National Stock Exchange of India

Circular

Department: Investigation	
Download Ref No: NSE/INVG/62266	Date: May 30, 2024
Circular Ref. No: 333/2024	

To All NSE Members,

Sub: SEBI Order in the matter of BRD Securities Limited

SEBI vide its order no. QJA/KS/SRO/SRO/30373/2024-25 dated May 30, 2024, has hereby restrained the below entities from accessing, directly or indirectly, the securities market and are further prohibited from buying, selling or otherwise dealing in securities market, in any manner whatsoever, for a period of two years from the date of this order, or till the date of refund of money to the allottees, whichever is later.

Sr. no.	Name of the Entity	PAN
1.	William Varghese Chungath Cheru	ACKPV7803J
2.	Surendran Thazhathpurakkal Krishnan	AKVPK2336A
3.	Chanayil Gopalan Surendran	AJEPS3796A
4.	Gigy Verghese Pulikkottil	ACTPP3500F
5.	Porathur Devassy Antony	AGJPD0248A
6.	Cheruvathoor Kuriappan Appumon	ACFPA2131D
7.	Jojo Njezhuvinkel Joseph	AAXPN6645H
8.	Prasad Punnoose	AGBPP0338F
9.	Thomas Augustine	AEQPT2614H

Further, below entities are restrained from accessing, directly or indirectly, the securities market and are further prohibited from buying, selling or otherwise dealing in securities market, in any manner whatsoever, for a period of two years from the date of this order.

National Stock Exchange of India

Sr. no.	Name of the Entity	PAN
1.	G Anoop	ACSPA7165L
2.	I Unnikrishnan	AAFPU7182C

The above directions come into force with immediate effect.

The detailed order is available on SEBI website (http://www.sebi.gov.in).

Further, the consolidated list of such entities is available on the Exchange website http://www.nseindia.com home page at the below mentioned link:

https://www.nseindia.com/regulations/member-sebi-debarred-entities

Members are advised to take note of the above and ensure compliance.

In case of any further queries, members are requested to email us at dl-invsg-all@nse.co.in

For and on behalf of
National Stock Exchange of India Limited

Anand Jangir
Manager

ANNEXURE: SEBI Order in the matter of BRD Securities Limited

QJA/KS/SRO/SRO/30373/2024-25

SECURITIES AND EXCHANGE BOARD OF INDIA

FINAL ORDER

UNDER SECTION 11(1), 11(4), 11A AND 11B OF THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992

IN RESPECT OF:

Noticee No.	Name	PAN
1.	BRD Securities Limited	AAACB99808
2.	William Varghese Chungath Cheru	ACKPV7803J
3.	Surendran Thazhathpurakkal Krishnan	AKVPK2336A
4.	Chanayil Gopalan Surendran	AJEPS3796A
5.	Gigy Verghese Pulikkottil	ACTPP3500F
6.	Porathur Devassy Antony	AGJPD0248A
7.	Cheruvathoor Kuriappan Appumon	ACFPA2131D
8.	Jojo Njezhuvinkel Joseph	AAXPN6645H
9.	Prasad Punnoose	AGBPP0338F
10.	Mary Williams	AAHPW7793F
11.	Arimpilly Vishnu Bhattathirippad	ADAPB9983C
12.	Thomas Augustine	AEQPT2614H
13.	G Anoop	ACSPA7165L
14.	I Unnikrishnan	AAFPU7182C

In the matter of Issuance of Debentures and Bonds by BRD Securities Limited.

1. Securities and Exchange Board of India **("SEBI")** examined issuance of debentures and bonds by BRD Securities Limited **(“BRD”/“NoticeeNo.1”/ “Company”)** during the period 2003-04 to 2017-18 to ascertain whether there was any violation of the provisions of the CompaniesAct,1956 and rules framed thereunder, the Companies Act 2013, the Companies (Prospectus and allotment of Securities) Rules, 2014, Securities and Exchange Board of India Act 1992 **(“SEBI Act”)** read with SEBI (Issuance and Listing of debt

Securities Regulations 2008 **("ILDS Regulations")** and SEBI (Debenture Trustees) Regulations,1993 **("Debenture Trustees Regulations" or "DT Regulations")**.

2. During the course of examination, SEBI vide below mentioned letters and emails sought information from Noticee No.1: -

Table No.1

SEBI Email/Letter dated	**Status of reply by BRD**
Email - June 01, 2018	Replied vide email dated June 08, 2018
Email - June 14, 2018	Replied vide email dated June 14, 2018
Email - July 11, 2018 (Reminder)	Replied vide letter dated July 30, 2018
Email - August 08, 2018 (Reminder 2)	Replied vide email dated August 08, 2018
Email - November 30, 2018	Replied vide email dated December 04, 2018.
Email - July 09, 2019	Replied vide email dated July 09, 2019 and July 17, 2019.
Letter - July 22, 2019 (Clarifications sought vide emails dated July 24, 2019 and July 29, 2019)	Replied vide letter dated July 26, 2019 and email dated July 31, 2019.
Email - August 13, 2019	Replied vide email dated August 16, 2019 (Certified copy submitted on August 19, 2019)
Email - August 16, 2019 (Reminder)	

SHOW CAUSE NOTICE

3. Based on information and documents collected during the course of examination, SEBI issued show cause notice dated March 13, 2020 **("SCN")**which, inter-alia, stated as follows: -

a. Noticee No.1 is a public limited company incorporated on February 9, 1993 and received Non Banking Finance Company registration(deposit taking)**(NBFC)** on November 28, 1998. In the year 2007, the classification was changed to Asset Finance company. Noticee No.1 surrendered deposit taking status in May 2017.

Issuance of Debentures

b. Since March 2005, Noticee No.1 issued non-convertible debentures **(NCD)**on 42 occasion, thereby, Noticee No.1 allotted NCDs to 1,20,701 persons and mobilized Rs.461.34 Crores by allotting 46,13,418 NCDs, which is tabulated as under: -

Table No.2

S.No	Date of Board Resolution and date of allotment	Debenture Series	No. of Allottees	Total No. of Allottees	No. of Debentures Allotted	Par Value	Amount Raised	Debenture Trustee
1.	31/03/2005	I	985	985	18990	1000	1899000	I Unnikrishnan
2.	1/07/2005	J	1003	1988	20282	1000	20282000	I Unnikrishnan
3.	01/10/2005	K	1265	3253	22614	1000	22614000	I Unnikrishnan
4.	1/1/2006	L	1236	4489	26359	1000	26359000	I Unnikrishnan
5.	31/03/2006	M	1674	6163	38105	1000	38105000	I Unnikrishnan
6.	1/07/2006	N	1067	7230	26504	1000	26504000	I Unnikrishnan
7.	5/01/2007	O	3623	10853	86942	1000	86942000	G Anoop
8.	31/03/2007	P	1575	12428	35297	1000	35297000	G Anoop
9.	01/07/2007	Q	1824	14252	48677	1000	48677000	G Anoop
10.	1/10/2007	R	2352	16604	65958	1000	65958000	G Anoop
11.	1/1/2008	S	1824	18428	52862	1000	52862000	G Anoop
12.	31/03/2008	T	1773	20201	51415	1000	51415000	G Anoop
13.	1/07/2008	U	677	20878	16474	1000	16474000	G Anoop
14.	1/07/2008	V	1791	22669	48512	1000	48512000	G Anoop
15.	1/09/2008	W	3119	25788	85179	1000	85179000	G Anoop
16.	1/11/2008	X	1437	27225	36501	1000	36501000	G Anoop
17.	1/1/2009	Y	2383	29608	72513	1000	72513000	G Anoop
18.	31/03/2009	Z	2835	32443	82217	1000	82217000	G Anoop
19.	01/06/2009	AA	1442	33885	40938	1000	40938000	G Anoop
20.	1/07/2009	AB	2340	36225	67509	1000	67509000	G Anoop
21.	1/09/2009	AC	2978	39203	105319	1000	105319000	G Anoop
22.	1/03/2010	AD	2231	41434	70135	1000	70135000	G Anoop

S.No	Date of Board Resolution and date of allotment	Debenture Series	No. of Allottees	Total No. of Allottees	No. of Debentures Allotted	Par Value	Amount Raised	Debenture Trustee
23.	1/03/2010	AE	744	42178	23695	1000	23695000	G Anoop
24.	1/03/2010	AF	2835	45013	99842	1000	99842000	G Anoop
25.	31/03/2010	AG	4450	49463	133823	1000	133823000	G Anoop
26.	1/06/2010	AH	5003	54466	124047	1000	124047000	G Anoop
27.	1/08/2010	AI	5996	60462	137546	1000	137546000	G Anoop
28.	1/10/2010	AJ	3682	64144	165363	1000	165363000	G Anoop
29.	1/12/2010	AK	3845	67989	169711	1000	169711000	G Anoop
30.	1/02/2011	AL	3629	71618	159121	1000	159121000	G Anoop
31.	31/03/2011	AM	3452	75070	160731	1000	160731000	G Anoop
32.	1/06/2011	AN	3810	78880	172393	1000	172393000	G Anoop
33.	1/08/2011	AO	5844	84724	245033	1000	245033000	G Anoop
34.	1/10/2011	AP	3836	88560	195142	1000	195142000	G Anoop
35.	31/12/2011	AQ	4047	92607	214214	1000	214214000	G Anoop
36.	1/02/2012	AR	4167	96774	216616	1000	216616000	G Anoop
37.	31/03/2012	AS	4043	100817	187509	1000	187509000	G Anoop
38.	30/06/2013	AT	5242	106059	270826	1000	270826000	G Anoop
39.	1/10/2012	AU	4491	110550	238364	1000	238364000	G Anoop
40.	1/01/2013	AV	4002	114552	237971	1000	237971000	G Anoop
41.	31/03/2013	AW	4245	118797	234499	1000	234499000	G Anoop
42.	25/06/2013	AX	1904	120701	107670	1000	107670000	G Anoop
Total			**120701**		**4613418**		**4613418000**	

c. As per Noticee No.1 submission dated December 16, 2017,out of above mentioned NCDs, NCDs issued to 7185 debenture holders for amount of Rs.102.75Crore were outstanding as on December 11, 2017, which is tabulated hereunder: -

Table No.3

S.No	Date of Board Resolution and date of allotment	Debenture Series	No. of Allottees	No. of Debentures Allotted	Amount Raised	Debenture Trustee	Outstanding No. of debenture holders	Outstanding Value
1	31/03/2011	AM	3452	160731	160731000	G Anoop	304	35197000
2	1/06/2011	AN	3810	172393	172393000	G Anoop	327	44467000
3	1/08/2011	AO	5844	245033	245033000	G Anoop	499	72956000
4	30/06/2013	AT	5242	270826	270826000	G Anoop	946	142209000
5	1/10/2012	AU	4491	238364	238364000	G Anoop	1266	194031000
6	1/01/2013	AV	4002	237971	237971000	G Anoop	1366	209014000
7	31/03/2013	AW	4245	234499	234499000	G Anoop	1544	223165000
8	25/06/2013	AX	1904	107670	107670000	G Anoop	933	106494000
Total			**32990**	**1667487**	**1667487000**		**7185**	**1027533000**

d. On January 11, 2014, Noticee No.1 extended tenure of aforesaid 16,67,487 NCDs from 5 years to 10 years without obtaining consent of the NCD holders.

Issuance of Bonds

e. Annual reports submitted by Noticee No.1 showed that Noticee No.1 also raised money from the public by issuing bonds. In the balance sheet, Noticee No.1 showed bonds under Long Term Borrowing as "Bond-Non Current". Details of issuance of such bonds were not e-filed by Noticee No.1 with the Registrar of Company **("ROC")**, as required under the Companies Act, 1956 and the Companies Act, 2013. As per Noticee No.1 letter dated July 30, 2018, details of outstanding bond is as follows: -

Table No.4

Year of Issue	No. of Customers	Unit Price	Amount Mobilized (Rs.)	Tenure (Months)
2014-15	1166	1000	7,61,68,000	60
	755	1000	5,67,70,000	66
2017-18	418	1000	10,78,88,000	60
	239	1000	2,73,15,000	72
	2578		26, 81,41,000	

f. Noticee No. 2 to 12 were director of Noticee No.1 during the period as mentioned hereunder: -

Table No. 5

Name	Noticee No.	Date of Appointment	Date of Resignation
William Varghese Chungath Cheru	2	09/03/1993	-
Surendran Thazhathpurakkal Krishnan	3	23/03/2006	-
Chanayil Gopalan Surendran	4	09/03/1993	-
Gigy Verghese Pulikkottil	5	09/03/1993	-
Porathur Devassy Antony	6	06/10/2001	-
Cheruvathoor Kuriappan Appumon	7	06/10/2001	Re-designated as Whole Time Director on 21/07/2018 and further changed as director on 09/10/2018
Jojo Njezhuvinkel Joseph	8	23/06/2016	-
Prasad Punnoose	9	14/12/1996	09/10/2018
Mary Williams	10	09/03/1993	16/05/2018
Arimpilly Vishnu Bhattathirippad	11	06/10/2001	20/01/2011
Thomas Augustine	12	06/10/2001	23/10/2013

g. In the case of NBFCs, second proviso to Section 67(3) of the Companies Act, 1956 is not a blanket rule and the company needs to prove that it had an intention to offer the securities only to those persons who received the offer or that the issue was a domestic concern of the company. NBFC should comply with sub-section 3 of Section 67 of the Companies Act,1956. BRD was required to show that the offer/allotment of NCDs and bonds to 1,20,701 persons and 2578 persons, respectively, was not intended to be available for subscription to the general public. However, BRD has not submitted any information to prove that the offer/allotment of NCDs and bonds were not intended to be available for subscription to the general public. BRD neither uploaded any such document with the ROC at the relevant time nor submitted any documentation to SEBI to show that the offer was a domestic concern of Noticee No.1.

h. In terms of Section42 of the Companies Act, 2013 read with Rule 14(2) of Companies(Prospectus and Allotment of Securities) Rules,2014 (as applicable during the issuance of Bonds from 2014 to March,2018), an offer or invitation to subscribe securities under private placement shall not be made to persons more than two hundred in the aggregate in a financial year. As per Rule14(7), the provisions of sub-rule(2) shall not be applicable to NBFCs, if they are complying with regulations made by the RBI in respect of offer or invitation to be issued on private placement basis and such companies shall comply with sub-rule(2) in case the RBI have not specified similar regulations. RBI Notification No.RBI/2014-15/475DNBR (PD) CCNo.021/03.10.001/2014-15 dated February 20, 2015 mandated that when an NBFC does private placement of NCDs(with maturity more than 1 year), there shall be a limit of 200 subscribers for every financial year, for issuance of NCDs with a maximum subscription of less than Rs.1 crore per investor, and such subscription shall be fully secured. In view of the number of subscribers and the amount mobilized by Noticee No.1 through bonds, it was observed that Noticee No.1 breached the number of 200 subscribers where subscription per investor was less than rupees one crore. Thus, issuance of bonds by Noticee No.1 during 2014-15 and 2017-18 has to be treated as a public issue of securities in view of the said RBI circular and read with Section 42 of the Companies Act, 2013 and the Companies(Prospectus and Allotment of Securities) Rules,2014.

i. Since March 09, 1993, Noticee No.2 was Managing Director**("MD")**of Noticee No.1. During mobilization of funds by Noticee No.1 through issuance of bonds and NCDs, Noticee No.2 was MD of Noticee No.1 and all ROC filings were done by Noticee No.2. As per BRD`s submission dated July 09, 2019, no director of BRD other than Noticee No.2 was designated as Executive/Whole Time/Managing Director during the period of issuance of bonds and NCDs by BRD. Examination of board resolutions along with respective attendance sheets of the board meetings, minutes of board meeting for appointment of directors along with attendance register and consent letters of directors of Noticee No.1 showed that, apart from MD, Noticee No. 3 to 12 were also part of the board of Noticee No.1 and part of decisions for issuance of NCDs and bonds by BRD. Such other directors were liable to ensure compliance with applicable provisions of the Companies Act, 1956, the Companies Act, 2013, DIP Guidelines and ILDS Regulations.

j. Noticee No.1 to 7 and 9 to 12 issued NCDs without following public issue norms including the following: -

   i. They failed to make disclosures in the prospectus and attach abridged prospectus as prescribed under Section 56(1) and 56(3) of the Companies Act, 1956;
   ii. They did not file any prospectus with ROC as prescribed under Section 60 of the Companies Act, 1956;
   iii. Noticee No.1 and 2 have not obtained prior approval of the Stock Exchanges to get their securities listed as required under Section 73 of the Companies Act, 1956;
   iv. Noticee No.1 and 2 have failed to return the money to the investors as required under Section 73 of the Companies Act, 1956;
   v. They failed to ensure compliance with the public issue requirements specified in DIP Guidelines;
   vi. They failed to ensure compliance with public issue requirements specified in ILDS Regulations;
   vii. Noticee No.1 and 2 appointed unregistered person as debenture trustee for issuance of NCDs. Other Noticee(s) failed to prevent appointment of unregistered persons as debenture trustees for issuance of NCDs to general public in violation of Regulation 4 (4) of ILDS regulations read with clause 10.2 of erstwhile SEBI DIP guidelines.

4. The SCN alleged that issuance of NCDs led to violation of Section 56, 60, 67 of the Companies Act, 1956, Section 26, 33, 42 of the Companies Act, 2013, Rule 14(2)(b) of the Companies (Prospectus and allotment of Securities) Rules, 2014, clause 2.1.4, 5.6.2, 2.5, 2.1.5, 5.4, 10.2, 6.0 to 6.15, 2.1.1, 5.6A, 6.16 to 6.33 and chapter X of DIP Guidelines, 2000 and Regulation 4(2)(a),4(2)(b), 4(2)(c), 4(2)(d), 4(3), 4(4), 5, 6, 7, 8, 9, 15 to

19 and 26 of ILDS Regulations by Noticee No. 1 to 7 and 9 to 12. Further, the SCN alleged that Noticee No. 1 and 2 also violated Section 73 of the Companies Act, 1956 and Section 40 of the Companies Act, 2013.

