

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

Under sections 11, 11A, 11B, 11(4) 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 Regenix Drugs Limited, Mr. Ayyavu Ramamurthy, Mr. Vishwas Vasant Pathak, Mr. Saleem Mohammed Mohamed Haniffa, Mr. Raju Gunasekaran, Ms. Malathy Ramamurthy, Mr. Arvind Devanathan, Mr. Govindarajan Venkatakrishna and Mr. Natarajan Arun

In the matter of issuance of equity shares by Regenix Drugs Limited.

Appearances for Noticees:

1. Mr. Rabi Narayanan Pal, Practising Company Secretary
2. Mr. Umesh Chandar Dalai, Company Secretary
3. Dr. Ramamurthy, Managing Director
4. Dr. Arvind, Director

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1. Regenix Drugs Limited ("RDL") served a notice dated May 13, 2013 to Securities and Exchange Board of India ("SEBI") pursuant to a direction of Company Law Board, Chennai ("CLB") which was examining a Compounding Application filed by RDL before it under section 621A of the Companies Act, 1956 ("Companies Act") to compound the offence in terms of section 67(3) read with section 629A of the Companies Act.
 2. In the aforesaid Compounding Application of RDL, *inter alia*, the following was mentioned:
 - a. RDL had allotted shares to persons belonging to doctors fraternity, their close relatives and associates on their request.
 - b. RDL, in continuation of its expansion plan had acquired three companies, *viz*, Queen Pharmaceuticals Limited, Mur & Mur Bio Science and Health Limited and Bharti Lifesciences Private Limited by way of acquiring 100% controlling stake from the existing shareholders of these companies.
 - c. The investments were received *suo motu* predominantly from doctors fraternity and their family members on their own accord in small tranches. Over a period of time due to accumulation of all investments, the size of investors in numbers grew to over 50 persons but at any point of

time RDL did not offer invitation to general public inviting them to offer for subscription of its equity shares.

- d. As a result, on 6 occasions, the number of persons to whom the shares were allotted exceeded the limit of 50 persons as prescribed in section 67(3) of the Companies Act. The instances are as under:

Table 1: Allotments of shares by RDL

S. No.	Date	No. of allottees	No. of shares allotted
1	December 14, 2007	50	97,500
2	March 20, 2008	1,668	33,70,730
3	September 20, 2008	94	18,53,020
4	March 28, 2009	164	12,81,760
5	March 20, 2010	199	4,76,994
6	December 08, 2010	133	21,31,103

3. Vide letter dated June 12, 2013, SEBI requested the Registrar of Companies, Chennai to provide documents such as return of allotment, board resolutions/general body meeting resolutions, etc. filed by RDL before it. The Registrar of Companies, Chennai provided the said documents to SEBI on September 10, 2013. From the said documents It was noted that there had been allotments of shares to more than 50 persons on the dates listed in table 1 above.
4. In view of the above, SEBI issued a Show Cause Notice dated January 13, 2014 (hereinafter referred to as 'the SCN') to RDL and its directors namely, Mr. Ayyavu Ramamurthy, Mr. Vishwas Vasant Pathak, Mr. Saleem Mohammed Mohamed Haniffa, Mr. Raju Gunasekaran, Ms. Malathy Ramamurthy, Mr. Arvind Devanathan, Mr. Govindarajan venkatakrishna and Mr. Natarajan Arun (hereinafter collectively referred to as "the Noticees" and individually by their respective names) under sections 11(1), 11(4), 11A and 11B of the Securities and Exchange Board of India Act, 1992 ("SEBI Act") read with regulation 107 of the Securities and Exchange Board of India (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 directing RDL to refund the money collected, directing RDL and other companies in which its directors hold substantial or controlling interest not to access the capital market for a particular period, and initiating prosecution proceedings under the relevant provisions of the Companies Act.
5. It is alleged in the SCN that the Noticees have violated section 73 read with section 67(3) of the Companies Act and also the provisions of clauses 2.1.1, 2.1.4, 2.1.5, 2.2, 2.8, 4.11, 4.14, 5.3.1, 5.6, 6.0 to 6.15 and 8.8.1 of the SEBI (Disclosure and Investor Protection) Guidelines, 2000 ("DIP Guidelines") read with regulations 4, 5, 6, 7, 25, 26, 36, 37, 46 and 57 of ICDR Regulations.

6. The Noticees filed their combined reply to the SCN vide letter dated February 24, 2014. The Noticees were afforded an opportunity of personal hearing in the matter on July 01, 2014, when their authorized representatives appeared and made their submissions. Thereafter, vide letter dated July 07, 2014, the Noticees filed their combined written submissions. The replies/written submissions submitted by the Noticees are, *inter alia*, as under:

