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F. No.9- 25/2009/FIU-IND
Government of India
Ministry of Finance
Department of Revenue
Financial Intelligence Unit-India (FIU-IND)

6th Floor, Hotel Samrat,
Kautilya Marg, Chanakyapuri,
New Delhi-110021,
Dated: 04th November, 2015

ORDER-IN ORIGINAL NO. 23 /DIR/FIU-IND/2015

Name and address of the Reporting Entity: National Spot Exchange Ltd.
FT Towers, CTS No 256 & 257
4th Floor, Suren Road
Chakla Andheri (East)
Mumbai -400 093.

Show Cause Notice No. & date : F. No.9-25/2009/FIU-IND dated 11th August, 2015

Section under which order passed: Section 13 of PMLA 2002

Date of Order : 04th November, 2015

Authority passing the order: Director, Financial Intelligence Unit-India

An appeal against this order may be made with the Appellate Tribunal under PMLA, 2002, 4th Floor, Lok Nayak Bhavan, Khan Market, New Delhi within a period of forty five days from the date on which this order is received by the National Spot Exchange Ltd. The appeal should be in the form and manner prescribed [refer to sub-section (3) of section 26 of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as "PMLA")].

2. In terms of Section 2(1) (n) of the PMLA as amended with effect from 15th February, 2013 by the Prevention of Money Laundering (Amendment) Act, 2012, an association "recognized" or "registered" under the Forward Contracts (Regulation) Act, 1952 (hereinafter referred to as the "FCRA") or any member of such an association is an

intermediary and, therefore, a reporting entity under section 2(1)(wa) of the PMLA. A reporting entity is required to comply with the various obligations laid down under sections 12 and 12A of the PMLA and the rules made thereunder.

3. National Spot Exchange Ltd. (hereinafter referred to as "NSEL") is a Spot Exchange. Vide Gazette Notification dated June 5, 2007, NSEL was granted exemption under section 27 of the FCRA from operation of the said Act for all forward contracts of one day duration for the sale and purchase of commodities traded on NSEL subject to the following conditions:

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

4. Section 12 of the PMLA and the Prevention of Money Laundering (Maintenance of Records) Rules, 2005 (hereinafter referred to as the "Rules") framed under the PMLA impose on all reporting entities obligations that include maintaining prescribed records of specified transactions, appointing a Principal Officer and a Designated Director, performing client due diligence and furnishing to Director, Financial Intelligence Unit-India (hereinafter referred to as "Director, FIU-IND") prescribed reports including reports on suspicious transactions (STRs).

5. Rule 3 of the Rules specifies the transactions, the records of which are to be maintained; Rule 7 prescribes the procedure and manner of furnishing information, including an obligation to evolve an internal mechanism for detecting the prescribed transactions. Rule 8 of the Rules prescribe the time of furnishing such information and Rule 9 of the Rules prescribes the procedure and manner of verification of records of identity of clients. Rule 2 of the Rules defines a transaction, to include any payment made or received in whole or in part of any contractual or other legal obligation. The Rules also specify the situations that could indicate the existence of suspicious transactions that

would warrant filing suspicious transaction reports (STR) under Rule 7 of the Rules. These situations are as follows:

- a) Transaction which gives rise to a reasonable ground of suspicion that it may involve proceeds of an offence specified in the Schedule to the PMLA, regardless of the value involved;
- b) appears to be made in circumstances of unusual or unjustified complexity;
- c) appears to have no economic rationale or bona fide purpose; or
- d) gives rise to a reasonable ground of suspicion that it may involve financing of the activities relating to terrorism.

6. Section 13 of the Act confers on the Director, FIU-IND powers to enquire into cases of failure to comply with the provisions of sections 12 and 12A of the PMLA and the Rules framed thereunder and to impose sanctions including fines in case of such failure to comply.

