

**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 Alchemist Capital Limited (PAN:AABCT5925F) and its Directors, viz. Shri Mansoor Ahmed (DIN: 01806631; PAN: AKKPA7873P), Shri Hariharan Veeraraghavan (DIN: 03163235; PAN: ABQPV9123N), Shri Harjit Singh (DIN: 06629572; PAN: ADLPS4992B), Shri Sandeep Sethi (DIN: 01541853; PAN: AQBPS6934N), Shri Brij Mohan Mahajan (DIN: 00031819; PAN: AAWPM1136F), Shri Sunil Kanti Kar (DIN: 00476819; PAN: AEQPK2126K), Shri Virendra Singh (DIN: 01683025; PAN: AAWPM1136F), Shri Kanwar Deep Singh (PAN: ACCPS3258G), Smt. Harpreet Kaur (PAN: ABCPK6456B), Shri Ravinder Singh (PAN: ALHPS5680C) and Shri R. P. Chhabra (PAN: ADOPC4099E).

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1. Securities and Exchange Board of India ("**SEBI**") received a reference dated September 18, 2013, from the Registrar of Companies, Punjab and Chandigarh ("**ROC**"), wherein the following was stated:

- i. *"An amount of ₹165 Crore was raised by M/s Alchemist Capital Limited (formerly known as Toubro Holdings Limited) ("**ACL**") during the year 2006.*
- ii. *It is seen from the Return of Allotment Form No. 2, allotment dated 10.4.2006 and Form (No.) 2, allotment dated 30.06.2006, that an amount of ₹165 Crores has been raised from 28000 investors spread throughout the Country. Obviously, such a wide subscription is not possible without making the offer to the public directly or indirectly. A list of the persons to whom the preferential shares were issued is enclosed in CD. It appears that the issue is public in nature."*

- 2.1 SEBI vide letter dated October 1, 2013, advised ACL to furnish *inter alia* the following information within 15 days from the date of receipt of the aforesaid letter, viz. –

- i. Certified copy of the Memorandum and Articles of Association of the company;
- ii. Details of the name change of the company since incorporation;
- iii. Copies of Annual Report and Annual Return filed with ROC since incorporation;
- iv. Details of the PAN of the company;

- v. Name, addresses, occupation and PAN of all the Promoters/Directors of the company since incorporation;
- vi. Statement of mobilization of funds through issue of preference shares duly certified by the Statutory Auditors of the company;
- vii. Names and details of key managerial personnel of the company;
- viii. Information in respect of every series of preference shares issued by the company since its inception, viz. –
 - a. Details regarding filing of Prospectus/Red Herring Prospectus with ROC;
 - b. Copies of application forms, RHP, pamphlets, advertisements and other promotional material circulated for issuance of preference shares;
 - c. Terms and conditions of the issue of preference shares;
 - d. Date of opening and closing of the subscription list;
 - e. Details regarding the number of applications received;
 - f. Details regarding the number of allottees;
 - g. The list of allottees and no. of preference shares allotted and value of such allotment against each allottee's name;
 - h. Details regarding subscription amount raised;
 - i. Date of allotment of preference shares;
 - j. Copies of the Board Resolutions and the minutes of such board meetings authorising issue of preference shares;
 - k. Date of dispatch of preference share Certificates, etc.

2.2.1 Vide another letter dated October 1, 2013, SEBI sought *inter alia* the following information from the ROC, viz. –

- i. Names of all the past & present Directors of the company since incorporation along with their particulars such as addresses, father's name etc.
- ii. Period of directorship of each Director.
- iii. Copies of Memorandum and Articles of Association, Annual Returns, Form No(s). 32, Balance sheets as well as any other document filed by the company since incorporation, if any.

