

SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

DIRECTIONS 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 IN THE MATTER OF ISSUANCE OF OPTIONALLY FULLY CONVERTIBLE DEBENTURES BY SAHARA INDIA REAL ESTATE CORPORATION LIMITED AND SAHARA HOUSING INVESTMENT CORPORATION LIMITED

BACKGROUND

1. Sahara Prime City Limited (hereinafter referred to as SPCL) had filed a Draft Red Herring Prospectus (hereinafter referred to as DRHP) with the Securities and Exchange Board of India (hereinafter referred to as SEBI) in respect of its proposed Initial Public Offer (hereinafter referred to as IPO), vide letter dated September 30, 2009 through its lead managers, Enam Securities Private Limited, J M Financial Consultants Private Limited, Edelweiss Capital Limited, IDBI Capital Market Services Limited and Daiwa Securities SMBC India Private Limited. While examining the same, SEBI received various complaints in respect of the disclosures made in the said DRHP. In the complaint dated December 25, 2009 received from 'Professional Group for Investor Protection', it was alleged that one of the housing companies in Sahara Group, Sahara India Real Estate Corporation Limited (hereinafter referred to as SIRECL) was issuing convertible bonds to the public throughout the country for many months and the same was not disclosed in the aforesaid DRHP. Professional Group for Investor Protection had also forwarded a copy of the said complaint to the aforesaid lead managers. A similar complaint from one Mr. Roshan Lal was also received

by SEBI through the National Housing Bank, vide letter dated January 4, 2010. In order to further examine the said complaints, SEBI had sought information from Enam Securities Private Limited (co-ordinating lead manager) *inter alia* with respect to the details of the issue of SIRECL. The said lead manager was further advised to inform as to whether such issue was in compliance with the Companies Act, 1956, the rules made thereunder and the applicable rules, regulation and guidelines issued by the Reserve Bank of India, Ministry of Corporate Affairs and National Housing Bank. Copies of the complaints received from 'Professional Group for Investor Protection' and Mr. Roshan Lal were also forwarded by SEBI to Enam Securities Private Limited. In reply, the lead managers mentioned above, vide a joint letter dated January 29, 2010 *inter alia* submitted that SIRECL and Sahara Housing Investment Corporation Limited (hereinafter referred to as SHICL) have issued Optionally Fully Convertible Debentures (hereinafter referred to as OFCDs). Further, they also stated, on the basis of the legal opinions received that, the issuance of OFCDs by the aforesaid companies is in compliance with all applicable laws including the guidelines issued by the Ministry of Corporate Affairs (hereinafter referred to as MCA). The said lead managers also annexed a copy of their letter dated January 29, 2010 addressed to Mr. Roshan Lal wherein it was *inter alia* stated that SIRECL and SHICL are not required to be registered with National Housing Bank and not subject to any rules, regulations, guidelines, notifications or directions framed thereunder. It was further stated that, on the basis of legal opinions received, the OFCDs issued by the said companies are in compliance with all applicable laws. On further enquiry, the lead managers vide their letter dated February 26, 2010, informed SEBI that the companies issued debentures on tap basis and confirmed that they have issued and circulated an information memorandum prior to opening of the offer. They have further stated that SIRECL had filed a Red Herring Prospectus (hereinafter referred to as RHP) dated March 13, 2008 with the Registrar of Companies (hereinafter referred to as the RoC), Uttar Pradesh and Uttarakhand and that the RHP dated October 6, 2009 of SHICL was filed with the RoC, Maharashtra. Copies of the terms and conditions of various OFCDs/Bonds issued by the said companies were also annexed with the said letter. From

the annexures to the said letter, it was noticed that the OFCDs/Bonds had varying face values (from ₹5,000 to ₹24,000) and maturity periods (varying from 48 to 180 Months), redemption values and conversion options. The lead managers also forwarded the copy of the legal opinions received in the subject matter, which *inter alia* stated the following:

a. OFCD issuance of SIRECL and SHICL do not come under the purview of SEBI as Section 55A of the Companies Act, 1956 delegates the administrative power to SEBI only with respect to the listed public companies and those public companies which are intending to get their securities listed in India. Since the said companies have stated in the RHP filed with the RoC that, they do not intend to get the OFCDs listed in any stock exchanges in India or abroad, the issuance of OFCDs does not come under the purview of SEBI.

b. Issuance of OFCDs was made on private placement basis to friends, associates, group companies, workers/employees and other individuals who are associated/affiliated or connected in any manner with Sahara India Group of Companies, on the strength of special resolution passed under Section 81 (1A) of the Companies Act, 1956. When the manner of such issue of shares is restricted to a select group (however large, they may be), it ceases to be an offer to the public.

c. Public company may, by adopting process laid down under Section 60B of the Companies Act, 1956 circulate information memorandum and file Red Herring Prospectus with the RoC with clear intention that it does not intend to list its securities. Thus, when securities are issued to more than 50 persons, by following the procedure laid down under Section 60B of the Companies Act, 1956, by circulation of information memorandum and filing of prospectus with the RoC, it would not be necessary to list the securities so offered and the issue shall remain outside the purview of SEBI.

2. Thereafter, SEBI, vide letter dated April 22, 2010, required Enam Securities Private Limited to furnish the following details regarding the OFCDs issued by SIRECL and SHICL (hereinafter SIRECL and SHICL are together referred to as the companies and individually by their respective names):

- a. details regarding the filing of RHP of the said companies with the concerned RoC
- b. date of opening and closing of the subscription list
- c. details regarding the number of application forms circulated after the filing of the RHP with RoC
- d. details regarding the number of applications received
- e. the number of allottees
- f. list of allottees
- g. the date of allotment
- h. date of dispatch of debenture certificates etc.
- i. copies of application forms, RHP, pamphlets and other promotional material circulated,

3. Since, SEBI did not receive the aforesaid information from the said lead manager, the same were sought directly from SIRECL and SHICL, vide letter dated May 12, 2010. The companies, vide their separate letters dated May 19, 2010, without providing the details sought by SEBI, while reiterating the submissions made by the lead managers, as stated above in this Order, requested for the copies of the complaints, based on which the information was sought, for enabling them to respond to the respective parties including SEBI. Subsequently, vide letters dated May 21, 2010, SEBI again advised the companies to provide the required information within five days and were further informed that failure to provide the same or delaying the same would result in initiating appropriate action in terms of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as the SEBI Act) and Regulations made thereunder and also under relevant sections of the Companies Act, 1956 (hereinafter referred to as the Act), which are delegated to SEBI. The companies, vide letters dated May 24, 2010 and May 26, 2010, without providing details sought by SEBI, replied that the issuance of OFCDs were made in compliance with provisions of the Act and that they are not listed entities and their securities are not traded in any of

