

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

Under sections 11(1), 11(4)(b), 11A(1)(b) and 11B of the Securities and Exchange Board of India Act, 1992 read with regulation 107 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 against Fishermen Development Micro Finance Limited, Mr. Mariadasan Ubald, Mr. Loorduswamy Michaelangelus, Mr. Anthony Pillai Kildos and Mr. Peter Remigius

In the matter of issuance of equity shares by Fishermen Development Micro Finance Limited

Appearance for Noticees:

Mr. Aloyce Franklin Fernandez, Chartered Accountant, M/s. Frank & Co.

1. Securities and Exchange Board of India (hereinafter referred to as "SEBI") received a reference dated July 24, 2014 from Reserve bank of India (hereinafter referred to as "RBI"), regarding the issuance of equity shares made by Fishermen Development Micro Finance Limited (hereinafter referred to as "FDMFL "). It was *inter-alia* stated in the reference that FDMFL has applied for certificate of registration under section 45-I of the Reserve Bank of India Act, 1934 ("RBI Act") for commencing business as a Non-Banking Financial Company-Micro Finance Institution ("NBFC-MFI"). It was also stated that while processing the said application, RBI had observed that FDMFL had made issuance of equity shares to more than 50 persons. Along with the said reference, RBI also enclosed copies of the share allotment forms and letters issued by FDMFL to the allottees.
2. In order to examine the matter, the documents/forms filed by FDMFL with Registrar of Companies, Chennai (hereinafter referred to as "ROC") were also examined. From these documents and the documents forwarded by RBI, the following was observed:
 - a. FDMFL (CIN U65921TN2013PLC090180) was incorporated on March 20, 2013 and is having its registered office at; Coastal Communities Training Centre, Caritas Tower, Bishop's House, Nagercoil, Tamilnadu - 629 001;

- b. The details of the directors of FDMFL (as per MCA- 21 Portal) are as follows:

Name of the Director	DIN No.	Date of appointment as Director
Mr. Mariadasan Ubald	06447105	20/03/2013
Mr. Loorduswamy Michaelangelus	06447463	20/03/2013
Mr. Anthony Pillai Kildos	06447650	20/03/2013
Mr. Peter Remigius	06493162	20/03/2013

- c. The Main Object of FDMFL as per its Memorandum of Association is as follows:

“To carry on the business of Non-Banking Financial Company-Micro Finance Institution as defined by Reserve Bank of India from time to time and to carry on the activities of lending money or providing credit or such other financial assistance as contemplated in the Non banking Financial Company - Micro Finance direction issued by the RBI.”

- d. As per Form 2 and list of allottees filed by FDMFL with ROC on March 19, 2014, FDMFL allotted 51,995 equity shares of ₹1,000 to 3,410 persons aggregating to ₹5.20 Crore;
- e. It was observed that FDMFL did not file any prospectus for its aforesaid issues with ROC or with SEBI;
- f. FDMFL was not registered as a NBFC as on the date of aforesaid allotment.
3. In view of the above, SEBI issued a Show Cause Notice dated September 29, 2014 (hereinafter referred to as "the SCN") to FDMFL and its aforesaid directors (hereinafter collectively referred to as "the Noticees" and individually by their respective names) under sections 11(1), 11(4)(b), 11A(1)(b) and 11B of the Securities and Exchange Board of India Act, 1992 ("SEBI Act") read with regulation 107 of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 ("ICDR Regulations") calling upon them to show cause as to why appropriate action should not be taken against them including:
- (i) directing FDMFL and its directors to refund the money collected under the above issues to the investors with interest,

(ii) directing FDMFL and its directors not to issue prospectus or any offer document or issue advertisement for soliciting money from the public for the issue of securities, in any manner whatsoever, either directly or indirectly, and

(iii) directing FDMFL and other companies, in which its directors hold substantial or controlling interest, not to access the capital market for a particular period as well as to initiate prosecution proceedings under section 621 of the Companies Act, 1956 read with the relevant sections of the Companies Act, 2013.