2.2.2 ROC replied to SEBI vide letter dated October 15, 2013.

- 2.3 Vide letter dated October 14, 2013, ACL, while seeking an extension of four weeks to submit the information sought vide SEBI letter dated October 1, 2014, submitted that it was a registered Non – Banking Financial Company ("**NBFC**"). Thereafter, a letter dated October 21, 2013, was issued by SEBI, to ACL, advising it to provide the information sought through the aforementioned letter dated October 1, 2013, by October 31, 2013. However, vide letter dated October 28, 2013, ACL sought time till November 12, 2013, to submit the requisite information.
- 2.4 Further, in light of the submission made by ACL that it was a registered NBFC, SEBI also referred the matter of issuance of preference shares by that company, to the Reserve Bank of India ("**RBI**") vide letter dated October 29, 2013.
- 2.5 ACL, vide its letter dated November 7, 2013, while reiterating that it was a registered NBFC *inter alia* submitted the following information to SEBI, viz. –
- i. Copy of the Memorandum and Articles of Association of the company;
 - ii. Details of the name change of the company since incorporation;
 - iii. Copies of Annual Report and Annual Return filed with ROC for the previous 5 years;
 - iv. PAN of the company;
 - v. Name, addresses and occupation of the present Directors of the company;
 - vi. Statement of mobilization of funds through the issue of preference shares duly certified by the auditors of the company;
 - vii. Details of redeemable preference shares issued from Financial Year 2003–2004 to Financial Year 2006–2007 and copies of Form 2 regarding allotment of redeemable preference shares.
- 2.6 Thereafter, vide letter dated February 20, 2014, SEBI advised ACL to provide a copy of the Certificate of Registration as a NBFC issued by the RBI. In addition, ACL was advised to furnish the remaining information as sought vide SEBI letter dated October 1, 2013.

- 2.7 ACL vide letter dated March 3, 2014, submitted the following information:
- a. Copy of certificate of registration issued by RBI for ACL to function as a non-deposit taking NBFC;
 - b. Sample Copy of application form and pamphlet form;
 - c. Copies of the Board Resolutions authorising issue of preference shares;
 - d. Form 23 filed with ROC pertaining to the registration of resolution(s) regarding the issuance of preference shares.
- 2.8 SEBI, vide letter dated March 27, 2014, advised ACL to provide the list of allottees and the number of preference shares allotted and amount of such allotment against each allottee's name for the allotments made on 30.08.2003, 31.12.2004 and 30.07.2005, alongwith pamphlets and application forms, if any, circulated by the company for the purpose of raising money at the time of the aforementioned allotment dates.
- 2.9 ACL replied to SEBI vide letter dated April 9, 2014, seeking an extension of sixty days for submitting the requisite information. However, ACL has not submitted the required information (sought vide the abovementioned SEBI letters dated February 20, 2014 and March 27, 2014) to SEBI till date.
3. The material available on record i.e. correspondences exchanged between SEBI and ACL alongwith the documents contained therein, information obtained from the Ministry of Corporate Affairs' website i.e. '*MCA 21 Portal*' alongwith documents annexed with the reference dated September 18, 2013, received by SEBI, against ACL, have been perused. On an examination of the same, it is observed that –
- i. ACL was incorporated as M/s Toubro Holdings Limited on December 13, 2000, with the ROC, Chandigarh with CIN No. as U65993CH2000PLC024127. Thereafter, the name of the company was changed to ACL on August 11, 2008. ACL's Registered Office is at SCO 52-53, Sector 9-D, Chandigarh–160009, India.
 - ii. The present Directors in ACL are Shri Mansoor Ahmed, Shri Hariharan Veeraraghavan, Shri Harjit Singh, Smt. Harpreet Kaur and Shri Sandeep Sethi.

- iii. Shri Brij Mohan Mahajan, Shri Sunil Kanti Kar, Shri Virendra Singh, Shri Kanwar Deep Singh, Shri Ravinder Singh and Shri R. P. Chhabra, who were earlier Directors in ACL, have since resigned.
- iv. ACL was granted, by the RBI, a "*Certificate of Registration ("CoR") (N. 06. 00580) to commence/carry on business of non – banking financial institution without accepting public deposits*" under Section 45–IA of the Reserve Bank of India Act, 1934 ("**RBI Act**"). As per the aforesaid Certificate issued on March 4, 2009, it is observed that same was "*issued in lieu of earlier CoR No. N. 06.00580 dated December 26, 2005*". The RBI vide letter dated December 2, 2014, has informed SEBI that the aforesaid CoR was the first CoR issued to ACL in the name of Toubro Holdings Ltd.
- v. From the information submitted by ACL vide letter dated March 3, 2014, it is observed that the company issued *Redeemable Preference Shares ("Offer of Redeemable Preference Shares")* in accordance with *inter alia* the following terms and conditions:

Plan	A	B	C	D	E	F
Issue price minimum 100 preference shares	1000					
Redemption Period	6 years	9 years	12 years	15 years	16 years	4 years
Redemption Premium	1000	2000	4100	7000	9000	500
Maturity value	2000	3000	5100	8000	10000	1500
Annualised Yield on investment	11.72%	12.40%	13.81%	14.10%	14.65%	10.25%

- a. "**Who can Invest:** *Individuals, Trusts, Corporate Bodies, Minors (through Guardians), Financial Institutions, Mutual Funds, HUFs and Co – operative Bodies.*

b. This Offer is being made on a private placement basis and cannot be accepted by any person other than to whom it has been offered. ..."

vi. ACL admittedly issued and allotted *Redeemable Preference Shares* during the Financial Years 2003–04, 2004–05, 2005–06 and 2006–07, details of which are provided below

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Year	Date of allotment	Amount Per Share (₹)	No. of Redeemable Preference Shares	No. of persons to whom Redeemable Preference Shares were issued	Total Amount Raised (₹)
2003–04	30.08.2003	10	13074000	Not available	130740000
2004–05	31.12.2004		45543680	Not available	455436800
2005–06	30.07.2005		43055650	Not available	430556500
2006–07	10.04.2006		33268600	14694	332686000
2006–07	30.06.2006		30270500	13470	302705000
Total			165212430	**28164	1652124300
**As per information obtained from Form 2 (Form for Return of Allotment – filed by ACL with the ROC in accordance with the provisions of the Companies Act, 1956).					

vii. In addition to the above and as per the Annual Returns submitted by ACL to the ROC, for the Financial Years from 2007–08 to 2011–12, it is observed that the year–wise status of the subscribed *Preference Share Capital* of ACL was as follows –

Sr. No.	Financial Year Ending	Issued and subscribed paid up <i>Preference Share Capital</i> (Number of shares)
1.	31.03.2007	164831970
2.	31.03.2008	163075264
3.	31.03.2009	158893054
4.	31.03.2010	146828494
5.	31.03.2011	137007994
6.	31.03.2012	108782904

viii. The Auditors vide their Certificate dated November 6, 2013, certified that ACL issued 1,65,212,430 *Redeemable Preference Shares* of ₹10 each amounting to ₹165.21

Crores upto June 30, 2006. Further, the Auditors also certified that as on March 31, 2013, an amount of approximately ₹92.80 Crores was outstanding pending for redemption of 9,28,01,424 *Redeemable Preference Shares*.

4.1 The issue for determination in the instant matter is whether the mobilization of funds by ACL through the *Offer of Redeemable 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, 1956, 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 the instant matter, for ascertaining whether the *Offer of Redeemable Preference Shares* made by ACL is a public issue or issue on private placement basis in accordance with Section 67(3) of the Companies Act, 1956, the following issues need to be addressed –

- i. *Whether the issue of 101673330 Redeemable Preference Shares under the Offer of Redeemable Preference Shares during the Financial Years 2003–04, 2004–05 and 2005–06, prior to ACL being registered as an NBFC with RBI, is a public issue in accordance with the first proviso to Section 67(3) of the Companies Act, 1956?*
- ii. *Whether by virtue of the second proviso to Section 67(3) of the Companies Act, 1956, an offer made by ACL to fifty or more persons may be exempted from the requirements pertaining to a*

public issue in respect of the issue of 63539100 Redeemable Preference Shares under the Offer of Redeemable Preference Shares during the Financial Year 2006–07, after ACL was registered as an NBFC with RBI?

- iii. *Whether ACL has discharged its burden of proof for establishing that the issue of 63539100 Redeemable Preference Shares under the Offer of Redeemable Preference Shares during the Financial Year 2006–07, after it was registered as an NBFC with RBI, was a private placement?*

4.4 In this regard, reference is made to Sections 67(1) and 67(3) of the Companies Act, 1956, which are reproduced as under:

"67. Construction of reference 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-sections (3) and (4), be construed as including a reference to offering them to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.

(2) Any reference in this Act or in the articles of a company to invitations to the public to subscribe for shares or debentures shall, subject as aforesaid, be construed as including a reference to invitations to subscribe for them extended to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.

(3) No offer or invitation shall be treated as made to the public by virtue of sub-section (1) or sub-section (2), as the case may be, if the offer or invitation can properly be regarded, in all 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)."*

- 4.5 While examining the scope of Section 67 of the Companies Act, 1956, the Hon'ble Supreme Court of India in the *Sabara Case* observed that:

"84. 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.

85. 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, after 13.12.2000, any offer of securities by a public company to fifty persons or more will be treated as a public issue under the Companies Act, even if it is of domestic concern or it is proved that the shares or debentures are not available for subscription or purchase by persons other than those receiving the offer or invitation. A public company can escape from the rigor of provisions, if the offer is made by companies mentioned under Section 67(3A), i.e. by public financial institutions specified under Section 4A or by non-banking financial companies referred to in Section 45I(f) of the Reserve Bank of India Act, 1934.

Following situations, it is generally regarded, as not an offer made to public.

- *Offer of securities made to less than 50 persons;*
- *Offer made only to the existing shareholders of the company (Right Issue);*
- *Offer made to a particular addressee and be accepted only persons to whom it is addressed;*
- *Offer or invitation being made and it is the domestic concern of those making and receiving the offer.*

86. 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...."

Consideration of Issues –

4.6 ***Whether the issue of 101673330 Redeemable Preference Shares under the Offer of Redeemable Preference Shares during the Financial Years 2003–04, 2004–05 and 2005–06, prior to ACL being registered as an NBFC with RBI, is a public issue in accordance with the first proviso to Section 67(3) of the Companies Act, 1956?***

- i. In the instant proceedings, it is observed that under the *Offer of Redeemable Preference Shares*, ACL admittedly issued and allotted *Redeemable Preference Shares* during the Financial Years 2003–04, 2004–05 and 2005–06, details of which are provided at paragraph 3(vi) of this Order.
- ii. Further, it is noted that ACL was granted a "*Certificate of Registration (N. 06. 00580) [issued on March 4, 2009, "in lieu of earlier CoR No. N. 06.00580 dated December 26, 2005"] to commence/carry on business of non – banking financial institution without accepting public deposits*" by the RBI under Section 45–IA of the RBI Act.
- iii. I note that ACL admittedly raised ₹101.67 Crores under the *Offer of Redeemable Preference Shares* even prior to being registered as an NBFC i.e. w.e.f. 26.12.2005 (*As stated at paragraph 3(iv) of page 5, the aforesaid CoR was the first CoR issued to ACL in the name of Toubro Holdings Ltd*). It is reiterated that ACL has failed to provide details of individuals/investors to whom approximately 101673330 *Redeemable Preference Shares of ₹10 each* was allotted pursuant to ACL's Board Resolutions dated 20.06.2003 and 15.11.2004. I note that SEBI repeatedly sought the aforesaid information vide letters dated October 1, 2013; February 20, 2014 and March 27, 2014. However, despite seeking an extension of sixty days for submitting the requisite information vide letter dated April 9, 2014, as on date, ACL has not submitted any such information. In addition, it is pertinent to note that during the Financial Year 2006–07, ACL admittedly issued and allotted 63539100 *Redeemable Preference Shares*, which as per information obtained from Form 2 filed by ACL with the ROC under the Companies Act, 1956, was to 28164 individuals/investors.
- iv. I find that since ACL was not registered as an NBFC with the RBI when the aforesaid allotment of 101673330 *Redeemable Preference Shares* was made under the *Offer of Redeemable Preference Shares* for the Financial Years 2003–04, 2004–05 and

2005–06 and having regard to the fact that it failed to co-operate with SEBI in submitting requisite information in respect of the number of allottees under the said *Offer* for those Financial Years 2003–04, 2004–05 and 2005–06, the same would lead me to the inescapable conclusion that the company exceeded the threshold for a private placement. I, therefore, find that the *Offer of Redeemable Preference Shares* was nothing but a public issue of securities in accordance with the *first proviso* to Section 67(3) of the Companies Act, 1956.

4.7.1 *Whether by virtue of the second proviso to Section 67(3) of the Companies Act, 1956, an offer made by ACL to fifty or more persons may be exempted from the requirements pertaining to a public issue in respect of the issue of 63539100 Redeemable Preference Shares under the Offer of Redeemable Preference Shares during the Financial Year 2006–07, after ACL was registered as an NBFC with RBI?*

- i. As has been stated above, ACL was granted a CoR to commence/carry on business of non-banking financial institution without accepting public deposits w.e.f. 26.12.2005. It is reiterated that after such registration, ACL admittedly issued and allotted 63539100 *Redeemable Preference Shares* under the *Offer of Redeemable Preference Shares*, during the Financial Year 2006–07, which as per information obtained from Form 2 filed by ACL with the ROC under the Companies Act, 1956, was to 28164 individuals/investors.
- ii. Upon a consideration of the preceding paragraphs 4.4 – 4.5, it is noted that as per the *first proviso* to Section 67(3) Companies Act, 1956, the public offer and listing requirements contained in that Act would become automatically applicable to a company making the offer to fifty or more persons. However, the *second proviso* to Section 67(3) exempts NBFCs and Public Financial Institutions ("**PFI**s") from the applicability of the *first proviso*. Simply put, the requirements of public offer under the Companies Act, 1956, would not be triggered for an NBFC or PFIs making an offer of shares or debentures in terms of Section 67 of that Act, to fifty or more persons, if the concerned NBFC or PFI can show that the offer was a private placement in terms of the aforesaid Section 67(3). In order to comply with Section 67(3), ACL is required to show that it had an intention to offer the *Redeemable Preference Shares* under the *Offer of Redeemable Preference Shares* during the Financial Year 2006–07, to only

those persons who received the *Offer*, or that the *Offer* is a domestic concern of ACL and the persons receiving the same.

- iii. Therefore, contrary to what has been stated by ACL in its replies, the fact that it was a registered NBFC will not exempt it from the requirement of proving that the *Offer of Redeemable Preference Shares* made by it under the *Offer of Redeemable Preference Shares* during the Financial Year 2006–07, was a private placement in accordance with Section 67(3) of the Companies Act, 1956.

4.7.2 *Whether ACL has discharged its burden of proof for establishing that the issue of 63539100 Redeemable Preference Shares under the Offer of Redeemable Preference Shares during the Financial Year 2006–07, after it was registered as an NBFC with RBI, was a private placement?*

- i. I note that Section 67(3) of the Companies Act, 1956, which pertains to private placements, requires an offer in a private placement to be made to a specific and pre-determined set of persons, or persons who are associated with the offeror company in a way so as to make the offer a domestic concern of the company making the offer of shares or debentures, and the offerees who are the intended recipients of such offer. The association between the offeror company and offerees for determining whether an offer is in the nature of a private placement needs to be established on a case-to-case basis. As per the *Sahara Case*, it was held that under Section 67(3) of the Companies Act, 1956, the "*Burden of proof is entirely on Saharas to show that the investors are/were their employees/workers or associated with them in any other capacity which they have not discharged.*" In view of the aforesaid, ACL is required to show that the *Offer of Redeemable Preference Shares* made to 28164 individuals/investors, who were allotted *Redeemable Preference Shares* during the Financial Year 2006–07, was not intended to be available for subscription by the general public. In this regard, I note that –
 - a. The terms and conditions of the *Offer of Redeemable Preference Shares* clearly provide who can invest, viz. – *Individuals, Trusts, Corporate Bodies, Minors (through Guardians), Financial Institutions, Mutual Funds, HUFs and Co – operative Bodies*. Such a generalized category of investor(s) cannot be said to satisfy the condition of specificity as required under Section 67(3) of the Companies Act, 1956. Further,

from the material on record, no evidence has been adduced by ACL of any prior determination of the identity of the offerees of what has been claimed by ACL in its reply dated March 3, 2014, to be the issue of *Redeemable Preference Shares* on private placement.

- b. ACL has failed to provide details of individuals/investors to whom *Redeemable Preference Shares* was allotted vide ACL's Board Resolution dated 15.02.2006. Further, ACL has not submitted copies of the prospectus, invitation letter or offer document through which it sought subscription from the investors. I note that SEBI repeatedly sought the aforesaid information vide letters dated October 1, 2013; February 20, 2014 and March 27, 2014, which as on date, have not been submitted by ACL.
 - ii. I find that ACL has not made available to SEBI any material or information to indicate that the *Offer of Redeemable Preference Shares* by ACL, which raised ₹63.54 Crores during the Financial Year 2006–07 and which resulted in subscription by 28164 individuals/investors, was intended to be an issue on private placement basis meant only for a specific or selected group of persons, as required by Section 67(3) of the Companies Act, 1956. I, therefore, find that ACL has failed to discharge the burden of proof necessitated for establishing that the *Offer of Redeemable Preference Shares* made by it was an issue on private placement basis in accordance with Section 67(3) of the aforesaid Act.
- 4.7.3 In view of the above, I, therefore, find that the issue of 63539100 Redeemable Preference Shares, by ACL, under the *Offer of Redeemable Preference Shares* during the Financial Year 2006–07, was *prima facie* a public issue and not an issue on private placement basis in accordance with Section 67(3) of the Companies Act, 1956.
- 4.8 From the abovementioned paragraphs 4.6 – 4.7.3, I note that –

- i. It will follow that since the *Offer of Redeemable Preference Shares* is a public issue of securities, such securities i.e. *Redeemable Preference Shares*, 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) Where a prospectus, whether issued generally or not, states that an application under sub-section (1) has been made for permission for the shares or debentures offered thereby to be dealt in one or more recognized stock exchanges, such prospectus shall state the name of the stock exchange or, as the case may be, each such stock exchange, and any allotment made on an application in pursuance of such prospectus shall, whenever made, be void, if the permission has not been granted by the stock exchange or each such stock exchange, as the case may be, before the expiry of ten weeks from the date of the closing of the subscription lists:

Provided that where an appeal against the decision of any recognized stock exchange refusing permission for the shares or debentures to be dealt in on that stock exchange has been preferred under section 22 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), such allotment shall not be void until the dismissal of the appeal.

(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 *Sabara 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, it therefore *prima facie* appears that ACL 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 Redeemable Preference Shares*, which was a public issue 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 Redeemable Preference Shares*, is mandatory on ACL. In this regard, there is no evidence on record to indicate whether or not ACL has paid interest to the investors under the *Offer of Redeemable Preference Shares*, as per the aforesaid Section. In view of the same, I find that *prima facie*, ACL 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 Redeemable Preference Shares* were

kept in separate bank account by ACL. In view of the same, I find that *prima facie*, ACL has not complied with the provisions of Section 73(3) of Companies Act, 1956.

- 4.9 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 Redeemable Preference Shares* were made to fifty persons or more, it has to be construed as a public offer. Having made a public offer, ACL 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*, ACL has not complied with the provisions of Section 60 of Companies Act, 1956.
- 4.10 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 *prima facie* ACL has not complied with the provisions of Section 56(1) and 56(3) of the Companies Act, 1956 and therefore, has violated the aforesaid provisions.
- 4.11 It is pertinent to note that though the Companies Act, 1956, has been repealed by the Companies Act, 2013, anything done or any action taken or purported to have been done or taken under the Companies Act, 1956, is deemed to have been done or taken under the corresponding provisions of the Companies Act, 2013, by virtue of Section 465(2) of the Companies Act, 2013, and is therefore saved regardless of the repeal of the Companies Act, 1956. Section 465(2)(a) 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;"

4.12 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 *Sabara 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 ACL has not complied with the following provisions of the DIP Guidelines –

- 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*)

4.13 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."

4.14 Upon a consideration of the aforementioned paragraphs, I am of the view that *prima facie*, ACL is engaged in fund mobilising activity from the public, through the *Offer of Redeemable 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 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; the DIP

Guidelines read with ICDR Regulations, over companies who issue securities such as *Redeemable Preference Shares* by way of a public issue, but do not comply with the applicable provisions of the aforesaid Companies Acts (as mentioned in paragraphs 4.1–4.14 above). Steps therefore, have to be taken in the instant matter to ensure that only legitimate fund raising activities are carried on by ACL and no investors are defrauded. In light of the same and also considering the failure on the part of ACL to submit relevant information to SEBI (despite being given several opportunities), I find there is no other alternative but to take recourse through an interim action against ACL and its Directors for preventing that company from further carrying on with its fund mobilising activity under the *Offer of Redeemable Preference Shares*.

6. I note that the present Directors in ACL are Shri Mansoor Ahmed, Shri Hariharan Veeraraghavan, Shri Harjit Singh, Smt. Harpreet Kaur and Shri Sandeep Sethi. I also note that Shri Brij Mohan Mahajan, Shri Sunil Kanti Kar, Shri Virendra Singh, Shri Kanwar Deep Singh, Shri R. P. Chhabra and Shri Ravinder Singh, who were earlier Directors in ACL, have since resigned.
7. 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 and Clause 17 of the DIP Guidelines read with Regulation 111 of the ICDR Regulations, hereby issue the following directions –
 - i. ACL shall not mobilize any fresh funds from investors through the *Offer of Redeemable 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. ACL and its present Directors, viz. Shri Mansoor Ahmed (DIN: 01806631; PAN: AKKPA7873P), Shri Hariharan Veeraraghavan (DIN: 03163235; PAN: ABQPV9123N), Smt. Harpreet Kaur (PAN: ABCPK6456B), Shri Sandeep Sethi (DIN: 01541853; PAN: AQBPS6934N) and Shri Harjit Singh (DIN: 06629572; PAN: ADLPS4992B) alongwith its past Directors, viz. Shri Brij Mohan Mahajan (DIN: 00031819; PAN: AAWPM1136F), Shri Sunil Kanti Kar (DIN: 00476819; PAN: AEQPK2126K), Shri Virendra Singh (DIN: 01683025; PAN: AAWPM1136F), Shri Kanwar Deep Singh (PAN: ACCPS3258G), Shri Ravinder Singh (PAN: ALHPS5680C) and Shri R. P. Chhabra (PAN: ADOPC4099E), 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. ACL and its abovementioned past and present 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. ACL shall provide a full inventory of all its assets and properties;
 - v. ACL's abovementioned past and present Directors shall provide a full inventory of all their assets and properties;
 - vi. ACL and its abovementioned present 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 Redeemable Preference Shares*, without prior permission from SEBI;
 - vii. ACL and its abovementioned present Directors shall not divert any funds raised from public at large through the *Offer of Redeemable Preference Shares*, which are kept in bank account(s) and/or in the custody of ACL;
 - viii. ACL and its abovementioned present Directors shall furnish complete and relevant information in respect of the *Offer of Redeemable Preference Shares* (as sought by SEBI letters dated October 1, 2013; February 20, 2014 and March 27, 2014), within 21 days from the date of receipt of this Order.
8. The above directions shall take effect immediately and shall be in force until further orders.
9. The *prima facie* observations contained in this Order are made on the basis of the material available on record i.e. correspondences exchanged between SEBI and ACL alongwith the documents contained therein, information obtained from the Ministry of Corporate Affairs' website i.e. '*MCA 21 Portal*' alongwith documents annexed with the reference dated September 18, 2013, received by SEBI, against ACL. In this context, ACL and its abovementioned past and present 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.

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

Place: Mumbai
Date: December 8, 2014

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