the stock exchanges in India or abroad. Further, the companies requested for extension of time for filing the reply (till June 15, 2010), as most of their staff were on long holidays. Thereafter, vide separate letters dated May 28, 2010, the companies had again requested SEBI to provide for the copies of the complaints. In reply, SEBI, vide letter dated June 11, 2010 further advised the companies to provide the information by June 15, 2010, as undertaken by them in their letters dated May 24, 2010 and May 26, 2010. Subsequently, the companies, vide separate letters dated June 14 2010, without providing the required details informed SEBI that they have sent their requests to certain Government Departments seeking clarifications as to the approach to be followed by them in the circumstances and further stated that on receipt of clarifications from the said departments, they would send their reply within 10-12 working days. Subsequently, vide letters dated June 28, 2010, the companies, instead of providing the required information as sought by SEBI, intimated that they had received a letter addressed to them from the office of the Hon'ble Minister of State (In-charge) for Corporate Affairs and Minority Affairs, Government of India stating that the subject matter was being examined in the Ministry under relevant provisions of the Act. They have not furnished any formal communication from the Ministry of Corporate Affairs nor has any such reference being made to SEBI. There evidently seemed to be reluctance on the part of the companies in providing the relevant details as sought by SEBI, which would enable SEBI to decide whether the OFCD issuances made by them are in compliance with the relevant provisions of the Act and applicable laws administered by SEBI. Thereafter, SEBI, vide Order dated August 16, 2010 initiated an investigation in the matter of issuances of OFCDs by the companies, as SEBI had reasonable grounds to believe that issuance of OFCDs by SIRECL and SHICL may be detrimental to the investors or the securities markets and that any intermediary or persons associated with the securities market may have violated the provisions of the SEBI Act, Securities Contracts (Regulations) Act, 1956, the Depositories Act, 1996 and the provisions as specified in Section 55 A of the Act, 1956 or the Rules or the Regulations made or directions issued by SEBI there under. Thereafter, summons dated August 30, 2010 and September 23, 2010, under Section 11C of the SEBI Act were

issued by SEBI to the companies to provide the following information/documents in respect of their OFCD issuances:

1. Details regarding filing of Prospectus/Red-herring Prospectus with ROC for issuance of OFCDs
2. Copies of the application forms, Red-Herring Prospectus, Pamphlets, advertisements and other promotional materials circulated for issuance of OFCDs.
3. Details regarding number of application forms circulated, inviting subscription for OFCDs;
4. Details regarding number of applications and subscription amount received for OFCDs;
5. Date of opening and closing of the subscription list for the said OFCDs;
6. Number and list of allottees for the said OFCDs and the number of OFCDs allotted and value of such allotment against each allottee's name;
7. Date of allotment of OFCDs;
8. Copies of the minutes of Board/committee meeting in which the resolution has been passed for allotment;
9. Copy of Form 2 (along with annexures) filed with ROC, if any, regarding issuance of OFCDs or equity shares arising out of conversion of such OFCDs
10. Copies of the Annual Reports filed with Registrar of Companies for the immediately preceding two financial years
11. Date of dispatch of debenture certificate etc.

A substantial part of the information/documents (mentioned above) had already been sought from the companies by SEBI vide various correspondences, since May, 2010. Despite providing sufficient opportunities over nearly six months beginning May, 2010, the companies have not provided such details, to date.

4. The said companies, instead of providing the aforesaid information/documents, have vide letters dated September 13, 2010 and September 30, 2010, stated that the jurisdiction to deal with the matters relating to the issuance of OFCDs by a company, which is unlisted or which does not intend to get its securities listed on stock exchanges, vests with the Central Government, in terms of Section 55A(c) of the Act, and that they had represented to the MCA on May 31, 2010, and were awaiting response from the Ministry. It is further stated that a special resolution was passed by the

respective shareholders [in the Annual General Meeting (AGM) of SHICL on September 16, 2009 and the AGM of SIRECL on March 3, 2008] under Section 81(1A) of the Act to issue OFCDs by way of private placement to friends, associates, group companies, workers/employees and other individuals who are associated/ affiliated or connected in any manner with Sahara India Group of Companies without advertising and offering these OFCDs to the general public. The companies have further stated that they had followed the procedure prescribed in Section 60B of the Act (as they are not listed companies and do not intend to get their securities listed on any recognised stock exchanges in India) and filed their RHP with the respective RoCs (SIRECL on March 13, 2008 and SHICL on October 6, 2009). The companies have, further, reiterated that, since they are not listed and neither intend to get these securities listed, they were not to be administered by SEBI, but fall under the purview of the Central Government. It is stated that the companies have mentioned in the RHP that, only those persons to whom the information memorandum was circulated and/or approached privately, who are associated/affiliated or connected in any manner with the Sahara Group of Companies are eligible to apply, and no advertisement has been issued canvassing applications from the general public. Further, according to the companies, the application forms for OFCDs mentioned that individuals including HUF through its Karta and Companies having dealings with the Group Companies or associates of Sahara India Group or persons connected in any manner with Sahara India Pariwar alone can apply for bonds. According to the companies, since the OFCDs were offered on a private placement basis to a select class of persons, it is not a public issue and therefore does not attract Regulation 3 or 6 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 (hereinafter referred to as the ICDR Regulations). They further stated that, if the offer was made to an identifiable class of persons through a preferential allotment under Section 81(1A) of the Act and if the issue was restricted to a select group, however large it may be, the offer would not be a public offer and would not therefore attract the provisions of the ICDR Regulations. The companies further maintained that, since the OFCDs are convertible securities, the Securities and Exchange Board of

India (Issue and Listing of Debt Securities) Regulations, 2008 is also not applicable. In order to substantiate their submissions, the companies have attached copies of the legal opinions which were earlier submitted to SEBI. Further, the companies have stated that the issue of OFCDs have not yet been closed and that even they themselves do not have the complete information pertaining to item nos. 3,4,6,7,8, and 11, sought by SEBI, vide its summons (mentioned above). The companies have further requested SEBI:

- I. to await clarification from the MCA, pursuant to their representation dated May 31, 2010 or
- II. to write directly to the MCA and seek their views on issue of jurisdiction or
- III. to seek the required information about the OCFDs, directly from the MCA and the concerned RoC.

5. In view of the above submissions, the companies requested SEBI to withdraw the summons and the Order of investigation, issued in the matter.