- 1) RDL was incorporated on May 10, 2007 as a closely held public limited company with the Registrar of Companies, Chennai by a group of doctors and their fraternity members with the basic intention to manufacture life saving drugs, set high tech diagnostic lab, offer retail pharmacy services, bring high tech medical equipments and provide various ancillary health care services at affordable cost to the rural populace in the State of Tamilnadu, who are deprived from the benefit of availing expensive medicines and health care services due to their poor economic conditions.
- 2) The noble objects of RDL and their intentions spread by word of mouth within the doctors/medical fraternity in Tamilnadu resulting in contribution by way of investment in the equity shares of RDL. The objects of RDL are more or less similar to that of Trusts, Co-operative societies, etc though the intention is to make some profits as well in this noble process.
- 3) The contributions of resources for the furtherance of RDL's objects were received *suo motu* predominantly from doctor fraternity and their family members on their own accord in small tranches. Being not practicably possible for RDL to allot shares as often on receipt of the contributions, in order to avoid multiplicity of allotments in short intervals, RDL accumulated the contributions received over a period of time and allotted the shares to persons from whom the investments were received during the relevant period of time. As a result, on six occasions, the number of persons to whom the shares were allotted exceeded 50 and hence amounted to contravention of provisions of section 67(3) of the Companies Act.
- 4) RDL neither made any offer nor issued any invitation to the doctors/their fraternity for subscription of shares and on all such occasions the allotments were made based on the request of the doctors and their fraternity members. The shares were issued to the doctor fraternity and their family members without giving any advertisement to the general public and hence, it is not an offer to the public.
- 5) There was no *mala fide* intention on part of RDL and the default was not wilful and happened accidentally. If RDL had any *mala fide* intention, the shares could have been allotted in several

tranches of less than 50 at any given point of time and in such case it could have overcome the restriction provided under section 67 of the Companies Act.

- 6) The allottees are the real owners and not the investors and the investment was purely made by the doctors with the sole intention to make available the medicines and health care services at affordable cost to the weaker sections of the public.
- 7) The size of preferential allotments made in all 6 occasions is not the deciding factor to determine the jurisdiction of SEBI under section 55A of the Companies Act. Instead the following are the determining facts to ascertain the jurisdiction of the SEBI:
 - A. RDL is not a listed public company nor did it intend to get its securities listed at the relevant point of time.
 - B. RDL in all such six occasions had not issued any offer documents, letter of offer, information memorandum, etc.
- 8) RDL is not a listed company nor did it intend to get its securities listed on any stock exchange at the relevant point of time and therefore SEBI shall have no power under section 55A of the Companies Act to administer various provisions relating to preferential allotment of shares by way of private placement made by RDL to its promoters, doctors and their fraternity as a domestic concern. In terms of section 55A(c) of the Companies Act read with the explanation to section 55A, the Central Government is the regulatory authority to administer the various provisions in relation to preferential allotment of shares made by RDL in respect of which the compounding application filed by RDL (under section 621A read with section 67(3) of the Companies Act) is pending before the CLB. Hence, RDL is not subjected to any Rules and Regulations, Guidelines framed by SEBI.
- 9) SEBI has erred in assuming its jurisdiction over an Unlisted Public Company, as regulations 3 and 6 of ICDR Regulations shall not apply to the allotments made in all such occasions, since there was no public issue either in the nature of an initial public offer or further public offer as defined by Regulation 2(zc), 2(p) and/or 2(n) of ICDR Regulations.
- 10) The allotments made to the Doctors and fraternity members cannot be regarded as "public issue" and the allotments were made in pursuance to the special resolution passed under section 81(1A) of the Companies Act, read with provisions of Unlisted Public Company (Preferential allotment of Shares) Rules 2003 (hereinafter referred to as "the 2003 Rules"), which is in full compliance of law and spirit as envisaged under Companies Act.

- 11) The provisions of the 2003 Rules (prior to December 14, 2001) did not prohibit an unlisted public company from inviting more than 49 persons for subscribing to its shares and debentures. The restriction on allotment of shares to more than 49 persons was subsequently brought into effect by way of amendment to rule 3 of the said Rules with effect from December 14, 2011 and by that time the company had completed all the allotments. Also, RDL has not issued any offer document making offer to the public for subscription of shares. Therefore the allotment of shares to even more than 50 persons cannot be construed as public offer. The compounding application was filed just because the allottees exceeded 50 therefore it is not justified on the part of the SEBI to construe that the petitioners made a public offer.
- 12) Even though the Hon'ble Supreme Court in *Sahara Real Estate Corporation Limited Vs. SEBI* held that the 2003 Rules are subordinate regulations and are to be read subject to the provisions of section 67(3) and section 73(1) of the Companies Act and other related provisions, in order to satisfy the requisites of the provisions of section 67(3) and section 73(1):
- There must be an *offering of shares* by the company to the public or a section of the public (Section 67(1) of the Companies Act);
 - There must be an invitation to the public or any section of the public to subscribe to the shares (Section 67(2) of the Companies Act);
 - The offer of shares to the public for subscription of shares should be by the issue of prospectus / offer document (section 73 of the Companies Act).
- 13) SEBI cannot go by the deeming provisions of "*public issue*" under section 67(1) and (2) of the Companies Act to insist that RDL has to comply with the procedure prescribed for inviting public for issue of shares. Provisions of section 67 become applicable only when a company has made an offer or invitation to the public through offer documents inviting offer for subscription of shares. RDL has not made any offer or invitation to the public in all 6 occasions and thus, these allotments cannot be regarded as public issue. The allotments made in all such six occasions were pursuant to the offer/proposal voluntarily received from the Doctors and their fraternity members.
- 14) Further, the provisions of section 73 of the Act are applicable to a company intending to offer shares or debentures to the public for subscription by issue of a prospectus and such company shall, before such issue, make an application to one or more recognized stock exchanges for permission for the shares or debenture intending to be so offered to be dealt with in the stock exchange or each such stock exchange. However, in all such 6 occasions RDL has never issued any prospectus, offer documents inviting the general public for subscription of securities and hence RDL is not falling under the provisions of section 73 of the Companies Act.