7. Following reports that NSEL had been undertaking activities that were not covered by the exemption granted to it vide the Gazette notification dated 5th June, 2007 and carrying out of which could be authorized only to an association 'recognized' or 'registered' under the FCRA, and that transactions /contracts facilitated by NSEL had led to defrauding of thousands of investors involving several thousands of crores of rupees, there were concerns that NSEL, in carrying out these non-exempted activities without getting 'recognized' or 'registered', had deliberately avoided coming under the purview of PMLA and fulfilling its obligations under PMLA. These obligations include, as mentioned above, carrying out customer due diligence and filing prescribed reports including STRs, with Director, FIU-IND. The alleged violations by NSEL included facilitating trading in "non-existent goods", which was tantamount to short selling, and offering contracts with settlement period of more than 11 days which were two of the six specific conditions (see paragraph 3 supra) that formed the basis of exemption granted to NSEL by the Central Government in 2007. Accordingly, NSEL was asked to explain its conduct and also why action should not be taken against it under section 13 of the PMLA. The details of the letters written to NSEL are as follows:

- i. Letter dated 16th January, 2015
- ii. Letter dated 6th February, 2015
- iii. Letter dated 12th May, 2015
- iv. Letter dated 5th June, 2015

In its replies to the above letters NSEL maintained that it was not a reporting entity in terms of the PMLA and therefore not subject to the obligations under the PMLA.

8. As the transactions/ contracts undertaken through or facilitated by the NSEL had been used to perpetrate financial irregularities that led to defrauding of thousands of investors thereby affecting public interest, and criminal investigations had been launched against NSEL, its directors and management for cheating, forgery, criminal breach of trust, money laundering and criminal conspiracy, a show cause notice dated 11th August, 2015 was issued to NSEL under section 13 of PMLA asking NSEL to show cause why action be not taken against NSEL for failing to carry out its obligations under PMLA despite being a deemed reporting entity by virtue of facilitating trade in contracts having settlement period of more than 11 days, which could not be carried out without being recognized or registered under FCRA. NSEL was specifically asked to show cause for not fulfilling the following obligations:

- i) Failure to register as a Reporting Entity with FIU-IND.
- ii) Not appointing a Designated Director and a Principal Officer as required under Rule 7(1) of the Rules.
- iii) Not furnishing any report as required under Section 12(1)(b) of the Act read with the Rule 7 and Rule 8 of the Rules.
- iv) Not furnishing details of its members who are also intermediaries as per the amended provisions of the Act.
- v) Not furnishing details, despite repeated requests dated 6th February, 2015, 12th May, 2015 and 5th June, 2015, of NSEL's Board of Directors and key officials who were holding office during the period 15th February, 2013 to 19th September, 2014 and the details of NSEL's current Board of Directors and key officials.
- vi) Wilfully avoiding the obligations of a reporting entity under Section 12 of the PMLA by choosing not to be registered or recognised under the FCRA even though carrying out activities, which required it to be registered or recognised under the FCRA.

9. NSEL in their reply dated September 1, 2015 stated that NSEL was a spot exchange to which exemption had been granted under section 27 of the FCRA subject to certain conditions. By notification dated August 6, 2013 all operations of NSEL were suspended and vide notification dated September 19, 2014, the exemption under section 27 was withdrawn. NSEL also stated that the notification clearly states that exemption

was from the operations of the provision of the Act (FCRA) and, therefore, when NSEL was exempt from the provisions of FCRA, the contracts having settlement period of more than 11 days may be carried out without being a recognized or registered association. NSEL submitted that it was not a reporting entity as envisaged under the provisions of PMLA and hence the consequential obligations as stated in para 7 of the notice are not applicable to NSEL, its Directors and officials.