5. Further, the SCN alleged that Noticee No.13 and 14 were mentioned as debenture trustee in the respective filings with ROC. Noticee No.13 and 14 acted as debenture trustee, without obtaining certificate of registration from SEBI, for NCDs issued by Noticee No.1, thereby, Noticee No.13 and 14 violated Section 12(1) of the SEBI Act and Regulation 7 of DT Regulations.

6. Noticee No.1 to 8 issued bonds without following public issue norms and they failed: -
   i. To make disclosures in the Prospectus and attach abridged prospectus as prescribed under Section 26 and 33 of the Companies Act, 2013;
   ii. To file any prospectus with ROC as prescribed under Section 26 of the Companies Act, 2013;
   iii. To make an application to recognized stock exchange and obtain permission for the securities to be dealt with in such stock exchange before making public offer;

7. SCN alleged that issuance of bonds by BRD resulted in violation of Section 26, 33, 42 and 40 of the Companies Act, 2013, Rule 14(2)(b) of the Companies (Prospectus and allotment of Securities) Rules, 2014 and Regulation 4(2)(a),4(2)(b), 4(2)(c), 4(2)(d), 4(3), 4(4), 5, 6, 7, 8, 9, 15 to 19 and 26 of ILDS Regulations by Noticee No. 2 to 8.

8. The SCN called upon the Noticee(s) to show cause as to why appropriate direction including: -
   a. Direction to refund application money received in connection with NCDs along with interest in terms of Section 73 of the Companies Act, 1956 read with corresponding provision of the Companies Act, 2013 should not be issued against Noticee No.1 and 2;

b. Direction to refund application money, received in connection with issuance of bonds, along with interest in terms of Section 73 of the Companies Act read with corresponding provision of the Companies Act, 2013 should not be issued against Noticee No.1 to 8;

c. Direction to restrain Noticee No.1 from issuing any securities and from accessing capital market for appropriate period should not be issued;

d. Direction to restrain Noticee No.2 to 12 from accessing capital market for appropriate period should not be issued;

e. Appropriate direction, including restraint from accessing securities market for period as deemed appropriate should not be issued against Noticee No. 13 and 14.

SERVICE OF SCN, REPLY AND HEARING

9. The SCN was sent to the Noticee(s) through speed post acknowledgement due. Noticee No. 13 vide emails dated March 28, 2020 and June 29, 2020, Noticee No. 14 vide emails dated March 25, 2020 and July 01, 2020, BRD vide email dated August 19, 2020 sought extension of time to file reply to the SCN on account of restrictions imposed due to then prevailing Covid-19. SEBI vide reminder letter dated August 20, 2020 called upon the Noticee(s) to file reply to the SCN. Thereafter, SEBI vide reminder letter dated September 28, 2020 called upon Noticee No.2 to 12 to file reply to the SCN. BRD vide letter dated October 16, 2020 filed partial reply with respect to issuance of NCDs and sought time to file reply with respect to issuance of bonds. Thereafter, BRD vide email dated November 16, 2020 sought further time of 30 days to file reply to the SCN. Subsequently, BRD vide reply dated December 15, 2020 filed reply with respect to issuance of bonds.

10. SEBI vide reminder letters dated October 22, 2020, November 26, 2020 called upon the Noticee(s) to file reply to the SCN. BRD vide email dated December 30, 2020 submitted authorization from Noticee No. 2, 3, 4, 5, 7, 8 and 10 in its favour to file reply and make submissions on their behalf. Noticee No. 2, 3, 4,5, 7, 8 and 10 vide their separate letters dated November 11, 2020 stated that BRD is authorized to make all replies and submissions on their behalf and such submissions/replies shall be binding on them. Similarly, Noticee No. 12 vide letter dated January 28, 2020, received by SEBI on February 9, 2021, filed such authorization in favour of BRD. Dr.Sreedevi Vishnu, stated to be wife of Noticee No.11, vide letter dated October 30, 2020 stated that Noticee No.11 passed away on January 20, 2017 and submitted death certificate of Noticee No.11.

11. Noticee No.9 vide email dated December 02, 2020 filed reply to the SCN, inter-alia, submitting that he was not privy to activities of Noticee No.1, other than what was presented during its board meetings. However, no reply was received from Noticee No.6. SEBI vide reminder letter dated January 19, 2021 reminded Noticee No.6 to file his reply to the SCN. However, no reply was received from Noticee No.6.

12. In the meantime, Noticee No.13 vide letter dated August 23, 2020 stated that he is in process of impugning the SCN before the Hon`ble High Court like Noticee No.14, who had filed writ petition no. 13682/2020 before the Hon`ble High Court of Kerala. Further, Noticee No.13 vide letter dated August 29, 2020, inter-alia, sought (a) Statutory provisions under which SEBI was empowered to issue the SCN and take penal action, (b) Documents/statements on basis of which the SCN was found and (c) Statements of witnesses relied upon in the SCN. SEBI vide reminder letter dated September 03, 2020 advised the Noticee No.13 and 14 to file reply to the SCN as there was no stay on proceedings initiated vide the SCN and proceedings in the present matter would be subject to outcome of the said writ petition. In response thereto, Noticee No.14 vide letter dated September 23, 2020 requested supply of documents relied upon in

the SCN. SEBI vide letter dated September 28, 2020 informed Noticee No.14 that documents relied upon in the SCN have already been provided along with the SCN, however, considering request of Noticee No.14, SEBI provided to Noticee No.14 Compact Disck **(CD)** containing annexures to the SCN and advised Noticee No.14 to file reply to the SCN.

13. SEBI vide separate letter dated September 28, 2020 advised Noticee No.13 to file reply to the SCN. Noticee No.13 also vide letter dated September 30, 2020 reiterated request for supply of documents relied upon in the SCN. Noticee No.13 vide letter dated October 14, 2020 responded to SEBI letter dated September 28, 2020 and stated that he does not have access to relevant records owing to restrictions imposed due to Covid-19 and reiterated request for supply of relied upon documents. SEBI vide letter dated October 22, 2020 informed Noticee No.13 that documents relied upon in the SCN have already been provided along with the SCN. However, considering request of Noticee No.13, SEBI provided to Noticee No.13 CD containing annexures to the SCN and advised Noticee No.13 to file reply to the SCN.

14. SEBI vide letter dated October 22, 2020 also reminded Noticee No.13 and 14 to file reply to the SCN. Noticee No.13 and 14 vide their separate letter dated November 04, 2020 acknowledged receipt of CD and informed that they have filed writ petition no. 22340/2020 and 13682/2020, respectively, before the Hon`ble High Court of Kerala impugning the SCN and stated that averments in such writ petitions may be treated as their preliminary reply to the SCN. SEBI vide letter dated November 26, 2020 advised Noticee No.13 and 14 to file their additional response, if any, to the SCN within 15 days from receipt of the said letter. In response thereto, Noticee No.13 and 14 vide their separate letters dated December 7, 2020 stated that Hon`ble High Court has reserved order in writ petition no. 22340/2020 and 13682/2020, respectively, and they will file reply to the SCN on disposal of the said writ petitions.

15. Hon`ble High Court of Kerala vide order dated February 12, 2021 dismissed writ Petition No. 13682/2020 and 22430/2020 observing as follows: -

> *"12. The petitioners have a case that the Company being a NBFC, is regulated by, apart from the Companies Act, by RBI Act and Regulations only and is not amenable to the jurisdictional authority of SEBI and hence Ext.P2 show-cause notice is ultravires. This Court is unable to accept the said proposition. Even though the Company is an NBFC, as far as regulation of issue of Debentures and Non-current Bonds is concerned, it is the bounden duty of SEBI to protect the interest of investors in securities. As long as NBFCs are not specifically excluded from the purview of SEBI Act, 1992, the Board will have jurisdiction over securities transactions of an NBFC, including the Debenture Trustees."*

16. Noticee No. 13 challenged the order dated February 02, 2021 by filing Writ Appeal No. 524/2021 before the division bench of the Hon`ble High Court of Kerala which vide order dated March 31, 2021 dismissed the appeal, inter-alia, observing as follows: -

> *"In view of the contention raised, that copies of the documents are not served on the appellant and therefore the action is violative of the principles of natural justice, we direct SEBI to serve all copies of the documents relied upon by it to the appellant if not already served."*

17. Pursuant to dismissal of Noticee No.14`s writ petition no. 22340/2020, Noticee No.14 vide letter dated March 25, 2021 filed reply to the SCN.

18. Hon`ble Whole Time Member, SEBI **("WTM")** granted opportunity of hearing to the Noticee(s) on February 22, 2022. Noticee(s) were informed about the hearing dated February 22, 2022 vide hearing notice dated February 02, 2022, sent through speed post and acknowledgement due. Noticee No.13 vide email dated February 14, 2022 sought adjournment of hearing, inter-alia, on the ground of his engagement in other assignments.

19. In the meantime, power to issue directions/orders, inter-alia, under Section 11(1), 11(4), 11(4A), 11B(1), 11B(2), 11D of SEBI Act was delegated and conferred, inter-alia, on the Chief General Manager **("CGM")**, SEBI. Accordingly, present matter was transferred from WTM

to CGM (Geetha G), who granted an opportunity of hearing to the Noticee(s) on October 03, 2022. However, hearing dated October 03, 2022 was re-scheduled to October 18, 2022.

20. On October 18, 2022, Sh. P.R. Ramesh, Advocate, appeared for Noticee No. 1, 2, 3,4,5,7,8, 10 and 12. Sh. Nitish Shenoy, Advocate, appeared for Noticee No.13. Ms. S. Manjula Devi, Advocate, appeared for Noticee No. 14. None appeared for Noticee No. 6, 9 and 11. Authorized Representative **("AR")** for Noticee No. 1, 2, 3,4,5,7,8, 10 and 12 submitted that the Noticee(s) have filed a writ petition (Civil) No. 32861 of 2022 (G), challenging delegation of quasi- judicial powers on the CGM, before the Hon`ble High Court of Kerala. The said writ petition was listed for hearing on October 17, 2022, wherein, the Hon`ble Court issued notice to SEBI and posted the matter to October 25, 2022. AR for Noticee No.13 requested time to file reply/written submission and sought adjournment of hearing dated October 18, 2022. AR for Noticee No. 14 stated that the Noticee has filed settlement application before SEBI. However, Noticee No.14`s settlement application was rejected and intimation in this respect was sent by SEBI to Noticee No.14 vide email dated September 8, 2022. Considering above submissions of ARs for the Noticee(s), hearing dated October 18, 2022 was adjourned to November 15, 2022 and Noticee No.13 was permitted to file reply/written submission. Accordingly, Noticee No. 13 filed reply dated November 05, 2022, received by SEBI on November 11, 2022.

21. In the meantime, Hon`ble High Court of Kerala vide order dated October 17, 2022, in writ petition (Civil) No. 32861 of 2022 (G), titled as BRD Securities Limited versus Union of India and Another, posted the writ petition to October 24, 2022 and directed that *"Although, I am not inclined to stay the hearing scheduled for 18-10-2022, the orders based on the hearing is directed to be kept on hold for ten days."*. Thereafter, the said writ petition was posted for hearing from time to time. Hon`ble High Court

of Kerala vide judgment dated May 25, 2023 dismissed the said writ petition.

22. In view of pendency of the writ petition no. 32861 of 2022 (G) before the Hon`ble High Court of Kerala, hearing dated November 15, 2022 before the quasi- judicial authority was adjourned. Subsequently, owing to transfer of CGM (Geetha G), the present matter was re-allocated to me. Accordingly, the Noticee(s) were granted an opportunity of hearing on June 13, 2023. The Noticee(s) were informed about hearing dated June 13, 2023 vide hearing notice dated June 05, 2023.

23. On June 13, 2023, Sh. P.R. Ramesh, Advocate, appeared for Noticee No. 1, 2, 3,4,5,7,8,10, 12 and made submissions on behalf of the Noticee(s). At the request of the AR for Noticee No. 1, 2, 3,4,5,7,8, 10 and 12, time was granted to the Noticee(s) to file written submissions on or before June 30, 2023. Despite service of hearing notice, nobody appeared for Noticee No.6. Sh. Sukumar Oommen, Advocate, appeared for Noticee No.13 and made submissions on behalf of Noticee No.13. At the request of the AR for Noticee No.13, time was granted to the Noticee No.13 to file written submissions on or before June 27, 2023. Ms. S. Manjula Devi, Advocate, appeared for Noticee No. 14 and sought adjournment of hearing. Accordingly, Noticee No.14 was granted another opportunity of hearing on June 23, 2023.

24. On June 23, 2023, Mr. Ravichandran K.S., Company Secretary, along with Ms. S. Manjula Devi, Advocate, appeared for Noticee No.14 and submitted arguments on behalf of Noticee No.14. The AR for Noticee No.14 submitted that the Noticee has been supplied with CD containing necessary documents, accordingly, the AR waived objection of non-supply of documents raised vide letter dated November 4, 2020 and December 7, 2020.Subsequently, the AR for Noticee No. 1, 2, 3,4,5,7,8,10, 12 vide email dated June 30, 2023 filed written submissions.

25. On February 27, 2024, the Noticee(s) were granted opportunity to file additional written submissions, if any, by March 05, 2024. The AR for Noticee No. 1, 2, 3,4,5,7,8,10 and 12 vide email dated February 27, 2024 sought extension of time till March 15, 2024 to file additional written submissions. Accordingly, the AR for Noticee No. 1, 2, 3,4,5,7,8,10 and 12 was granted time till March 10, 2024 to file additional written submissions. The AR for Noticee No. 1, 2, 3,4,5,7,8,10 and 12 vide email dated March 01, 2024 informed that Noticee No.10 has expired and filed death certificate of Noticee No.10. Noticee No.9 vide email dated March 4, 2024 sent an undated letter stating that Noticee No.9 had authorized Noticee No.1 to make submissions on his behalf and submissions made on behalf of Noticee No.1 shall be binding on him. Noticee No.13 vide email dated March 7, 2024 filed written submission. The AR for Noticee No. 1, 2, 3,4,5,7,8,10 and 12 vide email dated March 10, 2024 filed written submissions. The AR for Noticee No.14 vide email dated March 10, 2024 filed written submissions.

26. Subsequently, Noticee No.1 was informed vide email dated May 10, 2024 that under exhibit 2 to post hearing submission dated June 30, 2023 Noticee No.1 has filed front page of application form for NCDs. Noticee No.1 was advised to submit complete set of application form i.e. front page as well as back page for NCDs as well as bonds. In response thereto, Noticee No.1 vide email dated May 13, 2024 filed front and back side of application form for NCDs and stated that application form for bonds is in exhibit 4 of post hearing submissions.

<u>SUBMISSIONS OF NOTICEE(S)</u>

27. Noticee No. 1, 2, 3,4,5,7,8, 10 and 12 vide letter dated October 16, 2020 submitted their reply with respect to issuance of NCDs which stated as follows:-

   a. BRD was incorporated on February 9, 1993. With effect from 1998, BRD was deposit taking NBFC. From May 2017, BRD became non deposit taking NBFC.

b. Out of 42 NCD issues, 34 issues from I to AL and AP to AS were redeemed on maturity during era of the Companies Act, 1956. Tenure of remaining 8 issues i.e. AM, AN, AO, AT, AU, AV, AW and AX were extended vide general meeting of Noticee No.1 held on December 21, 2013.
c. There are various NCD holders to whom multiple NCD certificates were issued, therefore, number of NCD holders cannot be calculated based on number of NCD certificates issued or by taking difference between beginning and ending distinctive numbers for a particular NCD series. The actual number of NCD holders for series AM, AN and AO is 1745, 1773 and 2557, respectively.

d. As BRD is NBFC, therefore, issuance of NCDs by Noticee No.1 to 50 or more persons shall not be deemed to be a public issue, if clause (a) or (b) of Section 67(3) of the Companies Act, 1956 Act are complied with by Noticee No.1. Being an NBFC, Noticee No.1 is entitled to exemption and maximum limit of offer or invitation to 50 numbers, stipulated in Section 67 of the Companies Act, 1956 will not apply to Noticee No.1. BRD never issued any advertisement, circular, brochure or made any display through media, press or website to the public with respect to NCD issues. BRD can provide details to indicate that majority of its NCD holders are shareholders, debenture holders, customers or staff of the company. No offer or invitation to public was made by BRD. Noticee No.1 neither intended to issue securities to public nor did any act, deed or thing that could result in inviting any person, other than person who had subscribed to NCD, to subscribe. No issue of NCD was not made by offering for subscription or by inviting to subscribe to NCD any unidentified person or any person who could be termed as forming part of general public.

e. There was no circular or any document in nature of prospectus which was made available at any place including website of the Company. The

Company did not circulate any offer document or prospectus to persons on street or any person who enters the Company`s office. NCD were issued only to select persons.

f. Considering the number of persons to whom NCDs were issued on March 31, 2014 and August 01, 2014, such issue of NCDs cannot be construed as public issue. With reference to issue of NCDs from 2005 to 2013, reading of names and particulars of persons to whom NCDs were issued would show that number of NCD holders are far less than what is stated because the same name appears in list of allottee(s) many times.

g. Entire 16,67,487 NCDs were issued prior to coming into force of the Companies Act, 2013, thus, the Companies Act, 2013 **("2013 Act")** has no application to such NCD. Section 132 or Section 135 of the Companies Act, 1956 **("1956 Act")** pertain to registration of charges and did not require any specific compliance with respect to variation of rights of NCD holders. For extension of tenure of such NCD, the Company obtained special resolution and consent from shareholders in the meeting held on December 21, 2013 and no specific section of 1956 Act was mentioned in resolutions passed for such meetings. The amendment to terms of NCDs were pursuant to power conferred in Clause 7.8 of Debenture Trust deed.

h. The SCN is time barred as it is issued in the year 2020 for NCDs issued by BRD during the year 2005 to 2013 under the 1956 Act..

i. Section 55A of the 1956 Act conferred on SEBI power to administer provisions specified therein with respect to listed public company and those which intend to get listed. Such power did not apply to unlisted companies and companies which did not intend to get their securities listed.