4. It was alleged in the SCN that the Noticees have violated section 56(1) and 60 of the Companies Act, 1956, section 29, 33 (1) and 40 of the Companies Act, 2013 and regulations 4, 5, 6, 7, 8, 9, 26, 32, 36, 37, 46, 47, 49, 57, 58 and 63 of the ICDR Regulations.
5. FDMFL filed a reply dated October 07, 2014 for itself and its directors, *inter alia*, submitting the following:
 - a. The object of FDMFL is only to run as micro finance institution to carry on activities of lending or providing credit within the parameters laid down by RBI and accordingly, it has duly applied for license to function as NBFC to carry on business as micro finance lending institution. Therefore, FDMFL is a NBFC and has not yet commenced its business of micro finance, as issue of Certificate of Registration from RBI is yet pending.
 - b. The second proviso to section 67 (3) of the Companies Act, 1956 excludes the operation of first proviso to a company, which is non-banking financial company. Similar provisions are also there in the Companies Act, 2013 read with Companies (Prospectus and allotment of Securities) Rules, 2014. FDMFL, which is a NBFC, is thus entitled for the exemption under said section. Therefore, the aforesaid allotment cannot be construed as public offer and does not hit public issue guidelines.
 - c. Since the provisions of section 42 and section 23 (1) (b) of the Companies Act, 2013 are applicable only from April 01, 2014, the allotment made by the FDMFL would solely be governed by the provisions of section 67 of the Companies Act, 1956. The difference in the language of the provisions of section 67 of the Companies Act, 1956 and section 42 of the Companies Act, 2013 read with Rules made hereunder is that under the Companies Act, 1956, if a company is merely a NBFC, the offer or invitation through private placement to more than 50 persons do not constitute public offer, whereas under the provisions of section 42 of the Companies Act, 2013 read with Rules, to avail the benefit of exemption, NBFC should be registered with RBI.

- d. Since the offer/allotment of shares by FDMFL (which is a NBFC) to more than 50 persons is not a public offer within the meaning of section 67 of the Companies Act, 1956, section 60 (requirement to file Prospectus) and section 73 (application to stock exchange to list) will not be applicable to the said issue.
 - e. For the aforesaid reasons, the Noticees have not violated the provisions of section 56 (1) and 60 of the Companies Act, 1956, section 29, 33 (1) and 40 of the Companies Act, 2013 and Regulation 4, 5, 6, 7, 8, 9, 26, 32, 36, 37, 46, 47, 49, 57, 58 and 63 of the ICDR Regulations.
 - f. Since FDMFL has not violated any provisions of the Companies Act, 1956/2013 and SEBI Regulations, action under sections 11(1), 11(4)(b), 11A(1)(b) and 11B SEBI Act, 1992 read with Regulation 107 of the ICDR Regulations is not warranted.
6. The Noticees were afforded an opportunity of personal hearing in the matter on December 16, 2014 when their authorized representative appeared and made submissions on their behalf in line with their written reply. Pursuant to the hearing, the authorized representative submitted certain documents i.e. Certificate of incorporation, Memorandum of Association, Certificate of Commencement, acknowledgement of receipt of application with Reserve Bank of India for Certificate of Registration as NBFC-MFI, copy of balance sheet, excerpts of Companies Act, 1956/2013 and Rules made thereunder containing the relevant provisions thereof.
7. I have carefully considered the SCN, the reply of the Noticees and other relevant material available on record.
8. Before proceeding further with consideration of contentions raised by the Noticees in the present case, it is pertinent to note that the questions of law with regard to number of allottees exceeding more than 49 in an issue of securities, intention of the issuer company to list, interpretation of section 67(3) of the Companies Act, 1956, SEBI's jurisdiction in such matters, etc. have been settled by the Hon'ble Supreme Court of India in its judgment and order dated August 31, 2012 *in matter of Sahara India Real Estate Corporations Limited & Ors. Vs SEBI & Anr.* [(2013) 1 SCC 1] (hereinafter referred to as the "*Sahara Order*"). It is important to note that the Hon'ble Supreme Court in the *Sahara Order* has categorically held that every issue of securities made to fifty or more persons would be treated as a public issue by virtue of the first proviso to section 67(3) of the Companies Act, 1956.
9. In the present case, it is undisputed that FDMFL allotted 51,295 equity shares to 3410 persons on March 19, 2014. Since the aforesaid allotment under consideration by FDMFL

was made before April 1, 2014 (i.e. before section 42 of the Companies Act, 2013 came into effect), the provisions of section 67 of Companies Act, 1956 would apply thereto. Even otherwise, it is important to mention that section 42 of the Companies Act, 2013 only provides for a rule of construction and is *in pari materia* to section 67 of the Companies Act, 1956. Thus, in order to deal with the allegations levelled against the Noticees and their contentions in respect thereof, I deem it necessary to refer to the provisions of section 67 of the Companies Act, 1956 as it applied at the relevant time and provided as under:-

