|
| <i>Castor Seed</i> | <i>T+3 & T+36</i> | <i>7.5 -9 Lacs</i> | <i>16%</i> |
| <i>Castor Oil</i> | <i>T+5 & T+30</i> | <i>7-9</i> | <i>16%</i> |
| <i>Cotton Wash Oil</i> | <i>T+2 & T+25</i> | <i>10</i> | <i>16%</i> |
| <i>Paddy</i> | <i>T+2 & T+25</i> | <i>3.5-4.5</i> | <i>16%</i> |
| <i>Steel</i> | <i>T+2 & T+25</i> | <i>4.5-5</i> | <i>16%</i> |
| <i>Raw Wool</i> | <i>T+2 & T+25</i> | <i>3.5-4</i> | <i>16%</i> |
| <i>Wool Top</i> | <i>T+2 & T+25</i> | <i>1.8-2</i> | <i>16%</i> |
| <i>Crude Soybean Oil</i> | <i>T+2 & T+25</i> | <i>3.3.-3.5</i> | <i>16%</i> |
| <i>Soya DOC</i> | <i>T+2 & T+25</i> | <i>1.7-2.0</i> | <i>16%</i> |
| <i>Refined Mustard Oil</i> | <i>T+2 & T+25</i> | <i>6.5</i> | <i>16%</i> |
| <i>Refined Soybean Oil</i> | <i>T+2 & T+25</i> | <i>6.5</i> | <i>16%</i> |

| | | | |
|------------------------------|-----------------------|------------|------------|
| <i>Refined Sunflower Oil</i> | <i>T+2 & T+25</i> | <i>6.5</i> | <i>16%</i> |
| <i>RBD Palmolein Oil</i> | <i>T+2 & T+25</i> | <i>6.5</i> | <i>16%</i> |
| <i>Sugar</i> | <i>T+2 & T+25</i> | <i>3.0</i> | <i>16%</i> |
| <i>Maize</i> | <i>T+2 & T+25</i> | <i>3.0</i> | <i>16%</i> |

The above representation specifies:

- (i) Commodities;*
- (ii) Duration of trades;*
- (iii) Investment; and*
- (iv) Yield.*

For example, in the case of castor seeds, NSEL held out a buy contract (T+3) and sale contract (T+36), in which the yield is stated to be 16%. Moreover, NSEL represented that:

“Opportunities

- Traders can trade and lock their return*
- Trader has to buy in near settlement contract and sell in far settlement contract simultaneously*
- Price for both settlement available*
- Exchange provides counterparty guarantee risk*
- No basis risk, No link with future contracts*

While describing the features of trading opportunity, NSEL represented that:

“Features of Trading Opportunity:

- T+2 and T+25 contract offers unique trading opportunity to traders*
- Trader purchases T+2 contract and simultaneously sells T+25 contract*
- Pay-in obligation is on T+2 while Pay-out of the funds will be on T+25. Entire settlement cycle is of 35-37 days*

- *Price differential between the two settlement dates i.e premium if annualized offers interest rate of about 16%*
- *Income arising out of such trades are treated as Business Income”*

While comparing the investment opportunities of bank fixed deposits with trading opportunities at NSEL, NSEL represented that:

“Comparison

- *Bank FD 9.25% for 390 days; NSEL Trading Opportunity 16%;*
- *Bank FD minimum duration 390 days; NSEL Trade duration 35-55 days, depending on the contract*
- *Traders have an option of rolling over their position as per their convenience*

.....

The above representation indicates that paired contracts were designed as a unique trading opportunity by NSEL under which a trader would, for instance, purchase a T+2 contract (with a pay-in obligation on T+2) and would simultaneously sell a T+25 contract (with a pay-out of funds on T+25). The price differential between the two settlement dates was represented to offer an annualized return of about 16%. NSEL categorically represented that all trades were backed by collaterals in the form of stocks and its management activities included selection, accreditation, quality testing, fumigation and insurance. Therefore, NSEL represented that on receiving money and commodities, the members would receive ‘assured returns’ and a ‘service’. Though NSEL has been receiving ‘deposits’, it has failed to provide services as promised against the deposits and has failed return the deposits on demand. Therefore, the State of Maharashtra was justified in issuing the attachment notifications under Section 4 of the MPID Act.”