10. On request of NSEL, a personal hearing was granted on 14th September, 2015 which was re-scheduled to 15th September 2015 as per the request of NSEL. The hearing was attended by Shri P.R. Ramesh, Advocate and Shri Ashish Kakade, Vice President, Legal, of NSEL. During the course of hearing, NSEL:

- i) averred that NSEL did not violate any of the conditions of exemption under the notification of 5th June, 2007. NSEL would file an affidavit to that effect.
- ii) Admitted that none of the contracts resulted in the same day delivery. The dates of delivery were open ended and varied from contract to contract.
- iii) Admitted that NSEL was aware of the requirements under the PMLA that was amended w.e.f. 15th February, 2013 and the requirement of PML Rules.
- iv) Admitted that the operation of NSEL and its members were vulnerable to money laundering and financing of terrorism. However, a legal view was taken that NSEL did not have any reporting obligations due to exemption under Section 27 of FCRA.
- v) Admitted that the contracts that failed in July 2013 when the operations of NSEL stopped functioning were undertaken through the Exchange over the period from February 2013 to July, 2013.
- vi) Admitted that NSEL had in place systems and procedures for undertaking KYC etc. but did not choose to report to FIU-IND in terms of PMLA (Section 12) due to its legal interpretation that it was not a Reporting Entity, due to exemption under Section 27 of FCRA. In NSEL's views, there is no concept of "deemed Reporting Entity".
- vii) Admitted that it has chosen not to appoint a Principal Officer or Designated Director under the PMLA even after the exemption under Section 27 of FCRA was withdrawn in September, 2014 as it was not carrying on any activity except recovery.
- viii) Stated that it was reporting to FMC as prescribed by them.
- ix) NSEL also sought permission to make supplementary submission by 28th September, 2015. While permitting NSEL to make supplementary submissions,

NSEL was asked to submit the following documents in support of its arguments:

- a) Affidavit that none of the conditions of exemptions was violated.
- b) Evidence of Section 27 given to other entities along with copies of contracts.
- c) List of contracts on NSEL between 15.2.2013 and 31.7.2013 along with their age profile and delivery periods.
- d) FMC's letter to Government of India on penalties and regulatory status.

11. The following is a summary of the submissions made by NSEL in its various written and verbal submissions:

- a) The notice has been issued without jurisdiction. Before proceeding with the adjudication on the present notice, which proposes imposition of a penalty, a reasoned order in relation to jurisdictional issue must be passed first before embarking upon the adjudication for the purposes of imposition of penalty. Reliance has been placed on the judgement of the Supreme Court in Union of India versus Adani Exports Ltd.
- b) NSEL was never a "registered" or "recognized" association under the provisions of the FCRA and hence it was not a reporting entity under the provisions of PMLA.
- c) The notice is without jurisdiction since NSEL is neither recognized nor registered under FCRA. The provisions of PMLA are attracted only if NSEL is recognized or registered as an association under FCRA. It is only the fact of recognition or registration under FCRA which can confer jurisdiction on the authorities under PMLA.
- d) The legal position has been reiterated in all the replies submitted by NSEL but non-existent legal concepts such as 'deemed intermediary' under the FCRA and a "deemed reporting entity" under the PMLA have been erroneously introduced only with a view to apply penal provisions against NSEL, its Directors and key officials.
- e) Present proceedings are initiated on an erroneous assumption that there is deemed recognition or registration on account of alleged violation of the exemption conditions of the Notification dated June 5, 2007 issued by the Central Government in exercise of powers under section 27 of the FCRA. Following are the reasons given, in brief:
 - a. Legal fiction or a deeming provision is a creation of statute.