"67. Construction of references to offering shares or debentures to the public, etc.

(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 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 the non-banking financial companies or public financial institutions specified in section 4A of the Companies Act, 1956.

(3A) Notwithstanding anything contained in sub-section (3), the Securities and Exchange Board of India shall, in consultation with the Reserve Bank of India, by notification in the Official Gazette, specify the guidelines in respect of offer or invitation made to the public by a public financial institution specified under section 4A or non-banking financial company's referred to in clause (f) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934)."

10. The Noticees have contended that FDMFL is a NBFC as its object is only to run as a micro finance institution to carry on activities of lending or providing credit within the parameters laid down by RBI and accordingly it has duly applied for license to function as NBFC to carry on business as a micro finance lending institution. They have further contended that the second proviso to section 67(3) of the Companies Act, 1956 exempts all NBFCs (whether registered with RBI or not) from the applicability of the first proviso to section 67(3). In this regard, I note that in the present case, it is undisputed that as on the date of allotment under consideration (i.e. March 19, 2014) FDMFL was not registered with RBI as a NBFC. In fact, as on that date it had not even made an application for obtaining the certificate of registration from RBI, which it eventually did on April 17, 2014 as per its own submission. I note that NBFC has been defined under clause (f) of section 45-I of RBI Act, a reference whereof has also been made in section 67(3A) of the Companies Act, 1956. As per section 45-IA of the RBI Act, notwithstanding anything contained in any other law, such an NBFC cannot commence or carry on its business without obtaining a certificate of registration from RBI. Thus, if FDMFL could not commence the business of an NBFC as it had not obtained the certificate of registration from RBI, it could not even be treated as an NBFC under the provisions of second proviso to section 67(3). I note that recognizing an unregistered entity as an NBFC for the purposes of the RBI Act and the Companies Act, 1956, merely on the basis that its object is to carry out activities as that of an NBFC, would defeat the very purpose of registration and regulation of NBFCs under the law. In view of the above, I reject the contentions of the Noticees in this regard and find that the issuance of shares by FDMFL to 3410 persons was a public issue by virtue of the first proviso to section 67(3) of the Companies Act, 1956.
11. Even assuming that FDMFL was a NBFC, it could not have made the allotment of shares to more than 49 persons by virtue of the legal provisions framed by RBI applicable to NBFCs. I note that all the NBFCs are subject to the Circulars issued by RBI from time to time. On June 27, 2013, RBI had issued a Circular on *"Raising Money through Private Placement by NBFCs-Debentures etc."* and the same was in operation as on the date of allotment under consideration. Vide the said Circular, RBI had put in place *"Guidelines on Private Placement by NBFCs"* compliance whereof has to be ensured by every NBFC intending to make an issue of capital by way of private placement. Clause 2(iv) of these Guidelines stipulates that private placement by all NBFCs shall be restricted to not more than 49 investors identified upfront by the NBFC. In view thereof, even if FDMFL is treated as an NBFC, it could not

have allotted shares to more than 49 persons as the same is prohibited under the Guidelines for private placement issued by RBI.

