WTM/SR/ERO/65/09/2014

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA, MUMBAI
CORAM: S. RAMAN, WHOLE TIME MEMBER

ORDER

Under Sections 11, 11(4), 11A and 11B of the Securities and Exchange Board of India Act, 1992, in the matter of Torsa Agro Projects Limited (PAN: AACCT9099F) and its Directors, viz. Shri Arup Kumar Dey (DIN: 01585110; PAN: AFSPD0472J), Shri Arun Maji (DIN: 01591656; PAN: ALTPM2263M), Shri Ashish Kumar Dey (DIN: 01960755; PAN: AHEPD8514D), Shri Ranjit Chandra Pathak (DIN: 06512666; PAN: ANEPP8118P), Shri Pran Gobind Debnath (DIN: 06512700; PAN: AGSPD4319B), Nielhousanuo Angami (DIN: 05137311; PAN: AORPA2602M) and Shri Dipankar Medda (DIN: 06512759; PAN: AHJPM8312M).

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1. Securities and Exchange Board of India ("**SEBI**") received two references dated May 8, 2013 and May 9, 2013 respectively, from the Office of the Director: Bureau of Investigation (E. O.), Assam: Srimantapur – Guwahati, alleging mobilization of funds through the issue of preference shares by Torsa Agro Projects Limited ("**TAPL**").

2.1 SEBI vide letter dated July 30, 2013, advised TAPL to furnish *inter alia* the following information within 15 days from the date of receipt of the aforesaid letter, viz. –

i. Copy of Prospectus/Red Herring Prospectus/Statement in lieu of Prospectus/Information Memorandum filed with ROC for issuance of shares/debentures.
ii. Copy of the Memorandum and Articles of Association of the company;
iii. Audited Balance Sheet and Profit & Loss Account of the company for the last 3 years;
iv. Name, addresses and occupation of all the promoters/directors of the company;
v. Names and details of the Key Managerial Personnel of the company;
vi. Other information in respect of every series of shares/debentures issued by the company, viz. –
    a. Date of opening and closing of the subscription list;
    b. Details regarding the number of application forms circulated inviting subscription;
    c. Details regarding the number of applications received;
    d. Details regarding the number of allottees and list of such allottees;

e. Number of shares/debentures allotted and value of such allotment against each allottee's name.
f. Details regarding subscription amount raised;
g. Date of allotment of share/debenture certificates;
h. Copies of the minutes of Board/Committee meeting in which the resolution has been passed for allotment;
i. Date of dispatch of shares/debentures;
j. Details of the total number of applicants for each of TAPL's scheme besides the list of final allottees;
k. Copies of application forms, pamphlets, advertisements and other promotional material circulated for issuance of shares/debentures.
l. Terms and conditions of the issue of shares/debentures.

2.2 Thereafter, vide letter dated December 6, 2013 (addressed to TAPL) and letters each dated January 30, 2014 (addressed to the Directors of TAPL), SEBI once again sought the information sought vide its earlier letter dated July 30, 2013.

2.3 However, as on date, neither TAPL nor its Directors have submitted the information sought vide the abovementioned letters, to SEBI.

3. The material available on record i.e. information obtained from the Ministry of Corporate Affairs' website i.e. *'MCA 21 Portal'* alongwith documents annexed with the abovementioned references dated May 8, 2013 and May 9, 2013, have been perused. On an examination of the same, it is observed that –

i. TAPL was incorporated on March 7, 2008, with the ROC, Kolkata, with CIN No. as U02001WB2007PLC118607. TAPL has its Office at Kameshwari Road, West Khagra Bari, Cooch Behar, Kolkata–736101, West Bengal, India.

ii. The Directors in TAPL are Shri Arup Kumar Dey, Shri Arun Maji, Shri Ashish Kumar Dey, Shri Ranjit Chandra Pathak, Shri Pran Gobind Debnath, Nielhousanuo Angami and Shri Dipankar Medda.

iii. Form 2 (Form for Return of Allotment – filed by TAPL with the ROC in accordance with the provisions of the Companies Act, 1956), revealed that the

company issued and allotted *Preference Shares* (***"Offer of Preference Shares"***), details of which are provided below –

Year	Type of Security	Date of Allotment	No. of securities	No. of persons to whom preference shares were allotted	Total Amount (□ in Crores) Approximate
2008 – 09	Cumulative Preference Shares of □10	27.06.2008	47235	109	0.04
		23.10.2008	46950	95	0.04
2011 – 12	Cumulative Preference Shares of □10	05.04.2011	201990	385	0.21
TOTAL			**296175**	**589**	**0.29**

iv. From the Balance Sheet for the Financial Years 2009–10, 2010–11 and 2011–12, it is observed that TAPL collected a total of □1.24 Crores towards share application money.