- b. Section 27 has no relevance to the recognition or registration of an association under FCRA. Consequently, if there is a breach of the conditions of exemption, such a breach shall not and cannot result in automatic recognition or registration of an association under FCRA. Any violation of the conditions of the exemption has to be confined to the scope of the section, i.e., withdrawal of exemption or such other consequences as contained in the exemption notification and nothing beyond such consequence.
- c. NSEL was directed by an order dated July 12, 2013 not to launch any new contracts and settle outstanding contracts by due date and by notification dated August 6, 2013 was directed to stop all business and exemption was withdrawn by notification dated September 19, 2014.
- f) Central Government vide notification dated August 6, 2013 suspended all the operations of NSEL and vice Notification dated September 19, 2014, withdrew the exemption granted through the Gazette Notification dated 5th June, 2007.
- g) All forward contracts of one day duration were exempted vide notification dated June 5, 2007 which is also evident from the notification dated September 19, 2014 through which the exemption was withdrawn.
- h) In the notification dated June 5, 2007, while many conditions were imposed, there was no condition that the settlement period of the contracts should not be more than 11 days. During the personal hearing, it had been submitted that there was no legal requirement that the delivery should take place on the same date as the trading date as interpreted by the FIU-IND as even the FCRA does not envisage such a situation and allows 11 days period to complete delivery. NSEL was granted exemption under Section 27 of the FCRA "from the operation of the Provisions of the said Act", the 11 days period was not applicable to NSEL contracts.
- i) Assuming but not accepting that any of the conditions were violated the penalty consequence under the Provisions of Section 20 or 21 of the FCRA would follow. The FCRA does not speak of an entity committing violation, become a "deemed recognised" or "deemed registered" entity.
- j) In terms of Sub section 2 of Section 13 of PMLA, it is incumbent and mandatory to give reasons why other actions contemplated in clause (a) to (c) of Sub section 2 of Section 13 of the PMLA shall not meet the ends of jurisdiction before imposition of penalty in terms of Clause (d) thereof. Imposition of penalty in terms of Section 13(2)(d) also requires proof of mens rea which is totally absent in the personal case. Absence of mens rea is also fortified by the fact that the Rules in relation to maintenance of records and reporting for Reporting Entity as

defined in Section 2(1) (wa) pursuant to an amendment to the PMLA came into force only on August 27, 2013. No person can be penalised if the Rules relating to Reporting Entity themselves were not in force. The absence of mens rea is also evident from the fact that before the Rules were introduced on August 27, 2013, NSEL had stopped business pursuant to statutory order issued by Government of India on August 6, 2013. Affidavit as mentioned in the record of personal hearing is not being filed since in view of the legal submission made, the question does not arise.

Discussion and Findings

12. The information and evidence available on record, including the written and oral submissions made by NSEL, confirm that NSEL had been undertaking activities that were not covered by the exemption granted vide Gazette Notification dated 5th June 2007. The first two conditions of the exemption were as follows:

- (i) no short sales by members of the Exchange shall be allowed;
- (ii) all outstanding positions of the trade at the end of the day shall result in delivery.

Under section 2 (c) of the FCRA, forward contract means a contract for delivery of goods, and which is not a ready delivery contract. Under section 2(i) of the FCRA, ready delivery contract means a contract which provides for the delivery of goods and the payment of a price therefor, either immediately or within such period not exceeding eleven days after the date of the contract and subject to such conditions as the Central Government may, by notification in the official gazette, specify. It is clear from these that any contract that has a delivery period of more than eleven days is not a ready delivery contract, and therefore a forward contract. Therefore, in permitting contracts with delivery periods of more than eleven days, NSEL permitted execution of forward contracts, an act which required it to be registered or recognised under the FCRA. By not getting registered or recognised under the FCRA, and yet carrying out contracts with delivery periods of more than eleven days, NSEL not only violated the conditions of the exemption granted in 2007, but also wilfully violated the provisions of FCRA and resultantly the provisions of PMLA as will be discussed infra.

13. It must be stated that under section 27 of the FCRA, the Central Government may, by notification in the official gazette, exempt, subject to such conditions and in such circumstances and in such areas as may be specified in the notification, any contract or

class of contracts from the operation of all or any of the provisions of FCRA. This means that the exemption would apply to the contracts or classes of contracts specifically exempted. The exemption would not apply to the contracts or classes of contracts that were not exempted. Since the June 2007 exemption applied to the forward contracts of one day duration, any other contracts undertaken at or through the NSEL were subject to the requirements of the FCRA including the requirement of recognition or registration. Government notification dated 06th August 2013 clearly states that NSEL contravened the specified conditions subject to which the exemption was granted.

14. It is evident from the papers submitted by NSEL, including copies of affidavits filed in writ petition WP2340 of 2013, that the NSEL management permitted the use of NSEL's platform for facilitating contracts/ transactions where 'investors' would advance money to 'buyers' without adequate stocks of commodities or on the basis of fraudulent or forged warehouse receipts. The moneys were diverted or siphoned off by the 'buyers'. As a result, there was a settlement crisis in July 2013, when the NSEL was asked to settle all outstanding transactions/ contracts, and over 13,000 'investors' lost their funds advanced to the 'buyers' to the tune of Rs. 5,500 crore. It is also evident that cases against NSEL and its directors and senior management have been filed by the Mumbai Police and the Enforcement Directorate for cheating, forgery, criminal breach of trust, money laundering and criminal conspiracy. Enforcement Directorate has filed prosecution complaint before the Special PMLA Court, Mumbai under the PMLA. Cases have also been registered and assets attached by the Economic Offence Wing of Maharashtra Police under the MPID Act.

15. During the personal hearing on 15th September 2015, NSEL admitted that the contracts that failed in July 2013, when the operation of NSEL were stopped, were undertaken through the Exchange over the period from February 2013 to July 2013; that NSEL was aware of the requirements of PMLA as amended from 15 February 2013, as well as of the PMLA Rules; and that the operations of NSEL and its members were vulnerable to money laundering and financing of terrorism, however, a legal view was taken that NSEL did not have any reporting obligations due to exemption under section 27 of FCRA. In its follow-up written submission dated 28 September 2015, however, NSEL 'clarified' that the word "admitted" in the record of personal hearing held on 15 September 2015 means and refers to an admission of fact (s), and not to the admission of any violation or contravention, as alleged in the show cause notice or otherwise. NSEL also stated that in the event of any conflict between minutes of meeting and this written submission, the written submission shall prevail. In this backdrop, a point-wise

discussion of the issues raised by NSEL in its supplementary submissions of 28th September 2015 is as follows.

16. NSEL has stated that before proceeding with adjudication of the present notice, a reasoned order in relation to the jurisdictional issue must be passed. PMLA applies to all reporting entities as defined in the PMLA. The reporting entities include entities registered or recognized under the FCRA. It is evident from the information on record as well as the oral and written submissions made by NSEL that NSEL was undertaking activities that required recognition or registration under the FCRA. Therefore, these activities were not covered by the exemption granted to NSEL under section 27 of FCRA and, it was obligatory under the law for the NSEL to get registered or recognized under the FCRA before undertaking those activities. By wilfully not registering or getting recognized under the FCRA, the NSEL has not only violated the FCRA but also the PMLA, by knowingly not submitting to the obligations under the PMLA, to which any other entity, lawfully carrying on such activities, would have been subject. Accordingly, NSEL is deemed to be a reporting entity for the purpose of PMLA. PMLA is a central legislation dealing with prevention of money laundering, a subject that involves significant public interest and which requires proactive measures by the reporting entities including reporting on suspicious transactions to FIU-IND in order to facilitate preventive action against money laundering.

17. Public interest has to take precedence over the private or individual interest, lest individual entities should compromise the public interest by wilfully choosing to avoid subjugation to the law sub-serving public interest on convenient and manufactured technical grounds. Several pronouncements of the Supreme Court on public interest are instructive. In Murlidhar Aggarwal Vs State of Uttar Pradesh (1974) 2SCC472 the Hon. Supreme Court has pronounced that the Courts must certainly weigh the interest of whole community as well as the interest of a considerable section of it. In the Delhi Transport Corpn. V/s D.T.C. Mazdoor Congress AIR 1991 SC 101, the Apex court at para 288 has held that the phrase 'public policy' is incapable of precise definition. It is valued to meet the public good or the public interest. What is public good or in the public interest or what would be injurious or harmful to the public good or the public interest vary from time to time with the change of circumstances. In Central Inland Water Transport Corpn. Ltd. Vs. Brojo Nath Ganguly (1986) 3SCC 156, the Supreme Court has laid down that public policy is not the policy of a particular Government. It connotes some matter which concerns the public good and the public interest. The principles governing public policy must be and are capable, on proper occasion, of expansion or modification.