- 15) The allotments made by RDL are neither "initial public offer" or "further public offer", and hence DIP Guidelines or ICDR Regulations are not applicable. When the allotments are not falling within the purview of the above SEBI Guidelines, it is unjust and unfair to apply the rulings of Hon'ble High Court of Kerala in *SEBI Vs. Kunnumkulam Paper Mills Limited* and the rulings of Hon'ble Supreme Court in *Sahara India Real Estate Corporation Limited Vs. SEBI*, which were arrived by applying the above Guidelines.
- 16) RDL, during the financial years 2009-10 and 2010-11, as a part of its expansion programme and to gain geographical advantages and operational convenience without further capital investment acquired the existing business of Queen Pharmaceuticals Limited, Bharti Lifesciences Private Limited and Mur & Mur Biosciences and Health Limited. Subsequently, these companies were merged with RDL under separate schemes of amalgamation which were also approved by the High Courts. In pursuance of these mergers, RDL had allotted shares to the shareholders of the said companies. The details of allotments made by RDL are as under:

<i>Allotment pursuant of merger of RDL with Queen Pharmaceuticals Limited</i>		
Date	No. of persons	No. of shares allotted
Match 20, 2010	199	476994
December 08, 2010	79	27507
Total		504501
<i>Allotment pursuant of merger of RDL with Bharti Lifesciences Private Limited</i>		
December 08, 2010	31	1554750
<i>Allotment pursuant of merger of RDL with Mur & Mur Biosciences and Health Limited</i>		
December 08, 2010	6	410400

- 17) As on December 8, 2010, RDL had allotted an aggregate of 21,31,103 shares to 133 shareholders out of which 19,92,657 shares were allotted to 116 shareholders under the approved schemes of mergers mentioned above. Another 93,000 shares were allotted to one of the founder promoter and 45,446 shares were allotted to 16 persons who are other than existing shareholders.
- 18) This merger with RDL was purely a business decision of the shareholders of all the above three companies and the shares were allotted with their own accord and concurrence without any invitation and offer to the public. As result of the above allotment of shares made pursuant to approved schemes of mergers, the number of allottees on March 20, 2010 and on December 08, 2010 exceeded fifty persons. The allotment of shares made under a approved scheme of

merger and acquisition does not amount to public offer as defined under clause 2.(p) of ICDR Regulations.

- 19) RDL's case and Sahara's case are completely distinguishable and have complete material departure from each other. The distinction is drawn out under the following heads:

Carrying on business as a going concern:

- a) SIRECL while inviting offer for the subscription of OFCDs was not carrying on any business and the proposed issue was to augment long term resources to meet their future projects. As on December 31, 2007, the cash/bank balance and net current assets of SIRECL were around ₹6 lakh each. SIRECL had no fixed assets nor any investments as on that date. On the other hand, RDL had been continuously carrying on the business from the date of commencement of its first commercial operation during the year 2008-09. The contributions received were deployed in setting of labs, procurement of medical equipments, opening of pharmacy, etc.

Refund of contribution will lead to closure of business which will prejudicially affect the interest of all the stakeholders:

- b) Since SIRECL was not carrying out any business activities, the funds raised by it by issuance of OFCDs was lying idle in the bank accounts and hence the refund of money would not cause any damage or loss to the business nor it would prejudicially affect the interest of any investors if the amount raised will be returned to the investors as it is. Whereas, RDL has infused the contributions with philanthropic objects to provide best healthcare services to the poor and needy at affordable cost. The money raised has been already deployed in funding various projects which could not be ploughed back without closure and assuming that all the projects are closed, RDL will not be able to realize adequate resources to refund the original contribution of the doctors and their fraternity members. Thus, refund of contribution will lead to the closure of the business which will prejudicially affect the interest of all stakeholders.

Size of allotment:

- c) The size of allotments made by RDL is very small and negligible when compared to SIRECL.

Applicability of sections 67(1), (2) and (3) of the Companies Act:

- d) SIRECL filed its RHP with ROC, Uttar Pradesh, circulated Information Memorandum along with its application forms to its friends, associated group companies, workers/employees and other individuals associated with the Sahara Group for subscribing to OFCDs. The OFCDs were allotted to more than 2 crore allottees. Thus, the provisions of section 67 became applicable to SIRECL. On the contrary, the provision of section 67 shall not apply to RDL since it had not made any offer or invitation to the public inviting subscription of shares through any offer document and the contribution was received voluntarily from the doctors and their fraternity.

Real owner:

- e) The allottees (of the shares of RDL) on all the occasions are the real owners and not the investors. RDL is owned by doctors and their family members and the general public is not involved in any manner. Whereas, in the case of SIRECL, the investment in the form of OFCDs was invited and received from more than 2 crore investors who are general public and neither shareholders/promoters/directors of SIRECL nor in any way connected / concerned with the business of SIRECL. The investment was made by them only with an intention to earn fixed rate of interest.

Complaints:

- f) There are no pending complaints before SEBI or any other Regulatory Authority against RDL from any of the shareholders alleging oppression or mismanagement. Whereas, in case of SIRECL, SEBI had initiated the investigation process based on the complaints received.

Untrue statements:

- g) The RHP of SIRECL contained several untrue statements which attracted the provisions of section 62 and 63 of the Companies Act. Whereas RDL at any point of time did not issue any RHP / offer letter and hence the provisions of section 62 and 63 will not apply to RDL.