12. In view of the foregoing I find that in the present case, since the issuance of equity shares by FDMFL on March 19, 2014 was made to 3,410 persons, the said issuance was a "public issue" and was subject to the applicable provisions of Companies Act, 1956, Companies Act, 2013 and ICDR Regulations.
13. It is pertinent to note that on September 12, 2013, Ministry of Corporate Affairs *inter-alia* brought into force 98 sections of Companies Act, 2013 including section 2(70), 29, 33 (1) and 40 of the Companies Act, 2013 and also clarified that corresponding sections of the Companies Act, 1956 shall cease to have effect from that date including section 2(36), 56(3) and 73 of the Companies Act, 1956 which would have applied to any public issue of securities by a company prior to the notification of Companies Act, 2013.
14. Under section 56 (1) of Companies Act, 1956, every prospectus issued by or on behalf of a company, shall state the matters specified in Part I and set out the reports specified in Part II of Schedule II to Companies Act, 1956. Further, as per section 33 (1) of Companies Act, 2013, application for the purchase of any of the securities of a company shall be accompanied by an abridged prospectus. In the present case, I note that FDMFL did not issue any prospectus nor was any abridged prospectus attached with the application forms sent by FDMFL to the allottees for subscribing to its equity shares. I therefore find that FDMFL violated section 56(1) of the Companies Act, 1956 and section 33 (1) of the Companies Act, 2013.
15. As per section 60 of the Companies Act, 1956, a company needs to register its Prospectus with Registrar of Companies, before making a public offer/issuing the prospectus. section 2 (70) of the Companies Act, 2013 (corresponding provision of section 2(36) of Companies Act, 1956) defines "prospectus" *inter-alia* as any notice, circular, advertisement or other document inviting offers from the public for the subscription or purchase of any securities of a body corporate. In the present case, it is an undisputed fact that FDMFL has not issued any prospectus with respect to the said public issue nor has not filed any Prospectus with ROC and SEBI. Thus, FDMFL has violated section 60 of Companies Act, 1956 with respect to the aforesaid issuance of equity issues.

16. Section 40 of the Companies Act, 2013 (corresponding provision of section 73 of the Companies Act, 1956) stipulates that every company making a public offer shall, before making such offer, make an application to one or more recognized stock exchange(s) and obtain permission for its securities to be dealt with on such stock exchange(s). I note that in the above mentioned *Sahara Order*, the Hon'ble Supreme Court also decided the issue whether listing of securities issued to 50 persons or more is mandatory, Hon'ble Supreme Court has held in the said *Sahara Order* as under:

*"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. 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.** 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 section 73 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."*

17. By issuing equity shares to more than 50 persons, FDMFL had to compulsorily apply to any recognised stock exchange for listing such securities in compliance with section 40 of the Companies Act, 2013 which it had not done in the present case. In view of the above, I find FDMFL has violated section 40 of the Companies Act, 2013.
18. As per section 29 of the Companies Act, 2013, every company making public offer of securities, shall issue the securities only in dematerialised form by complying with the provisions of the Depositories Act, 1996 and the regulations made thereunder. In the present case, FDMFL did not its equity shares in dematerialised form. I, therefore find that FDMFL violated section 29 of the Companies Act, 2013.
19. It is important to mention that SEBI Act is a special legislation to deal with the matters relating, *inter alia*, to the protection of interests of investors in securities. I note that SEBI had notified the ICDR Regulations with effect from August 28, 2009 and all the public issues are required to comply with the ICDR Regulations which lay down the eligibility norms, disclosure norms and other procedural requirements, for ensuring investor

protection in case of issue of securities. The ICDR Regulations operate as reasonable safeguards for the investors who subscribe or intend to subscribe in the public issues of securities. In this regard, I observe that FDMFL has admittedly not complied with the following clauses of the ICDR Regulations:

S. No.	Regulation	Requirements
1	Regulation 4(2))	To apply for listing of specified securities on one or more recognized stock exchange and to enter into an agreement with Depositories to issue securities in Dematerialized mode
2	Regulation 5	To appoint merchant banker and other intermediaries and enter into agreement with Intermediaries as prescribed
3	Regulation 6	To file draft offer document with SEBI and the designated stock exchange and RoC
4	Regulation 7	To obtain in-principle approval from the recognized stock exchanges on which the specified securities are to be listed
5	Regulation 8	To submit Permanent Account Number, bank account number and passport number of its promoters to such stock exchange
6	Regulation 9	To issue public advertisement regarding filing of draft offer documents with SEBI
7	Regulation 26	To satisfy the conditions of initial public offer
8	Regulation 32	To ensure Minimum Contribution by Promoters
9	Regulation 36 and 37	To ensure Lock-in of specified securities held by promoters and persons other than promoters
10	Regulation 46	To keep the public issue open for the specified period
11	Regulation 47	To issue pre issue advertisement for public issue
12	Regulation 49	To ensure that the minimum application value is ten thousand rupees to fifteen thousand rupees
13	Regulation 57, 58	To adhere to the manner of disclosures in the offer documents and abridged prospect
14	Regulation 63	To appoint Compliance Officer