18. The PMLA, apart from being the law of land is also an important instrument of public policy, as it concerns the public interest and, therefore, any action which is in breach of the provisions of PMLA has to be termed as an action opposed to public policy. It is evident that had NSEL evolved an internal mechanism and established institutional arrangement for compliance with the provisions of PMLA, including filing of STRs, the activities, transactions or contracts that led to defrauding of thousands of investors would likely have been reported to FIU-IND as STRs, much before they eventually came to light. Timely action could have prevented perpetuation of fraudulent behaviour, transactions or contracts and could possibly have saved thousands of investors their hard earned money. Therefore, it is held that NSEL, in wilfully carrying on the activities, transactions or contracts that required registration or recognition under the FCRA, wilfully avoided its obligations as a reporting entity under the PMLA and will be deemed as a reporting entity for the purpose of PMLA and the rules made thereunder. If that were not so, every reporting entity will find some reason to technically escape being categorized as a reporting entity and frustrate the very purpose of the PMLA, thereby also frustrating the public good or public policy. In any event, whether FIU-IND has jurisdiction over the NSEL, is not a matter of subjective satisfaction of NSEL. Under section 51 of the PMLA, the authorities under the PMLA have to exercise their powers and perform their functions under the PMLA in accordance with directions of the Central Government. Therefore, the question of jurisdiction raised by NSEL is superfluous and devoid of any merit.

19. NSEL's argument that it was neither registered nor recognized under FCRA and, hence, was not a reporting entity is invalid and unacceptable. NSEL was undertaking activities that required recognition and registration. Recognition and registration are granted on the application of the entity carrying on those activities. In order to carry on those activities in a legitimate manner, it was incumbent on NSEL to take action for recognition or registration under the FCRA before undertaking the activities that required registration or recognition. It is seen from the papers filed by NSEL that in an affidavit filed in a writ petition, as mentioned above, Government of India had stated that NSEL had applied to FMC in November 2010 for registration under section 14B of FCRA for launching NTSD contracts and that its application was under consideration of FMC to examine the implications of giving such permission to unregulated entities. Thus the NSEL was aware that the exemption granted under section 27 of FCRA was not applicable in respect of NTSD contracts. NSEL therefore permitted execution of NTSD contracts without the requisite registration and, in doing so, NSEL wilfully avoided its obligations not only under the FRCA but also under the PMLA. It is clear that the

responsibility for permitting NTSD contracts without getting NSEL registered or recognised under FCRA lay squarely on NSEL and its management. NSEL cannot be absolved of its obligations under the PMLA merely on the ground that it was not recognized or registered under the FCRA, as NSEL deliberately chose to carry out those activities for which it was not authorised. Having chosen to do so, NSEL cannot claim any immunity from the application of the relevant laws, since NSEL deliberately chose to undertake those activities.

20. This deliberate act of avoidance of law was mala-fide as NSEL's own admissions show that it was aware of the risk of money laundering inherent in its operations as well as in the operations of its members. The nature of allegations being investigated against NSEL viz., cheating, forgery, criminal breach of trust, money laundering and criminal conspiracy, give ample indication that the violations by NSEL merit a more serious treatment than any innocent breach of law. That the FCRA does not mention the words 'deemed intermediary' or the PMLA does not mention the words 'deemed reporting entity' cannot be used as a shield to rationalize NSEL's acts of omission and commission and is not germane. The deeming treatment would derive from the substantive nature of the activities undertaken by the NSEL and the obligations of NSEL would be judged solely on the basis of its activities, actions and intentions. As stated, NSEL's actions in wilfully avoiding its obligations under the FCRA as well as under the PMLA were deliberate and, therefore, NSEL is deemed to be a reporting entity under the PMLA on this substantive ground.

21. It is instructive to note that NSEL has refused to file an affidavit under section 50 of the PMLA that it did not violate any of the conditions of the exemption, despite having committed to do that during the personal hearing on 15 September 2015.

22. NSEL has submitted that the Government notification dated 5th June 2007, did not have any condition that the settlement period of contracts should not be more than 11 days; that 11 days period was not applicable to NSEL contracts; that if any conditions of June 2007 notification were violated then penalty would be imposed under section 20 or 21 of the FCRA and not under the PMLA. These are flawed and make-believe arguments and therefore not acceptable. NSEL had been granted exemption on the condition that no short sales by the members will be allowed and all outstanding positions at the end of the day shall result in delivery. By no stretch of imagination, this can be taken to mean that the period of delivery can be indefinite or infinite or the contracts could be executed without the underlying commodities. Any such interpretation can only be termed as perverse and mischievous as that would lead to misuse and perpetuation of malpractice.

as has been clearly illustrated by the failure of NSEL contracts for which thousands of investors lost their money.

23. There is an umbilical cord between the FCRA and the PMLA inasmuch as only an entity recognized or registered under the FCRA can be reporting entity under the PMLA. The arguments of NSEL that the penal consequences of its violations under the FCRA can only be the sanctions under the FCRA is not acceptable because of this umbilical cord between the FCRA and the PMLA; an entity that violates the FCRA by not getting registered or recognised also violates the PMLA since the act of getting registered or recognised would have made it liable under the PMLA as a reporting entity. By choosing to wilfully carry out activities that NSEL knew required being registered or recognised under the FCRA, NSEL has also knowingly and wilfully avoided its obligations under the PMLA, despite being aware that the activities were vulnerable to money laundering and financing of terrorism.

24. As stated above, Rule 7 requires filing of STRs. During February, 2013 to July, 2013, NSEL facilitated 134 contracts, of which 28 contracts with a value of Rs. 5,084 crores could not be settled on 31/07/2013, when the operations of NSEL were suspended, due to default of buyers. NSEL has submitted that the Enforcement Directorate has filed complaint before the Special Court under section 44 of the PMLA which relates to money laundering. It is evident that there were sufficient reasons for examining the transactions/contracts at NSEL for filing STRs but such scrutiny was never undertaken by NSEL.

25. NSEL has stated that imposition of penalty under section 13(2)(d) requires proof of mens rea which is totally absent in the present case. In the support of this, it has stated that the rules under the PMLA came into force only in August 2013. NSEL has also stated that before a penalty under section 13(d) is imposed, it is mandatory to give reasons why penalty under clauses (a) to (c) of sub section 2 of section 13 cannot be imposed. As far as the issue of mens rea is concerned, it is amply clear from NSEL's own admission that it was aware that the operations of NSEL and its members were vulnerable to money laundering and financing of terrorism, however, a legal view was taken that NSEL did not have any reporting obligations due to exemptions under section 27 of FCRA. This would appear like a wishful thinking. NSEL has not produced any evidence of any consultation with any authority including its regulator or FIU-IND whether it was obligated under the PMLA. What is striking is that this was done fully knowing that the operations of NSEL and its members were vulnerable to money laundering. Therefore, the mens rea is evident. It appears that NSEL was more

concerned about interpreting the laws etc in a manner that would give it a reason to avoid being regulated or furnishing any reports rather than serving the public interest. The mens rea is also evident from the persistent refusal of NSEL to furnish to FIU-IND even routine information, despite repeated letters of requests, including the information on its directors and senior management and submit to the other requirements of law. This is hardly how a law abiding entity conducts itself. This non-cooperation coupled with clear understanding of the vulnerability and risks involved in its operations clearly prove that NSEL had the mens rea underlying its repeated violations of the PMLA obligations. As to the penalties, the different penalties mentioned in section 13(2) of the PMLA do not represent the sequential order in which the penalties have to be imposed on a reporting entity for being in violation of PMLA. These penalties can be imposed in any order depending on the gravity and the nature of violation. In the present case, there is ample evidence of the wilful violation of the law and, therefore, NSEL cannot be let off with a penalty that should normally be imposed for minor violations.

26. In summary, I find that NSEL is guilty of failing in several obligations under the Act and the Rules, as indicated in the Show Cause Notice (refer to paragraph 8 above) and as further elucidated below.

- a) NSEL failed to appoint a Designated Director, as required under Rule 7 (1).
- b) NSEL failed to appoint a Principal Officer, as required under Rule 7 (1).
- c) NSEL failed to furnish to FIU-IND details of its members in violation of section 12A.
- d) NSEL failed to furnish to FIU-IND, despite repeated requests, details of its Board of Directors and key officials, in violation section 12A.
- e) NSEL failed to fulfil its obligations under the PMLA by not evolving a mechanism for detecting and furnishing suspicious transaction reports, resulting in failure to examine 134 contracts that were in operation during the period from 15 February 2013 to 31 July 2013 in violation of Section 12(1)(b) of the Act read with the Rule 7 and 8 of the Rules.

Considering that these failures were deliberate and wilful and keeping in mind that the penalties have to be effective, proportionate and dissuasive, I hereby impose a fine of Rs one lakh for each failure, as detailed below in the table.

Failure	Penalty	Amount
Failure to appoint a Designated Director under Rule 7(1) of the Rules	Rs. 6 lakh at the rate of Rs 1 lakh for each month of violation during the 6-month period from February 2013, when the	Rs 6 lakh

Failure	Penalty	Amount
	PMLA became applicable to NSEL, to July 2013 when NSEL suspended its operation	
Failure to appointing a Principal Officer as required under Rule 7(1) of the Rules.	Rs. 6 lakh at the rate of Rs 1 lakh for each month of violation during the 6-month period from February 2013, when the PMLA became applicable to NSEL to July 2013 when NSEL suspended its operation	Rs. 6 lakh
Failure to furnish details of its members who are also intermediaries as per the amended provisions of the Act.	Rs. 1 lakh for each month of violation during the period from 1 st February, 2015 when the details were asked for to 26 th August, 2015 when the details were filed.	Rs. 7 lakh
Failure to furnish details, despite repeated requests of NSEL's Board of Directors and key officials.	Rs. 1 lakh for each month of violation during the period from 18 th February, 2015 when the details were asked for to 26 th August, 2015 when the details were filed.	Rs. 7 lakh
Failure to evolve a mechanism for detecting and furnishing suspicious transaction reports resulting in failure to examine 134 contracts that were in operation during the period from 15 February 2013 to 31 July 2013 in violation of Section 12(1)(b) of the Act read with the Rule 7 and 8 of the Rules.	Rs 134 lakh at the rate of Rs. 1 lakh for each contract	Rs 134 lakh
Wilfully avoiding the obligations of a reporting entity under Section 12 of the Act by choosing not to be registered or recognised under the FCRA even though carrying out activities, which required it to be registered or recognised under the FCRA.	Rs. 1 lakh for 6 months for each violation for each month of violation during the 6-month period from February 2013, when the PMLA became applicable to NSEL to July 2013 when NSEL suspended its operation	Rs. 6 lakh
	Total	Rs 166 lakh

27. NSEL is, therefore, directed to deposit a fine of Rs 1 crore and 66 lakh and register itself as a reporting entity under the PMLA, failing which the provisions of Section 69 of the PMLA will apply. The fines imposed by this order are without any prejudice to any further action under section 13 of the Act that may be taken against any directors, senior management or officers of NSEL.

(Praveen Kumar Tiwari)
Director
Financial Intelligence Unit-India

To

National Spot Exchange Ltd.
FT Towers, CTS No 256 & 257
4th Floor, Suren Road
Chakla Andheri (East)
Mumbai -400 093.
Through: The Managing Director & CEO