Genuineness of the investors:

- h) In case of SIRECL, the addresses of OFCD holders were incomplete/ ambiguous. Serious doubts were also raised by SEBI with regard to the identity and genuineness of the investors and the intention of SIRECL to pay the debenture holders upon redemption. Whereas in case of RDL, the capital contributions from doctors were received in the form of account payee cheques and they were also KYC compliant. Proper identification of the doctors was

also taken into account and all the doctors are also available on their addresses available with RDL.

Document containing offer of shares or debentures also to be a deemed prospectus:

- i) SIRECL for soliciting OFCDs had registered the RHP, issued information memorandum and applications which come within the purview of section 4 of the Companies Act. Whereas, RDL at any point of time did not issue any document containing offer for subscription of shares or debentures.
- 20) The kind of direction SEBI is contemplating against RDL including refund of investors money is unjust, illegal and without jurisdiction. The interference from SEBI in the pretext of protection of investors is not warranted. Instead, it will hamper the smooth functioning of RDL's business and derail the original object of forming RDL. The contributions received from the doctors in pursuance of the allotments have been already deployed in funding various projects, which are not possible to be withdrawn. Even if the projects are closed, RDL will not be in a position to realize entire proceeds of investment and will incur huge losses. In turn the doctors and their fraternity members will sustain huge losses and they will be discouraged from venturing into philanthropic services and ultimately the action of SEBI will prejudicially affect the interest of not only the doctors but also the poor, needy and weaker section of the society without any gain to the Government. The proposed action in any manner is not beneficial to any person(s) instead it will cause irreparable damage to investors and RDL. At this juncture, when there are no financial irregularities and RDL has voluntarily come forward to rectify the procedural error by filing compounding application before Hon'ble CLB, it would be unfair to tell RDL to return the money to the Doctors/shareholder.
- 21) RDL had already filed compounding application before the Company Law Board. SEBI has also filed its objection in accordance with the direction of CLB and the same is pending for consideration of CLB and the matter is now *sub-judice*. While the issue is before CLB, SEBI has issued the SCN. This will lead to multiple proceedings for the same cause of action and will lead to conflict of decision of CLB with that of SEBI.
7. Mr. Saleem Mohammed Mohamed, vide a separate letter dated January 27, 2014, submitted that he was inducted as an additional director of RDL in board meeting dated April 15, 2012 and was regularized in the annual general body meeting dated September 24, 2012. In view thereof, he submitted that he was not involved in the activities of RDL mentioned in the SCN.

8. I have carefully considered the SCN, the replies/written submissions of the Noticees and relevant material available on record.
9. The SCN lists out six dates (mentioned in Table 1 above) on which RDL had allotted shares to more than 49 persons. In this regard, it is pertinent to note the submission of the Noticees that out of these allotments, the allotments made on March 20, 2010 (i.e. allotment of 476994 shares to 199 shareholders) and December 08, 2010 (i.e. allotment of 19,92,657 shares to 116 shareholders) were pursuant to mergers of RDL with Queen Pharmaceuticals Limited, Bharti Lifesciences Private Limited and Mur & Mur Biosciences and Health Limited under separate schemes of amalgamation which were approved by the respective High Courts under sections 391-394 of the Companies Act. I note that schemes of arrangement involving merger and amalgamation require compliance with the provisions of section 391-394 of the Companies Act and Rules made there under. In accordance with the said provisions, in case of a scheme of arrangement involving a merger/amalgamation, the proposal to merge/ amalgamate the company/companies with the approval of shareholders, creditors, etc. is filed before the concerned High Court for its sanction. On receipt of sanction of the High Court, the company, in which the other company has merged, allots its shares to the shareholders of the merged company. In these cases, the issuance of shares is incidental and consequential to the implementation of the scheme of merger and amalgamation. Hence, such allotments pursuant to the High Court's approval cannot be construed as an offer/invitation to public to subscribe for shares in the company for the purposes of section 67 of the Companies Act. Considering the above, I am of the view that the allotments made by RDL on March 20, 2010 and December 8, 2010 pursuant to schemes of arrangement approved by the concerned High Courts shall be excluded from the applicability of section 67 of the Companies Act and other provisions of the Companies Act, SEBI Regulations / Guidelines relating to "public issues". I also note that on December 8, 2010, 93,000 shares were allotted to one of the founder promoter and 45,446 shares were allotted to 16 persons who were other than existing shareholders. Since the number of allottees in respect of these allotments (i.e. 17) was less than 50, they fall outside the purview of the proviso to section 67(3). In view of the above, if find that for the purpose of allegations levelled in the SCN against the Noticees, only the allotments made by RDL on December 14, 2007, March 20, 2008, September 20, 2008 and March 28, 2009 shall be relevant.
10. Before proceeding further with consideration of other 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, SEBI's jurisdiction in such matters, etc. have been settled by the Hon'ble Supreme Court of India in its judgement 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").

11. 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 as it applied at the relevant time and provided as under:-

“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 is made to fifty persons or more:

.....”

12. I note that section 67 of the Companies Act provides for rule of construction for treating an issue of shares or debentures as public issue. From the language of section 67, it is very clear that construction of public issue under sub-sections (1) and (2) thereof is subject to provisions of section 67(3). Section 67(3) exempts an offer or invitation from the purview of the construction laid down in section 67(1) and 67(2), if such offer or invitation can properly be regarded, in all the circumstances -

- i. 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
- ii. otherwise as being a domestic concern of the persons making and receiving the offer or invitation.

13. I note that the first proviso to section 67(3) states 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. Thus, in terms of the first proviso to section 67(3), any offer or invitation to fifty or more persons to subscribe for shares or debentures is a public issue even if a case satisfies the conditions under section 67(3) (a) or (b). In other words, an offer or invitation to 50 or more persons is a public issue even if it is shown that the shares or debentures are not available for subscription or purchase by persons other than those receiving the offer or invitation or that it is of a “domestic concern” of those making and receiving the offer or invitation. In this regard it is also to be kept in mind that the first proviso was inserted in section 67(3) vide the Companies (Amendment) Act, 2000, with effect from December 13, 2000, in order to curb the companies from offering shares and debentures to a wider group of people by disguising it as “domestic concern”. In my view, the intention of the Legislature, as envisaged in the said Amendment Act is that any mobilization of funds from a group of investors, fifty or more in number, should be classified as a "public issue".
14. I further note that the Hon'ble Supreme Court in the above mentioned *Sahara Order* has settled all the doubts relating to interpretation of section 67 of the Companies Act and has held as under -
- ".....Even those issues which satisfy Sections 67(3)(a) and (b) would be treated as an issue to the public if it is issued to fifty or more persons, as per the proviso to Section 67(3) and as per Section 73(1), an application for listing becomes mandatory and a legal requirement. Reading of the proviso to Section 67(3) and Section 73(1) conjointly indicates that any public company which intends to issue shares or debentures to fifty persons or more is legally obliged to make an application for listing its securities on a recognized stock exchange."*
15. In view of the provisions of section 67(3) and aforesaid observations of the Hon'ble Supreme Court, I find that once the number of allottees exceeds 49, it becomes irrelevant whether the allottees were members of an identified group or fraternity. In the present case, though the Noticees have claimed that the allotments made by them do not fall within the meaning of “Initial Public Offer” or “Further Public Offer” as defined under ICDR Regulations, but since the number of allottees in the allotments dated December 14, 2007, March 20, 2008, September 20, 2008 and March 28, 2009 exceeded 49 persons, the same would be deemed to be public offers. I, therefore, reject the contentions of Noticees in this regard and find that the aforesaid issuances of shares by RDL in this case were "public issues".
16. 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 following:

“... after the amendment to the Companies Act, 1956 on 13.12.2000, every private placement made to fifty or more persons becomes an offer intended for the public and attracts the listing requirements under Section 73(1). Even those issues which satisfy Sections 67(3)(a) and (b) would be treated as an issue to the public if it is issued to fifty or more persons, as per the proviso to Section 67(3) and as per Section 73(1), an application for listing becomes mandatory and a legal requirement. Reading of the proviso to Section 67(3) and Section 73(1) conjointly indicates that any public company which intends to issue shares or debentures to fifty persons or more is legally obliged to make an application for listing its securities on a recognized stock exchange.”

17. Another contention of the Noticees is that provisions of the 2003 Rules (prior to December 14, 2001) did not prohibit an unlisted public company from inviting more than 49 persons for subscribing to its shares and debentures and the restriction on allotment of shares to more than 49 persons was subsequently brought into effect by way of amendment to rule 3 of the said Rules with effect from December 14, 2011. They have further submitted that by that time (i.e. December 14, 2011) RDL had completed all the allotments and therefore the allotment of shares to even more than 50 persons cannot be construed as public offer. In this regard, I note that the Hon'ble Supreme Court in the *Sahara Order* has also settled the law relating to applicability of the 2003 rules in cases where the number of allottees exceeds 49 in number. The following observations of the Hon'ble Supreme Court in the *Sahara Order* are noteworthy:

*"2003 Rules are not applicable to any offer of shares or debentures to more than 49 persons. 2003 Rules was framed by the Central Government in exercise of the powers conferred under Section 81(1A) read with Section 642 of the Companies Act to provide for rules applicable to the unlisted public companies. Section 81 of the Companies Act deals with further issue of securities and only gives pre-emptive rights to the existing shareholders of the company, so that subsequent offer of securities have to be offered to them as their "rights". Section 81(1A), it may be noted, is only an exception to the said rule, that the further shares may be offered to any persons subject to passing a special resolution by the company in their general meeting. Section 81(1A) cannot, in any view, have an overriding effect on the provisions relating to public issue. Even if armed with a special resolution for any further issue of capital to person other than shareholders, it can only be subjected to the provisions of Section 67 of the Company Act, that is if the offer is made to fifty persons or more, then it will have to be treated as public issue and not a private placement. A public issue of securities will not become a preferential allotment on description of label. Proviso to Section 67(3) does not make any distinction between listed and unlisted public companies or between preferential or ordinary allotment. Even prior to the introduction of the proviso to Section 67(3), any issue of securities to the public required mandatory applications for listing to one or more stock exchanges. **After insertion of the proviso to Section 67(3) in December 2000, private placement allowed under Section 67(3) was also restricted up to 49 persons. 2003 Rules apply only in the context of preferential allotment of unlisted***

companies, however, if the preferential allotment is a public issue, then 2003 Rules would not apply."

18. In view of the above observations of the Hon'ble Supreme Court, I find no merit in the contention of the Noticees that the issuances of shares by RDL to more than 49 persons was not a "public issue" as the same were made in accordance with the 2003 Rules.
19. The Noticees have further contended that SEBI does not have the jurisdiction in respect of the issuance of shares by RDL since RDL was not a listed company and did not have any intention of getting listed on any stock exchange. They have also contended that the issue of shares was to be administered only by the Central Government and not by SEBI, I note that the Hon'ble Supreme Court in the *Sahara Order* has conclusively held that SEBI has the power to administer the provisions referred to in section 55A which relate to issue and transfer of securities and non-payment of dividend by public companies, which have issued securities to fifty persons or more, though not listed on a recognized stock exchange and whether they intend to list their securities or not. The following observations of Hon'ble Supreme Court in this regard are noteworthy:

"The main part of Section 55A confers jurisdiction on SEBI with regard to three categories i.e. issue of securities, transfer of securities and non-payment of dividend. The expression "all other matters" mentioned in the explanation would refer to powers other than the above mentioned categories. Further, it may also be remembered that the explanation does not take away the powers conferred on SEBI by other sections of the Companies Act. At the same time, matters relating to prospectus, statement in lieu of prospectus, return of allotment, issue of shares and redemption of irredeemable preference shares be exercised by the Central Government, Tribunal, Company Law Board, Registrars of Companies, as the case may be. Further, Section 60B(9) clearly indicates that upon closing of the offer of securities, a final 'prospectus' has to be filed in the case of listed company with SEBI and Registrar, hence the explanation to Section 55A can never be constructed or interpreted to mean that SEBI has no power in relation to the prospectus and the issue of securities by an unlisted public company, if the securities are offered to more than forty nine persons."

20. Admittedly, in the present case, RDL had issued shares to more than 49 persons on December 14, 2007, March 20, 2008, September 20, 2008 and March 28, 2009. As held by the Hon'ble Supreme Court in the *Sahara Order*, SEBI has the jurisdiction over the issuance of shares where the number of allottees exceeded 49 in number. I therefore, reject the contentions of the Noticees that SEBI has no jurisdiction to administer the applicable provisions of the Companies Act in this case.
21. I note that in terms of provisions of section 73 of the Companies Act, listing of securities issued pursuant to a public issue, is mandatory and not optional at the intention of the issuer. Thus, when shares or debentures are issued by any company including an unlisted company to 50 or

more persons, it is under a legal obligation to make an application on a recognized stock exchange for listing thereof. In this regard, I note that in the above mentioned *Sahara Order*, Hon'ble Supreme Court has held 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.

Listing is, therefore, a legal responsibility of the company which offers securities to the public, provided offers are made to more than 50 persons. In view of the clear statutory mandate, the contention raised, based on Rule 19 of the SCR Rules framed under the SCR Act, has no basis. Legal obligation flows the moment the company issues the prospectus expressing the intention to offer shares or debentures to the public, that is to make an application to the recognized stock exchange, so that it can deal with the securities. A company cannot be heard to contend that it has no such intention or idea to make an application to the stock exchange. Company's option, choice, election, interest or design does not matter, it is the conduct and action that matters and that is what the law demands."

22. In light of the above observations of the Hon'ble Supreme Court, I do not find merit in the contention of the Noticees that SEBI has no jurisdiction in case of issuances of its shares since RDL did not intend to list its shares on any recognized stock exchange and reject the same.
23. The Noticees have also contended that the issuance of shares by RDL cannot be treated as an offer made to the public since the allotments were made by RDL to doctors and their fraternity members on their request and it had not made any offer or invitation to them for subscription of shares. Further RDL did not issue or file any offer document with regard to issue of its shares nor did it give any advertisement to the public in that regard. I note that as held by the Hon'ble Supreme Court in the *Sahara Order*, by virtue of the first proviso to section 67(3) of the Companies Act, the issuance of shares to more than 49 persons would become an offer to the public. Further, even the issue which satisfies the requirements of sections 67(3)(a) and (b) would be treated as an issue to the public if it is made to fifty or more persons. Consequently, even if RDL did not make an offer or invitation to the doctors and their fraternity for subscription of its shares, the issuances of shares by RDL, where the

number of allottees exceeded 49 in number, would be treated as "public issues". Further, non-filing of the offer document by RDL also cannot be taken as a defence by the Noticees since it was a legal obligation of the Noticees under clause 2.1.1 of the DIP Guidelines and regulation 6 of the ICDR Regulations to file a draft offer document with SEBI as the issuances of shares by RDL were "public issues". In view of the above, I reject the contentions of the Noticees in this regard.

24. The Noticees have also contended that the facts of the present case are different from those of Sahara Case as the Sahara group entities issued OFCDs to very large number of persons without any clear relationship between the issuer and the subscribers whereas RDL had issued shares only to the doctor fraternity and its family members. RDL has also sought to distinguish its case from the Sahara Case on the following grounds:

- i. RDL was carrying on business as a going concern;
- ii. The size of allotment in case of RDL was negligible;
- iii. The shareholders of RDL were real owners and not merely investors;
- iv. There are no pending complaints against RDL;
- v. The shareholders in case of RDL were genuine;
- vi. RDL did not issue any RHP/offer document. Hence there were no untrue statements made by it to its shareholders;
- vii. There was no document issued by RDL containing offer of shares or debentures which could be deemed as a prospectus;
- viii. Refund of contribution by RDL to its shareholders will lead to closure of business which will prejudicially affect the interest of all the stake holders.

25. As already noted, the relevant factor for determining whether the issuance of shares by RDL was a "public issue" was that the issuance of shares was made to more than 49 persons. As observed by Hon'ble Supreme Court in the *Sahara Order*, *"every private placement made to fifty or more persons becomes an offer intended for the public"*. In view thereof, even if the case of RDL may be different from the Sahara Case in respect of the above aspects highlighted by the Noticees, the fact remains that the issuance of shares by RDL was made to more than 49 persons on December 14, 2007, March 20, 2008, September 20, 2008 and March 28, 2009, and therefore by virtue of this fact those issuances of shares were "public issues". Consequently, the applicable provisions of the Companies Act, DIP Guidelines and the ICDR Regulations were applicable in case of RDL and therefore, it was obligated to comply with the requirements thereof in respect of the offers of shares made to the public. In view thereof, I find that the aforesaid differences from the Sahara Case, which have been highlighted by the Noticees, will have no bearing on their acts and omissions committed by them.

26. The Noticees have also submitted that there are no pending complaints with SEBI or any other Regulatory Authority against RDL. As already noted RDL had made issuances of shares to more than 49 persons on December 14, 2007, March 20, 2008, September 20, 2008 and March 28, 2009 and in respect of all these issuances, it had failed to comply with the applicable provisions of Companies Act, DIP Guidelines and ICDR Regulations. The fact that there is no pending complaint against RDL or any of its directors before SEBI or any other authority does not have any bearing on the non-compliances of the applicable laws on part of RDL. Hon'ble Madras High Court in *Apple FMCG Marketing Pvt Limited Vs The Union of India & others*, (Manu/TN/0021/2005) had also held that "*Mere fact that no complaints were received does not make an act legal, if it be otherwise illegal*". In light of the above, I find that the contentions of the Noticees in this regard are unfounded.
27. The Noticees have further contended that RDL has filed a compounding application before CLB which is now *sub-judice* and the SCN issued by SEBI may lead to multiple proceedings for the same cause of action and will lead to conflict of decision of CLB with that of SEBI. In this regard, I note that under section 621A of the Companies Act, the Central Government can compound any offence punishable with imprisonment only, or with imprisonment and also with fine either before or after the institution of any prosecution. Such compounding bars only institution of prosecution for the offence under the Companies Act which has been compounded. The said compounding, however, does not apply with regard to an offences under the SEBI Act and the Regulations made thereunder and it does not bar or preclude the civil proceedings under the Companies Act or the SEBI Act or the Regulations made thereunder. In my view, the preventive or remedial or other directions contemplated under sections 11(1), 11(4), 11A and 11B of the SEBI Act read with regulation 107 of the ICDR Regulations against the Noticees in this case are civil actions and are distinct from those in respect whereof compounding application has been filed by RDL before CLB. Further, I am also of the view that the directions contemplated under the present proceedings shall not be in conflict with the outcome of the compounding application pending before CLB since compounding of offences in the compounding application will only bar the prosecution in respect thereof.
28. I note that Mr. Ayyavu Ramamurthy, Mr. Vishwas Vasant Pathak, Mr. Raju Gunasekaran, Ms. Malathy Ramamurthy, Mr. Arvind Devanathan, Mr. Govindarajan Venkatakrishna and Mr. Natarajan Arun constituted the board of directors of RDL which authorised the issuances of shares on December 12, 2007, March 20, 2008, September 20, 2008 and March 28, 2009. However, Mr. Mohammed Saleem Mohamed (who is also a Noticee in the present SCN) was subsequently inducted as an additional director of RDL in the board meeting dated April 15, 2012 and was regularized in the annual general body meeting dated September 24, 2012. As found hereinabove,

the issuances of shares dated December 12, 2007, March 20, 2008, September 20, 2008 and March 28, 2009 were "public issues" and in respect thereof, the applicable provisions of the Companies Act and SEBI Regulations / Guidelines were not complied by RDL. The board of directors of RDL at the time of the above mentioned issuances of shares, being in control of the affairs of RDL, was under an obligation to ensure that these issuances were in compliance with all the applicable provisions of the Companies Act and SEBI Regulations / Guidelines. In my view, the above named directors of RDL as on the date of the above mentioned issuances of shares are also "*officers in default*" as defined under section 5 of the Companies Act. I, therefore, find that the above named directors of RDL are also responsible for the acts and omissions of RDL in this case except Mr. Mohammed Saleem Mohamed who was appointed as a director subsequent to the issuances.

29. SEBI Act is a special legislation to deal with the matters relating, *inter alia*, to the protection of interests of investors in securities. DIP Guidelines that were issued under section 11(1) of the SEBI Act and the ICDR Regulations framed for the purposes of section 11(1) and section 11A lay down various disclosure and other related requirements for public issues in furtherance of the objective and duties of SEBI enshrined under the SEBI Act. It is also to be kept in mind that these statutory requirements and obligations are intended to protect the interests of the investors in securities and to ensure transparency and integrity in the securities market. Accordingly, a company making a public issue of securities is obligated to comply with these requirements in addition to the requirements prescribed under the Companies Act. In this case, admittedly, the company has not complied with any requirements of DIP Guidelines/ICDR Regulations that were applicable. I, therefore, find that apart from non-compliance of provisions of section 73 read with section 67(3) of the Companies Act, RDL failed to comply with requirements relating to public issue and listing of securities contained in clauses 2.1.1., 2.1.4., 2.1.5, 2.2, 2.8, 4.11, 4.14, 5.3.1, 5.6, 6.0 to 6.15, 8.8.1 of the DIP Guidelines read with regulations 4, 5, 6, 7, 25, 26, 36, 37, 46, 57, 61 and 111 of the ICDR Regulations as alleged in the SCN. The requirements of the relevant provisions are described in the following Table:-

Sr. No.	Relevant provisions	Requirements
1.	Clause 2.1.1 of the DIP Guidelines read with regulation 6 and 111 of the ICDR Regulations.	To file draft offer document with SEBI;
2.	Clause 2.1.4 of the DIP Guidelines read with regulation 4(2), 7 and regulation 111 of the ICDR Regulations.	To make application for listing of securities to a stock exchange
3.	Clause 2.1.5 of the DIP Guidelines read with regulation 4(2) and regulation 111 of the	To issue securities in demat mode

	ICDR Regulations.	
4.	Clause 2.2 of the DIP Guidelines read with regulation 25, 26 and regulation 111 of the ICDR Regulations.	To comply with the eligibility criteria before making an initial public offer.
5.	Clause 2.8 of the DIP Guidelines read with regulation 4(2), 7 and regulation 111 of the ICDR Regulations.	To make firm arrangements of finance through verifiable modes
7.	Clause 4.11 of the DIP Guidelines read with regulation 36 and 111 of the ICDR Regulations.	To ensure lock-in of minimum promoters' contribution
8.	Clause 4.14 of the DIP Guidelines read with regulation 37 and 111 of the ICDR Regulations.	To ensure lock-in of pre-issue capital
9.	Clause 5.3.1 of the DIP Guidelines read with regulation 5(1) and 111 of the ICDR Regulations.	To enter into a Memorandum of Understanding with a merchant banker specifying their mutual rights, liabilities and obligations relating to the issue and to file the same with SEBI.
10.	Clause 5.6 of the DIP Guidelines read with regulation 61 and regulation 111 of the ICDR Regulations.	To ensure that the offer document / RHP is made public.
11.	Clauses 6.0 to 6.15 of the DIP Guidelines read with regulation 57 and 111 of the ICDR Regulations.	To ensure that the offer document /RHP contains the details specified in that regard
12.	Clause 8.8.1 of the DIP Guidelines read with regulation 46 and 111 of the ICDR Regulations.	To close the issue within a maximum of 10 working days.

30. As already noted, Hon'ble Supreme Court in the *Sahara Order* has held that listing is a mandatory obligation and legal responsibility of the company which offers securities to the public, provided offers are made to 50 or more persons and the company cannot be heard to contend that it has no such intention or idea to make an application to the stock exchange. In this case, admittedly, RDL did not intend to list the shares on any stock exchange. Since RDL had allotted shares to more than 49 persons and these allotments were deemed to be "public issues", it was under a mandatory obligation to make an application to a recognized stock exchange for listing of those shares under section 73 which it failed to make. I, therefore, find that in this case, RDL has contravened the

provisions of section 73 of the Act since it did not apply for listing of its shares on any recognized stock exchange.

31. I note that in terms of section 73(2) of the Companies Act, where the permission (to deal shares or debentures on a stock exchange) has not been applied under sub-section (1), the company shall forthwith repay without interest all moneys received from applicants in pursuance of the prospectus, and, if such money is not repaid within eight days after the company becomes liable to repay it, the company and every director of the company who is an officer in default shall, on and from the expiry of the eight days, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent, as may be prescribed, having regard to the length of the period of delay in making the repayment of such money. Since, RDL failed to make applications for listing of its shares on any recognized stock exchange, RDL and its directors at the time of issuances of shares mentioned above are liable to refund the amounts collected from subscribers of its shares issued to them along with interest at the rate of 15% per annum.
32. In view of the foregoing, I, in exercise of the powers conferred upon me under sections 11, 11(4), 11A and 11B read with section 19 of the SEBI Act and regulation 107 of the ICDR Regulations hereby issue the following directions:
- (a) Regenix Drugs Limited and its directors, Mr. Ayyavu Ramamurthy, Mr. Vishwas Vasant Pathak, Mr. Raju Gunasekaran, Ms. Malathy Ramamurthy, Mr. Arvind Devanathan, Mr. Govindarajan Venkatakrishna and Mr. Natarajan Arun, shall within three months from the date of this order, jointly and severally refund the money collected pursuant to the allotment of shares on December 14, 2007, March 20, 2008, September 20, 2008, March 28, 2009 to the allottees 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) Regenix Drugs Limited shall issue a public notice, in all editions of one English National Dailies 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, Regenix Drugs 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 (ICAI).

- (e) Regenix Drugs Limited and its directors, Mr. Ayyavu Ramamurthy, Mr. Vishwas Vasant Pathak, Mr. Raju Gunasekaran, Ms. Malathy Ramamurthy, Mr. Arvind Devanathan, Mr. Govindarajan Venkatakrishna and Mr. Natarajan Arun, 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. Ayyavu Ramamurthy, Mr. Vishwas Vasant Pathak, Mr. Raju Gunasekaran, Ms. Malathy Ramamurthy, Mr. Arvind Devanathan, Mr. Govindarajan Venkatakrishna and Mr. Natarajan Arun, are further 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 the money is made to the allottees as directed hereinabove.
33. 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.
34. 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: November 10th, 2014

Place: Mumbai

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