28. Noticee No. 1, 2, 3,4,5,7,8, 10 and 12 vide reply dated December 15, 2020 submitted reply with respect to issuance of bonds and submitted as follows: -

a. Being NBFC, BRD has been issuing subordinate debt instruments **(SDI)** since 2014-15 onwards as it is entitled to issue SDIs as per RBI Regulations. SDIs are referred to as bonds in the SCN as this is category referred to in audit financial statements of BRD.

b. SDIs were non-convertible, unsecured, non-transferable, redeemable after period of five years and subordinated to claims of other creditors, as stated in term sheets at the time of issuance of SDIs. Being non-transferable instrument, SDIs is not a security, as defined in Section 2(h) of the Securities (Contracts) Regulation Act, 1956 **(SCRA)**, thus, SDIs is not coming under regulatory purview of SEBI. SEBI Act, the Companies Act, 2013 Act and Regulations framed thereunder are not applicable to SDIs issued by BRD.

c. As per Para 3(xxvii) of the Master Direction - Non-Banking Financial Company- Non-systemically important Non-Deposit Taking Company (Reserve Bank Directions) 2016 dated November 22, 2019, the term "Subordinated Debt' has been defined in Paragraph 3(xxvii) as an instrument, which is fully paid up, unsecured and subordinated to the claims of other creditors and is free from restrictive clauses and is not redeemable at the instance of the holder or without the consent of the supervisory authority of the NBFC. Further, this instrument shall form part of Tier II capital for the purpose of maintaining capital adequacy. Therefore, issue of SDIs by BRD is with definition of Reserve Bank of India **(RBI)** and that SDI is not a security under the SEBI Act.

d. SDIs are permitted as an instrument for raising capital and are included as part of Tier II capital. There is no restriction imposed on number of subscribers to whom SDIs can be issued.

e. As far as limit of 200 persons specified under Rule 14 of the Companies (Prospectus and Allotment of securities) Rules, 2014 is concerned, BRD being an NBFC was required to adhere to RBI Regulations only. With respect to SDIs, above stated Master Direction was applicable to BRD.

f. RBI Notification No.RBI/2014-15/475DNBR(PD)CCNo.021/03.10.001/2014-15 dated February 20, 2015, which governs private placement of NCDs with maturity of more than one year, is not applicable to BRD as NCDs are different from SDIs. SDIs are always fully unsecured by nature and subordinated to claims of all creditors, thus, SDIs can never be instruments like NCDs, which may or may not be secured. Unlike NCDs, there is no limit on minimum subscription amount for SDIs.

g. As per Section 179 of the Companies Act, 2013, the directors of BRD have passed board resolution for SDIs issued from time to time and overall borrowing limit was duly approved by passing a special resolution as per Section 180 of the Companies Act, 2013. SDIs have been issued through private placement as per Section 42 of the Companies Act, 2013 Act. BRD never issued any advertisement, circular or offer document in respect of SDIs to public indicating nature of it as public issue.

h. BRD has maintained register of SDI holders and made interest payments and undertaken redemptions in a timely manner as per provisions of the Companies Act, 2013 and RBI Regulations.

i. BRD has been making disclosure about SDIs in its balance sheet as per RBI norms. Periodically, BRD has been filing statutory returns to RBI. BRD has undergone routine inspections from RBI but never had any observation or adverse remarks regarding SDIs.

j. RBI circular no. RBI/2009-10/147/DBOD.No. BP.BC.38/21.01.002/2009-10 dated September 7, 2009 (on Issue of Subordinated Debt for Raising Tier II Capital) is applicable to banks. Such circular does not provide that every issue of debt instrument will have to comply with Regulations issued by SEBI. SDIs are issued by BRD in terms of Master directions of 2016. SEBI has not issued any circular to NBFCs by referring to RBI circular dated September 7, 2009 or 2016 Master directions of RBI or inapplicability of ceiling of number of subscribers of an issue of any security by NBFC as prescribed under the Companies Act, 2013 Act. SEBI has not prescribed any harsher norm than contained in the Companies Act, 2013 Act with respect to private placement of any securities.

k. Section 2(60) of the Companies Act, 2013 Act has nothing to do with anything connected to SEBI`s jurisdiction and that SDI is not a security. It is applicable with respect to contravention under the Companies Act, 2013.

29. Noticee No. 1, 2, 3,4,5,7,8, 10 and 12 vide written submissions dated June 30, 2023 submitted as follows: -

a. Noticee No.11 passed away on January 20, 2017. Death Certificate of Noticee No.11 has already been filed with SEBI.

b. BRD raised share capital on private placement basis from time to time from promoters, directors, employees/staff and their friends and relatives. It issued NCD/debenture and subordinate debt on private placement basis to augment its lending resources.

c. As of June 30, 2023, some NCDs of series AM, AO, AT, AU, AV AW and AX were outstanding as NCD holders have not surrendered NCD certificate for obtaining redemption payments. Remaining NCDs have been cleared.

d. The SCN fails to allege that each of private placement issue is a contravention and in absence of such charge, no direction to refund proceeds pursuant to Section 73 of the Companies Act, 1956 Act can be legally tenable. Section 73 of the Companies Act, 1956 apply to each issue separately, thus, refund envisaged in Section 73 (2) has to be ordered for each issue separately and cannot be clubbed in the SCN.

e. Allegations made in the SCN with respect to bonds are inconsistent as para 12 and 15 of the SCN refers to issuance of bonds by BRD during 2014-15 and 2017-18. However, para 18 and 21 refers to entire SDIs and not restricted to issues alleged at para 12.

f. The SCN is in violation of principles of natural justice as paragraph 22 (a), 22(b) and 22(c) of the SCN do not state provisions of law under which directions are proposed to be issued. The SCN must tell the Noticee legal provisions under which penalties/directions are proposed and specific penalty/restraint must be indicated. As per the Hon`ble Supreme Court judgment dated August 4, 2014 in Gorkha Security Services versus Govt. of NCT of Delhi & Ors, 2014(8) SCC 105, show cause notice in order to meet requirements of principles of natural justice should meet requirement of (i) the material grounds to be stated which according to the department necessitates an action; (ii) particular penalty/action which is proposed to be taken.

g. The SCN suffers from delay and laches in commencing proceedings. SEBI first sought information by letter dated October 19, 2017, which was 12 years after first NCD issue and 4 years after last NCD issue. After about two and half years, the SCN was issued on March 13, 2020. Delay in starting an inquiry/investigation and issuing the SCN has prejudiced the Noticee; as funds raised from NCDs/bonds have been utilized in legitimate business of the company; BRD deployed the funds towards lending activities and currently there are a large number of borrowers. Covid-19 has caused substantial changes in the circumstances and business of BRD and recovery from borrowers have been substantially affected. Proposed direction including direction to refund subscription money in terms of Section 73 of the Companies Act, 1956 is legally untenable on ground of delay and laches in initiating inquiry and proceedings. The Companies Act prescribed maintenance of various records which are permanent record and some are to be maintained for 5/8 years. Permanent record and statutory record relating to issuance of NCDs/bonds by BRD was made available to SEBI. Such records that are available include application forms, details of applicants, board minutes/resolutions for allotment, minutes of general body meetings, allotment forms filed with RoC, annual returns, etc., Due to lapse of time, BRD is not able to produce, which was not prescribed in law, sought by SEBI even if such record was maintained at relevant time. Reference is made to para 12 to 20 of the Hon`ble Securities Appellate Tribunal **(SAT)** order dated January 05, 2023 in the matter of BRD Securities Limited versus SEBI, Appeal No. 492 of 2021.

h. BRD is an NBFC registered with RBI, therefore, by virtue of second proviso to sub-section (3) of Section 67 of the Companies Act, 1956 stipulation that private placement cannot exceed 49 persons does not apply to it. RBI has also not prescribed any limit on number of persons to whom private placement can be made under the Companies Act, 1956.

i. BRD has not issued any circular, advertisement, offer letter or any prospectus or any material of any nature for any of the issues. The resolutions passed by BRD at its general meeting provided for issuance of NCDs on private placement basis. No application was directly or indirectly available to any person other than to whom the application was given. BRD followed process of giving application with name written to the person and obtained it back from him. At the relevant time, the Companies Act, 1956 or any SEBI Regulations did not provide procedure for private placement issue. The Companies Act, 1956 did not contain any provision as to maintenance of records under Section 67. Provision relating to procedure for private placement and maintenance of record was introduced in sub-section (7) of Section 42 of the Companies Act, 2013 Act. No NCD was issued after coming into force of the Companies Act, 2013.

j. Para 7 of the SCN reproduced details of ordinary resolution under Section 293 (1)(a) of the Companies Act, 1956 placed before the general meeting, which categorically mentions that such issue would be on private placement basis. Paragraph 11 of the SCN refers to resolution under Section 293(1) (d) which is for borrowing limit and need not refer to nature of issue i.e. whether private placement or public issue.

k. BRD issued bonds, which were non-marketable, on private placement basis. The application in respect of such bonds were printed with words 'private and confidential. First page read *"I/we have read and understood the contents of the memorandum of private placement for issue of unsecured subordinated debt…"*. Nature of instrument was mentioned as non-marketable debenture/promissory note. Nature of issue was mentioned as offer on private placement basis which could have been accepted by person to whom offer was specifically made. Such bonds were out of purview of SEBI Act as they were not securities as they were non-marketable. Reference was made to paragraph 20, 21 and 22 of judgment of the Hon`ble Supreme Court in the matter of Bhagwati Developers Pvt. Ltd. versus Peerless General Finance and Investment Company Ltd., (2013) 9 Supreme Court cases. Requirement to make an application for listing on stock exchange under Section 73 of 1956 Act would apply only if shares or debentures were marketable and not otherwise.

l. As such issues were made on private placement basis, thus, there was no requirement to comply with provisions of the Companies Act, 1956 or

2013 relating to public issue of securities, SEBI Act and Regulations framed thereunder including ILDS Regulations. As such, provision relating to appointment of debenture trustee was not applicable to it. Hence, no violation was committed by the managing director or any other director by making such issues of NCDs and bonds.

30. Noticee No. 1, 2, 3,4,5,7,8, 10 and 12 vide additional written submissions dated March 9, 2024 further submitted that: -

  a. Submissions made by BRD may be treated as submission made on behalf of Noticee No. 9 also.

  b. Noticee No. 10 expired on August 8, 2023. Death certificate of Noticee No.10 was also furnished.

  c. NCDs which are subject matter of the SCN have been repaid/redeemed.

  d. Reliance was placed on the Hon`ble Supreme Court judgment in the matter of SEBI versus Sunil Krishna Khaitan & Others, Civil Appeal No. 8249 of 2013 and referred to para 81 and 82 of the said judgment.

31. Noticee No. 13 vide reply dated November 05, 2022 has submitted as follows:-

  a. BRD appointed him as debenture trustee (DT) in 2007 to manage subscriptions raised by BRD through issue of NCDs. The NCDs were secured through assets of BRD, as required under Section 125 of the Companies Act, 1956. The subscriptions were raised through private placements from January 05, 2002 to June 25, 2013. The subscriptions have been refunded on maturity of the NCDs.

  b. The charges are vague and unsubstantiated as SEBI has not identified specifically the documents and witnesses whose evidence is relevant to the charges levelled against Noticee No.13.

c. The Companies Act, 1956 has been repealed by Section 465 of the Companies Act, 2013. Consequently, the Companies Act, 1956 has been completely abrogated. Section 465(2)(a) of the Companies Act, 2013 has provided protection only to such actions done or taken or purported to have been done or taken under erstwhile enactment. The SCN is not continuation of any action initiated under the Companies Act, 1956 when it was in force. It is a fresh action initiated under the Companies Act, 1956 after abrogation of the Companies Act, 1956.

d. Role of Noticee No.13 as debenture trustee ought to be viewed through prism of status of BRD as an NBFC. BRD has raised subscription in exercise of its powers under Section 293(1)(a) and 293(1)(d) of the Companies Act, 1956.

e. Section 177B and 67(3A) of the Companies Act, 1956 Act are not included among provisions related to powers of SEBI enumerated in Section 55A of the Companies Act, 1956. Section 55A the Companies Act, 1956 applies to (a) listed public companies and (b) public companies intending to get their securities listed on any recognized stock exchange. BRD does not fall under either of such categories. Explanation to Section 55A the Companies Act, 1956 states that powers not specified shall be exercised by the Central Government. In absence of authorization by the Central Government, SEBI cannot act.

f. Matters relating to private placement of NCDs by NBFC are regulated by RBI circular no. 330.03.10.001/2012/13 dated June 27, 2013 read with RBI circular no. 349/03.10.001/2013/14 dated July 02, 2013. The term 'private placement' has been defined in the Circular dated June 27, 2013 as *"an issue capital made by an NBFC in pursuance of a resolution passed under sub-section 1A of Section 81 of the Companies Act, 1956"*. The term 'public issue' has been defined as "an invitation by an NBFC to subscribe to the securities offered through a prospectus". SEBI has not been vested with any power under these Circulars.

g. RBI has reiterated its supervisory control over acceptance of deposits by NBFCs by Circular No. 021/03.10.001/2014/2015 dated February 20, 2015, wherein, it has stated that *'there shall be no limit on the number of subscribers in respect of issuances with a minimum number of subscriptions of Rupees 1 Crore and above; the option to create security in favour of subscribers will be with the issuers*. *Such unsecured debentures shall not be treated as public deposits as defined in NBFCs Acceptance of Public Deposit (Reserve Bank) Directions 1998*."

h. The RBI has issued these circulars in exercise of its powers under Section 45JA and 45MA of the Reserve Bank of India Act, 1934 **(RBI Act)**. The question whether SEBI or RBI has jurisdiction is a jurisdictional fact. The SCN has been issued without jurisdiction and is void ab initio.

i. The SCN is barred by limitation as it pertains to issue of NCDs from 2005 to 2013. BRD is not obliged under Section 128 of the Companies Act, 1956 Act to preserve the books of accounts beyond 8 years.

32. Noticee No.13 filed written submissions dated June 19, 2023, inter-alia, reiterating the submissions made vide reply dated November 05, 2022. Noticee No. 13 filed written submissions dated February 22, 2024, whereby, Noticee No.13 submitted that NCDs in question stands closed. Satisfaction of charges have been filed with the ROC. Noticee No.13 placed reliance on the Hon`ble SAT order dated January 05, 2023, in the matter of BRD Securities Limited versus SEBI.

33. Noticee No.14 vide letter dated March 25, 2021 while denying allegations against him submitted as follows: -

a. Information sought vide letters dated November 04, 2020 and December 7, 2020 has not been furnished. Vide said letters, physical copy of documents relevant to charges framed against Noticee No.14 was sought. Pursuant thereto, CD containing documents obtained behind back of Noticee No.14 has been provided. SEBI has legal obligation to clarify specific documents which are relevant to charges framed against Noticee No.14, apart from furnishing the same in a physical form.

b. The SCN has been issued beyond period of limitation prescribed under the Companies Act 1956 and 2013 Act or within a reasonable period.

c. With effect from December 13, 2020, proviso to Section 67(3) and 67(3A) was inserted in the Companies Act, 1956. SEBI has failed to issue any regulations, as mandated under Section 67(3A) of the Companies Act, 1956. Proviso to Section 67(3) specifically excludes NBFCs from its purview. It is not in dispute that no specific regulation has been issued regarding appointment of DT in accordance with DT Regulations. RBI in exercise of its supervisory powers over NBFCs in Section 17(11)(f) read with Section 45Q of the RBI Act has issued circular dated June 27, 2013, wherein, in the guidelines public issue and private placement have been defined. RBI has issued another circular dated February 27, 2015, wherein, the number of subscribers for private placement has been raised from 50 to 200 for subscriptions less than Rs.1 Crore but no limit has been specified for subscriptions above Rs.1 Crore.

d. Terms 'Issue', body corporate, as defined in Regulation 2 of the Debenture Trustees Regulations indicates that said Regulations in the context of private placement would apply in the case where security is proposed to be listed. However, in the present case, there was no intention to list NCDs, thus, invocation of DT Regulations is without any basis.

e. Jurisdiction over issuance of NCDs by an NBFC vests with RBI. SEBI has no jurisdiction over issuance of NCDs by an NBFC. Thus, the SCN is void ab initio as it has been issued without jurisdiction.

f. The Companies Act, 1956 has been repealed with enactment of the Companies Act, 2013. Section 465 of the Companies Act, 2013 does not save action initiated under the Companies Act, 1956 which are inconsistent with provisions of the Companies Act, 2013. Jurisdiction of SEBI over issuance of NCDs by an NBFC has been specifically ousted in the Companies Act, 2013. Further, actions not initiated under the Companies Act, 1956 are not saved under Section 465 of the Companies Act, 2013.

g. Subscriptions raised with charge on immovable properties are classified as 'debentures'; subscriptions raised with a charge on movable properties are classified as 'deposits'. NCDs issued by BRD are secured against movable assets and not immovable assets. Thus, BRD has raised deposits and not debentures though called as NCDs. Such deposits can only be regulated by RBI and not SEBI. DT Regulations cannot be extended to NCDs issued and secured against movable assets as such instruments are not debentures within meaning of debentures under the Companies Act, 1956.

h. As per Regulation 25 of DT Regulations, alleged default would need to be dealt with in the manner provided in SEBI(Intermediaries) Regulations, 2008. Related file notes and approval granted by designated member culminating in the SCN and documents relating to appointment as designated authority for issuance of impugned SCN be provided.

34. Noticee No.14 filed additional written submissions dated March 11, 2024. In addition to submissions made by Noticee No.14 vide reply dated March 25, 2021, Noticee No.14 submitted as follows: -

a. It is a question of fact whether the Company had made any issue of securities to public or in a private placement the Company intended to get the debentures listed. There is no evidence to prove that the Company had intended to get the debentures listed.

b. Information about allottee(s), submitted by the Company to SEBI, is sufficient to show that they are persons connected with the Company as directors` friends and relatives. Therefore, no offer was made to the general public nor was there any intention to make the offer available to any unconnected person.

c. Unless it is shown that the Company had made an issue of securities to public, Section 55A of the Companies Act, 1956 or Regulation 2(ea) of DT Regulations shall not be applicable. No contravention of DT Regulations can be alleged against Noticee No.14 as there was no issue of securities to public within meaning of Section 55A of the Companies Act, 1956 or Regulation 2(ea) of DT Regulations.

d. Hon`ble SAT in its decision dated January 05, 2023 in the matter of issue of securities by Noticee No.1 held that sufficient details have been given in relation to the relationship of the recipient of offer of subscription and burden of proof under Section 67(3) has been discharged. The said decision of the Hon`ble SAT is applicable to present case also.

e. Issue of NCDs by the Company is not public issue. As per resolutions passed by the Company, it is clear that the Company`s board did not intend to get its securities listed on any stock exchange nor was it ever listed until redemption of specified securities. Further, in annual reports of the Company also presence of any such intention to get securities listed on stock exchange could not be found. There can be deemed public issue but not deemed intention. Even though issue of NCDs by the Company was private placement but there was no intention to list such NCDs on stock exchanges, thus, there was no issue within meaning of Regulation 2(ea) of DT Regulations.

CONSIDERATION OF ISSUES AND FINDINGS

35. I have considered the SCN, replies and submissions of the Noticee(s) and other material available on record. Before examining the merits of the case, I proceed to deal with preliminary issues such as limitation or delay in initiation of proceedings, non-supply of documents, violation of principles of natural justice and failure to allege that each issue of NCDs is in contravention of public issue norms, as raised by the Noticee(s).

36. I note that the Noticee(s) have submitted that the SCN is barred by limitation as the SCN pertains to NCDs issued during the year 2005 to 2013 and Bonds/SDIs issued during 2014-2015 and 2017-2018. It has been submitted that proceedings must be initiated within a reasonable period of time even when no period of limitation is prescribed. In support thereof, reliance is placed on the order dated January 05, 2023, passed by the Hon`ble SAT in the matter of BRD Securities Limited and Others versus SEBI, Appeal No.492 of 2021. Further, it has been submitted that delay and laches in initiating proceedings has prejudiced the Noticee(s) as funds raised from NCDs and bonds have been utilized for legitimate business of the Company; Covid-19 has caused substantial changes in circumstances and business of BRD and recovery from borrowers have been affected; BRD is not able to produce documents and information which was not statutorily required to be maintained.

37. I note that the Hon`ble SAT vide order dated January 5, 2023, inter-alia, observed as follows: -

"11. In the instant case we find that the impugned order cannot be sustained for the following reasons: -

12. The first private allotment was made on October 6, 2001 and the last allotment was made on November 25, 2010. The show cause notice issued on April 5, 2019 after more than 18 years from the date of the first allotment and 9 years from the date of the last allotment. The private placements are part of the record which is in the public domain and which is reflected in the annual reports etc. before RoC. Dividends are being paid by the Company to the shareholders year to year, and therefore, in our opinion there has been an undue delay in the issuance of the show cause notice for refund of the allotment of money in terms of Section

73(2) of the Companies Act. The contention that SEBI only came of the irregularities only in 2017 cannot be accepted when everything was in the public domain.

13. This Tribunal in a catena of cases over the past 15 years have held that proceedings must be initiated in a timely manner and that proceedings are liable to be set aside only on the ground of undue delay in the initiation of the proceedings. One such recent decision that comes to the notice of this Tribunal is in the case of ***Mr. Rakesh Kathotia & Ors. vs SEBI, Appeal no. 7 of 2016 decided on May 27, 2019*** *wherein the proceedings were quashed on account of inordinate delay. This Tribunal held:-*

> *"23. It is no doubt true that no period of limitation is prescribed in the Act or the Regulations for issuance of a show cause notice or for completion of the adjudication proceedings.* ***The Supreme Court in Government of India vs, Citedal Fine Pharmaceuticals, Madras and Others, [AIR (1989) SC 1771]*** *held that in the absence of any period of limitation, the authority is required to exercise its powers within a reasonable period. What would be the reasonable period would depend on the facts of each case and that no hard and fast rule can be laid down in this regard as the determination of this question would depend on the facts of each case. This proposition of law has been consistently reiterated by the Supreme Court in* ***Bhavnagar University v. Palitana Sugar Mill (2004) Vol.12 SCC 670, State of Punjab vs. Bhatinda District Coop. Milk P. Union Ltd (2007) Vol.11 SCC 363 and Joint Collector Ranga Reddy Dist. & Anr. vs. D. Narsing Rao & Ors. (2015) Vol. 3 SCC 695****."*

14. Similar order was passed in ***Ashok Shivlal Rupani vs SEBI, Appeal no. 417 of 2018 decided on August 22, 2019****.This order was taken to the Supreme Court by SEBI in* ***Civil Appeal No. 8444 – 8445 of 2019, Securities and Exchange Board of India vs. Ashok Shivlal Rupani & Anr****, etc was dismissed by the Supreme Court on November 15, 2019 thus affirming the decision of this Tribunal.*

15. Recently, the Supreme Court in ***Adjudicating Officer, SEBI vs Bhavesh Pabari (2019) SCC Online SC 294*** *held asunder:-*
11 "There are judgments which hold that when the period of limitation is not prescribed, such power must be exercised within a reasonable time. What would be reasonable time, would depend upon the facts and circumstances of the case, nature of the default/statute, prejudice caused, whether the third-party rights had been created etc."

16. Similar orders were passed by this Tribunal in ***Ashlesh Gunvantbhai Shah vs SEBI (Appeal no. 169 of 2019) decided on January 31, 2020, SIC Stock & Services Pvt. Ltd. vs SEBI (Appeal no. 639 of 2021), Morepen Laboratories Limited vs SEBI (Appeal no. 62 of 2020)***

decided on April 15, 2021 and in ICICI Bank Limited vs SEBI (Appeal no. 583 of 2019) decided on July 8, 2020.

17. In the light of the aforesaid, the finding of the WTM that there is no limitation period prescribed under the SEBI Act is in total disregard and disrespect to the various orders passed by this Tribunal and by the Supreme Court."

38. The Noticee(s) have also placed reliance on the judgment of the Hon`ble Supreme Court in the matter of SEBI Vs. Sunil Krishna Khaitan & Others, Civil Appeal No.8249 of 2013, wherein, it was, inter-alia, observed as follows: -

"81. This Court in the judgment authored by one of us (Sanjiv Khanna, J.) in Bhavesh Pabari (supra) had examined the question of delay and laches in initiating proceedings under Chapter VI-A of the Act and the principle of law that when no limitation period is prescribed proceedings should be initiated within a reasonable time and what would be reasonable time would depend upon facts and circumstances of each case. In this regard, it was held as under:

> *35. The appellants have also contended that in the absence of any prescribed limitation period, SEBI should have issued show-cause notice within a reasonable time and there being a delay of about 8 years in issuance of show-cause notice in 2014, the proceedings should have been dropped. This contention was not raised before the adjudicating officer in the written submissions or the reply furnished. It is not clear whether this contention was argued before the Appellate Tribunal. There are judgments which hold that when the period of limitation is not prescribed, such power must be exercised within a reasonable time. What would be reasonable time, would depend upon the facts and circumstances of the case, nature of the default/statute, prejudice caused, whether the third-party rights had been created, etc. The showcause notice in the present case had specifically referred to the respective dates of default and the date of compliance, which was made between 30-8-2011 to 29- 11-2011 (delay was between 927 days to 1897 days). Only upon compliance being made that the defaults had come to notice. In the aforesaid background, and so noticing the quantum of fine/penalty imposed, we do not find good ground and reason to interfere."*

82. The directions given in the aforesaid quotation should not be understood as empowering the authorities/Board to initiate action at any time. In the absence of any period of time and limitation prescribed by the enactment, every authority is to exercise power within a reasonable period. What would be the reasonable period would depend upon facts of each case, such as whether the violation was hidden and camouflaged and thereby the Board or the authorities did not have any knowledge. Though, no hard and fast rules can be laid down in this regard as *determination of the question will depend on the facts of each case, the nature of the statute, the rights and liabilities thereunder and other consequences, including prejudice caused and whether third party rights have been created are relevant factors. Whenever a question with regard to inordinate delay in issuance of a show-cause notice is made, it is open to the noticee to contend that the show-cause notice is bad on the ground of delay and it is the duty of the authority/officer to consider the question objectively, fairly and in a rational manner. There is public interest involved in not taking up and spending time on stale matters and, therefore, exercise of power, even when no time is specified, should be done within reasonable time. This prevents miscarriage of justice, misuse and abuse of the power as well as ensures that the violation of the provisions are checked and penalised without delay, thereby effectuating the purpose behind the enactment."*

39. From the findings and observations made in the above judgments, I note that that the Hon`ble Supreme Court and Hon`ble SAT has held that when no limitation period is prescribed for initiation of proceedings then proceedings should be initiated within a reasonable time. What would be reasonable time would depend upon facts and circumstances of each case, such as whether the violation was hidden and camouflaged and thereby the Board or the authorities did not have any knowledge, prejudice caused, nature of the default/statute and other relevant factors.

40. In order to determine whether there is delay in initiation of proceedings or not, it is pertinent to refer to sequence of events which led to issuance of the SCN. In the year 2017, officials of SEBI posted at its Kochi Local office (KLO) through interaction with investors in one of the regional seminars came to know about raising of money by BRD through issuance of securities. Pursuant thereto, SEBI vide letter dated October 19, 2017, emails dated November 7, 2017, February 21, 2018, May 23, 2018, June 01, 2018, July 11, 2018, November 30, 2018, July 09, 2019 and August 16, 2019 sought information from BRD about securities issued by BRD. In response thereto, BRD provided information about the securities including NCDs and Bonds, issued by BRD from time to time. Thus, I note that SEBI was dependent on Noticee No. 1 for the information required by it for completing its examination. But, as noted in Table of the SCN, BRD in response to SEBI letters dated October 19, 2017 and November 7, 2017

submitted only partial information. Upon completion of examination, the Competent Authority in SEBI approved proposed action against the Noticee(s) on December 19, 2019. In furtherance thereto, the SCN dated March 13, 2020 was issued and served to the Noticee(s). Noticee No. 13 vide emails dated March 28, 2020 and June 29, 2020, Noticee No. 14 vide emails dated March 25, 2020 and July 01, 2020, BRD vide email dated August 19, 2020 sought extension of time to file reply to the SCN on account of restrictions imposed due to then prevailing Covid-19. SEBI vide reminders dated August 20, 2020 and September 28, 2020 called upon Noticee No.2 to 12 to file reply to the SCN. BRD vide letter dated October 16, 2020 filed partial reply with respect to issuance of NCDs and sought time to file reply with respect to issuance of bonds. Subsequently, BRD vide reply dated December 15, 2020 filed reply with respect to issuance of bonds. Noticee No.9 vide email dated December 02, 2020 filed reply to the SCN.

41. In the meantime, Noticee No.13 and 14 challenged the SCN by filing writ petition no. 22340/2020 and 13682/2020, respectively, before the Hon`ble High Court of Kerala which vide order dated February 12, 2021 dismissed the said writ petitions. Pursuant to dismissal of Noticee No.14`swrit petition no. 22340/2020, Noticee No.14 vide letter dated March 25, 2021 filed reply to the SCN. Noticee No. 13 filed Writ Appeal No. 524/2021 against the Hon`ble High Court of Kerala order dated February 02, 2021 before the division bench of the Hon`ble High Court of Kerala which vide order dated March 31, 2021 dismissed the appeal. Thereafter, on November 11, 2022, Noticee No.13 filed reply dated November 05, 2022 to the SCN.

42. In my view, period of limitation ought to commence from date of knowledge of the person who is competent to take action or approve action for the violations. In the instant matter, in the year 2017 SEBI gained knowledge about the alleged violations by the Noticee(s). In December 2019 i.e. when examination report along with proposed action

was put up to the Competent Authority, the Competent Authority gained knowledge about the alleged violations by the Noticee(s).In view of the above sequence of events, I do not find any delay on part of SEBI in initiating action against the Noticee(s). Accordingly, I reject contention of the Noticee(s) that the SCN is barred by limitation or there is delay in initiation of proceedings in the instant matter or proceedings were not initiated within a reasonable period of time.

43. Next I proceed to examine the contention of Noticee No.13 and 14 that necessary documents have not been supplied to them. I note that Noticee No.13 vide reply dated August 29, 2020 sought *"documents/statements on basis of which the SCN has been founded (both hard and soft copy)"* and *"The statements of witnesses, whose testimony is relevant to the SCN"*. Vide reply dated September 30, 2020, Noticee No.13 reiterated request for hard copy of documents relevant to the charges framed against him. Further, Noticee No.13 vide reply dated November 04, 2020, inter-alia, stated *"I wish to respectfully remind you that in my letter dated 30.09.2020, I have requested physical copies of documents which are relevant to the charges framed against me. I assert that I have not received the same despite repeated requests. I acknowledge that I have received a CD containing documents in respect of all notices. I submit that you have a legal obligation to clarify the specific documents which are relevant to charges framed against me, apart from furnishing the same in a physical form….*" Thereafter, Noticee No.13 vide letter dated December 7, 2020 reiterated the request made vide reply dated November 04, 2020. Vide email dated February 14, 2022, Noticee No.13, inter-alia, stated *"Moreover, I was denied access to the documents relied upon by SEBI against me which were collated from the company through my back. I have made several requests on 3/09/2020, 8/10/2020, 4/11/2020 and 7/12/2020 to SEBI to provide physical copies."* Subsequently, Noticee No.13 in his reply dated November 5, 2022 stated that *"He has further requested SEBI to provide him with the documents and the names of witnesses in support of the charges against him in the*

SCN. SEBI has provided him with soft-copy of documents and statements of witnesses in respect of the charges levelled against all the Noticee(s). It has not identified specifically the documents and the witnesses whose evidence is relevant to the charges levelled against the Noticee…."

44. Similarly, Noticee No.14 vide reply dated September 23, 2020 requested for physical copy of documents relevant to the charges framed against him. Vide reply dated November 4, 2020, Noticee No.14 acknowledged receipt of CD containing documents in respect of all Noticee(s) and stated that physical copies of documents relevant to the charges framed against him have not been provided. Thereafter, Noticee No.14 reiterated request for physical copy of documents vide reply dated December 7, 2020 and March 25, 2021.

45. I note that the SCN alleges violation of public issue norms by BRD. Noticee No. 2 to 12 have been alleged to be director of BRD at the relevant time and person in default, thus, they are alleged to have violated public issue norms. In support of allegations in the SCN, SEBI letters/emails to BRD, documents obtained from ROC, replies from BRD, Annual report of BRD and minutes of board meetings containing decision about issuance of securities have been relied upon as Annexures in the SCN. The annexures to the SCN were annexed along with the SCN. Subsequently, SEBI vide letter dated October 22, 2020 and September 28, 2020, respectively, provided to Noticee No.13 and 14 CD containing annexures to the SCN. Receipt of the CD was acknowledged by Noticee No.13 and 14 vide separate reply dated November 04, 2020. Noticee No.13 and 14 have not specified any particular document which has been relied upon in the SCN and not provided to them. Since soft copy of relied upon documents have been provided to Noticee No.13 and 14, therefore, I find no merit in submission of Noticee No.13 and 14 that physical copy of documents relevant to the charges framed against them have not been provided to them. Further, I do not find any merit in submission of Noticee No.13 and 14 that documents and witnesses whose evidence is relevant

to the charges levelled against them have not been identified. Even otherwise, the AR for Noticee No.14 in hearing dated June 23, 2023 waived objection regarding non-supply of documents.

46. I note that Noticee No.1 vide submissions dated June 30, 2023 has contended that the SCN is liable to be set aside on the ground that the SCN is in violation of principles of natural justice as legal provisions under which the penalties/directions are proposed are not indicated. In this regard, reliance is placed on the Judgment dated August 4, 2014, passed by the Hon`ble Supreme Court in the matter of Gorkha Security Services versus Govt. of NCT of Delhi & Ors. (2014(9) SCC 105). I note that the SCN clearly mentions that it proposes to issue directions under Sections 11(1), 11(4) and 11B of the SEBI Act for violation of provisions of the Companies Act, 1956, the Companies Act, 2013, DIP Guidelines and ILDS Regulations. On a perusal of the said judgment of the Hon'ble Supreme Court, I find that the same is distinguishable on facts and is not applicable to the present proceedings for the following reasons:-

a. Gorkha Security case pertained to blacklisting of a contractor by a government agency which resulted in depriving the contractor from entering into any public contracts with government, thereby, violating the fundamental rights of equality of opportunity in the matter of public contract of such person. Further, in Gorkha Security case, the contractor was blacklisted for breaching the terms of the contract. On the other hand, the present SCN has been issued for breach of provisions of law.

b. In Gorkha Security case, blacklisting was imposed by way of penalty, whereas in the instant proceedings, Sections 11(1), 11(4), 11A and 11B of the SEBI Act itself provides for the nature of directions which can be issued.

c. In Gorkha Security Case, the governing contract itself provided blacklisting of the contractor as a penalty to be imposed in case of breach of terms of contract, whereas, in the present matter provisions of law under which directions are contemplated to be issued, confer discretion to SEBI to take such measure as it thinks fit in the interest of investors and securities market.

Keeping in view the above distinctions in the facts and circumstances of Gorkha Security case from the facts of the present proceedings, I find that reliance placed by Noticee No.1 on Gorkha Security matter is misplaced.

47. I note that Noticee No. 1, 2, 3,4,5,7,8, 10 and 12 have contended that SCN failed to allege that each issue of NCDs is a contravention and in absence of such charge, no direction to refund proceeds pursuant to Section 73 of the Companies Act, 1956 Act can be legally tenable. In this regard, I note that para 5 of the SCN mentions details of NCDs issued by BRD from the year 2005 to 2013. In para 11 of the SCN, it is alleged that *"the issuance of debentures to 1,20,701 debenture holders cannot be considered as private placement and instead be considered a deemed public issue…..".* The above contention of the Noticee(s) show that the Noticee(s) have understood the allegations in the SCN. Instead of addressing the core allegation that NCDs were issued by the Noticee(s) during 2005 to 2013 without complying with public issue norms, the Noticee(s) have chosen to raise technical objections. Even to ascertain whether an issue of shares or debentures by a company is public issue or private placement issuance made during financial year is to be considered. In view of the above, I do not find any merit in submission of the Noticee(s) that the SCN has not alleged that each issue of NCD by BRD was in contravention of public issue norms.

CONSIDERATION ON MERITS

48. The SCN has alleged that during the period 2005-2013 BRD made 42 issue of NCDs, detailed in Table No.2 above, which were public issue of NCDs and not private placement. In order to examine whether such

issuances of NCDs were public issue or private placement, it is relevant to refer to provisions of the Companies Act, 1956.

49. I note that Section 55A of the Companies Act, 1956 conferred on SEBI power to administer, inter-alia, Section 55 to 58, 59 to 81, 117 of the Companies Act, 1956, in the case of public companies, whether listed or unlisted, when they issue and transfer securities. While examining the scope of Section 55A of the 1956 Act, the Hon'ble Supreme Court of India in Sahara India Real Estate Corporation Limited & Ors. versus SEBI (Civil Appeal no. 9813 of 2011) (Judgment dated August 31, 2012) ("Sahara Case"), had observed that:

"We, therefore, hold that, so far as the provisions enumerated in the opening portion of Section 55A of the Companies Act, so far as they relate to issue and transfer of securities and non-payment of dividend is concerned, SEBI has the power to administer in the case of listed public companies and in the case of those public companies which intend to get their securities listed on a recognized stock exchange in India."

50. In this regard, reference may be made to Sections 67(1) and 67(3) of the Companies Act, 1956, which are reproduced as under:-

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

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

(3) No offer or invitation shall be treated as made to the public by virtue of sub-section (1) or sub-section (2), as the case may be, if the offer or invitation can properly be regarded, in all the circumstances-
(a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or

(b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation.

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

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

51. While examining the scope of Section 67 of the 1956 Act, the Hon'ble Supreme Court of India in the Sahara Caseobserved that:

" 51. Saharas, along with Vol III (additional documents), filed before this Court, gave certain details of the persons who have invested. Documents produced before us and before the fact finding authorities do not show the relationship Sahara Group had with the investors. Claim of Saharas was that the investors were their friends, associated group companies, workers/employees and other individuals who were associated/affiliated or connected with Sahara Group………….. Burden of proof is entirely on Saharas to show that the investors are/were their employees/ workers or associated with them in any other capacity which they have not discharged……………….

84. Section 67(1) deals with the offer of shares and debentures to the public and Section 67(2) deals with invitation to the public to subscribe for shares and debentures and how those expressions are to be understood, when reference is made to the Act or in the articles of a company. The emphasis in Section 67(1) and (2) is on the —section of the public. Section 67(3) states that no offer or invitation shall be treated as made to the public, by virtue of subsections (1) and (2), that is to any section of the public, if the offer or invitation is not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation or otherwise as being a domestic concern of the persons making and receiving the offer or invitations. Section 67(3) is, therefore, an exception to Sections 67(1) and (2). If the circumstances mentioned in clauses (1) and (b) of Section 67(3) are satisfied, then the offer/invitation would not be treated as being made to the public.
85. The first proviso to Section 67(3) was inserted by the Companies (Amendment) Act, 2000 w.e.f. 13.12.2000, which clearly indicates,

nothing contained in Sub-section (3) of Section 67 shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more. Resultantly, after 13.12.2000, any offer of securities by a public company to fifty persons or more will be treated as a public issue under the Companies Act, even if it is of domestic concern or it is proved that the shares or debentures are not available for subscription or purchase by persons other than those receiving the offer or invitation. A public company can escape from the rigor of provisions, if the offer is made by companies mentioned under Section 67(3A), i.e. by public financial institutions specified under Section 4A or by non-banking financial companies referred to in Section 45I(f) of the Reserve Bank of India Act, 1934.

Following situations, it is generally regarded, as not an offer made to public.

- *Offer of securities made to less than 50 persons;*
- *Offer made only to the existing shareholders of the company (Right Issue);*
- *Offer made to a particular addressee and be accepted only persons to whom it is addressed;*
- *Offer or invitation being made and it is the domestic concern of those making and receiving the offer.*

86. Resultantly, if an offer of securities is made to fifty or more persons, it would be deemed to be a public issue, even if it is of domestic concern or proved that the shares or debentures are not available for subscription or purchase by persons other than those received the offer or invitation...."

52. While dealing with issue of applicability of Section 67 of the Companies Act, 1956 Act to NBFC, the Hon`ble SAT vide order dated June 29, 2018, in the matter of Alchemist Holdings Limited versus SEBI, Appeal No. 425 of 2015, observed as follows:-

"15. <u>Basic argument of the appellants that Section 67 of 1956 Act is not applicable to NBFCs is without any merit</u>, because, there is no provision in the 1956 Act which excludes NBFCs from the provisions contained in the 1956 Act. Even the second proviso to Section 67(3) does not exempt NBFCs from the provisions contained in the 1956 Act. In fact the second proviso to Section 67(3) simply provides that the first proviso which provides that an offer or invitation of a company to fifty persons or more persons receiving the offer/ invitation shall be treated to be an offer/ invitation made to public shall not be applicable to NBFCs<u>. It obviously means that the offer/invitation made by NBFCs to more than 49 persons shall not be treated to have been made to the public, provided, the offer/ invitation is only to the persons receiving the offer/ invitations.</u>

19. In our opinion, propositions that emerge from the Apex Court decision in the case of Sahara India (Supra) may be summarized thus:-

a) For an issue of securities not to be a public issue, the twin requirements namely (one) Section 67 (3)(a) and (b) and (two) first proviso to Section 67 (3) must be satisfied. However, in case of NBFCs the second of the 'twin requirements' was not required to be met viz. the number of persons to whom the offer or invitation was made need not be less than 50. <u>It means that first of the 'twin requirements', viz. satisfaction of the conditions of Section 67(3)(a) and (b) would be applicable to all companies, including NBFCs.</u>

b) Observation made by the Apex Court in para 95 of the judgement that the rigour of Section 67 do not apply to an NBFC is in the context of first proviso to Section 67(3). Therefore, based on para 95 of the Apex Court decision in case of Sahara (Supra) appellants are not justified in contending that the rigour of Section 67(3) (a) and (b) are not applicable to NBFCs……

23. Once it is held that the offer/ invitation made by the company was liable to be construed as an offer/ invitation made to public, then it was obligatory for the company to issue prospectus and also seek prior permission under Section 73(1) of 1956 Act from the recognized stock exchanges for the shares intended to be offered to be dealt with in the stock exchange. Since, such permission was not sought by the company, as per Section 73(2), it was obligatory for the company to forthwith repay the amount received without interest within 8 days failing which the company and every director of the company who is an officer in default were on and from the expiry of the eighth day, jointly and severally liable to repay the money with interest not less than 4% and not more than 15% as may be prescribed.

24. In the present case, since the company had offered preferential shares not to persons to whom the offer was addressed but was made generally to 'Individuals, Trusts, Corporate Bodies,' Minors (through Guardians) Financial Institutions, Mutual Funds, HUFs and Cooperative Bodies and therefore, the allotment made by the company was liable to be construed as an offer made to the public……………..."

53. From Section 67 of the Companies Act, 1956 and observations made in Sahara Judgment (Supra) and Alchemist Holdings Limited(Supra), I note that for an issue of securities not to be a public issue, the twin requirements namely (one) Section 67 (3)(a) and (b) and (two) first proviso to Section 67 (3) must be satisfied. However, in case of NBFCs, the second of the 'twin requirements' is not required to be met viz. the number of persons to whom the offer or invitation was made need not be less than 50. It means that first of the 'twin requirements', viz. satisfaction of the conditions of Section 67(3)(a) and (b) would be applicable to all companies, including NBFCs. The burden of proving that the offer or invitation is not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by

persons other than those receiving the offer or invitation or otherwise as being a domestic concern of the persons making and receiving the offer or invitations is on the Company. Accordingly, I proceed to examine whether BRD has proved requirements of Section 67(3) of the Companies Act, 1956 or not.

54. BRD in its submission dated June 30, 2023 has filed application form, issued by BRD for offer and issuance of NCDs, which is as follows: -

BRD SECURITIES LIMITED

Registered Office : Bethany Complex, Thrissur Road , Kunnamkulam – 680503

04885 – 228565
04885 – 228566
04885 – 228567

PRIVATE PLACEMENT APPLICATION FORM FOR NON-CONVERTIBLE DEBENTURES

To be filled in by Applicant, Use BLOCK LETTERS / Tick [√] wherever Applicable

To
BRD SECURITIES LIMITED
Bethany Complex, Thrissur Road,
Kunnamkulam – 680503

Strictly confidential. For Private circulation only
Series :

Non Convertible Debenture : Period 10 years

Dear Sir,
Having paid to the company as mentioned below I/we apply for the allotment of secured debentures to me/us on the terms and conditions as set out below. We hereby authorise you to place our names on the Register of Debenture holders of the company as the holder(s) of the debenture that may be allotted and as to register our address as given below.

FIRST APPLICANT NAME : Mr. /Mrs.					
Father's/Husbands Name : Mr.					
Address of the First Applicant					
Phone		E-mail		Pin Code	
Age		D.O.B.		Senior Citizen [ ]	Mobile No.
SECOND APPLICANT'S NAME : Mr. /Mrs.					
Father's/Husbands Name : Mr.					
Address of the Second Applicant					
Phone		E-mail		Pin Code	
Age		D.O.B.		Senior Citizen [ ]	Mobile No.
Nominee:				D.O.B.	
In case of Minor,guardian's Name : Mr./Mrs				Date of Birth	
(Relationship: Father/Mother)					

CUMULATIVE SCHEME [ ] FIXED INCOME SCHEME [ ]	Amount Rs
Payment of Interest: [ ] YEARLY [ ] MONTHLY	Rupees
Tax Status	DD/ Local Cheque / NEFT/RTGS/ Pay Order Cheque/
Deduct Tax [ ] PAN CARD No	Other bank Transfer
Do not deduct Tax-Form 15G/15H enclosed [ ]	No Date
	STATUS OF THE FIRST APPLICANT :
Interest payable to (In case the interest to be paid is to a person other than the First Applicant)	Resident [ ] Others [ ]
	Repayment of Debenture to be made payable to:
Direct to me [ ] With Bank Mandate [ ]	Any one or Survivor/s [ ] Either or Survivor [ ]
BANK DETAILS	Former or Survivor/s [ ]

SB A/c No		IFSC Code	
Bank Name:		Branch Name	
Place		Date	
Applicant Depository details (Tick whichever is applicable	NSDL	CDSL	

Declaration:- I/We hereby delcare that the details furnished above are true and correct to the best of my/our knowledge and belief and undertake to inform you of any changes therein immediately. I/We also undertake that I/We will be fully liable for any false information furnished in this form

1. 2. 3.

Signature of the Applicant/s

Name & Signature (Introducer) Name Signature

YOU ARE IN HIGH SECURITY WITH BRD SECURITIES LIMITED

55. I note that the Company in its reply dated October 16, 2020, in part I-Section 1- IV-vi, has submitted that *"We also can provide further specific details to indicate that out of the total debenture holders to whom we have made the issue of NCDs, majority of them would be shareholders, debenture holders, customers or staff of the company……."*. However, the Company has not provided supporting documents to show that holders of NCDs were its shareholders, debenture holders, customers or staff of BRD. As per BRD`s submissions, only majority of NCD holders were its shareholders, debenture holders, customers or staff and not all persons whom NCDs were offered and allotted were shareholders, debenture holders, customers or staff of BRD. Subsequently, BRD in its submission dated June 30, 2023, in para 9, has submitted that "*The Noticee raised share capital on private placement basis from time to time from promoters, directors employees/staff and their friends and relatives. It also issued Non Convertible Debentures (NCDs/debentures) and subordinated Debt on private placement basis from time to time to augment its lending resources."* Further, the application form issued by BRD for NCDs did not require any declaration from the applicant that the applicant to NCDs is BRD`s *promoter, director, employees/staff and their friends and relatives or customer*.

56. I find that there is inconsistency in BRD`s submission dated October 16, 2020 and June 30, 2020 as submission dated October 16, 2020 states that majority of persons whom NCDs were offered and allotted were 'shareholders, debenture holders, customers or staff of the company'. However, as per submission dated June 30, 2020, NCDs were offered and allotted to '*promoters, directors employees/staff and their friends and relatives'.* In my view, the class of persons particularly 'their friends and relatives' and 'customers', stated to have been offered and allotted NCDs, are general in nature and not identified or selected group of persons.

57. BRD`s application form for NCDs mentions "Name & Signature (Introducer)". Thus, applicant for NCDs required an introducer. Nature or class of person who can be an introducer is also not specified in the

application form. If NCDs were offered to identified class of persons, as stated in BRD`s submissions dated October 16, 2020 and June 30, 2020, then there was no requirement for an introducer. The application form neither mentions any stipulation that applicant should belong to specified class of persons nor it required any declaration that the applicant belonged to specified class of persons stated in BRD`s submission dated October 16, 2020 and June 30, 2020. Further, class of persons i.e. 'shareholders, debenture holders, customers or staff of the company', '*promoters, directors employees/staff and their friends and relatives',* stated to have been offered and allotted NCDs by BRD, are general in nature. For the foregoing reasons, I find that NCDs were not offered to specified class of persons, as stated in BRD`s submissions dated October 16, 2020 and June 30, 2020. I find that BRD has failed to discharge its burden of proving that NCDs issued by BRD were not available for subscription or purchase by persons other than those receiving the offer or invitation or otherwise as being a domestic concern of the persons making and receiving the offer or invitations. In view of the above, I find that each issuance of NCDs by BRD, as detailed in Table no.2 above, was not private placement but public issue of NCDs.

58. I note that Section 2(36) of the Companies Act, 1956 defines prospectus to mean "any document described or issued as a prospectus and includes any notice, circular, advertisement or other document inviting deposits from the public or inviting offers from the public for the subscription or purchase of any shares in, or debentures of, a body corporate" In view of the foregoing conclusion that NCDs were offered and allotted to public, I find that application form issued by BRD for offer and subscription of NCDs was a document inviting offers from the public for subscription or purchase of NCDs.

59. I note that Section 55 of the Companies Act, 1956 provide that prospectus issued should be dated. Section 56(1) of the Companies Act, 1956 require that every prospectus shall *"state the matters specified in Part I of Schedule II and set out the reports specified in Part II of that*

Schedule; and the said Parts I and II shall have effect subject to the provisions contained in Part III of that Schedule." Sub-section 3 of Section 56 provide that *"No one shall issue any form of application for shares in or debentures of a company, unless the form is accompanied by a memorandum containing such salient features of a prospectus as may be prescribed which complies with the requirements of this section"*. I find that application form issued by BRD for each issuance of NCDs does not contain particulars required to be stated in terms of Section 56 of the Companies Act, 1956. Section 60 of the Companies Act, 1956 require that prospectus duly signed by every person who is named there in as a director or proposed director or his agent should be delivered to the ROC for registration. Further, I find that there is no document on record evidencing that prospectus containing specified particulars was filed by BRD in respect of such issuances of NCDs with the concerned the ROC.

60. Since each issuance of NCDs by BRD is a public issue of securities, such securities, shall also have to be listed on a recognized stock exchange, as mandated under Section 73 of the Companies Act, 1956. In this regard, reference is made to Sections 73 of the Companies Act, 1956, of which sub-Sections (1), (2) and (3) are relevant for the instant case, which is reproduced as under:

"73. (1) Every company intending to offer shares or debentures to the public for subscription by the issue of a prospectus shall, before such issue, make an application to one or more recognised stock exchanges for permission for the shares or debentures intending to be so offered to be dealt with in the stock exchange or each such stock exchange.

(1A) Where a prospectus, whether issued generally or not, states that an application under sub-section (1) has been made for permission for the shares or debentures offered thereby to be dealt in one or more recognized stock exchanges, such prospectus shall state the name of the stock exchange or, as the case may be, each such stock exchange, and any allotment made on an application in pursuance of such prospectus shall, whenever made, be void, if the permission has not been granted by the stock exchange or each such stock exchange, as the case may be, before the expiry of ten weeks from the date of the closing of the subscription lists:

Provided that where an appeal against the decision of any recognized stock exchange refusing permission for the shares or debentures to be dealt in on that stock exchange has been preferred under section 22 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), such allotment shall not be void until the dismissal of the appeal.

(2) Where the permission has not been applied under subsection (1) or such permission having been applied for, has not been granted as aforesaid, the company shall forthwith repay without interest all moneys received from applicants in pursuance of the prospectus, and, if any such money is not repaid within eight days after the company becomes liable to repay it, the company and every director of the company who is an officer in default shall, on and from the expiry of the eighth day, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent, as may be prescribed, having regard to the length of the period of delay in making the repayment of such money.

(3) All moneys received as aforesaid shall be kept in a separate bank account maintained with a Scheduled Bank [until the permission has been granted, or where an appeal has been preferred against the refusal to grant such. permission, until the disposal of the appeal, and he money standing in such separate account shall, where the permission has not been applied for as aforesaid or has not been granted, be repaid within the time and in the manner specified in sub-section (2)]; and if default is made in complying with this sub-section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees."

61. In the Sahara Case, the Hon'ble Supreme Court of India also examined Section 73 of the 1956 Act, wherein it observed that –

"Section 73(1) of the Act casts an obligation on every company intending to offer shares or debentures to the public to apply on a stock exchange for listing of its securities. Such companies have no option or choice but to list their securities on a recognized stock exchange, once they invite subscription from over forty nine investors from the public. <u>If an unlisted company expresses its intention, by conduct or otherwise, to offer its securities to the public by the issue of a prospectus, the legal obligation to make an application on a recognized stock exchange for listing starts.</u> Sub-section (1A) of Section 73 gives indication of what are the particulars to be stated in such a prospectus. The consequences of not applying for the permission under sub-section (1) of Section73 or not granting of permission is clearly stipulated in sub-section (3) of Section 73. Obligation to refund the amount collected from the public with interest is also mandatory as per Section 73(2) of the Act. Listing is, therefore, a legal responsibility of the company which offers securities to the public, provided offers are made to more than 50 persons."

62. It is pertinent to note that though the Companies Act, 1956, has been repealed by the Companies Act, 2013, anything done or any action taken or purported to have been done or taken under the Companies Act, 1956, is deemed to have been done or taken under the corresponding provisions of the Companies Act, 2013, by virtue of Section 465(2) of the Companies Act, 2013, and is therefore saved regardless of the repeal of the Companies Act, 1956. Section 465(2)(a) of the Companies Act, 2013, provides that:

"(2) Notwithstanding the repeal under sub-section (1) of the repealed enactments,—
(a) anything done or any action taken or purported to have been done or taken, including any rule, notification, inspection, order or notice made or issued or any appointment or declaration made or any operation undertaken or any direction given or any proceeding taken or any penalty, punishment, forfeiture or fine imposed under the repealed enactments shall, insofar as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;"

63. In view of the above, I find that Noticee No.1 has failed to comply with Section 56, 60, 67(3) and 73 of the Companies Act, 1956 (corresponding Section 26, 33, 40 and 42 of the Companies Act, 2013) read with Section 465 of the Companies Act, 2013.

64. I also note that SEBI has framed the DIP Guidelines, in exercise of the powers conferred under the SEBI Act. In the words of the Hon'ble Supreme Court in the Sahara Case, *"DIP Guidelines had statutory force since they were framed by SEBI in exercise of its powers conferred on it under Sections 11 and 11A of the SEBI Act. Powers have been conferred on SEBI to protect the interests of the investors in securities and regulate the issue of prospectus, offer documents or advertisement soliciting money through the issue of prospectus. Section 11 of the Act, it may be noted has been incorporated, evidently to protect the interests of investors whose securities are legally required to be listed. DIP Guidelines were implemented by SEBI with regard to the listed and unlisted companies, which made public offer, until it was replaced by*

ICDR 2009". In this regard, I observe that Noticee No.1 has not complied with following provisions of the DIP Guidelines: –

a. Clause 2.1.1. –(Filing of offer document)
b. Clause 2.1.4 –(Application for listing)
c. Clause 2.1.5 –(Issue of securities in dematerialized form),
d. Clause 2.5 – (Credit Rating for Debt Instruments)
e. Clause 5.4 –(Appointment of intermediaries)
f. Clause 5.6.2 –(Offer document to be made public)
g. Clause 5.6A –(Pre-issue Advertisement)
h. Clause 6.0 to 6.15 –(Contents of offer documents)
i. Clause 6.16 to 6.33 (Contents of Abridged Prospectus)
j. Clause 10.2- (Requirement in respect of Debenture Trustee)
k. Chapter X – (Guidelines for Issue of Debt Instruments)

65. With effect from June 6, 2008, SEBI(Issue and Listing of Debt Securities) Regulations, 2008 **("ILDS Regulations")** were notified. As per Regulation 3 of ILDS Regulations, it applied to (a) public issue of debt securities; (b) listing of debt securities through public issue or on private placement basis on a recognized stock exchange. As per Regulation 33 (1) of the ILDS Regulations, on and from the commencement of ILDS Regulations provisions of DIP Guidelines in so far as they related to issue and listing of debt securities stood rescinded. However, Regulation 33(2) of the ILDS Regulations, provided that*: "(2)Notwithstanding* such rescission*,—(a) anything done or any action taken or purported to have been done or taken including observation made in respect of any draft offer document, any enquiry or investigation commenced or show cause notice issued in respect of the said guidelines shall be deemed to have been done or taken under the corresponding provisions of these regulations; (b) any application made to the Board under the said Guidelines and pending before it shall be deemed to have been made under the corresponding provisions of these regulations."*

66. I find that Noticee No.1 made public issue of NCDs even after notification of ILDS Regulations. Accordingly, I find that Noticee No.1 failed to comply with following provisions of ILDS Regulations: -

a. Regulation 4(2)(a) to (d)- (Issue Requirements for Public Issues)
b. Regulation 4(3)- (Appointment of Merchant Banker)
c. Regulation 4(4)- (Appointment of Debenture Trustee)
d. Regulation 5 – (Disclosure in Offer Document)
e. Regulation 6- (Filing of draft offer document)
f. Regulation 7- (Mode of Disclosure of Offer Document)
g. Regulation 8- (Advertisements for Public Issues)
h. Regulation 9 – (Abridged Prospectus and application forms)
i. Regulation 15- (Trust Deed)
j. Regulation 16- (Debenture Redemption Reserve)
k. Regulation 17- (Creation of Security)
l. Regulation 18- (Redemption and Roll-over)
m. Regulation 19- (Mandatory Listing)
n. Regulation 26- (Obligations of the Issuer, Lead Merchant Banker, etc.,)

<u>Bonds- Subordinate Debt</u>

67. In this regard, the SCN has alleged that Noticee No.1 in its balance sheet showed Bonds under Long Term Borrowing as “Bond-Non Current”. Details of issuance of such bonds were not e-filed by Noticee No.1 with the ROC. Noticee No.1 vide letter dated July 30, 2018 provided to SEBI details of outstanding bond as on March 31, 2018, which is tabulated in Table No.4 above and also reproduced hereunder: -

Year of Issue	**No. of Customers**	**Unit Price**	**Amount Mobilized**	**Tenure**
2014-15	1166	1000	7,61,68,000	60
	755	1000	5,67,70,000	66
2017-18	418	1000	10,78,88,000	60
	239	1000	2,73,15,000	72
	2578		26, 81,41,000	

68. The SCN alleged that Noticee No. 1 issued such bonds to the public without complying with Section 26, 33, 42 and 40 of the Companies Act,

2013, Rule 14(2)(b) of the Companies (Prospectus and allotment of Securities) Rules, 2014 and Regulation 4(2)(a), 4(2)(b), 4(2)(c), 4(2)(d), 4(3), 4(4), 5, 6, 7, 8, 9, 15 to 19 and 26 of ILDS Regulations. At the relevant time, Noticee No.2 to 8 were directors of Noticee No.1, officers in default and were involved in decision making of Noticee No.1 to issue such bonds without complying with public issue norms.

69. Before proceeding further, it is pertinent to refer Section 42 of the Companies Act, 2013 and Rule 14 of the Companies (Prospectus and Allotment of Securities) Rules, 2014, which are extracted hereunder: -

" The Companies Act, 2013
42. Offer or invitation for subscription of securities on private placement
(1) Without prejudice to the provisions of section 26, a company may, subject to the provisions of this section, make private placement through issue of a private placement offer letter.

(2) Subject to sub-section (1), the offer of securities or invitation to subscribe securities, shall be made to such number of persons not exceeding fifty or such higher number as may be prescribed, [excluding qualified institutional buyers and employees of the company being offered securities under a scheme of employees stock option as per provisions of clause (b) of sub-section (1) of section 62], in a financial year and on such conditions (including the form and manner of private placement) as may be prescribed.

Explanation I.--If a company, listed or unlisted, makes an offer to allot or invites subscription, or allots, or enters into an agreement to allot, securities to more than the prescribed number of persons, whether the payment for the securities has been received or not or whether the company intends to list its securities or not on any recognised stock exchange in or outside India, the same shall be deemed to be an offer to the public and shall accordingly be governed by the provisions of Part I of this Chapter.

Explanation II.--For the purposes of this section, the expression--

(i) "qualified institutional buyer" means the qualified institutional buyer as defined in the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 as amended from time to time.

(ii) "private placement" means any offer of securities or invitation to subscribe securities to a select group of persons by a company (other

than by way of public offer) through issue of a private placement offer letter and which satisfies the conditions specified in this section.

……...

(4) <u>Any offer or invitation not in compliance with the provisions of this section shall be treated as a public offer and all provisions of this Act, and the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and the Securities and Exchange Board of India Act, 1992 (15 of 1992) shall be required to be complied with.</u>

(5) All monies payable towards subscription of securities under this section shall be paid through cheque or demand draft or other banking channels but not by cash.

[(6) A company making an offer or invitation under this section shall allot its securities within sixty days from the date of receipt of the application money for such securities and if the company is not able to allot the securities within that period, it shall repay the application money to the subscribers within fifteen days from the date of completion of sixty days and if the company fails to repay the application money within the aforesaid period, it shall be liable to repay that money with interest at the rate of twelve per cent. per annum from the expiry of the sixtieth day:

Provided that monies received on application under this section shall be kept in a separate bank account in a scheduled bank and shall not be utilised for any purpose other than--

(a) for adjustment against allotment of securities; or

(b) for the repayment of monies where the company is unable to allot securities.]

[(7) All offers covered under this section shall be made only to such persons whose names are recorded by the company prior to the invitation to subscribe, and that such persons shall receive the offer by name, and that a complete record of such offers shall be kept by the company in such manner as may be prescribed and complete information about such offer shall be filed with the Registrar within a period of thirty days of circulation of relevant private placement offer letter.

(8) No company offering securities under this section shall release any public advertisements or utilise any media, marketing or distribution channels or agents to inform the public at large about such an offer.

(9) Whenever a company makes any allotment of securities under this section, it shall file with the Registrar a return of allotment in such manner as may be prescribed, including the complete list of all security-holders, with their full names, addresses, number of securities allotted and such other relevant information as may be prescribed."

The Companies (Prospectus and Allotment of Securities) Rules, 2014

Rule 14 - Private Placement

(2) A company shall not make a private placement of its securities unless- ……………..

(b) such offer or invitation shall be made to <u>not more than two hundred persons</u> in the aggregate in a financial year:

Provided that any offer or invitation made to qualified institutional buyers, or to employees of the company under a scheme of employees stock option as per provisions of clause (b) of sub-section (1) of section 62 shall not be considered while calculating the limit of two hundred persons;

Explanation.- For the purposes of this sub-rule, it is hereby clarified that-

(i) the restrictions under sub-clause (b) would be reckoned individually for each kind of security that is equity share, preference share o rdebenture;

(ii) the requirement of provisions of sub-section (3) of section 42 shall apply in respect of offer or invitation of each kind of security and no offer or invitation of another kind of security shall be made unless allotments with respect to offer or invitation made earlier in respect of any other kind of security is completed;

(c) the value of such offer or invitation per person shall be with an investment size of not less than twenty thousand rupees of face value of the securities;

(5) The provisions of clauses (b) and (c) of sub-rule (2) shall not be applicable to-

<u>(a) non-banking financial companies which are registered with the Reserve Bank of India under Reserve Bank of India Act, 1934; and</u>

(b) housing finance companies which are registered with the National Housing Bank under National Housing Bank Act, 1987,

<u>if they are complying with regulations made by Reserve Bank of India or</u> National Housing Bank in respect of offer or invitation to be issued on private placement basis:

Provided that such companies shall comply with sub-clauses (b) and (c) of sub-rule (2) in case the Reserve Bank of India or the National Housing Bank have not specified similar regulations."

Consequent to the Companies (Prospectus and Allotment of Securities) Amendment Rules, 2014, with effect from August 7, 2018, sub rule 5 to Rule 14 was re-numbered as sub rule 7 to Rule 14 of the Companies (Prospectus and Allotment of Securities) Rules, 2014.

70. As per Section 42 of the Companies Act, 2013, the offer of securities or invitation to subscribe securities, could have been made to such number of persons not exceeding fifty or such higher number as may be prescribed. Rule 14(2) (b) of the Companies (Prospectus and Allotment of Securities) Rules, 2014 provided that such offer or invitation of securities on private placement basis could be made to not more than 200 persons in aggregate in a financial year. Rule 14(5)(a) provided that provision of clause (b) to sub-rule (2) shall not apply to non-banking financial company registered with RBI subject to condition that such non-banking financial company comply with regulations made by RBI in respect of offer or invitation to be issued on private placement basis.

71. In the financial year **(FY)** 2014-15, Board of Noticee No.1 approved raising of money through issuance of subordinated debt **(SDI)** in its meeting dated April 11, 2014. Minutes of said meeting, inter-alia, reads as follows: -

> **RESOLVEDTHAT** pursuant to the provisions of RBI Act, 1934 and other applicable provisions, if any, of the Companies Act and in accordance with the enabling provisions of the Articles of Association of the company, the Board hereby approves the issue of 1,50,000 (One Lakh Fifty Thousand) units of Unsecured Subordinated Debt at a price of Rs.1,000/- each aggregating to Rs. 15,00,00,000/- (Rupees Fifteen Crores Only) to finance the Company's expansion of business activities and for general corporate purposes.

72. Similarly, in FY 2017-18 Board of Noticee No.1 in meeting dated April 28, 2017 approved issuance of 1,50,000 units of unsecured subordinated debt at price of Rs.1,000/- each aggregating to Rs.15,00,00,000/-. Minutes of said meeting dated April 28, 2017are worded similar to minutes of meeting dated April 11, 2014.

73. RBI vide notification no. DNBS.(PD).CC.No. 12 /02.01/99-2000 dated January 13, 2000 effected certain changes to definition of public deposit provided in Non-Banking Financial Companies Acceptance of Public Deposit (Reserve Bank) Directions, 1998 and notified that subordinated debt having features mentioned below shall be exempted from definition of public deposits for the reasons which are as follows: -

*"**B. Amendments to NBFC Directions on Acceptance of Public Deposits***

(2) Minimum period of hybrid debt capital instruments and subordinated debts for exclusion from the description of public deposits.

*A few NBFCs introduced new deposit products, one of which was the subordinated debts having a maturity period of 17 months. **The intention was to avoid the application of SEBI regulations applicable to the issue of debentures and those provisions of the RBI directions applicable to acceptance of public deposits** because the hybrid debt capital instruments and subordinated debts issued by an NBFC are treated as part of Tier II capital in terms of the Prudential Norms Directions and by virtue thereof, they would be exempt from the meaning of `public deposit'. It has, therefore, been decided that the subordinated debt instruments with a minimum maturity period of 60 months or above at the time of their initial offer which (a) are unsecured and subordinated to the claims of other creditors, (b) are free from restrictive clauses, (c) are not redeemable at the instance of the holder or without the consent of the supervisory authority of the NBFC, will only be exempted from the definition of public deposits."*

74. Paragraph 2, clause (xvii) of Non-Banking Financial (Deposit Accepting or Holding) Companies Prudential Norms (Reserve Bank) Directions, 2007, notified by RBI, defined subordinate debt as: -

"'subordinated debt' means an instrument, which is fully paid up, is unsecured and is subordinated to the claims of other creditors and is free from restrictive clauses and is not redeemable at the instance of the holder or without the consent of the supervisory authority of non-banking financial company."

75. RBI vide circular no. RBI/2012-13/560 DNBD(PD) CC No. 330/03.10.001/2012-13 dated June 27, 2013 issued guidelines for NBFCs on raising of money through private placement of Debentures, etc., and directed as follows: -

"NBFCs raise money by <u>issuing capital/debt securities including debentures by way of public issue or private placement</u>. <u>In the case of public issue of such securities, institutions and retail investors can participate. Private placement, on the other hand, may involve institutional investors.</u>

2. As certain adverse features have come to the notice of the Reserve Bank in private placements by certain NBFCs, it has been decided to put in place a minimum set of guidelines (given in the annex) for compliance by all NBFCs. <u>The Guidelines require NBFCs to space out such issuances and also aim to bring NBFCs at par with other financial entities as far as private placement is concerned by restricting the maximum number of subscribers to forty nine (currently the ceiling of investors stipulated by the Companies Act 1956 for private placement is not applicable for NBFCs)</u>. It may be noted that all other extant guidelines on private placement remain unchanged. The provisions of these guidelines will however override other instructions in this regard, wherever contradictory."

Annex

A Guidelines on Private Placement by NBFCs:

2. Regulations

"i. The offer document for private placement should be issued within a maximum period of 6 months from the date of the Board Resolution authorizing the issue. The offer document should include the names and designations of the officials who are authorised to issue the offer document. The Board Resolution and the offer document must contain information on purpose for which the resources are being raised.

ii. The offer document may be printed or typed "For Private Circulation Only". General information including the address of the registered office of the NBFC, date of opening / closing of the issue etc. shall be clearly mentioned in the offer document.

iii. An NBFC shall only issue debentures for deployment of funds on its own balance sheet and not to facilitate resource requests of group entities/ parent company / associates.

iv. Private placement by all NBFCs shall be restricted to not more than 49 investors, identified upfront by the NBFC.

v. The minimum subscription amount for a single investor shall be Rs. 25 lakh and in multiples of Rs.10 lakh thereafter………..

B. Security cover for debentures (by private placement or public issue):

NBFCs shall ensure that at all points of time the debentures issued, including short term NCDs, are fully secured. Therefore in case, at the stage of issue, the security cover is insufficient /not created, the issue proceeds shall be placed under escrow until creation of security, which in any case should be within one month from the date of issue………."

76. RBI vide circular dated July 02, 2023 issued clarification on circular no. RBI/2012-13/560 DNBD(PD) CC No. 330/03.10.001/2012-13 dated June 27, 2013 and clarified that "4. iii. The provisions of paragraph B of the Annex to the said circular shall not apply to subordinated debt, as defined under paragraph 2(1)(xvii) of the Non-Banking Financial (Non-Deposit Accepting or Holding Companies Prudential Norms (Reserve Bank) Directions, 2007."However, no exemption was granted to subordinated debt from applicability of Part A of said circular dated June 27, 2013.

77. In suppression of above circular dated June 27, 2013 and July 02, 2013, RBI vide notification No DNBR (PD) CC No.021/03.10.001/2014-15 dated February 20, 2015 notified guidelines on private placement of NCDs (maturity more than 1 year) by NBFC which read as follows: -

"2. In supersession of circulars DNBS(PD)CC.No.330/03.10.001/2012-13 dated June 27, 2013 and the DNBS (PD)CC.No.349/03.10.001/2013-14 dated July 02, 2013, the guidelines on private placement of NCDs for NBFCs have been reviewed in the light of the provisions of Companies Act 2013……

2. The issues shall be governed by the following instructions:

i. The minimum subscription per investor shall be Rs. 20,000 (Rupees Twenty thousand);

ii. The issuance of private placement of NCDs shall be in two separate categories, those with a maximum subscription of less than Rs. 1 crore and those with a minimum subscription of Rs. 1 crore and above per investor;

iii. There shall be a limit of 200 subscribers for every financial year, for issuance of NCDs with a maximum subscription of less than Rs. 1 crore, and such subscription shall be fully secured;

iv. There shall be no limit on the number of subscribers in respect of issuances with a minimum subscription of Rs. 1 crore and above; the option to create security in favour of subscribers will be with the issuers. Such unsecured debentures shall not be treated as public deposits as defined in NBFCs Acceptance of Public Deposits (Reserve Bank) Directions, 1998.

v. An NBFC (excluding Core Investment Companies) shall issue debentures only for deployment of funds on its own balance sheet and not to facilitate resource requests of group entities / parent company / associates.

vi. An NBFC shall not extend loans against the security of its own debentures (issued either by way of private placement or public issue).

78. RBI vide notification RBI/DNBR/2016-17/45 dated September 1, 2016 issued Non-Banking Financial Company - Systemically Important Non-Deposit taking Company and Deposit taking Company (Reserve Bank) Directions, 2016 **(2016 Directions)**. Para 107 of Directions, 2016 read as *"Applicable NBFCs shall follow the guidelines on private placement of Non-Convertible Debentures (NCDs) given in Annex XXIII. The provisions of Companies Act, 2013 and Rules framed thereunder shall be applicable wherever not contradictory*." Para 125 of Directions, 2016 repealed RBI circular dated February 20, 2015. However, contents of circular dated February 20, 2015 were incorporated in the Annex XXIII of Directions 2016 which read as follows:-

"2. The issues shall be governed by the following instructions:

i. The minimum subscription per investor shall be ₹20,000 (Rupees Twenty thousand);

ii. The issuance of private placement of NCDs shall be in two separate categories, those with a maximum subscription of less than ₹1 crore and those with a minimum subscription of ₹1 crore and above per investor;

iii. There shall be a limit of 200 subscribers for every financial year, for issuance of NCDs with a maximum subscription of less than ₹1 crore, and such subscription shall be fully secured;

iv. There shall be no limit on the number of subscribers in respect of issuances with a minimum subscription of ₹1crore and above; the option to create security in favour of subscribers shall be with the issuers. Such unsecured debentures shall not be treated as public deposits as defined in these Directions……"

79. Section 2(30) of the Companies Act, 2013, defined debentures as "debenture" includes debenture stock, bonds or any other instrument of a company evidencing a debt, whether constituting a charge on the assets of the company or not;. Application form, Exhibit 4 to Noticee No.1`s submission dated June 30, 2023, issued by Noticee No.1 for raising money through subordinated debt read as follows: -

Private and Confidential

BRD SECURITIES LIMITED

Registered Office : Bethany Complex
Thrissur Road, Kunnamkulam - 680 503

04885 - 228565

Application for Unsecured, Subordinated Debts

No:

BRANCH:

Dear Sir,

I/We have read and understood the contents of the Memorandum of Private Placement for Issue of Unsecured subordinated Debts..Series ....for Rs..I/We apply for allotement to me/us the subordinated Debts as per details given below. The amount payable on application as shown below is remitted herewith. On allotment, please place my/our name of the register of Subordinate Debt holders. I/We bind myself/ ourselves by the terms and conditions as contained in the Memorandum of Private Placement.

(Please read the instructions on the next page carefully before filling this bond application)

The application shall be for a minimum of (one) subordinated Debts an in multiple of (one) thereafter

80. Subordinated debt certificate issued by Noticee No.1 and provided by Noticee No.1 vide email dated December 04, 2018 read as follows: -

BRD SECURITIES LIMITED

Regd. Office: Bethany Complex, Thrissur Road, Kunnamkulam - 680 503, Kerala
CIN: U67120KL1993PLC007022

SUBORDINATED DEBT CERTIFICATE

For value received, BRD Securities Limited, having registered office at **Bethany Complex, Thrissur Road, Kunnamkulam - 680 503, Kerala** promises to pay to the person(s) named as holder(s) upon presentation and discharge of this certificate on the date of redemption as mentioned below, including the amount of interest at the rate specified below at regular intervals of the months (subject to deduction of tax at source at the rates prevailing from time to time under the provisions of the Income Tax Act, 1961 or any statutory modifications or re-enachment/thereof).

Folio / CRT No:

Branch

Date of Allotment

Name & Address of the Holder(s)
(If Minor Name of Guardian)

Amount Rs.

Effective Yield

Interest Payment

Maturity Value

Name & Details of Nominee

Maturity Date

Date of Issue

P.D. Antony
Director

Authorised Signatory

81. From perusal of above application form and subordinated debt certificate, issued by Noticee No.1, I note that subordinated debt instruments ("SDI") represented debt of Noticee No.1. I find that RBI circular dated January 13, 2000 and July 02, 2013 treated subordinated debt as unsecured debentures. In view of Section 2(30) of the Companies Act, 2013, I find that SDIs issued by Noticee No.1 are non-convertible unsecured debentures.

82. From RBI notification dated January 13, 2000, it is evident that SDIs were devised as an instrument with intent to avoid SEBI regulations applicable to issue of debentures. It follows that SDIs were/are in the nature of debentures intended to avoid SEBI regulations on issue of debentures.RBI vide circular dated June 27, 2013 noted that institutions and retail investors can participate in public issue of securities. Private placement may involve institutions. Further, RBI vide circular dated June 27, 2013 intended to bring NBFCs at par with other financial entities as far as issuance of Debentures by NBFCs on private placement is concerned, thereby, RBI restricted the maximum number of subscribers to such debentures to forty- nine. RBI vide circular dated June 27, 2013 also specified that short term as well as long term debentures issued by NBFCs should be fully secured. As SDIs were unsecured, as apparent from RBI notification dated January 13, 2000 and Paragraph 2, clause (xvii) of Non-Banking Financial (Deposit Accepting or Holding) Companies Prudential Norms (Reserve Bank) Directions, 2007, RBI vide circular dated July 02, 2013 granted exemption to subordinated debt from applicability of part B of RBI circular dated June 27, 2013 which mandated that debentures should be secured. However, no exemption was granted to issuance of subordinated debt by NBFCs on private placement from restriction of maximum number of subscribers to forty-nine. Consequent to the Companies Act, 2013, RBI vide circular dated February 20, 2015 categorized NCDs issued by NBFCs in two categories i.e. NCDs having subscription above Rs.20,000/- and less than Rs.1 crore

per investor and NCDs having minimum subscription of Rs.1 crore and above per investor. For first category of NCDs i.e. having subscription above Rs.20,000/- and less than Rs.1 crore per investor, limit of 200 subscribers for every financial year was specified. For second category of NCDs i.e. minimum subscription of Rs.1 crore and above per investor, no limit of subscribers was prescribed.

83. I note that SEBI vide email dated June 14, 2018 informed Noticee No.1 that Annual reports of Noticee No.1 showed that Noticee No.1 had outstanding bonds (long term) and advised Noticee No.1 to provide details regarding such bonds i.e. year of allotment, date of issue, type of bond(description), bond series, no of allottee(s), per unit price, total amount mobilized, outstanding allottee(s) and outstanding amount. In response thereto, Noticee No.1 vide letter dated July 30, 2018 submitted details of active sub-ordinate debt as on March 31, 2018 and claimed that Noticee No.1 collected funds from public by raising sub-ordinate debt as per RBI norms and sub-ordinate debt is not security covered under provisions of the Companies Act. Noticee No.1 failed to provide complete information sought by SEBI vide email dated June 14, 2018. SEBI vide email dated August 8, 2018 again advised Noticee No.1 to provide information sought vide email dated June 14, 2018. However, Noticee No.1 vide email dated August 14, 2018 again forwarded letter dated July 30, 2018 and failed to furnish required information.

84. I also note that RBI vide circular no. RBI/2009-10/147 DBOD. No. BP.BC.38/21.01.0002/2009-10 dated September 7, 2009 (applicable to all commercial banks) notified terms and conditions for issuance of unsecured bonds as subordinated debt by banks for raising Tier- II capital. Para 1 (f)- Other conditions of the said circular read as *"(i) The instruments should be fully paid-up, unsecured, subordinated to the claims of other creditors, free of restrictive clauses and should not be redeemable at the initiative of the holder or without the consent of the Reserve Bank of India.".* Para 1(f) (iii) of the circular dated September 7,

2009 read as *“Banks should comply with the terms and conditions, if any, set by SEBI/other regulatory authorities in regard to issue of the instruments.”* I note that features of subordinated debt provided in RBI circular no. RBI/2009-10/147 DBOD. No. BP.BC.38/21.01.0002/2009-10 dated September 7, 2009 and in the definition of subordinated debt in Para 1(f)(ii) of Non-Banking Financial (Deposit Accepting or Holding) Companies Prudential Norms (Reserve Bank) Directions, 2007, notified by RBI, and in para 3(xxix) of Non-Banking Financial Company - Systemically Important Non-Deposit taking Company and Deposit taking Company (Reserve Bank) Directions, 2016 are same. In case of banks as well as NBFCs, subordinated debt formed part of Tier II capital. The Noticee(s) have not shown any RBI circular which indicates that subordinated debt instruments issued by NBFCs shall be treated differently from subordinated debt instruments issued by banks. In view thereof, I find that SDIs issued by Noticee No.1, being an NBFCs, were also mandated to comply with applicable public issue norms notified by SEBI. Accordingly, I find no merit in submission of Noticee No.1 that SDIs issued by NBFCs were not required to comply with SEBI norms.

85. As noted above that Noticee No.1 in its submission dated June 30, 2023, in para 9, has submitted that “*The Noticee raised share capital on private placement basis from time to time from promoters, directors employees/staff and <u>their friends and relatives</u>. <u>It also issued Non Convertible Debentures (NCDs/debentures) and subordinated Debt on private placement basis from</u> time to time to augment its lending resources.”* I note that application form did not require any declaration from the applicant for SDIs that the applicant is *promoters, directors, employees/staff and <u>their friends and relatives</u>*. Thus, I find that Noticee No.1 failed to demonstrate that SDIs were issued only to selected group of persons and not to public at large.

86. In view of Section 42 of the Companies Act, 2013 and Rule 14 of the Companies (Prospectus and Allotment of Securities) Rules, 2014 read

with RBI circular June 27, 2013, July 02, 2013, February 20, 2015 and 2016 Directions, I find that Noticee No.1 could have issued SDIs on private placement basis to 200 subscribers only. From information on outstanding bonds/SDIs as on March 31, 2018, submitted by Noticee No.1 vide letter dated July 30, 2018, I note that Noticee No.1 in the year 2014-15 had issued SDIs having face value Rs.1000/-, for tenure 60 month to 66 months, to 1166 and 755 persons, which is in excess of limit of 200 subscribers. Further, Noticee No.1 issued SDIs having face value Rs.1000/-, tenure 60 and 72 months, to 418 and 239 persons in the year 2017-2018. Accordingly, I find that such issuance of SDIs by Noticee No.1 was public issue and not private placement.

87. Noticee No.1 has submitted that SDIs were non-transferable, therefore, they are not security, as defined in Section 2(h) of the Securities (Contracts) Regulation Act, 1956, thus, they are not under purview of SEBI. From application form for SDIs, I note that no stipulation restricting transferability of such bonds is stated therein. As noted above, Noticee No.1 failed to provide complete information regarding SDIs i.e. year of allotment, date of issue, type of bond(description), bond series, no of allottees, per unit price, total amount mobilized, outstanding allottes and outstanding amount, as sought by SEBI vide email dated June 14, 2018. Section 42*(4) of the Companies Act, (extracted above) provides that "*<u>*Any offer or invitation not in compliance with the provisions of this section shall be treated as a public offer and all provisions of this Act, and the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and the Securities and Exchange Board of India Act, 1992 (15 of 1992) shall be required to be complied with.*</u> As Noticee No.1 breached limit of 200 persons in a financial year, therefore, SDIs fall within jurisdiction of SEBI. Accordingly, I do not find any merit in the above submissions of Noticee No.1.

88. In view of the above, I find that SDIs issued by Noticee No.1 in the year 2014-15 and 2017-18 were not private placement but public issue, thus,

Noticee No.1 violated Section 26, 33, 42 and 40 of the Companies Act, 2013 read with Rule 14(2)(b) of the Companies (Prospectus and allotment of Securities) Rules, 2014 and Regulation 4(2)(a), 4(2)(b), 4(2)(c), 4(2)(d), 4(3), 4(4), 5, 6, 7, 8, 9, 15 to 19 and 26 of ILDS Regulations.

89. I note that the Noticee(s) have submitted that the SCN with respect to bonds are inconsistent as para 12 and 15 of the SCN refers to issuance of bonds by BRD during 2014-15 and 2017-18. However, para 18 and 21 refers to entire SDIs and not restricted to issues alleged at para 12. In this regard, I note that para 12 of the SCN, inter-alia, reads *“Hence, the issuance of Bonds by the company during 2014-15 and 2017-18 has to be treated as a public issue of securities in view of the said RBI circular….”,* Para 21 of the SCN also refers to bonds issued to 2578 investors for total of Rs.26.81 crores which pertains to bonds issued by Noticee No.1 during 2014-15 and 2017-18. Accordingly, I do not find any inconsistency between para 12, 13 of the SCN and para 18, 21 of the SCN.

<u>Role of Noticee No. 2 to 7 and 8 to 12</u>

90. In the foregoing paragraphs, I have held that NCDs issued by Noticee No.1 during March 31, 2005 to June 25, 2013 pursuant to board resolutions passed during March 31, 2005 to June 25, 2013 were public issues in the guise of private placement. Noticee No.1 issued such NCDs without complying with applicable public issue norms. During the said period of issuance of NCDs, Noticee No.2 was Managing Director **(MD)** of Noticee No.1. Noticee No.2 to 7 and 8 to 12 being directors of Noticee No.1 were part of Board of Noticee No.1 as well as decision making process in respect of issuance of NCDs. The Noticee(s) have not disputed their period of directorship or their role alleged in the SCN. I find that Noticee No. 2 to 7 and 8 to 12 failed: -

a. To make disclosures in the prospectus and attach abridged prospectus as prescribed under Section 56(1) and 56(3) of the Companies Act, 1956;

b. To file prospectus with the concerned ROC as prescribed under Section 60 of the Companies Act, 1956;

c. To obtain prior approval of the Stock Exchange to get NCDs listed in terms of Section 73 of the Companies Act, 1956;

d. To comply with public issue requirements provided in clause 2.1.4, 5.6.2, 2.5, 2.1.5, 5.4, 10.2, 6.0 to 6.15, 2.1.1, 5.6A, 6.16 to 6.33 and chapter X of DIP Guidelines, 2000 in respect of NCDs issued from 2005 to June 5, 2008 i.e. prior to notification of ILDS Regulations;

e. To comply with public issue requirements provided in Regulation 4(2)(a),4(2)(b), 4(2)(c), 4(2)(d), 4(3), 4(4), 5, 6, 7, 8, 9, 15 to 19 and 26 of ILDS Regulations in respect of NCDs issued after June 6, 2008;

f. To appoint registered debenture trustee in terms of Clause 10.2 of DIP Guidelines and Regulation 4(4) of ILDS Regulations

91. For the foregoing reasons, I find that Noticee No.2 to 7 and 8 to 12 acted in violation of Section 56, 60, 67(3) of the Companies Act, 1956 (corresponding Section 26, 33, 40 and 42 of the Companies Act, 2013) read with Section 465 of the Companies Act, 2013, clause 2.1.4, 5.6.2, 2.5, 2.1.5, 5.4, 10.2, 6.0 to 6.15, 2.1.1, 5.6A, 6.16 to 6.33 and chapter X of DIP Guidelines, 2000 and Regulation 4(2)(a),4(2)(b), 4(2)(c), 4(2)(d), 4(3), 4(4), 5, 6, 7, 8, 9, 15 to 19 and 26 of ILDS Regulations. Further, I find that Noticee No.2 acted in violation of Section 73 of the Companies Act, 1956.

92. In the foregoing paragraphs, I have found that SDIs issued by Noticee No.1 in the year 2014-15 and 2017-18 were not private placement but public issue. The SCN has alleged that Noticee No.2 to 8 were directors of Noticee No.1 at the relevant time; as such were part of decision of Noticee No.1 to issue such SDIs and were officers in default in respect of issuance of SDIs. In the board meeting dated April 11, 2014 and April 28, 2017, the board of Noticee No.1 approved issuance of SDIs. Pursuant thereto, SDIs were issued in the year 2014-15 and 2017-18. As per attendance sheet for board meeting dated April 11, 2014 and April 28, 2017, Noticee No.2 to 7 had attended the said board meetings. Noticee No. 2 to 8 have not disputed their period of directorship or their role alleged in the SCN. Accordingly, I find that Noticee No.2 to 8 failed:-

a. To make disclosures in the prospectus as required to be stated in terms of Section 26 of the Companies Act, 2013;

b. To issue abridged prospectus in terms of Section 33 of the Companies Act, 2013;

c. to file prospectus with the concerned ROC;

d. To make an application to the Stock Exchange(s) for permission for the SDIs to be dealt with in such Stock Exchange(s);

e. To appoint registered debenture trustee in terms of Regulation 4(4) of ILDS Regulations

f. To comply with public issue requirements provided in Regulation 4(2)(a),4(2)(b), 4(2)(c), 4(2)(d), 4(3), 4(4), 5, 6, 7, 8, 9, 15 to 19 and 26 of ILDS Regulations;

93. For the foregoing reasons, I find that Noticee No. 2 to 8 acted in violation of Section 26, 33, 40 and 42 of the Companies Act, 2013, Rule 14(2)(b) of the Companies (Prospectus and Allotment of Securities) Rules, 2014 and

Regulation 4(2)(a),4(2)(b), 4(2)(c), 4(2)(d), 4(3), 4(4), 5, 6, 7, 8, 9, 15 to 19 and 26 of ILDS Regulations.

Role of Noticee No.13 and 14

94. I note that Noticee No.13 and 14 are alleged to have acted as debenture trustee **("DT")** without obtaining certificate of registration from SEBI for NCDs issued by Noticee No.1, thereby, Noticee No.13 and 14 are alleged to have violated Section 12(1) of the SEBI Act and Regulation 7 of the Debenture Trustees Regulations.

95. I note that Noticee No.14 acted as DT for I, J, K, L, M and N series of NCDs, issued by Noticee No.1 during 2005 to 2006 and mentioned at serial no. 1 to 6 of Table 2 above. Noticee No. 13 acted as DT for series O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, AB, AC, AD, AE, AF, AG, AH, AI, AJ, AK, AL, AM, AN, AO, AP, AQ, AR, AS, AT, AU, AV, AW and AX NCDs, issued by Noticee No.1 during 2007 to 2013 and mentioned at serial no. 7 to 42 of Table 2 above.

96. Noticee No.13 and 14 have submitted that the Companies Act, 1956 has been repealed by the Companies Act, 2013. Section 465 of the Companies Act, 2013 has provided protection only to such actions done or taken or purported to have been done or taken under erstwhile enactment. The SCN is a fresh action initiated under the Companies Act, 1956 Act after its abrogation.

97. I note that Section 465 of the 2013 Act was notified with effect from January 30, 2019. Sub-section 2 of Section 465 lists actions which stands saved despite repeal of the 1956 Act. Section 465(3) reads *"mention of particular matters in sub-section (2) shall not held to prejudice general application of Section 6 of the General Clauses Act, 1897 with regard to the effect of repeal of the repealed enactment*". I note that Section 6 of the General Clauses Act, 1897 provides that where any Central Act repeals any enactment then unless a different intention appears, the

repeal shall not affect any investigation or legal proceeding under the repealed enactment and any such investigation or legal proceeding may be instituted, continued or enforced as the repealing Act had not been passed. In view of the above, I find that investigation or legal proceedings initiated under the 1956 Act shall not lapse due to commencement or operation of the Companies 2013 Act and such investigation or proceedings can be continued. In the instant case, investigation or examination was initiated in the year 2017 and information was being sought from Noticee No.1 till 2019. Accordingly, I find no merit in submission of Noticee No.13 and 14 that the SCN is not continuation of action initiated under the Companies Act, 1956 Act or the action initiated under the SCN is barred by any law.

98. In view of the above finding on the issue whether NCDs issued by Noticee No.1 is private placement or public issue, I find no merit in submission of Noticee No.13 and 14 that NCDs were not public issue but private placement and issue of NCDs by Noticee No.1 would fall within jurisdiction of RBI and not SEBI. I also find no merit in submission that Section 67(3A) is not included in Section 55A of the 1956 Act which lists out provisions to be administered by SEBI. In view of findings made by the Hon`ble Supreme Court in the Sahara Judgment (Supra), I find no merit in submission of the Noticee(s) that there was no intention to list securities on part of BRD, thus, there was no requirement to comply with Section 73 of the Companies Act, 1956. In this regard, Hon`ble Supreme Court has observed that "*If an unlisted company expresses its intention, by conduct or otherwise, to offer its securities to the public by the issue of a prospectus, the legal obligation to make an application on a recognized stock exchange for listing starts".* Accordingly, I find no merit in submission of the Noticee(s) that DT Regulations will not apply in the instant case as there was no "issue" of securities to public within the meaning of Section 55A of the Companies Act, 1956 or Regulation 2(ea) of DT Regulations.

99. I note that Section 2(12) of the Companies Act, 1956 Act defines debenture to include "debenture stock bonds and any other securities of a company, whether constituting a charge on the assets of the company or not". Regulation 2(1) (e) of ILDS Regulations define debt securities to mean *"a non-convertible debt securities which create or acknowledge indebtedness, and include debenture, bonds and such other securities of a body corporate or any statutory body constituted by virtue of a legislation, whether constituting a charge on the assets of the body corporate or not, but excludes bonds issued by Government or such other bodies as may be specified by the Board , security receipts and securitized debt instruments"* Accordingly, I do not find any merit in submission that NCDs issued by Noticee No.1 are deposits and not debentures as subscriptions raised with a charge on movable properties are classified as deposits and subscriptions raised with charge on immovable properties are classified as debentures.

100. Noticee No.14 has submitted that as per Regulation 25 of Debenture Trustees Regulations alleged default needs to be dealt with in the manner provided in the SEBI(Intermediaries) Regulations, 2008. Accordingly, Noticee No.14 has sought (a) related file notes and related approval granted by the designated member culminating in the issuance of the SCN; (b) Documents relating to your appointment as a designated authority for issuance of the impugned SCN. I note that Regulation 25(1) of the Debenture Trustees Regulations provides for liability for action in case of default by a "Debenture Trustee". I find that Regulation 25 (1) of Debenture Trustees Regulations is applicable to defaults committed by Debenture Trustee', who has been granted certification of registration to act as such by SEBI under Regulation 8 of Debenture Trustees Regulations. Thus, Regulation 25(1) of Debenture Trustees Regulations is not applicable to present case as Noticee No. 13 and 14 acted as DT without obtaining certificate of registration from SEBI. In case of Noticee No. 13 and 14, Section 12 of the SEBI Act and Regulation 7 of Debenture Trustees Regulation is application.

101. I note that Section 12(1) of the SEBI Act reads as follows: -

"Registration of stock brokers, sub-brokers, share transfer agents, etc.
12. (1) "No stock broker, sub-broker, share transfer agent, banker to an issue, trustee of trust deed, registrar to an issue, merchant banker, underwriter, portfolio manager, investment adviser and such other intermediary who may be associated with securities market shall buy, sell or deal in securities except under, and in accordance with, the conditions of a certificate of registration obtained from the Board in accordance with the regulations made under this Act:……"

102. Regulation 7 of Debenture Trustees Regulations reads as follows: -

"No person shall be entitled to act as a debenture trustee unless it is :—

(a) a scheduled bank carrying on commercial activity; or

(b) a public financial institution as defined sub-section (72) of section 2 of the Companies Act, 2013; or

(c) an insurance company; or

(d) body corporate as defined under sub-section (11) of section 2 of the Companies Act, 2013.

103. Noticee No.13 and 14 admittedly acted as DT to NCDs issued by Noticee No.1. Noticee No.13 and 14 acted as DT without obtaining certificate of registration from SEBI. They are individuals and are not eligible to be appointed as DT as per Regulation 7 of Debenture Trustees Regulations. Thus, I find that Noticee No.13 and 14 violated Section 12(1) of the SEBI Act and Regulation 7 of Debenture Trustees Regulations.

Liability for Refund

104. Noticee No.1 vide reply dated October 16, 2020 submitted that out of 42 NCD issues 34 issues from I to AL and from AP to AS were duly redeemed upon maturity. The tenure of remaining 8 issues i.e. AM, AN, AO, AT, AU, AV, AW and AX were extended vide general meeting of Noticee No.1 held on December 21, 2013. Noticee No.1 vide submissions dated June 30, 2023 has submitted that as of June 30, 2023 NCDs having series AM, AO, AT, AU, AV, AW and AX are outstanding. Further, Noticee No.1 vide written submissions dated March 9, 2024 has stated

that NCDs have been repaid/redeemed. In support of such claim of repayment/redemption, certificate dated March 9, 2024, from the Chartered Accountant of Noticee No.1, has also been filed which in the column ‘Status’ mentions “CLOSED”. The certificate mentions serial number, Series of NCDs, date of allotment, Charge ID, Amount in Rupees, Date of Maturity and Status.

105. I note that Noticee No.1 has not furnished any supporting document in support of claim of redemption or repayment of NCDs made vide reply dated October 16, 2020 and submission dated June 30, 2023. Noticee No.1 has not furnished details such as Name of the subscriber, Name of Payee, date of repayment, amount of payment, mode of repayment, etc., Further, with respect to claim of redemption/repayment made vide submission dated March 9, 2024, it is noted that the certificate as well as submission of Noticee No.1 are silent on mode of repayment, amount of repayment, dates on which repayments were done. Further, no supporting documents such as bank statements showing repayment, acknowledgment of receipt of payment from NCD holders have been filed.

106. With respect to SDIs, Noticee No.1 has stated vide reply dated December 15, 2020 that SDIs which are following scheduled maturity pattern are being duly redeemed by Noticee No.1 from time to time. However, no details of such repayment, if any, has been furnished.

107. I note that Section 73(2) of the Companies Act, 1956 mandates that where permission for listing has not been applied, the Company shall repay without interest all money received from applicant and if such money is not repaid within eight days after the Company becomes liable to pay then the Company and every director of the company who is an officer in default shall, on and from the expiry of the eight day, be jointly and severally liable to repay that money with interest at such rate, not less than four percent and not more than fifteen percent.

108. Section 5 of the Companies Act 1956 defined ‘officer in default’ as follows: -

Section 5 of the Companies Act, 1956

“For the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any punishment or penalty, whether by way of imprisonment, fine or otherwise, the expression "officer who is in default" means all the following officers of the company, namely :
(a) the managing director or managing directors ;
(b) the whole-time director or whole-time directors ;
(c) the manager ; (d) the secretary ;
(e) any person in accordance with whose directions or instructions the Board of directors of the company is accustomed to act ;
(f) any person charged by the Board with the responsibility of complying with that provision :
Provided that the person so charged has given his consent in this behalf to the Board ;
(g) where any company does not have any of the officers specified in clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so specified, all the directors..”

109. I note that the Hon’ble SAT in the matter of Sayanti Sen versus SEBI (Appeal No.163 of 2018) vide its order dated August 09, 2019 has held as follows: -

> *“13. As per Section 5 of the Companies Act it becomes clear that a managing director, whole time director, manager, secretary and any person who has been authorized by the board or by any director are now officers in default. Section 5(g) of the Companies Act makes it apparently clear that if there is a managing director appointed in a company, he would be an officer in default. Further, in the absence of any managing director, if the board has specified any particular director or manager or any other person as an officer in default in which case only that specified director or manager etc. as the case may be would bean officer in default.*
>
> *Section 5(g) of the Companies Act further provides that apart from the directors any officer can also be penalized if his role can be attributed to be an officer in default. If any officer has played some role in bringing about the default or he might have performed the duties assigned to him then he could be penalized as an officer in default. Section 5(g) of the Companies Act thus makes it clear that in the absence of any managing director or any specific order of a*

board, then by a deeming fiction, all the directors of the company would be officers in default."

110. During the relevant time, Noticee No.2 was acting as MD of Noticee No.1. Noticee(s) have not placed on record any document which indicates repayment of application money to applicants of NCDs within period of eight days or thereafter along with interest. In view of the above, I find that Noticee No.2 is an officer in default within meaning of Section 5 of the Companies Act, 1956 and is liable along with Noticee No.1 to refund subscription received through NCDs in terms of Section 73 of the Companies Act, 1956.

111. I note that Section 40(3) of the Companies Act, 2013 reads as follows:-

"(3) All monies received on application from the public for subscription to the securities shall be kept in a separate bank account in a scheduled bank and shall not be utilised for any purpose other than—
(a) for adjustment against allotment of securities where the securities have been permitted to be dealt with in the stock exchange or stock exchanges specified in the prospectus; or

(b) for the repayment of monies within the time specified by the Securities and Exchange Board, received from applicants in pursuance of the prospectus, where the company is for any other reason unable to allot securities.

Further, sub-section 5 of Section 40 of the Companies Act, 2013 provides that if default is made in complying with provisions of Section 40 then the company and every officer of the company who is in default shall be punishable.

112. Section 2(60) of the Companies Act, 2013 reads as follows: -

"officer who is in default", for the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any penalty or punishment by way of imprisonment, fine or otherwise, means any of the following officers of a company, namely:--

(i) whole-time director;

(ii) key managerial personnel;

(iii) where there is no key managerial personnel, such director or directors as specified by the Board in this behalf and who has or

have given his or their consent in writing to the Board to such specification, or all the directors, if no director is so specified;

(iv) any person who, under the immediate authority of the Board or any key managerial personnel, is charged with any responsibility including maintenance, filing or distribution of accounts or records, authorises, actively participates in, knowingly permits, or knowingly fails to take active steps to prevent, any default;

(v) any person in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity;

(vi) every director, in respect of a contravention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings without objecting to the same, or where such contravention had taken place with his consent or connivance;

(vii) in respect of the issue or transfer of any shares of a company, the share transfer agents, registrars and merchant bankers to the issue or transfer;

113. I note that Rule11 of the Companies (Prospectus and Allotment of Securities) Rules, 2014 reads as follows: -

"(1) If the stated minimum amount has not been subscribed and the sum payable on application is not received within the period specified therein, then the application money shall be repaid within a period of fifteen days from the closure of the issue and if any such money is not so repaid within such period, <u>the directors of the company who are officers in default shall jointly and severally be liable to repay that money with interest at the rate of fifteen percent per annum.</u>

114. As noted above, as per the SCN Noticee No.2 to 8 were directors of Noticee No.1 at the relevant time; as such were part of decision of Noticee No.1 to issue SDIs and were officers in default in respect of issuance of SDIs. In the board meeting dated April 11, 2014 and April 28, 2017, the board of Noticee No.1 approved issuance of SDIs. Pursuant thereto, SDIs were issued in the year 2014-15 and 2017-18. As per attendance sheet for board meeting dated April 11, 2014 and April 28,

2017, Noticee No.2 to 7 had attended the said board meetings. Noticee No. 2 to 8 have not disputed their period of directorship or their role alleged in the SCN. Accordingly, I find that Noticee No.2 to 8 are officer in default within the meaning of Section 2(60) and 40 of the Companies Act, 2013 and are liable to refund subscription received through bonds/SDIs along with interest at the rate of 15 percent per annum.

115. I note that Noticee No.10 and 11 passed away on August 8, 2023 and January 20, 2017, respectively. In this regard, death certificate of Noticee No.10 and 11 have also been filed. Considering the same, I find that proceedings against Noticee No.10 and 11 stands abated.

116. Having observed that each issuance of NCDs and bonds/SDIs by Noticee No.1 is public issue in the guise of private placement. Such issuance of NCDs and SDIs are in violation of public issue norms, as detailed hereinabove. During the issuance of such NCDs and SDIs, Noticee No. 1 to 9 and 12 were directors of Noticee No.1. Noticee No.13 and 14 acted as debenture trustee in respect of NCDs. Accordingly, I proceed to issue necessary directions against the Noticee No. 1 to 9, 12, 13 and 14.

ORDER

117. In view of the foregoing, I, in exercise of the powers conferred upon me under Section 19 read with Sections11(1), 11(4), 11A and 11B of the SEBI Act, 1992, hereby issue, with immediate effect, the following directions: -

(a) Noticee No.1 and 2 shall jointly and severally refund the money collected through the offer and allotment of NCDs by BRD, with an interest of 15% per annum [the interest being calculated from the date when the repayments became due in terms of Section 73(2) of the Companies Act, 1956 till the date of actual payment], within a period of 180 days from the date of receipt of this Order.

(b) Noticee No.1 and 2 shall within fifteen days from the date of receipt of this Order issue a public notice, in all editions of one English national daily and one vernacular daily with wide circulation, detailing the modalities for refund of money collected by BRD through such NCDs including details such as names, addresses and contact details of contact persons, requesting investors to lodge their claim within a period of 30 days from the date of public notice.

(c) Noticee No.1 to 8 shall jointly and severally refund the money collected through the offer and allotment of bonds/SDIs by BRD, with an interest of 15% per annum [the interest being calculated from the date when the repayments became due in terms of Section 40 of the Companies Act, 2013 till the date of actual payment], within a period of 180days from the date of receipt of this Order.

(d) Noticee No.1 to 8 shall within fifteen days from the date of receipt of this Order issue a public notice, in all editions of one English national daily and one vernacular daily with wide circulation, detailing the modalities for refund of money collected by BRD through such bonds/SDIs including details such as names, addresses and contact details of contact persons, requesting investors to lodge their claim within a period of 30 days from the date of public notice.

(e) Such refund shall be made through banking channels such as demand draft or electronic mode of transfer and a trail of such refunds shall be maintained by the Noticee(s) for verification, if necessitated at a later date.

(f) After completing the aforesaid repayments as directed above, Noticee No.1 shall file a report of such completion with SEBI, within a period of 210 days from the date of this order. The said report shall be certified by two independent peer reviewed Chartered Accountants who are in the panel of any public authority or public institution. For the purpose of this Order, a peer reviewed Chartered Accountant shall mean a

Chartered Accountant, who has been categorized so by the Institute of Chartered Accountants of India **(ICAI)** holding such certificate.

(g) Noticee No. 1 is restrained from, directly or indirectly, accessing the capital market by issuing Prospectus, any offer document or advertisement soliciting money from the public for a period of two years from the date of this order or till the date of refund of money to the allottees, whichever is later.

(h) Noticee No. 2 to 9, and 12 are further restrained from associating themselves with any listed public company and any public company which intends to raise money from the public, or any intermediary registered with SEBI for a period of two years from the date of this order or till the date of refund of money to the allottees, whichever is later.

(i) Noticee No. 2 to 9 and 12 are restrained from accessing, directly or indirectly, the securities market and are further prohibited from buying, selling or otherwise dealing in securities market, in any manner whatsoever, for a period of two years from the date of this order, or till the date of refund of money to the allottees, whichever is later.

(j) Noticee No. 1 to 8 are directed to provide a full inventory of all their assets and properties and details of all their bank accounts, demat accounts and holdings of mutual funds / shares / securities, if held in physical form and demat form and the information sought shall be provided within a period of 15 days from the date of receipt of this order.

(k) Noticee No. 1 and its present directors are permitted to sell the assets, properties and holding of mutual funds/shares/securities held in demat and physical form, by Noticee No.1 for the sole purpose of making the refunds as directed above and deposit the proceeds in an Escrow

Account opened with a nationalized Bank. Such proceeds shall be utilized for the sole purpose of making refund / repayment to the investors till the full refund / repayment as directed above is made.

(l) Noticee No. 13 and 14 are restrained from accessing, directly or indirectly, the securities market and are further prohibited from buying, selling or otherwise dealing in securities market, in any manner whatsoever, for a period of two years from the date of this order.

(m) In view of prohibition on sale of securities, it is clarified that during the period of restraint, the existing holding, including units of mutual funds, of Noticee No. 1 to 9, 12, 13 and 14 shall remain frozen.

(n) The SCN against Noticee No.10 and 11 is disposed without any directions.

(o) The above directions shall come into force with immediate effect.

118. A copy of this order shall be served on all the Noticee(s), the recognized stock exchanges, depositories and registrar and transfer agents, ICAI and RBI for information and necessary action.

K. SARAVANAN
CHIEF GENERAL MANAGER
SECURITIES AND EXCHANGE BOARD OF INDIA

Date: May 30, 2024
Place: Mumbai