20. In view of the foregoing, I find that in respect of the allotment of equity shares on March 19, 2014, FDMFL violated the provisions of section 56 (1) and 60 of the Companies Act, 1956, section 29, 33 (1) and 40 of the Companies Act, 2013 and regulations 4, 5, 6, 7, 8, 9, 26, 32, 36, 37, 46, 47, 49, 57, 58 and 63 of ICDR Regulations.

21. I note that as per MCA-21, the board of directors of FDMFL as on the date of allotment of shares under consideration by FDML constituted Mr. Mariadasan Ubald, Mr. Loorduswamy Michaelangelus, Mr. Anthony Pillai Kildos and Mr. Peter Remigius. The

board of directors of FDMFL at the time of the above mentioned issuances of shares, being in control of the affairs of FDMFL, was under an obligation to ensure that these issuances were in compliance with all the applicable provisions of the Companies Act and SEBI Regulations. In my view, the above named directors of FDMFL as on the date of the above mentioned issuance of shares are also "*officers in default*" as defined under section 2(60) of the Companies Act, 2013. I, therefore, find that the above named directors of FDMFL are also responsible for the acts and omissions of FDMFL in this case.

22. In view of the foregoing, I, in exercise of the powers conferred upon me under sections 11(1), 11(4)(b), 11A(1)(b) and 11B read with section 19 of the Securities and Exchange Board of India Act, 1992 and regulation 107 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 hereby issue the following directions:

- (a) Fishermen Development Micro Finance Limited (CIN U65921TN2013PLC090180 / PAN AACCF1697H) and its directors *viz.* Mr. Mariadasan Ubald (DIN 06447105/PAN ACKPU2077R), Mr. Loorduswamy Michaelangelus (DIN 06447463 / PAN BELPM6495M), Mr. Anthony Pillai Kildos (DIN 06447650 / PAN CSUPK7293M) and Mr. Peter Remigius (DIN 06493162/ PAN AXAPR3056Q) shall within three months from the date of this order, jointly and severally refund the money collected pursuant to the allotment of shares dated March 19, 2014 to the allottees along with interest at the rate of 15% per annum from the date of receipt of money till the date of such refund.
- (b) Such refund shall be made only in cash through a Demand Draft or Pay Order.
- (c) Fishermen Development Micro Finance Limited shall issue a public notice, in all editions of one english national daily and one vernacular newspaper with wide circulation, detailing the modalities for refund, including details of contact persons including names, addresses and contact details, within fifteen days of this order coming into effect.
- (d) Within seven days of completion of refund as directed hereinabove, Fishermen Development Micro Finance Limited shall file a certificate of such completion with SEBI from 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.

- (e) Fishermen Development Micro Finance Limited and its directors, Mr. Mariadasan Ubald, Mr. Loorduswamy Michaelangelus, Mr. Anthony Pillai Kildos and Mr. Peter Remigius are directed not to, directly or indirectly, access the capital market by issuing prospectus, any offer document or advertisement soliciting money from the public and are further restrained and prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner till the refund of the money is made to the allottees as directed hereinabove.
- (f) Mr. Mariadasan Ubald, Mr. Loorduswamy Michaelangelus, Mr. Anthony Pillai Kildos and Mr. Peter Remigius are also restrained from associating themselves, with any listed public company and any public company which intends to raise money from the public, till the refund of money is made to the allottees as directed hereinabove.
23. The above directions are without prejudice to the right of SEBI to take any other appropriate action for the violations found in this case or to initiate any action in case of failure to comply with the above directions, in accordance with the provisions of applicable laws.
24. The order shall come into force with immediate effect. A copy of the order shall be served upon the Noticees to ensure compliance with the above directions.

Sd/-

Date: March 4th, 2015

Place: Mumbai

**RAJEEV KUMAR AGARWAL
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA**