

## Public issue of securities: SIRECL v SEBI – an analysis

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Two unlisted companies, Sahara India Real Estate Corporation (SIRECL) and Sahara Housing Investment Corporation Limited (SHICL), were raising funds by way of a private placement through optionally fully convertible debentures (OFCDs). They filed a red herring prospectus with the registrar of companies of Uttar Pradesh. Another Sahara group company, Sahara Prime City, filed a draft red herring prospectus with the Securities and Exchange Board of India (SEBI) for an initial public offering.

SEBI received complaints that SIRECL and SHICL had issued OFCDs in violation of statutory norms and issued a notice to their merchant banker calling for certain information relating to the debentures. Subsequently, on 24 November 2010, SEBI banned the Sahara group from raising money from the public for allegedly violating public issue norms.

### Outside scope of SEBI?

Aggrieved by SEBI's order, SIRECL filed a writ petition before Allahabad High Court on the grounds that section 55A of the Companies Act, 1956, gives SEBI jurisdiction only over listed companies or companies that intend to list on the stock exchange. SIRECL said its offer was made by a private placement to a select group of people (friends, associates and employees), without advertising it to the public. Insisting it had no intention to list on the stock exchange, SIRECL pointed out the OFCDs were outside SEBI's purview.

SIRECL also said the OFCDs were being issued pursuant to an information memorandum filed with the registrar of companies under the Ministry of Company Affairs, which had allowed

the two unlisted companies to issue OFCDs. SIRECL argued only the central government has jurisdiction over the issue of debentures by unlisted company.

### Action by courts

Allahabad High Court granted SIRECL interim relief against SEBI's order. This prompted SEBI to file a special leave petition before the Supreme Court. Holding that SEBI would be entitled to call for any information which it deems fit and necessary, including the names of the investors, the apex court on 4 January dismissed the petition filed by SEBI seeking to restrain the Sahara group from raising money from the market through OFCDs.

The court then directed the Lucknow bench of Allahabad High Court to hear and decide the case expeditiously. On 7 January SEBI issued a public notice to investors cautioning against the debentures issued by SIRECL and SHICL.

### Relevant provisions

An analysis of the Companies Act, 1956, reveals the following:

1. Section 55A – SEBI has jurisdiction only over listed public companies and those public companies that intend to get their securities listed in India.

2. Section 67 explicitly states that a reference in the act or in the articles of a company to offering or inviting the public to subscribe to shares or debentures, shall be construed as a reference 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. Proviso to section 67(3) – an issue

that is made by way of private placement to 50 or more people is deemed to be a public issue irrespective of whether it was offered to the public at large or to just a section of the public chosen in whatever manner.

4. Section 73(1) – a company that intends to offer shares or debentures to the public by the issue of a prospectus shall, before such issue, make an application to one or more recognized stock exchanges for permission to list the shares or debentures.

5. Section 73(2) – a company that does not apply for listing permission (as observed in the present case) will refund all the money received as subscription within a stipulated time.

6. Sections 55A and 73 read together provides for compulsory listing of securities in case of a deemed public issue. Further section 73(4) voids any condition to waive this requirement.

7. Sections 55 to 81 that deal with "prospectus" are applicable if the offer is made to 50 persons or more.

This case has raised issues about the jurisdiction and powers of SEBI vis-à-vis that of the central government, with regards to the issue of securities by an unlisted company to the public. While the proviso to section 67 provides that an offer to more than 50 persons shall be deemed to be a public issue, it is debatable if a private placement by an unlisted company to 50 or more people will result in the compulsory listing of its securities. This matter is *sub judice*, but its outcome will settle issues relating to the public issue of securities and the jurisdiction of SEBI.

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