4.1 The issue for determination in the instant matter is whether the mobilization of funds by TAPL through the *Offer of Preference Shares,* is in accordance with the provisions of the SEBI Act, 1992 ("**SEBI Act**"); the Companies Act, 1956 read with the Companies Act, 2013; the SEBI (Disclosure and Investor Protection) Guidelines, 2000 ("**DIP Guidelines**") read with the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 ("**ICDR Regulations**") –

4.2 I note that the jurisdiction of SEBI over various provisions of the Companies Act in the case of public companies, whether listed or unlisted, when they issue and transfer securities, flows from the provisions of Section 55A of the Companies Act. While examining the scope of Section 55A of the Companies Act, 1956, the Hon'ble Supreme Court of India in ***Sahara India Real Estate Corporation Limited & Ors. vs. SEBI (Civil Appeal no. 9813 of 2011) (Judgment dated August 31, 2012)*** (hereinafter referred to as the "***Sahara Case***"), had observed that:

"We, therefore, hold that, so far as the provisions enumerated in the opening portion of Section 55A of the Companies Act, so far as they relate to issue and transfer of securities and non-payment of dividend is

concerned, SEBI has the power to administer in the case of listed public companies and in the case of those public companies which intend to get their securities listed on a recognized stock exchange in India."

4.3 In this regard –

i. Reference is also made to Sections 67(1) and 67(3) of the Companies Act, 1956, which are reproduced as under:

"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-sections (3) and (4), be construed as including a reference to offering them to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.
(2) ...
(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:*
***Provided further** that nothing contained in the first proviso shall apply to non-banking financial companies or public financial institutions specified in section 4A of the Companies Act, 1956 (1 of 1956)."*

ii. While examining the scope of Section 67 of the Companies Act, 1956, the Hon'ble Supreme Court of India in the *Sahara Case* observed that:

"Section 67(1) deals with the offer of shares and debentures to the public and Section 67(2) deals with invitation to the public to subscribe for shares and debentures and how those expressions are to be understood, when reference is made to the Act or in the articles of a company. The emphasis in Section 67(1) and (2) is on the "section of the public". Section 67(3) states that no offer or invitation shall be treated as made to the public, by virtue of subsections (1) and (2), that is to any section of the public, if the offer or invitation is 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 otherwise as being a domestic concern of the persons making and receiving the offer or invitations. Section 67(3) is, therefore, an exception to Sections 67(1) and (2). If the circumstances mentioned in clauses (1) and (b) of Section 67(3) are satisfied, then the offer/invitation would not be treated as being made to the public.

The first proviso to Section 67(3) was inserted by the Companies (Amendment) Act, 2000 w.e.f. 13.12.2000, which clearly indicates, nothing contained in Sub-section (3) of Section 67 shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more. …

Resultantly, if an offer of securities is made to fifty or more persons, it would be deemed to be a public issue, even if it is of domestic concern or proved that the shares or debentures are not available for subscription or purchase by persons other than those received the offer or invitation. …

I may, therefore, indicate, subject to what has been stated above, in India that any share or debenture issue beyond forty nine persons, would be a public issue attracting all the relevant provisions of the SEBI Act, regulations framed thereunder, the Companies Act, pertaining to the public issue. …"

i. In the instant matter, for ascertaining whether the *Offer of Preference Shares* are public issues or issues on private placement basis in accordance with Section 67 of the Companies Act, 1956, the number of subscribers is of utmost importance.

a. Under the *Offer of Preference Shares,* it is observed that TAPL issued and allotted preference shares to a total of 589 individuals/investors and mobilized an amount of approximately □1.53 Crores [*0.29 Crores (amount mobilized under the Offer of Preference Shares) plus 1.24 Crores (share application money)*] during the Financial Years 2008–09, 2009–10, 2010–11 and 2011–12. These facts when viewed in light of TAPL's refusal to submit information to SEBI *prima facie* indicate that the *Offer of Preference Shares* was a public issue of securities under the first proviso to Section 67(3) of the Companies Act, 1956, which has been elucidated by the Hon'ble Supreme Court of India in the *Sahara Case*. In this regard, it is pertinent to note that by virtue of Section 55A of the Companies Act, Section 67 of that Act, so far as it relates to issue and transfer of securities, shall also be administered by SEBI.