11. As such, both the FMC Order and the aforesaid order of Hon’ble Supreme Court have explicitly brought out the details as to how NSEL permitted short sales - i.e. by permitting sellers to offer contract for sale of commodities on its

platform without ensuring that requisite amount of commodity is available in the warehouse.

12. It is also pertinent to note that the Hon'ble Supreme Court in another Judgement dated April 30, 2019, titled 63 Moons Technologies Ltd Vs. Union of India, Civil Appeal No. 4476 of 2019 observed that these contracts were in the nature of "financing transactions". The relevant extract of the said order is as under: -

*"55.3. We have seen that neither FTIL nor NSEL has denied the fact that paired contracts in commodities were going on, and by April to July, 2013, 99% (and excluding E-series contracts), at least 46% of the turnover of NSEL was made up of such paired contracts. **There is no doubt that such paired contracts were, in fact, financing transactions which were distinct from sale and purchase transactions in commodities and were, thus, in breach of both the exemptions granted to NSEL, and the FCRA.**"*

III. Show Cause Notice, Reply and Hearing

13. In light of the background and history narrated above, the DA issued show cause notice dated September 25, 2018 to the Noticee, calling upon it to show cause as to why appropriate recommendation should not be made against it as prescribed under Regulation 27 of the Intermediaries Regulation read with Section 12(3) of the SEBI Act. The Noticee vide letter dated November 05, 2018 submitted its reply to the said show cause notice. Upon completion of the enquiry, the DA submitted its report dated December 16, 2020, recommending cancellation of the certificate of registration granted to the Noticee, since the Noticee was not a FPP in terms of Regulation 5(e) read with Regulation 27(iv) of the Broker Regulations and Schedule II of the Intermediaries Regulations.
14. Pursuant to the same, a post enquiry show cause notice (hereinafter referred to as the "**SCN-1**") dated January 15, 2021, was issued to the Noticee, under

Regulation 28(1) of the Intermediaries Regulations to show cause as to why action, as recommended by the DA or any other action as considered appropriate by the Designated Member, should not be taken against the Noticee. A copy of the DA's Report was also forwarded to the Noticee along with an advice to file a reply, if any, within 21 days from the date of receipt of the notice. Along with the DA's Report, letter dated December 30, 2014 of the Ministry of Finance ("MoF"), Department of Economic Affairs ("DEA") addressed to the Chairman, FMC was provided to the Noticee, wherein it was stated that the DEA was in agreement that NSEL had violated the conditions of exemptions granted to it under the FCRA. Further, Order dated August 22, 2014 of Hon'ble Bombay High Court, in the matter of *Jignesh Prakash Shah Vs. The State of Maharashtra*, Criminal Bail Application No. 1263 of 2014, wherein it was held that the brokers through whom the paired contracts were entered into had knowledge of the illegality of such contracts, was also furnished to the Noticee. The SCN-1 also *inter alia* highlighted the observations made by the Hon'ble Supreme Court in the matter of *63 Moons Technologies Ltd. Vs. Union of India* (order dated April 30, 2019), wherein it was held that paired contracts were in fact financing transactions in breach of exemptions granted to NSEL under the FCRA. The Noticee submitted its reply to the SCN-1 vide letter dated March 01, 2021.

15. In the meantime, while the proceedings in the present matter were ongoing, Whole Time Member, SEBI ("WTM") passed certain orders rejecting the applications of five other entities for registration as commodity brokers. The Hon'ble Securities Appellate Tribunal ("**the Hon'ble SAT**") vide its order dated June 9, 2022 remitted the matters to the WTM to decide the matter afresh after giving an opportunity of hearing to the brokers. Further, Hon'ble SAT had observed that "...It will be open to the WTM to rely upon other material such as the complaint letters of NSEL, EOW report, EOW charge sheet, etc. provided such copies are provided to the brokers and opportunity is given to rebut the allegations. Such additional documents relied upon by SEBI should form part of the show cause notice for which purpose, it will be open to the WTM to issue a supplementary show cause notice".

16. In light of the order of Hon'ble SAT dated June 9, 2022, supplementary show cause notice dated October 07, 2022 (hereinafter referred to as "**SCN-2**") was issued to the Noticee. Vide the SCN-2, additional documents viz. SEBI's complaint dated September 24, 2018 to Economic Offence Wing ("EOW"), First Information Report ("FIR") dated September 28, 2018 filed by SEBI and the amended Schedule II of the Intermediaries Regulations were furnished to the Noticee calling upon it to show cause as to why information/material provided therein along with the Enquiry Report should not be considered against the Noticee.
17. In response to the SCN-2, the Noticee vide letter dated November 17, 2022 has submitted its reply in lines of the earlier submissions made by it.
18. In order to proceed with the matter, a hearing was granted to the Noticee in terms of Regulation 27(4) of the Intermediaries Regulations as the DA had recommended cancellation of the certificate of registration of the Noticee. The hearing was held on December 07, 2022 which was duly availed by the Noticee and reiterated the submissions made in replies dated November 05, 2018, March 01, 2021 and November 17, 2022. Subsequent thereto, the Noticee vide letter dated December 13, 2022 filed additional submissions stating that its earlier replies and submissions shall be considered. The summary of the said replies of the Noticee is given hereunder:
- a. SGCPL is a commodity broker registered with MCX and NCDEX and was a trading-cum-clearing member with NSEL. Its application for surrender of membership of MCX was approved and the surrender of membership of NCDEX is yet to be accepted by NCDEX as NSEL matter is pending owing to Show Cause Notices issued was by SEBI.
 - b. The Noticee traded in 7 to 8 commodities for and on behalf of its clients during the year 2011-2013. The trades were taking place during the period May 2012 to July 2013 and Show Cause Notice was issued only

in September 2018 i.e. after 5years, the delay for issuance of SCN proceedings has not been explained.

- c. The Noticee was not a party in the 'criminal bail application no. 1263 of 2014 in the matter of Jignesh Prakash Shah vs. The State of Maharashtra dated August 22, 2014 and therefore views were not available to the Hon'ble Bombay High Court.
- d. Its membership of NSEL is misconstrued and is treated as 'close association' with NSEL. It was NSEL who had invited brokers of other Exchanges to become their members and granted their membership. Hence it was a membership of one more Exchange. The other exchanges where they are members had not raised questions about the reputation/ competence / character/ integrity or raised any question about 'Fit and Proper' status of the Noticee. Transgressions, breaches and non-compliances, if any, were on the part of NSEL and its management team and no blame can be fastened on the Noticee for the NSEL failures.
- e. The Noticee has not promoted the 'paired contracts' among its clients, in fact, clients find benefits of so called 'paired contracts' through market information and approached for trading therein. The Designated Authority has misconstrued, misused and misinterpreted their association with NSEL. Their relationship cannot be considered as an association. They were members under the command and control of NSEL. The relationship was governed by Rules, Bye-laws and Regulations. It had no say in the business model of NSEL which had its board of directors. It is inconceivable to even think that directly Government of India regulated entity could violate conditions and continue to run Exchange without any detection thereof.
- f. There has been no question on the reputation, fairness, honesty, integrity and character of the Noticee in the security market from anyone-

no complaint, no default, no arbitration. On the contrary the Noticee itself has become a victim at the hands of NSEL. It has been wrongly brought in and linked to business which was carried out in terms of NSEL circulars, on-line in transparent manner and under supervisory regulator's surveillance/ monitoring systems.

- g. The name of the Noticee has not appeared in the list of top ten participants in the fortnightly reports submitted by NSEL to erstwhile FMC.
- h. The Noticee's association with NSEL was based on Exchange -member basis (as is the case with other exchanges). The Noticee was not part of management, and controlling and ownership interest of NSEL. NSEL was the provider of trading platform- like many brokers, the Noticee used it (after passing the membership process) for their clients. The Noticee was not informed by NSEL at the time of becoming member that it had to do due diligence of the Exchange itself and that of its financial products available to public for trading on a continuous basis. Such a condition was not part of their membership.
- i. The Noticee submitted that it was not involved in the framing of modus operandi of so called 'paired contracts', as the members were required to follow prescribed trading rules and do trading within the framework of Exchange's mechanism. The Noticee has yet to receive a large amount for their clients and for itself from the Exchange.
- j. The clients who did 'paired contracts' trading through it for better/higher returns believed that such trades were permissible in law and on the belief that NSEL (like other exchanges) would have followed law while introducing this product for investors.
- k. The amended Schedule II of the Intermediaries Regulations w.e.f. November 17, 2021 can be applied only prospectively. This amended

provision is effective from November 17, 2021 however the Noticee had filed its reply dated November 5, 2018. Provision passed thereafter cannot have retrospective application to the subject matter of SCN dated September 25, 2018. The objectionable trades, conduct of NSEL was during the years 2011 to 2013 and the cause of action pertaining to 2011 to 2013, and therefore, amended Schedule II w.e.f. November 17, 2021 has no application.

- l. The Noticee did not apply for SEBI registration in case of NSEL in the year 2015, when FMC was merged with SEBI and hence the proceedings are an afterthought and retrograde. Referring Hon'ble SAT's order dated June 9, 2022, the Noticee submitted that no disciplinary/ punitive proceedings which the Exchanges usually conduct-against its members can be initiated against it. Further, when the exchange's conduct itself in the matter of paired contracts is found in violation of conditions of its registration, and when NSEL was under the regulatory command and control of Government of India ("GOI")/FMC and its Ministries/ Departments/ Divisions, no fault can be attributed to the brokers/ investors who participated in trading activities in good faith on the NSEL.
- m. The applicability of 'Fit and Proper' criterion loses its relevance when it is considered after a lapse of long period.
- n. The Noticee submitted that it has about 1,25,000 clients out of which approximately 60,000 clients are active; there is no complaint; their performance track record and services to clients are excellent; they are in the stock broking business for the last 40 years and it has already left commodity business, surrendered membership with MCX.
- o. The Noticee has not changed codes of clients, not transferred any transaction from client 'A' to client B' nor changed any effect of any trade

in commodities. There was no violation of any trading rule. No penal action was taken by NSEL.

- p. There is no order of FMC against the Noticee (as is the case of order dated December 17, 2013) on fit and proper person status of the Noticee. Had FMC considered unfit, it would have passed similar order against the Noticee.
- q. It was inconceivable that an Exchange, under the regulatory oversight, would not act as per law. It gave all signals and indications that it was like an exchange (such as BSE/ NSE) and most of members of BSE/ NSE participated on NSEL believing it as an exchange recognized by GOI/FMC. Further, they were not informed by GOI/FMC and not put on caution. NSEL functioned like an Exchange and in retrospect it appears that it gave an illusion of that of an exchange. They participated on the trading platform of NSEL in good faith, met their obligations and acted bonafide.
- r. When the FMC was a regulator, NSEL had its board of directors and MD to control the affairs and operations and supervise and monitor and take corrective actions. No fault can be attributed to the Noticee for carrying out the transactions on NSEL. It acted bonafide at the relevant time. Neither FMC nor NSEL pointed out any infirmity in their status of membership at the relevant time.
- s. The Noticee submitted that the NSEL itself followed substantially the same process flow for pre-trade, trade and post-trade activities. It gave an impression through its circulars to members about it being a valid commodities Exchange and hence several members of BSE/ NSE became members of NSEL and participated in trading of commodities on that Exchange. There was nothing suspicious - NSEL issued its circulars on trading etc. matters to members and gave reference numbers too. Such circulars inter alia prescribed standard operating

procedures, charges relating to trading, settlement and delivery (e.g. Circular dated December 22, 2010). Hence no fault can be fastened on the Noticee for trading on NSEL.

- t. The Noticee submitted that no flaws, non-compliance, deficiencies and breaches of trading in commodities was pointed out by any government department, FMC or by anyone when it was functional and on a contemporaneous basis. The allegations against them are therefore afterthought and they are involved in the episode just for the sake of it, without any cogent, incriminating material against them. No relevant parameters have been applied for judging, FPP status. No "live and proximate link" between reasons stated in the SCN-2 and facts, circumstances and purpose of the case is shown. Further, no *mens rea* is established for any objectionable conduct on their part. Alleged incriminating material is cryptic, stale and out of context. The SCN-2 is therefore a case of regulatory outreach/overreach.

IV. Consideration of Issues

19. I have considered the SCN-1, SCN-2, the Enquiry Report submitted by the DA, Noticee's replies dated November 05, 2018, March 01, 2021, November 17, 2022 and December 13, 2022 and other material available on record. Having regard to the same, I now proceed to deal with the issues in the present matter.
20. It is alleged that the Noticee has violated Regulation 9(b) and (f) read with Clause A(1), A(2) and A(5) of the Schedule II of the Broker Regulations and Regulation 5(e) of the Broker Regulations read with Schedule II of the Intermediaries Regulations. The relevant provisions are reproduced hereunder: -

Provisions of Broker Regulations:

Consideration of application for grant of registration.

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.

Conditions of registration.

9. Any registration granted by the Board under regulation 6 shall be subject to the following conditions, namely, -

.....

(b) he shall abide by the rules, regulations and bye-laws of the stock exchange which are applicable to him...

.....

(f) he shall at all times abide by the Code of Conduct as specified in Schedule II

SCHEDULE II

Securities and Exchange Board of India (Stock Brokers) Regulations, 1992

CODE OF CONDUCT FOR STOCK BROKERS

[Regulation 9]

A. General.

(1) Integrity: A stock-broker, shall maintain high standards of integrity, promptitude and fairness in the conduct of all his business.

(2) Exercise of due skill and care : A stock-broker shall act with due skill, care and diligence in the conduct of all his business.

(3).....

(5) Compliance with statutory requirements: A stock-broker shall abide by all the provisions of the Act and the rules, regulations issued by the Government, the Board and the Stock Exchange from time to time as may be applicable to him.

Provisions of Intermediaries Regulations:

“SCHEDULE II

SECURITIES AND EXCHANGE BOARD OF INDIA (INTERMEDIARIES)

REGULATIONS, 2008

[See regulation 7]

(1) The applicant or intermediary shall meet the criteria, as provided in the respective regulations applicable to such an applicant or intermediary including:

- (a) the competence and capability in terms of infrastructure and manpower requirements; and*
- (b) the financial soundness, which includes meeting the net worth requirements.*

(2) The 'fit and proper person' criteria shall apply to the following persons:

- (a) the applicant or the intermediary;*
- (b) the principal officer, the directors or managing partners, the compliance officer and the key management persons by whatever name called; and*
- (c) the promoters or persons holding controlling interest or persons exercising control over the applicant or intermediary, directly or indirectly:*

Provided that in case of an unlisted applicant or intermediary, any person holding twenty percent or more voting rights, irrespective of whether they hold controlling interest or exercise control, shall be required to fulfill the 'fit and proper person' criteria.

Explanation– *For the purpose of this sub-clause, the expressions "controlling interest" and "control" in case of an applicant or intermediary, shall be construed with reference to the respective regulations applicable to the applicant or intermediary.*

(3) For the purpose of determining as to whether any person is a 'fit and proper person', the Board may take into account any criteria as it deems fit, including but not limited to the following:

- (a) integrity, honesty, ethical behaviour, reputation, fairness and character of the person;*
- (b) the person not incurring any of the following disqualifications:*
 - (i) criminal complaint or information under section 154 of the Code of Criminal Procedure, 1973 (2 of 1974) has been filed against such person by the Board and which is pending;*
 - (ii) charge sheet has been filed against such person by any enforcement agency in matters concerning economic offences and is pending;*
 - (iii) an order of restraint, prohibition or debarment has been passed against such person by the Board or any other regulatory authority or enforcement agency in any matter concerning securities laws or financial markets and such order is in force;*
 - (iv) recovery proceedings have been initiated by the Board against such person and are pending;*

(v) an order of conviction has been passed against such person by a court for any offence involving moral turpitude;
(vi) any winding up proceedings have been initiated or an order for winding up has been passed against such person;
(vii) such person has been declared insolvent and not discharged;
(viii) such person has been found to be of unsound mind by a court of competent jurisdiction and the finding is in force;
(ix) such person has been categorized as a wilful defaulter;
(x) such person has been declared a fugitive economic offender;
or
(xi) any other disqualification as may be specified by the Board from time to time.

(4) Where any person has been declared as not 'fit and proper person' by an order of the Board, such a person shall not be eligible to apply for any registration during the period provided in the said order or for a period of five years from the date of effect of the order, if no such period is specified in the order.

(5) At the time of filing of an application for registration as an intermediary, if any notice to show cause has been issued for proceedings under these regulations or under section 11(4) or section 11B of the Act against the applicant or any other person referred in clause (2), then such an application shall not be considered for grant of registration for a period of one year from the date of issuance of such notice or until the conclusion of the proceedings, whichever is earlier.

(6) Any disqualification of an associate or group entity of the applicant or intermediary of the nature as referred in sub-clause (b) of clause (3), shall not have any bearing on the 'fit and proper person' criteria of the applicant or intermediary unless the applicant or intermediary or any other person referred in clause (2), is also found to incur the same disqualification in the said matter: Provided that if any person as referred in sub-clause (b) of clause (2) fails to satisfy the 'fit and proper person' criteria, the intermediary shall replace such person within thirty days from the date of such disqualification failing which the 'fit and proper person' criteria may be invoked against the intermediary: Provided further that if any person as referred in sub-clause (c) of clause (2) fails to satisfy the 'fit and proper person' criteria, the intermediary shall ensure that such person does not exercise any voting rights and that such person divests their holding within six months from the date of such disqualification failing which the 'fit and proper person' criteria may be invoked against such intermediary.

(7) The 'fit and proper person' criteria shall be applicable at the time of application of registration and during the continuity of registration and the intermediary shall ensure that the persons as referred in sub-clauses (b) and (c) of clause (2) comply with the 'fit and proper person' criteria."

21. I note that the Noticee has contended that there is a delay in initiation of proceedings. In this regard, I note that the NSEL scam unfolded in 2013 after which several agencies conducted investigations into what had transpired therein. Charge sheets are still being filed in the matter by these agencies. A large number of brokers had participated in the illegal forwards contracts. After the merger of FMC with SEBI on September 28, 2015, some of these brokers applied for registration with SEBI. Subsequently, it was felt appropriate to initiate enquiry proceedings in the matter as noted in paragraphs 1 and 2 above. Further, as noted at paragraph 15 above, while the instant matter was under consideration, the Hon'ble SAT vide its order dated June 9, 2022 remitted certain orders pertaining to some other brokers who had also participated in paired contracts on NSEL to SEBI to decide the matter afresh. The Hon'ble SAT left it open to SEBI to rely on other material like EOW charge sheet, complaint letters etc., after providing the same to the appellants therein. Keeping in line with the aforesaid order of the Hon'ble SAT, the SCN-2 was issued to the Noticee on October 7, 2022. I also note that all documents sought by the Noticee have been provided to them. The Noticees have also filed detailed replies in the matter. Moreover, unlike other cases where delay may be a vitiating factor, as the core issue in the instant case pertains to the adjudication of FPP criteria of the Noticee and the same being a continuing criteria, I am of the view that delay cannot be attributed to the initiation of the proceedings.

22. From the reply of the Noticee, it is seen that the Noticee has admitted to the fact of execution of the illegal contracts, referred to as "paired contracts" by FMC and the Hon'ble Supreme Court, on behalf of its clients on NSEL. Further, the Noticee has stated that circulars issued by NSEL pertaining to paired contracts were available on website of NSEL and available to all regulatory

authorities. The Noticee has attempted to shift the entire burden for the illegality underlying the trades onto NSEL and the other regulators who were supposed to supervise. In short, it is contended that there was no reason for the Noticee to suspect the regulators or functioning of NSEL. I note from the reply that the Noticee executed such trades in commodities for and on behalf of clients during the years 2011-2013. On perusal of reply of the Noticee, I find that the Noticee had sufficient experience in dealing with other commodity exchanges such as NCDEX, MCX etc. As a broker with sufficient experience and knowledge and having presence in various other exchanges, the Noticee ought to have refrained from participating in the subject contracts or from allowing its clients to participate on such platform, going by the very structure of the back-to-back contracts. It appears to be the case of the Noticee that since everything was in public domain and it was all being done with the knowledge of regulators, it presumed that the activities were legally valid and that there was nothing that raised his suspicion. In this context, I note that NSEL itself was advertising such contracts as an alternative to fixed deposits. The return offered was 16% across all commodities irrespective of the nature of the contract or the duration. Also, these contracts were structured in a manner which ensured that the buyer always made pre-determined profits. I am, therefore, of the view that while executing trades for clients in such contracts, the Noticee failed to examine the basic nature of the product and also failed in understanding the source of powers relied upon by NSEL for selling such products which other exchanges were not offering. Thus, the Noticee failed to conduct proper and effective due diligence on these aspects of paired contracts which were not essentially spot contracts.

23. I further note that the SCN-1 dated January 15, 2021 provided the Noticee with the DA's Report, the letter dated December 30, 2014 of the DEA, MoF addressed to FMC and copy of Order dated August 22, 2014 passed by the Hon'ble Bombay High Court in the matter of *Jignesh Prakash Shah vs. The State of Maharashtra*. I do not find that the said documents are relevant for consideration in the instant matter.