FAILURE TO SUBMIT THE INFORMATION SOUGHT

6. Before I discuss the merits of the responses that the companies have furnished in response to the letters/summons issued by SEBI, and go into the substantive issues involved herein, I shall briefly examine what seems to be an obvious reluctance on the part of the companies to furnish the information sought by SEBI. There is no dispute regarding the issue of OFCDs by the companies. Admittedly, the companies had filed RHPs in respect of the said issues with the concerned RoC. As stated above in this Order, the companies have not furnished various information/documents which were sought by SEBI, in its various letters during the preliminary examination of the matter. Except for providing the date of filing of RHP with the concerned ROCs, the companies have not provided any other information/document sought in the summons issued by SEBI and thus, the summons issued by SEBI were not fully complied with. The submissions of the companies is that their OFCD issues are not under the purview of SEBI

and that they do not have complete information in respect of some of the details sought in the summons. The claim that the issuer of the securities itself does not have information of the nature sought for by SEBI appears to be quite preposterous. I may simply state here that such a reply, in the facts of the case, carries little credibility and is therefore, liable to be rejected. The details sought by SEBI in its letters and in the subsequent summons are pertaining to the issues of OFCDs in the background of receipt of various complaints alleging disclosure violations and violation of applicable laws pertaining to the issue of securities to the public. Such details are important to ascertain whether the issuances of OFCDs by the companies are public or not. Some of the details so sought from the companies, are the details of number of application forms circulated, application forms received, amount of subscription, number and list of allottees, number of OFCDs allotted and value of allotment, date of allotment, date of dispatch of debenture certificate, copy of the board/committee meeting minutes in which allotment was made etc. (sought by SEBI at serial nos. 3,4,6,7,8, and 11 in the summons which are reproduced in paragraph 3 above). In respect of such details, the companies have, vide letters dated September 30, 2010, claimed that they do not have complete information. At the cost of repetition, it is rather perplexing that the companies having mobilized money through the OFCDs, could not provide even the basic details pertaining to its issue or investors. It is the contention that the OFCDs were issued by way of private placement to friends, associates, group companies, workers/employees and other individuals who are associated/ affiliated or connected in any manner with Sahara India Group of Companies. If the OFCDs are offered to such restricted group (as contended by them) connected to them, it is not clear as to what, in fact, prevented them from parting with such information. It is highly improbable that the issuer companies do not have details of the offerees to whom securities were issued, especially when it was claimed that the offer was made on a private placement basis to a set of people connected to them. Such a submission can only be dismissed as a very frivolous one and reasonable prudence demands, that it be rejected.

7. On November 3, 2010, the Chief Financial Officer of the Sahara Group, Mr. D. J. Bagchi, was, on request, given an opportunity to meet with the undersigned Whole Time Member, during which time too, it was impressed on the Company representative about the need to fully and accurately furnish the information sought by SEBI at the earliest. However, no commitment was given by the Company representative about furnishing the information required.

8. There is a statutory duty cast upon a person who is called upon to furnish the required information to assist SEBI in its investigations so as to carry out its functions effectively. Non compliance with the summons issued by SEBI during the course with its investigation cannot be treated as trivial in nature and has therefore to be perforce, discouraged. Despite the importance of the documents sought by SEBI in the context of the case, and despite having brought to the attention of the companies about the imperative for doing so, the companies concerned are evidently reluctant to provide the information and have adopted an intractable attitude of delaying the submission under one or the other pretext. Information sought from them is of a basic nature and should have been in their possession and therefore could have been provided easily. However, there appears to be reluctance in providing the information by these companies, which are relevant and required for SEBI to examine the matter with respect to delegated provisions of the Companies Act as well as the provisions of SEBI Act, Regulations and Guidelines made there-under.

RELEVANT DETAILS AVAILABLE ON THE MCA21, PORTAL OF THE MINISTRY OF CORPORATE AFFAIRS

9. As the companies have failed to provide the necessary information, as required, SEBI collected certain relevant details from the filings made by the companies with the respective RoCs, as available on the 'MCA21 Portal' (maintained by MCA). Such details are given below:

Relevant extract of the information filed by SIRECL to RoC:

- i. **Shareholders Resolution:** Vide resolution passed at the Extraordinary General meeting held on March 3, 2008 (and filed with RoC), consent of the members of SIRECL was obtained for issuance of OFCD by way of private placement basis to friends, associates, group companies, workers/employees and other individuals who are associated/affiliated or connected in any manner with Sahara India Group of Companies and RHP of SIRECL was filed with RoC, Uttar Pradesh and Uttrakhand on March 13, 2008.
- ii. **Promoters as per the RHP:** SIRECL is a Company belonging to the Sahara India Group and is promoted by Mr. Subrata Roy Sahara, the founder of Sahara India Group.
- iii. **Directors as per the RHP:** Mrs. Vandana Bharrgava, Mr. Ravi Shankar Dubey and Mr. Ashok Roy Choudhary have given consent to include their name as directors and have signed the RHP as the directors of SIRECL.
- iv. **Date of opening and closing of the issue:** RHP merely states that date of opening and closing would be as decided by the Board of Directors.
- v. **Details of the issue as per the RHP:** The issue consists of OFCDs with option to the holders to convert the same into Equity Share of ₹10 each at a premium to be decided at the time of issue equal to the face value of the Optionally Fully Convertible ₹. ****. Since it is a RHP, the quantum and the price is to be determined at a future date. (It is pertinent to note that in the RHP, the total cost of the project, in which the proceeds of the said issue would be utilized is mentioned as ₹ 20,000 Crores).
- vi. **Objects of the issue as per RHP:** The Funds raised shall be utilized for the purpose of financing the acquisition of lands for the purpose of development of townships, residential apartments, shopping complexes etc. The proceeds shall also be utilized for construction activities which shall be undertaken by the company in major cities of the country and also to finance other commercial activities / projects taken up by the company within or apart from

the above projects The company also proposes to carry out infrastructure activities and the amount collected from the current issue shall be utilized in financing the completion of projects viz. establishment/constructing the bridges, modernization or setting up of airports, rail system or any other projects which may be allotted to the company, from time to time future. The company also proposes to engage into the business of electric power generation and transmission and the proceeds of the current issue shall also be used for the power projects which shall be allotted to the company The money not required immediately by the company may be parked/invested inter-alia by way of circulating capital with partnership firms or Joint Ventures or in any other manner as per the decision of the Board of Directors, from time to time.

- vii. **Annual results:** As per the recently filed balance sheet of SIRECL (as at June 30, 2009), proceeds from the issuance of OFCDs is shown as ₹ 4843. 37 Crores.
- viii. **Eligibility to apply:** It is mentioned in the RHP that only those persons are eligible to apply to whom the Information Memorandum was circulated and/or approached privately, who are associated/affiliated or connected in any manner with Sahara Group of Companies, without giving any advertisement in general public.

Relevant extract of the information filed by SHICL to RoC:

- i. **Shareholders Resolution:** As per the RHP, it is observed that the OFCD issuances by SHICL was approved by shareholders, vide the resolution (which is more or less similar to the resolution passed by SIRECL), passed in the AGM held on September 16, 2009. The RHP was filed with RoC, Maharashtra on October 6, 2009.
- ii. **Promoters as per the RHP:** SHICL is a company promoted by Mr. Subrata Roy Sahara, the founder of Sahara India Group.
- iii. **Directors as per the RHP:** Mrs. Vandana Bhargava, Mr. Ravi Shankar Dubey and Mr. Ashok Roy Choudhary have given consent to include their name as directors and have signed the RHP as directors of SHICL.

- iv. **Date of opening and closing of the issue:** RHP merely states that date of opening and closing would be as decided by the Board of Directors.
- v. **Details of the issue:** The issue consists of Optionally Fully Convertible Unsecured Debentures with option to the holders to convert the same into Equity Share of ₹ 10 each at a premium of to be decided at the time of issue equal to the face value of the Optionally Fully Convertible Unsecured Debentures to be privately placed aggregating to ₹ ****. (Since it is a Red Herring Prospectus the quantum and the price is to be determined at a future date). (It is pertinent to note that in the RHP , the total cost of the project, in which the proceeds of the said issue would be utilized is mentioned as ₹ 20,000 Crores)
- vi. **Objects of the issue as per RHP:** The Object stated in short is “..... financing the acquisition of lands for the purpose of development of townships, residential apartments, shopping complexes etc.....” The objects mentioned therein is more or less similar to the “Objects of the issue” mentioned in the RHP of SIRECL.
- vii. **Annual Report:** Since the Annual Report of SHICL for the concerned period has not yet been filed with RoC, the amount of the issue proceeds is not known.
- viii. **Eligibility to apply:** RHP mentions that only those persons are eligible to apply to whom the Information Memorandum was circulated and/or approached privately, who are associated/affiliated or connected in any manner with Sahara Group of Companies, without giving any advertisement in general public.
- ix. **Explanatory note to the shareholders resolution:** The explanatory note to the shareholders resolution filed by SHICL with RoC (Extra Ordinary General Meeting resolution dated November 11, 2009 by SHICL) mentions: “***The company further keeping in view that the number of persons to whom the offer of OFCDs shall be issued might exceed the limits as specified under Section 67 of the Companies Act, 1956 made an application for approval of Red herring Prospectus.***”

ISSUES FOR CONSIDERATION

10. The submissions of the companies in brief are as follows:
 - a. The issuance of OFCDs are made on private placement basis to friends, associates, group companies, workers/employees and other individuals who are associated/affiliated or connected in any manner with Sahara India Group of Companies and hence, it is not an offer to the public.
 - b. They do not intend to get the OFCDs listed in any stock exchanges in India or abroad and therefore the issuance of OFCDs do not come under the purview of SEBI, in terms of Section 55A of the Act.
 - c. Public company may, by adopting process laid down under Section 60B of the Act circulate information memorandum and file RHP with the RoC, with a clear intention that it does not intend to list its securities.

11. Therefore on the basis of the submissions made by the companies and the material available before me, I note that there are broadly two substantive sets of issues that have to be examined:
 - a) Whether the impugned OFCD offers have been made to the public and if so, whether listing of the OFCDs, so offered, is mandatory?
 - b) Whether Section 60B of the Act provides "*an alternative route*" for raising capital without complying with Section 73 of the Act and other SEBI requirements, as contended by the companies?

My *prima facie* findings in respect of the above issues are as follows:

ISSUE NO. 1- Whether the impugned OFCD offers have been made to the public and if so, whether listing of the OFCDs, so offered, is mandatory?

12. Section 67 of the Act lays down the provisions as to when offering of shares and debentures to investors shall be construed as having been made to the public. Therefore, for the purpose of deciding whether the impugned OFCD offers were made to the public, it is necessary to refer to Section 67 of the Act, which is reproduced herein below:

“Construction of references 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-section (3) and (4), be construed as including a reference to offering them to any section of the public, whether selected as members of 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 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 in made to fifty persons or more:

..... .
”

13. The aforesaid Section explains what is to be construed as offer of shares or debentures to the public. The said Section explicitly states that any reference in the Act or in the articles of a company to offering (or inviting to subscribe) for shares or debentures to the public shall be construed as including a reference to offering them (or inviting them to subscribe) 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. However, such construction is subject to Section 67(3) and (4) and any other provision to the contrary contained in the Act. Section 67(3) of the Act, exempts such offer or invitation from the purview of the construction laid down in 67(1) and (2) thereof, if such 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.

14. In order to curb the companies from offering shares and debentures to a wider group of people by disguising it as “*domestic concern*”, vide Companies (Amendment) Act, 2000, with effect from December 13, 2000, a *proviso* was inserted to Section 67(3) stating that nothing contained therein shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to **fifty persons or more**. Therefore, if an offer is made to fifty or more persons, it would be deemed to be a public issue, even if it is of “*domestic concern*” or shown that “*the shares or debentures are not available for subscription or purchase by persons other than those receiving the offer or invitation*”. First proviso to Section 67(3) of the Act is as clear as that. In other words, even if an issue is made by way of private placement to fifty or more persons, it would be deemed to be a public issue irrespective of whether it was offered to public at large or to just a section of the public chosen, in whatever manner.

15. The intention of the Legislature, more specifically as evinced in the amendment to the Act referred to above, is very clear that any and all mobilization of funds from a group of investors, fifty or more in number should be classified as a ‘public issue’ and consequently be accorded all the safeguards provided, that typically accompanies the safety and protection accorded to their funds, in law. In view of the above, the contention of the companies that the OFCDs are issued by way of private placement basis to friends, associates, Group Companies, workers /employees and other individuals who are associated/affiliated or connected in any manner with Sahara India Group of Companies, would not give it a different colour. The rigour of the procedures enshrined in law, for the protection of investors who subscribe to an issue of securities would have to be preserved in toto. Though, the companies have stated that the offer was made on private placement to a select group, they could not provide any details of the group despite the fact that SEBI has issued summons seeking such information. This would lead to an adverse inference that they were offering OFCDs to fifty or more persons. Otherwise, they could have given such crucial and basic details to support their claim that their offer was not made to public. The companies, in their representations have also not advanced any claim

that their issue is to a base of investors less than fifty in number. If the companies were able to convincingly state any stand to the effect that the offers were made to less than fifty persons, to SEBI's satisfaction, SEBI would not have proceeded further, as then the matter would lie outside its remit. On the other hand, even apart from the fact that there has been a tacit admission of the companies that their issue are being made to over fifty investors, there are various other factors which would lead to an unambiguous inference that the OFCDs were offered to a wider group of people numbering fifty or more.

16. In case of private placement to less than fifty persons, legislation casts an obligation on the part of the issuer to ensure that the offer is not 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. In the present case, it is observed that no targeted set of persons have been identified by the companies, to whom the offer is made, rather the applicant was required to sign a declaration that they are associated with the Sahara India Group. Needless to say, any association with the Group has to lend itself for a definite and unambiguous identification as to whether a prospective investor would fall within such an association or not. Clearly in this case, no such definition accompanies the association contemplated, and hence such a declaration signed by the applicant, will not change the generic nature of the offer. The very fact that the offer was made to friends, associates, Group Companies, workers /employees and other individuals who are associated/affiliated or connected in any manner with Sahara India Group of Companies, by itself would indicate the intention of the offeror to make the offer to wider gamut of people. There is one more reason that strengthens such inference. SHCIL in its explanatory statement filed with the RoC, stated that the number of persons to whom the impugned offer is made might exceed the limits as specified under Section 67 of the Act. One does not have to look farther for reasons that would substantiate a *prima facie* inference that the offer of OFCDs by SHCIL was made to more than forty nine persons and therefore the companies had made a public issue of OFCDs. Further, as per the

balance sheet of SIRECL, the amount of money solicited through issuance of the impugned OFCDs (till June 30, 2009) is ₹4843.37 cr. Since the information sought regarding the number of persons from whom the subscription was solicited, is not forthcoming, if it is presumed that the offer is subscribed by only forty nine persons, for argument sake, then the average subscription by each person shall be ₹98.84 Crores (₹4800 crores/49). Such subscriptions, even from High Net-worth Investors, are not clearly the norm even in public issues of huge size. Taking into account the minimum application sizes prescribed in the application (ranging from ₹5,000 to ₹24,000) of the impugned OFCD, from the available data, it is highly unlikely that the offer is made to less than fifty persons. The above factors, in the absence of anything to the contrary provided by the companies, would lead to a *prima facie* inference that the companies have made a public issue of OFCDs. The companies, on the basis of the legal opinion received by them, have stated that they had passed the resolution under Section 81 (1A) of the Act (which states that further shares may be offered to any persons in any manner whatsoever) and that their offer to a select set of persons should not be construed as a public offer. Section 81 (1A) of the Act cannot have an overriding effect on the provisions relating to public issue, specified in the Act. Section 81 of the Act deals with further issue of securities and only gives pre-emptive rights to the existing shareholders of a company so that the subsequent offer of securities have to be offered to them as their “rights”. Section 81(1A) is only an exception to the said rule subject to the procedural requirements contained therein. However, any further issue of capital, even pursuant to a resolution made under Section 81(1A) of the Act, is subject to the provisions of Part III of the Act, if the offer is made to fifty persons or more. Hence, the views submitted in the legal opinion that since the companies had passed resolutions under Section 81(1A) of the Act, the issuance of shares/debentures to a select group (however large, they may be), ceases to be an offer to the public, is devoid of any legal basis and hence cannot be accepted. It is quite obvious from a reading of Section 81(1A) that it was never intended to dilute the provisions of the Act relating to the definition of public issues. Whether an issue is a public or not is to be

decided on the basis of Section 67 of the Act. As stated above in this Order, the first proviso to Section 67(3) of the Act, makes it very clear that any offer or invitation to subscribe of shares or debentures to fifty persons or more should be treated as a public issue.

17. Further, the fact that the companies have filed RHP with RoC would make it clear that their OFCDs were intended to be offered to the public for the following reasons. In terms of Section 2(36) of the Act, “prospectus” means 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. Considering the definition of the term prospectus as mentioned above and the conduct of the companies in filing prospectus for their OFCDs with the concerned RoCs would lead to believe that they intended to mobilize funds through subscriptions from the public.

18. In summary, the following inferences emerge:

- i. The issue of OFCDs by the companies have been made to a base of investors that are fifty or more in number.
- ii. The companies themselves tacitly admit the same as they have no case that funds have been mobilized from a group smaller than fifty.
- iii. A resolution under Section 81(1A) of the Act does not take away the ‘public’ nature of the issue.
- iv. The filing of a prospectus under the Act signifies the intention of the issuer to raise funds from the public.

Therefore, for the aforesaid reasons, the submission of the companies that their OFCD issues are made on private placement and do not fall under the definition of a public issue, is not tenable. The instances discussed above would prima facie suggest that the offer of OFCDs made by the companies is “public” in nature.

19. Having *prima facie* observed that the OFCDs of the companies are offered to public, it follows that the companies have to comply with the relevant provisions of the Act concerning public issues and the Regulations and Guidelines framed by SEBI in this regard. As per Section 73 (1) of the Act, 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 recognized stock exchanges for permission for the shares or debentures intending to be so offered to be dealt with in a stock exchange or each such stock exchange. Thus, it is obligatory for a company issuing shares/debentures through prospectus, to compulsorily seek approval for listing, before such offer is made. The intention of this provision [Section 73 (1)] was explained in the Notes on Clauses to Companies (Amendment) Act, 1988, which states as follows:

“Presently, listing of public issues is not compulsory. The object of this section is that the subscribers to the shares must have a facility to approach a stock exchange for having their holdings converted whenever they desire.”

20. The requirement of listing in respect of a public issue is to ensure that the subscribers to the shares or debentures have a facility to approach a stock exchange for having their holdings converted into cash, whenever they desire and to provide liquidity and exit opportunity to the investors, especially in case, when the offer is made to large number of investors (50 or more). Section 73 of the Act, further, states that any allotment made shall be void, if the permission has not been granted by the stock exchanges for listing. Further, in terms of Section 73(2) of the Act, where any listing permission is not applied, as observed in the present case, the companies are required to refund all the money received as subscription within the stipulated time. Therefore, the intention of the companies to list or not is immaterial, insofar as Section 73 of the Act is concerned, as once the offer is public, the companies are statutorily bound to apply for listing permission. Such statutory obligation cannot be evaded by merely stating in the prospectus that the company does not intend to list its securities. The legislation, as it

stands today, requires the companies offering its shares or debentures to the public through a prospectus, to compulsorily list the same, regardless of the intention of the companies. This requirement is for the protection and benefit of the investors who subscribe to such offers. Further, the RHP and the “terms and conditions” in the application forms for subscribing to OFCDs mentions that the companies do not intend to list the OFCDs. However, as per Section 73(4) of the Act, any condition purporting to require or bind any applicant for shares or debentures to waive compliance with any of the requirements of Section 73 thereof shall be void. Thus, introducing any clause in the prospectus and application forms stating that the company is not intending to list its securities when in actual terms such offer was intended to be made to the public, is ultra vires of Section 73 of the Act. Any such condition contrary to provisions of Section 73 of the Act would therefore be *void ab-initio*. Therefore, having *prima facie* held that the OFCDs were offered to the public, it is necessary that an application for listing should have been made to any recognized stock exchange, before making such offer. Admittedly, the companies had not sought listing permission from any of the recognized stock exchanges.

21. Therefore, on the first point for determination, I find that the issuance of OFCDs by the companies is a public issue and therefore, these securities are liable to be listed on a recognized stock exchange under the provisions of Section 73 of the Act. Hence, the companies have *prima facie* contravened the provisions of Section 73 of the Act.

ISSUE NO. 2- Whether Section 60B of the Act provides “an alternative route” for raising capital without complying with Section 73 of the Act and other SEBI requirements, as contended by the companies?

22. One of the contentions of the companies is that the OFCDs in question were issued in terms of Section 60B of the Act. The companies have also argued that this is supported by the legal opinion that they have taken in this matter. It is first necessary to understand the scope of Section 60B of the Act against the backdrop of the provisions in it, that explicitly

addresses public issues and requirements of listing of the same. Section 60 of the Act provides that prospectus shall not be issued unless a copy of it has been delivered to the RoC for registration. In case of book-built public issues, the price/quantum of securities to be issued is determined after the closure of the issue. Hence, RHPs for a book-built issue filed initially with RoC does not include particulars regarding price and quantum of securities. Section 60B was inserted in the Act by the Companies (Amendment) Act, 2000 on the recommendation of the Working Group while redrafting of the Act, in order to facilitate such book building process for a company to obtain the best price for the securities so offered. The mechanism for making public issues through book-building process is elaborated in the ICDR Regulations. Section 60B(1) of the Act states that a public company making an issue of securities may circulate information memorandum to the public prior to filing of a prospectus. Information memorandum defined in Section 2(19B) thereof is a process undertaken prior to the filing of a prospectus by which the demand for the securities proposed to be issued by a company is elicited, and the price and the terms of issue for such securities is assessed, by means of a notice, circular, advertisement or document. Further, Section 60B(3) states that the information memorandum and red-herring prospectus shall carry same obligations as are applicable in the case of a prospectus.

23. The contention that the expression “. . . and in any other case with the Registrar only”, appearing in Section 60B(9) of the Act provides for an alternative route of filing the RHP with RoC, without complying with any other provisions of the Act (including Sections 67 and 73) would tantamount to arguing that the other provisions of the Act pertaining to the public issues are redundant and infructuous. Section 60B of the Act refers to merely two classes of issuers—(i) companies listed already and (ii) all others. It does not explicitly mentioned about the companies which intend to get their securities listed and propose to make a public offering for the first time. In fact, if such companies are grouped along with the second category that would file the final prospectus with the RoC and not with SEBI, it would run contrary to what is contemplated under Section 55A of the Act whereby the powers of

SEBI extends to public companies which intend to get their securities listed on any recognized stock exchange in India.

24. For the above reasons, Section 60B of the Act cannot be read in isolation, but has to be harmoniously construed with the other provisions of the Act governing public issues. Therefore, Section 60B of the Act does not prescribe an alternative procedure to provisions of Sections 67(3) and 73(1) of the Act, as contended by the companies. Further, vide their letter dated September 30, 2010, the companies have mentioned that the issue is not yet closed. A prospectus cannot be kept open perpetually. It is *prima facie* inferred from such conduct of the companies that they have taken recourse to the argument that their issues are covered under Section 60B to circumvent the applicable legal framework laid out elaborately for public issues. Once an offer is made to fifty or more persons, compliance with Section 60B (filing with RoC) alone cannot be treated as compliance. The moment the company offers to fifty or more persons, it has to comply with all the provisions applicable for public issues (Part III of the Act). Hence, the legal opinion submitted by the companies that they can issue to fifty or more persons without making an application to a stock exchange under Section 73 of the Act, by following the procedure under Section 60B thereof, seems to be a narrower and a convenient interpretation. If such an interpretation is accepted it will pave the way for companies to raise money from the general public, without following various procedures intended to protect the interest of investors, in respect of the public issues, prescribed under the Act and the ICDR Regulations including the requirements for due-diligence, disclosures, credit-rating etc.

25. Thus, it is *prima facie* observed above that the OFCD issuance made by the companies are public in nature and therefore there is a legal duty cast on them to list the same in any of the stock exchanges. Such issues squarely fall within the purview of SEBI. Further, in terms of Section 55A(1)(b) of the Act, the provisions relating to issue of securities, in case of those public companies which intend to get their securities listed on any recognized stock exchange in India, shall be administered by SEBI. The said

Section has to be harmoniously read with the provisions of Section 73 of the Act, which mandates compulsory listing in case of all public issues. Thus, the words “intend to get their securities listed” in Section 55A(1) (b) of the Act is clearly synonymous with the words “intend to offer their securities to public”, as law mandates compulsory listing in case of public issues and specifies that any condition to waive this requirement is void. In other words, the latter viz. offering securities to the public implies the former viz. getting the securities listed. Therefore, the stated intention of the companies to list or not to list is immaterial, if the offer is made to the public. No company issuing securities to the public can wish away this legal requirement by simply claiming that they do not intend to list, once they make an offer to public, as the law stipulates mandatory listing of such securities. Such statutory requirement cannot be waived of especially in view of Section 73(4) of the Act. Therefore, once the companies offer their securities to the public, they should compulsorily apply for listing and the same would automatically be governed by the applicable requirements in the Act as well as those requirements separately stipulated by SEBI.

26. Further in terms of Section 56 of the Act *“Every prospectus issued by or on behalf of a company, 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.”* In order to ensure that any solicitation for subscription from public is done, only after complying with the requirements stipulated by SEBI, an amendment was made to Schedule II of the Act, vide notification no. GSR 650(E), dated September 17, 2002, by inserting a declaration, which has to be signed by the directors of the company filing the prospectus. The said declaration is reproduced below:

“That all the relevant provisions of the Companies Act, 1956, and the guidelines issued by the Government or the guidelines issued by the Securities and Exchange Board of India established under section 3 of the Securities and Exchange Board of India Act, 1992, as the case may be, have been complied with and no statement made in prospectus is contrary to

the provisions of the Companies Act, 1956 or the Securities and Exchange Board of India Act, 1992 or rules made there-under or guidelines issued, as the case may be. ”(emphasis supplied)

27. I find that in the present case, the RHPs filed by the SIRECL and SHICL do not contain such declaration in toto as prescribed. The declaration so contained in the RHPs of the companies seems to have deliberately omitted all reference to the compliance to be made by them of the guidelines or rules made under the SEBI Act. On the other hand, it states the following:

“All the relevant provisions of the Companies Act, 1956 and the guidelines issued by the Government have been complied with and no statement made in the Prospectus is contrary to the provisions of the Companies Act, 1956 and rules there under. ”

This declaration is in total disregard to the declaration prescribed in Schedule II (as given above) which every prospectus (including the RHP filed under Section 60B) should mandatorily contain. The standard declaration stipulated under the statute cannot be substituted or altered for convenience of the companies, for whatever reasons. Such a deliberate omission in respect of laws pertaining to SEBI would reflect their pre-planned attempt to by-pass the regulatory framework of SEBI in respect of public issues. However, even such deliberate changes/omissions in the declaration does not absolve them from their duty to comply with the relevant provisions of the ICDR Regulations/Securities and Exchange Board of India (Disclosure and Investor Protection) Guidelines 2000 (hereinafter referred to as the DIP Guidelines) (since rescinded). Thus, the RHPs filed by the companies, do not contain the “declaration” as specified under Schedule II to the Act and therefore, the companies have *prima facie* violated Section 56 of the Act.

28. Further, all public issues are required to comply with the ICDR Regulations [ICDR Regulation was framed by SEBI under the SEBI Act in place of DIP Guidelines], in terms of Regulation 3 thereof. Prior to the ICDR

Regulations, such issues were governed by the DIP Guidelines. SIRECL filed the RHP on March 13, 2008, when DIP Guidelines were in force whereas RHP of SHICL was filed with ROC on October 6, 2009, after the ICDR Regulations came into force. One of the views given in the legal opinion submitted by the companies is that, as per the ICDR Regulations, no listing is permitted if the number of allottees are less than 1000, whereas the plain reading of the Act, suggests that the company issuing securities to fifty or more persons would require their securities listed on any recognised stock exchange and such an interpretation would on the face of it, be inconsistent with the provisions of the Act. I am unable to accept such a view. As per Section 67(3) of the Act, an offer to fifty or more persons is treated as a public issue. Such offeror has to then comply with various statutory requirements, such as registering the prospectus with RoC before making the public issue (Section 60), making an application to list their securities to recognized stock exchanges (Section 73), etc. It has also to follow the other requirements specified in SEBI Act and Guidelines/ICDR Regulations issued thereof (as per the declaration specified in Schedule II of the Act). Hence, once the issuer decides to offer its securities to 50 or more persons, then the issue is an offer to public at large, complying with the provisions prescribed in the ICDR Regulations/DIP Guidelines, including Regulation 26(4) of the ICDR Regulations. Regulation 26(4) of the ICDR Regulations mentions that an issuer shall not make an allotment pursuant to a public issue if the number of prospective allottees is less than 1000, to ensure there is sufficient liquidity in the scrip post listing. Similar provisions were also in existence (Clause 2.2.2A) of erstwhile the DIP Guidelines. Hence, there is no inconsistency between Act and the ICDR Regulations/DIP Guidelines and that the provisions of the ICDR Regulations/DIP Guidelines have to be read in conjunction with the applicable provisions of the Act.

29. As per Regulation 6 of the ICDR Regulations, no issuer shall make a public issue unless a draft offer document has been filed with SEBI through the lead merchant banker, at least thirty days prior to registering the prospectus/red herring prospectus with the RoC. (Corresponding provision was prescribed in Clause 2.1.1 of the erstwhile DIP Guidelines). SIRECL has

not filed the draft offer document with SEBI for processing before filing the RHP with RoC and thus has *prima facie* violated Clause 2.1.1 of the SEBI (DIP) Guidelines. Similarly, SHICL has *prima facie* violated Regulation 6 of the ICDR Regulations. The DIP Guidelines/ICDR Regulations intended to provide for necessary checks and balances in public issue process and enables investors to make an informed decision making, with regard to investment in public issues. Checks and balances provided in SEBI (DIP) Guidelines/ICDR Regulations include eligibility norms for the issuers, requirement of minimum promoters contribution and lock-in, requirement for mandatory IPO grading, comprehensive disclosure requirements in prospectus, guidelines regarding the issue process, issue advertisements, etc. In case of issuance of convertible debentures, certain additional requirements in-built in the ICDR Regulations/DIP Guidelines in the interest of investors like requirement to obtain credit rating, to appoint Debenture Trustee, to create Debenture Redemption Reserve, to create adequate charge or security on its assets and additional disclosure requirements. Based on the examination of the records available, it appears that SIRECL have violated the provisions of SEBI (DIP) Guidelines, 2000 and SHICL has violated the provisions of the ICDR Regulations, 2009 (the said *prima facie* violations are more elaborately explained in Annexure to this Order). Based on such observations, SIRECL has *prima facie* violated Clause 2.1.1., 2.1.4., 2.1.5., 2.2, 2.5, 2.8, 4.11, 4.14, 5.3.1., 5.6.2, 6.0 to 6.15, 8.8.1, 8.17, 10.0 to 10.6 and 10.9 of erstwhile DIP Guidelines. Similarly, SHICL has *prima facie* violated Regulation 4 (2), 5(1), 5(7), 6, 7, 16 (1), 20 (1), 25, 26, 36, 37, 46 and 57 of the ICDR Regulations. These *prima facie* violations amount to the following:

- a) failure to file the draft offer document with SEBI
- b) failure to mention the risk factors and provide the adequate disclosures that is stipulated, to enable the investors to take a well-informed decision
- c) denied the exit opportunity to the investors
- d) failure to lock-in the minimum promoters contribution
- e) failure to grade their issue
- f) failure to open and close the issue within the stipulated time limit

- g) failure to obtain the credit rating from the recognized credit rating agency for their instruments
- h) failure to appoint a debenture trustee
- i) failure to create a charge on the assets of the company
- j) failure to create debenture redemption reserve, etc. .

Thus, in effect, the companies have denied the investors of all the mechanisms designed to protect their interests.

30. From, the above preliminary analysis, it is observed that the issuances of OFCD by SIRECL and SHICL are *prima facie* in violation of Sections 56 and 73 of the Act. Further SIRECL has *prima facie* violated Clause 2.1.1., 2.1.4., 2.1.5., 2.2, 2.5, 2.8, 4.11, 4.14, 5.3.1., 5.6.2, 6.0 to 6.15, 8.8.1, 8.17, 10.0 to 10.6 and 10.9 of erstwhile DIP Guidelines and SHICL has *prima facie* violated Regulations 4(2), 5(1), 5(7), 6, 7, 16(1), 20(1), 25, 26, 36, 37, 46 and 57 of the ICDR Regulations.

31. It is pertinent to note, as per the prospectus filed by SIRECL and SHICL with the RoC, that the cost projects of both of the companies is ₹20,000 crores each and as per the annual accounts filed with RoC, SIRECL has already raised ₹4843.37 crore. The details of the amount raised by SHICL are not available from the RoC filings. The companies have been provided with sufficient opportunities to provide the information, as detailed above in this Order. Both the companies, instead of providing the information sought by SEBI, have adopted various means and adopted convenient pleas for not providing the information and delaying the examination process initiated by SEBI to ascertain the facts. In the absence of complete details required for such examination, due to non-cooperation by these companies, at this stage, it is difficult to assess the quantum of funds solicited by SIRECL and SHICL which are *prima facie* in violations of certain provisions of law, as stated above. It is, further, noted that the funds needed by the said companies for their projects, ₹40,000 cr. (i.e. ₹20,000 cr. each), which they are raising through issuance of OFCDs, is huge. A clearer appreciation of

the actions by the companies, emerges when one considers the scale of such a massive mobilization from the public against the fact that only ₹24,696 cr. were raised collectively in the entire capital market of the country by 39 companies through initial public offers (complying with the established legal framework prescribed by SEBI) during the financial year 2009-10 and ₹2,083 cr. alone were raised collectively by 21 companies during the financial year 2008-09. This raises serious concerns for the safety of the funds of the investors who have subscribed to the OFCDs issued by the said companies. As the capital market regulator, SEBI has to intervene to ascertain as to whether such issues to the public are in compliance with the applicable laws governed by it. It is to be noted that the companies chose not to co-operate with the regulator and continue to raise capital without complying with the applicable laws. Given this background, I note that the issuances of securities by the said companies, ostensibly by an interpretation of the phrase in Section 60B of the Act, as discussed previously, challenges the basic fabric of how a company can access funds from the public. If left unchecked, it leads to further unbridled solicitation of money from the public at large, without complying with the statutory requirements, without adequately disclosing the risks involved, and without adhering to other checks and balances built-in to protect the interest of the investors.

32. The contentions given by the companies are *prima facie* devoid of any merit. I have little hesitation in observing that these merely are put forward to defeat the whole purpose of the statutes that govern public issues and other incidental requirements. The ICDR Regulations/Guidelines have been framed to provide necessary checks and balance in the public issues framework. It is very clear that companies have conveniently omitted the necessary statutory declaration of compliance. If companies are allowed to go ahead in such a manner and raise vast sums of capital in the guise of private placement, it would be a mockery of the entire capital market framework and all established mechanisms to protect investor's interest.

33. A perusal of the balance sheets filed by one of the Sahara Group entities with RoC, Sahara India Commercial Corporation Limited (SICCL), it is observed that balances under the head “Optionally Fully Convertible Debentures” under “unsecured loans” in the preceding financial years shown as follows:

Year	Amount as per the balance sheet (in ₹)
2004-05	5,171. 41 Crs
2005-06	6,141. 89 Crs.
2006-07	7,111. 39 Crs
2007-08	7,008. 51 Crs
2008-09	6,922. 32 Crs

34. Further, in the DRHP of SPCL (in page no. 640), a disclosure is made with respect to the litigations between SICCL and Commissioner of Income Taxes (CIT), where it is mentioned that assessment order by CIT mentioned that the assessee had violated the provision of section 269SS of the Income Tax Act, 1961 to the tune of ₹35.56 Crs. by accepting OFCDs of ₹20,000 or more from individuals otherwise than through account payee cheque or demand draft and assessee had violated the provision of section 269T of the Income Tax Act, 1961 and to the tune of ₹28.35 Crs. by repaying OFCDs of ₹20,000 or more to individuals otherwise than through account payee cheque or Demand Draft. As per the disclosure, the said matters are pending before Commissioner of Income Tax (Appeals), New Delhi. From the facts mentioned in preceding paragraphs, it *prima facie* appears that few of the Sahara Group companies are raising massive sums of money in the form of OFCDs.

35. The OFCD issuances by the companies seem *prima facie* characterized by lack of transparency on their part. As inordinately large amounts have been received as subscription for OFCDs issued by the companies, it is imperative to find out the source from which the funds have been obtained as a means to ensure that the interests of investors providing such funds are adequately protected. However, the companies have deliberately not provided the information pertaining to the issues. It is crucial

to probe into how the companies could have raised huge amount of money running into thousands of crores without conforming to prudent disclosure norms that govern public issues. There is a startling absence of details regarding the issues in public domain which coupled with the reluctance of the companies to furnish required information, that makes the required understanding almost impossible. It may require detailed scrutiny of the balance sheet of Sahara Group, to examine the flow of funds in and out of the companies. *Prima facie*, it appears that in the guise of private placements, these companies are rampantly tapping huge amount of money by not disclosing the source of funds by circumventing the applicable framework of law.

36. Further, it is also a matter of concern that the details regarding filing of RHP by SIRECL and SHICL with RoC and the amount raised through issuance of OFCDs by these group companies is not disclosed in the DRHP of Sahara Prime City Limited, which, needless to say, is material information of interest to prospective investors.

37. Considering the quantum of money solicited by these companies, it is only to be presumed that the *prima facie* violations have taken place with the connivance of the promoters. The resolutions passed in the AGM of the said companies make it clear that the promoter of the companies have full cognizance about the mode of raising money. This is a fit case, where, in the interest of the investors, there is a clear imperative to lift the corporate veil and identify the individuals, behind this solicitation of funds. Needless to say, it would be an indefensible failure on the part of SEBI, if it were to allow investors to be imperiled, given the massive scale of fund mobilization as brought out above, *prima facie*, completely outside the applicable regulatory framework.

38. Taking into account the gravity of this case, I am of the considered opinion that pending the outcome of investigations in the matter, immediate action is called for, in the interest of the investors to prevent these companies from raising further capital from public, which is *prima facie* in

violation of the relevant provisions of the Act and SEBI Act and the relevant regulations made thereunder, as found above in this Order.

39. Therefore, in view of the foregoing reasons, in order to protect the interest of investors and the integrity of the securities market, I, in exercise of the powers conferred upon me under Section 19 the Securities and Exchange Board of India Act, 1992 and Sections 11(1), 11(4)(b), 11A and 11B thereof, read with Regulation 107 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, pending investigation, hereby issue the following directions, by way of this ad interim, ex-parte Order:

a. Sahara India Real Estate Corporation Limited and Sahara Housing Investment Corporation Limited are restrained from mobilizing funds under the Red Herring Prospectus dated March 13, 2008 and October 6, 2009, respectively, filed with the concerned Registrar of Companies, till further directions. The said companies are further directed not to offer their equity shares/OFCs or any other securities, to the public and invite subscription, in any manner whatsoever, either directly or indirectly till further directions.

b. Sahara India Real Estate Corporation Limited and Sahara Housing Investment Corporation Limited and the persons who are named as promoters and directors of the said companies in the Red-Herring Prospectus filed with the concerned Registrar of Companies, namely, Mr. Subrata Roy Sahara, Ms. Vandana Bharrgava, Mr. Ravi Shankar Dubey and Mr. Ashok Roy Choudhary, are prohibited from issuing 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, till further directions.

40. Sahara India Real Estate Corporation Limited and Sahara Housing Investment Corporation Limited are directed to show cause as to why action should not be initiated against them including issuance of directions to

refund the money solicited and mobilized through the prospectus issued with respect to the impugned OFCDs, done *prima facie* in violation of the provisions of the Companies Act, 1956, the Securities and Exchange Board of India Act, 1992, the erstwhile Securities and Exchange Board of India (Disclosure and Investor Protection) Guidelines, 2000 and the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, as observed in this Order.

41. The entities/persons against whom this order is issued may file their objections, if any, to this Order within thirty days from the date of this Order and, if they so desire, avail of an opportunity of personal hearing at the Securities and Exchange Board of India, Head Office, SEBI Bhavan, C-4A, G Block, Bandra Kurla Complex, Bandra (East) Mumbai-400051. They may also inspect the relevant documents, if they so desire, on any working day prior to the hearing, during office hours at the above mentioned address.

42. Copy of this Order is also forwarded to the Ministry of Corporate Affairs to enable them to take appropriate action as deemed fit by them, for any violation of the applicable provisions of the Companies Act, 1956 administered by them.

43. This Order is without prejudice to any other action that may be initiated against the said violations.

44. This Order shall come into force with immediate effect.

**DR. K. M. ABRAHAM
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA**

**PLACE: MUMBAI
DATE: NOVEMBER 24, 2010**