4.4 I note that –

i. From the abovementioned, it will follow that since the *Offer of Preference Shares* were public issues of securities, such securities shall also have to be listed on a recognized stock exchange, as mandated under Section 73 of the Companies Act, 1956. In this regard, reference is made to Sections 73 of the Companies Act, 1956, of which sub-Sections (1), (2) and (3) are relevant for the instant case, which is reproduced as under:

"73. (1) 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 recognised stock exchanges for permission for the shares or debentures intending to be so offered to be dealt with in the stock exchange or each such stock exchange.
(1A) …
(2) Where the permission has not been applied under subsection (1) or such permission having been applied for, has not been granted as aforesaid, the company shall forthwith repay without interest all moneys received from applicants in pursuance of the prospectus, and, if any 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 eighth day, 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.
(3) All moneys received as aforesaid shall be kept in a separate bank account maintained with a Scheduled Bank 1 [until the permission has been granted, or where an appeal has been preferred against the refusal to grant such. permission, until the disposal of the appeal, and the money standing in such separate account shall, where the permission has not been applied for as aforesaid or has not been granted, be repaid within the time and in the manner specified in sub- section (2)]; and if default is made in complying with this sub- section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees."

ii. In the *Sahara Case*, the Hon'ble Supreme Court of India also examined Section 73 of the Companies Act, 1956, wherein it observed that –

"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."

iii. In the facts of the instant case, since the *Offer of Preference Shares* were made to fifty persons or more by TAPL, the same will attract the requirement of compulsory listing before a recognized stock exchange in terms of Section 73(1) of the Companies Act, 1956. It therefore *prima facie* appears that TAPL has violated the provisions of Section 73(1) of the Companies Act, 1956, since it has failed to ensure listing with a recognised stock exchange of the securities issued under the *Offer of Preference Shares* were public issues of securities.

iv. As per Section 73(2) of the Companies Act, 1956, the obligation to refund the amount with interest that was collected from investors under the *Offer of Preference Shares,* is mandatory on TAPL. From the Balance Sheet for the Financial Years 2009–10, 2010–11 and 2011–12, it is observed that TAPL collected a total of □1.24 Crores towards share application money. In this regard, there is no evidence on record to indicate whether or not TAPL has refunded the amount with interest to the investors under the *Offer of Preference Shares,* as per the aforesaid Section. In view of the same, I find that *prima facie,* TAPL has not complied with the provisions of Section 73(2) of the Companies Act, 1956.

v. Section 73(3) of Companies Act, 1956, says that all moneys received shall be kept in a separate bank account maintained with a Scheduled Bank and if default is made in complying with this sub-Section, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees. In the instant case, there is no evidence on record to indicate whether or not funds received from the investors under the *Offer of Preference Shares* were kept in separate bank account by TAPL. In view of the same, I find that *prima facie,* TAPL has not complied with the provisions of Section 73(3) of Companies Act, 1956.

4.5 Under Section 2(36) read with Section 60 of the Companies Act, 1956, a company needs to register its prospectus with the ROC, before making a public offer or issuing the prospectus. As per the aforesaid Section 2(36), *"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. As mentioned above, since the *Offer of Preference Shares* were made to fifty persons or more, it has to be construed as a public offer. Having made a public offer, TAPL was required to register a prospectus with the ROC under Section 60 of the Companies Act, 1956. Based on the material available on record, I find that *prima facie,* TAPL has not complied with the provisions of Section 60 of Companies Act, 1956.

4.6 Under Section 56(1) of the Companies Act, 1956, every prospectus issued by or on behalf of a company, shall state the matters specified in Part I and set out the reports specified in Part II of Schedule II of that Act. Further, as per Section 56(3) of the Companies Act, 1956, no one shall issue any form of application for shares in or debentures of a company, unless the form is accompanied by abridged prospectus, contain disclosures as specified. Based on the material available on record, I find that TAPL has not complied with the provisions of Section 56(1) and 56(3) of the Companies Act, 1956 and therefore, has *prima facie* violated the aforesaid provisions.