24. I also note that vide the SCN-2, additional documents viz. SEBI's complaint dated September 24, 2018 to EOW, FIR dated September 28, 2018 filed by SEBI and the amended Schedule II of the Intermediaries Regulations was provided to the Noticee. I note that Schedule II of the Intermediaries Regulations was amended vide SEBI(Intermediaries) (Third Amendment) Regulations, 2021, w.e.f. 17.11.2021 and the following disqualifications have been included amongst others:

“(i) criminal complaint or information under section 154 of the Code of Criminal Procedure, 1973 (2 of 1974) has been filed against such person by the Board and which is pending;”

25. I also note that as per the amendment, the disqualification of an associate or group entity of the applicant or intermediary of the nature as referred in sub-clause (b) of clause (3) of Schedule II to the Intermediaries Regulations, shall not have any bearing on the FPP criteria of the applicant or intermediary unless the applicant or intermediary or any other person referred in clause (2), is also found to incur the same disqualification in the said matter.

26. It is pertinent to note that in terms of Regulation 5(e) of Broker Regulations, the eligibility criteria for an entity to get registered as a stock broker includes that it should be a 'fit and proper person' based on the criteria specified in Schedule II of Intermediaries Regulations. It has been specified in Clause 7 of Schedule II of Intermediaries Regulations that the said criteria are required to be satisfied by the intermediary at the time of registration as well as during the continuity of registration with SEBI. Therefore, even if the Noticee fulfilled the eligibility requirements at the time of grant of certificate of registration, it is required to continually comply with the criteria including those conditions which are incorporated subsequently.

27. It is a matter of record that SEBI has filed a complaint dated September 24, 2018 with Economic Offence Wing (EOW), seeking appropriate action against the brokers/members of NSEL, including the Noticee as mentioned at serial no. 239, and certain other persons in the NSEL matter under Sections 20 and

21 and other appropriate provisions of FCRA. Additionally, SEBI has filed a FIR No. Spl LAC No. 110/18 dated September 28, 2018 under section 154 of the Code of Criminal Procedure, 1973 at the MIDC Police Station, Mumbai requesting it to take lawful action against trading members of NSEL and other members of NSEL who were involved in trading of illegal forward contracts in violation of FCRA. The same list of members provided by SEBI in its complaint made to EOW was annexed to the said FIR. I note that both the criminal complaint and FIR are currently pending with the respective authorities. In view thereof, I note that disqualifications contained in paragraph 3(b)(i) of Schedule II of Intermediaries Regulations are attracted against the Noticee.

28. When the pendency of a criminal complaint or FIR filed by SEBI is prescribed as a negative criterion / disqualification from eligibility under Schedule II of the Intermediaries Regulations, it is imperative for me to consider the same while adjudging the eligibility of the Noticee to continue to hold the authorization granted. In my view, the amendment of Schedule II of the Intermediaries Regulations merely encapsulates the criteria in the form of specific parameters, which would apply uniformly to all intermediaries. The FPP criteria, being an eligibility criteria which has to be complied with on a continuing basis, the question of retrospective application does not arise, as contended by the Noticee. To reiterate, the fact that SEBI has filed a complaint and FIR against the Noticee and the fact that both are pending, by itself constitutes a disqualification from satisfaction of eligibility criteria to function as an intermediary.

29. Coming to the question of the directions to be issued, I note that the membership of the Noticee with MCX has been surrendered with effect from March 25, 2021. Further, vide letter dated November 17, 2022, the Noticee has submitted that its application for surrender of membership of NCDEX has been kept on hold by NCDEX owing to pendency of the instant proceedings. The evaluation of the facts and legal provisions as brought out above, compels me to arrive at the conclusion that the Noticee is not a 'fit and proper' person and

hence is not eligible to continue its business as a stock broker using the certificate of registration no. INZ000025633 granted by SEBI.

DIRECTIONS

30. In exercise of powers conferred upon me under Section 19 read with Section 12(3) of the SEBI Act, 1992 and Regulation 27 of the Intermediaries Regulations, 2008, I, hereby, cancel the Certificate of Registration bearing no. INZ000025633 of the Noticee i.e. Sushil Global Commodities Private Limited.
31. The Order shall come into force with the immediate effect.
32. A copy of this order shall be served upon the Noticee and the recognized Stock Exchanges, Depositories and Clearing Corporations for necessary compliance.

Date: February 28, 2023

Place: Mumbai

Sd/-

GEETHA G

CHIEF GENERAL MANAGER

SECURITIES AND EXCHANGE BOARD OF INDIA