4.7 As per Section 465(1) of the Companies Act, 2013, the Companies Act, 1956, *"shall stand repealed"*. However, Section 465(2)(i) of the Companies Act, 2013, provides that:

"(2)Notwithstanding the repeal under sub-section (1) of the repealed enactments,—
(a) anything done or any action taken or purported to have been done or taken, including any rule, notification, inspection, order or notice made or issued or any appointment or declaration made or any operation undertaken or any direction given or any proceeding taken or any penalty, punishment, forfeiture or fine imposed under the repealed enactments shall, insofar as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;"

4.8 I also note that SEBI framed the DIP Guidelines, in exercise of the powers conferred under the SEBI Act. In the words of the Hon'ble Supreme Court in the *Sahara Case, "DIP Guidelines had statutory force since they were framed by SEBI in exercise of its powers conferred on it under Sections 11 and 11A of the SEBI Act. Powers have been conferred on SEBI to protect the*

interests of the investors in securities and regulate the issue of prospectus, offer documents or advertisement soliciting money through the issue of prospectus. Section 11 of the Act, it may be noted has been incorporated, evidently to protect the interests of investors whose securities are legally required to be listed. DIP Guidelines were implemented by SEBI with regard to the listed and unlisted companies, which made public offer, until it was replaced by ICDR 2009". In this regard, I observe *prima facie* that the Company has not complied with the following clauses of the DIP Guidelines for the *Offer of Preference Shares*:

a. Clause 2.1.1. – (*Filing of offer document*)
b. Clause 2.1.4 – (*Application for listing*)
c. Clause 2.1.5 – (*Issue of securities in dematerialized form*),
d. Clause 2.8 – (*Means of finance*),
e. Clause 4.1 – (*Promoters contribution in a public issue by unlisted companies*),
f. Clause 4.11 – (*Lock-in of minimum specified promoters contribution in public issues*),
g. Clause 4.14 – (*Lock-In of pre-issue share capital of an unlisted company*)
h. Clause 5.3.1 – (*Memorandum of understanding*),
i. Clause 5.3.3 – (*Due Diligence Certificate*)
j. Clause 5.3.5 – (*Undertaking*),
k. Clause 5.3.6 – (*List Of Promoters Group And Other Details*),
l. Clause 5.4 – *(Appointment of intermediaries)*
m. Clause 5.6 – (*Offer document to be made public*)
n. Clause 5.6A – (*Pre-issue Advertisement*)
o. Clause 5.7 – *(Despatch of issue material)*
p. Clause 5.8 – *(No complaints certificate)*
q. Clause 5.9 – *(Mandatory collection centres* including *Clause 5.9.1* (*Minimum number of collection centres*)
r. Clause 5.10 – *(Authorised Collection Agents)*
s. Clause 5.12.1 – (*Appointment of compliance officer*)
t. Clause 5.13 – *(Abridged prospectus)*
u. Clause 6.0 – *(Contents of offer documents)*
v. Clause 8.3 – (*Rule 19(2)(b) of SC(R) Rules, 1957*)
w. Clause 8.8.1 – (*Opening & closing date of subscription of securities*)
x. Clause 9 – *(Guidelines on advertisements by Issuer Company)*
y. Clause 10.1 – (*Requirement of credit rating)*
z. Clause 10.5 – (*Redemption*)

4.9 As per Regulation 111(1) of the ICDR Regulations, the DIP Guidelines, *"shall stand rescinded"*. However, Regulation 111(2) of the ICDR Regulations, provides that:

"(2)Notwithstanding the repeal under sub-section (1) of the repealed enactments,—
(a) anything done or any action taken or purported to have been done or taken including observation made in respect of any draft offer document, any enquiry or investigation commenced or show cause notice issued in respect of the said Guidelines shall be deemed to have been done or taken under the corresponding provisions of these regulations;
(b) any offer document, whether draft or otherwise, filed or application made to the Board under the said Guidelines and pending before it shall be deemed to have been filed or made under the corresponding provisions of these regulations."

4.10 The following fact may also be noted –

i. From the information available on the *'MCA 21 Portal',* it is observed that TAPL has not filed its Balance Sheet for the Financial Year 2012–13.

4.11 Upon a consideration of the aforementioned paragraphs, I am of the view that *prima facie,* TAPL is engaged in fund mobilising activity from the public, through the *Offer of Preference Shares* and as a result of the aforesaid activity has violated the aforementioned provisions of the Companies Act, 1956 (Section 56, Section 60 read with Section 2(36), Section 73) read with Section 465 of the Companies Act, 2013; the DIP Guidelines read with ICDR Regulations.

5. SEBI has a statutory duty to protect the interests of investors in securities and promote the development of, and to regulate, the securities market. Section 11 of the SEBI Act has empowered it to take such measures as it thinks fit for fulfilling its legislative mandate. Further, as per the provisions of Section 55A of the Companies Act, 1956 read with Section 465 of the Companies Act, 2013, administrative authority on the subjects relating to public issue of securities is exclusively with SEBI. For this purpose, SEBI can exercise its jurisdiction under Sections 11(1), 11A, 11B and 11(4) of the SEBI Act read with Section 55A of the Companies Act, 1956 and Section 465 of the Companies Act, 2013, over companies who issue *Preference Shares* to fifty persons or more, but do not comply with the applicable provisions of the aforesaid Companies Acts, the DIP Guidelines read with ICDR Regulations (as mentioned in paragraphs 4.1–4.11 above). Steps therefore, have to be taken in the instant matter to ensure only legitimate fund

raising activities are carried on by TAPL and no investors are defrauded. In light of the same and in view of the failure on the part of TAPL to furnish necessary information sought by SEBI, I find there is no other alternative but to take recourse through an interim action against TAPL and its Directors, for preventing that company from further carrying on with its fund mobilising activity under the *Offer of Preference Shares*.

6. In view of the foregoing, I, in exercise of the powers conferred upon me under Sections 11, 11(4), 11A and 11B of the SEBI Act; the DIP Guidelines read with the ICDR Regulations, hereby issue the following directions –

i. TAPL (PAN: AACCT9099F) shall not mobilize funds from investors through the *Offer of Preference Shares* or through the issuance of equity shares or any other securities, to the public and/or invite subscription, in any manner whatsoever, either directly or indirectly till further directions;
ii. TAPL and its Directors, viz. Shri Arup Kumar Dey (DIN: 01585110; PAN: AFSPD0472J), Shri Arun Maji (DIN: 01591656; PAN: ALTPM2263M), Shri Ashish Kumar Dey (DIN: 01960755; PAN: AHEPD8514D), Shri Ranjit Chandra Pathak (DIN: 06512666; PAN: ANEPP8118P), Shri Pran Gobind Debnath (DIN: 06512700; PAN: AGSPD4319B), Nielhousanuo Angami (DIN: 05137311; PAN: AORPA2602M) and Shri Dipankar Medda (DIN: 06512759; PAN: AHJPM8312M), 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 orders;
iii. TAPL and its abovementioned Directors, are restrained from accessing the securities market and further prohibited from buying, selling or otherwise dealing in the securities market, either directly or indirectly, till further directions;
iv. TAPL shall provide a full inventory of all its assets and properties;
v. TAPL's abovementioned Directors shall provide a full inventory of all their assets and properties;
vi. TAPL and its abovementioned Directors shall not dispose of any of the properties or alienate or encumber any of the assets owned/acquired by that company through the *Offer of Preference Shares,* without prior permission from SEBI;
vii. TAPL and its abovementioned Directors shall not divert any funds raised from public at large through the *Offer of Preference Shares,* which are kept in bank account(s) and/or in the custody of TAPL;

viii. TAPL shall furnish complete and relevant information (as sought by SEBI letters dated July 30, 2013; December 6, 2013 and January 30, 2014), within 21 days from the date of receipt of this Order.

7. The above directions shall take effect immediately and shall be in force until further orders.

8. The *prima facie* observations contained in this Order are made on the basis of the material available on record i.e. information obtained from the Ministry of Corporate Affairs' website i.e. *'MCA 21 Portal'* alongwith documents annexed with the abovementioned references dated May 8, 2013 and May 9, 2013. In this context, TAPL and its abovementioned Directors may, within 21 days from the date of receipt of this Order, file their reply, if any, to this Order and may also indicate whether they desire to avail themselves an opportunity of personal hearing on a date and time to be fixed on a specific request made in that regard.

9. This Order is without prejudice to the right of SEBI to take any other action that may be initiated against TAPL and its abovementioned Directors, in accordance with law.

Place: Mumbai
Date: September 12, 2014

S. RAMAN
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA