

2012 CLD 1895

[Securities and Exchange Commission of Pakistan]

*Before Shahid Nasim, Executive Director (Insurance)*

DAWOOD FAMILY TAKAFUL LIMITED: In the matter of Show Cause Notice dated 20th January, 2011, decided on 14th May, 2012.

***Insurance Ordinance (XXXIX of 2000)---***

*---Ss. 12, 39, 59-A & 156—Companies Ordinance (XLVII of 1984), Ss. 160(I)(b) 81 209—Mismanagement and carrying out transaction without care and diligence by Takaful Company—Board of Directors of the company in the meeting resolved to place before the shareholders of the company in the first Annual General Meeting of the company, the approval of equity investment in shares/certificates/Units of the bank up to Rs. 100 million—Findings of on-site inspection of the company, revealed that said investment transaction by the company contained certain discrepancies—Prima facie, the decision of the company of investment in the shares of Bank had been carried out .without 'due care and professional skills'—Company, in circumstances, had contravened the provisions of S.12(1)(a) of Insurance Ordinance, 2000—Directors and the Chief Executive of the company, in addition of the day-to-day running of the company and the management of the business, also had some fiduciary" duties, held in trust and some wider obligations imposed by statute on them and on the company—Board of Directors of the company had acceded to the fact that mismanagement took place in carrying out the transaction in question—Carrying out that transaction without due care and diligence, had not only led to the contravention of S.12(1)(a) of Insurance Ordinance, 2000, but also to the contravention of 8.39 of said Ordinance, and/or S. 209 of Companies Ordinance, 1984—Said contravention had clearly affected the interests of the shareholders of the company—Keeping in view that the shares of the Bank had been transferred in the name of the company, evidencing that the company's management had taken steps to comply with*

*the provisions of S.39 of the Insurance Ordinance, 2000 with, respect to the shares of the Bank, the company's intention to abide by the applicable laws was noticeable— Securities and Exchange Commission, in exercise of powers conferred on it under . 156 of Insurance Ordinance, 2000, instead of imposing a penalty on the company and its Directors, took a lenient view and did not impose any fine—Company and its Directors, however, were warned to exercise due care in future, while complying with the requirements of the law.*

*[pp. 1897, 1898, 1901, 1913] A, B,C&D*

Aziz Nishtar (Legal Counsel), Abbas Qurban, Director, Tahir Mehmood, Director and FahadAlam, Company Secretary for Dawood Family Takaful Limited.

Dates of hearing: 12th April and 14th June, 2011.

#### **ORDER**

(Under section 12 read with section 156 of the Insurance Ordinance, 2000)

SHAHID NASIM, EXECUTIVE DIRECTOR (INSURANCE).—This Order shall dispose of the proceedings Initiated against Dawood Family Takaful Limited (the "Company") for the contravention of section 12 of the Insurance Ordinance, 2000 (the "Ordinance 2000").

#### **Background Facts**

2. The provision of subsection 1(a) of section 12 of the Ordinance 2000 provides that:-

#### **12. Criteria for sound and prudent management.—**

(1) *"For the purposes of this Ordinance the following shall, without limitation, be recognized as criteria for sound and prudent management of an insurer or applicant for registration as a person authorized to carry on insurance business:*

*(a) the business of the insurer or applicant is carried on with integrity, due care and the professional skills appropriate to the nature and scale of its activities*

3. The Board of Directors of the Company In the 7<sup>th</sup> Board of Directors meeting dated March 7, 2008 had approved the notice of first Annual General Meeting ("AGM") of the Company along with the statement of material facts under section 160(I)(b) of the Companies Ordinance. 1984 (the "Ordinance 1984")

4. The Board of Directors of the Company in the aforesaid Board meetings had also resolved to place before the shareholders of the Company in the first AGM of the Company, the approval of equity investment. In shares/certificates/units of Dawood Islamic Bank Limited ("DIBL") up to Rs. 100 Million.

5 The statement of material facts under section 160(I)(b) of the Ordinance 1984 stated that the shares shall be purchased at the price equivalent to the breakup value/market value of the shares if the listing process started on the investment date.. And the breakup value of the shares as disclosed in the statement referred above was Rs. 10.179 per share.

6. The listing process of DIBL did not take place at the date of investment and therefore, the breakup value of the shares of DIBL, which was Rs.10,179 was the price at which the transaction should have been closed.

7. It was. also resolved In the aforesaid board meeting that the Chief Executive and Company Secretary of the Company were authorized to do all the acts, deeds and things necessary to implement the aforementioned resolution and were also empowered to make amendments/modifications to the resolution as may be required and such amendments/modifications shall also be deemed to be approved by the shareholders.

8. All the aforementioned resolutions were approved by the shareholders in the first AGM of the Company held on, March 31, 2008.

9. The findings of On-Site Inspection of the Company under section 59A of the Ordinance 2000, which was conducted during the year 2010, revealed that the aforesaid Investment transaction by the Company contained the following discrepancies:--

- (a) The Company purchased the shares of DIBL at a price of Rs. 11.956 per share, whereas, the shareholders had approved price of Rs. 10.179 per share, due to which, the Company had to pay an amount of Rs.8.89 Million in excess of what had been approved by the shareholders.
- (b) The transaction was carried out by Mr. Muhammad Shoaib (Ex-Director of the Company and Ex-Director Finance First Dawood Investment Bank Limited) and Mr. Ayaz Dawood (Director First Dawood Investment Bank Limited) as the cheque for the purpose of the said investment was signed by the aforesaid persons as authorized signatories for and on behalf of the Company, whereas, the Chief Executive and Company Secretary had been authorized by the shareholders to implement the resolution of the AGM related to the said investment.
- (c) The payment for the transaction had been made without any agreement. The agreement for Assignment and Transfer of shares was entered on August 24, 2009 almost fifteen months after the date of transaction, which means that during those fifteen months the Company was not entitled to any right of profit attached to those shares in spite of paying Rs.59.78 million.
- (d) The license issued by State Bank of Pakistan ("SBP") to DIBL restricted the transfer of the sponsor shares of DIBL for a period of three years from the date of issuance of license to DIBL and prior written approval of SBP would thereafter be required for the transfer of shares. Whereas, the Board of Directors of the Company despite the legal and technical issues in transferring the title of the shares authorized and executed the investment in DIBL.

10. The Company even before the transfer of the title of the shares has recorded an impairment of Rs. 11.87 million in the value of this investment as per the audited

accounts for the year ended December 31, 2009.

11. The Commission had sought clarification on the matter of the execution of the transaction and the current status of the aforesaid investment from the Company in its letter dated August 24, 2010

12. The Company responded through a letter dated August 31, 2010 that the transaction was executed after the Boards approval and authorization in the AGM by the shareholders. It is also implied from the reply that as at the date of reply, the shares as yet, were not transferred in the name of the Company, which is also a non-compliance of section 39 of the Ordinance 2000 that requires to keep all the assets in the name of the insurer. -

13. To discuss the observations highlighted in the On-Site Inspection Report of the Company, the Board of Directors of the Company were called by the: then Executive Director —Insurance for a meeting with the officials of the Insurance Division of the Commission. The meeting was held on November 29, 2010 and was attended by the following, on behalf of the Company:--

- Mr. Humayun Javed, Chairman - Board of Directors.
- Mr. Bakht Jamal Shaikh, CEO.
- Mr. Jamil Ahmed Qureshi, Director.
- Mr. Ishtiaq Hussan, Director.
- Mr. Abbas Qurban, Director.
- Mr. Javed Hashmat, Director.
- Mr. Tahir Mehmood, Director.

14. Draft minutes of the, said meeting were circulated to all the members of the Board of Directors for their review and recommendations for corrections, if any. None of the Directors of the Company raised any objection on the draft however, one of the Directors of the Company made comments on the minutes which were not discussed and/or presented by the attendees during the meeting, therefore, the said comments were not incorporated in the

minutes of the meeting. Mr. Humayun Javed the then Chairman of the Board of Directors, also signed off the said minutes for and on behalf of the Board of Directors of the Company. The portion of the minutes of the said meeting relevant to the said investment issue states:—

***"Observation***

*The transaction of investment in shares of DIBL was carried out on sponsor shares, which were not transferrable in the name of the Company for a period of three years.*

***Board Reply***

*Mr. Jamil Qureshi replied that the members of the current. Board were not present at that time and the said transaction was approved by the Board which has resigned. He further stated that the members of the Board are pursuing the case after their appointment and are trying to get the shares transferred in the name of the Company and If not possible, the Board shall get the amount of investment back from the sponsor shareholder and shall initiate legal proceedings in case the shares are not transferred to the Company's name by December 2010.*

***Observation***

*The transaction allowed by the Board was at Rs.-10.179 per share in its 7th Board meeting dated 7-3:2008. The transaction was actually carried at Rs. 11.956 per share, for 5 million shares (Rs.59.78 million). The transaction was carried out in excess of Board's approval at Rs.1.77 per share equivalent to Rs.8.89 million.*

***Board Reply***

*No satisfactory explanation for the said query was given by the Board. The reply as discussed above was emphasized.*

***Observation***

*The CEO and Company's Secretary were authorized to implement the • resolution while the transaction was carried out by Mr. Shouib (Ex-Director). The Ex-CEO of DFTL had also confirmed that the transaction was carried out without his authorization.*

***Board Reply***

*The members of the Board accepted. the observation that the said transaction was carried out by Mr. Shoaib without authorization.*

*Mr. Noman Akhter said that this was mismanagement in the company being confirmed by the Board. Mr. Jamil Ahmed Qureshi replied that mismanagement is a soft word to. be used for the way the transaction was carried out. E.D. requested the Board for the appropriate word. Mr. Jamil Ahmed Qureshi replied that the most suitable word is 'Lack of Corporate Governance" or any other similar harsh-word may be used."*

15. *Prima .facie*, the decision of the Company of investment in the shares of DIBL has been carried out without "due care and professional skills" and therefore, the Company has contravened the provisions of section 12(l)(a) of the Ordinance 2000.

16. Section 156 is the: applicable penal provision of the Ordinance 2000 for contravention of section 12, which states:--

***Penalty for default in complying with, or acting in contravention of this Ordinance.***—*Except as otherwise provided in this Ordinance, any insurer who makes default in complying with or acts in contravention of any requirement of this Ordinance, and, where the insurer is a company, any director, or other officer of the company, who is knowingly a. party to the default, shall be punishable with fine which may extend to one million rupees and,- in the case of a continuing default, with an additional fine which may extend to ten thousand rupees for every day during which the default continues.*

**Show Came Notice**

17. Accordingly, a Show Cause Notice was Issued on January 20, 2011 under section 12 of the Ordinance 2000 to the Company, Its former and present Chief Executive and Its former and present Directors, calling upon them to show cause as to why the penalty, as provided In section 156 of the Ordinance 2000, should not be imposed upon them and/or upon the Company for not complying with provisions of section 12 of the Ordinance 2000.

**Company's Response to the Show Cause Notice**

18. The Company, via its letter dated February 21, 2011, responded to the abovementioned Show Cause Notice. Salient points of Company's reply have been reproduced below:--

*"...Your first observation is that the Company purchased, shares of DIBL for Rs.11.956 per share while shareholders had approved the transaction at the breakup value of Rs.10.179 per. share. In this regard we would like to draw your attention towards the statement sent to each shareholder under section 160 of the Companies Ordinance, 1984, along with the notice of Annual General Meeting wherein it was clearly stated that breakup value per share is Rs.10.179 while the Company intends to purchase them either at breakup value OR the market value if listing process started on investment date. Before entering into agreement the listing process had started hence the shares were to be purchased at the market value. The market value was determined keeping in view the expected cash flows, business plans, profile of assets and liabilities, growth prospects and branch network, which was fully taken into consideration while determining the purchase value. The subsequent developments also proved that determination of market value at Rs. 11.956 per share was on the conservative side as just within four months of the purchase SECP approved Initial public offering of shares through stock exchange at Rs. 13.21 per share. Approval of market value by' SECP at Rs. 13.25 per share clearly establishes that the Company purchased shares at an ideal price. At the same time the company has not lost anything due to the fact that these shares are transferable in future and no dividend or bonus*



*shares have been declared or issued respectively till date. Even if it were done the same was protected under the assignment agreement executed between FRSL and the Company to reduce the agreement to sell into a formal assignment document to thwart the possibility of any minor disagreements before the actual transfer of shares into the Company's name is due.*

*... we would submit that where investments in shares or any other investment of a similar nature is to be made, it should be kept In mind that the unit price of a share continuously keeps on changing and practically it is impossible to get the exact per share price approved by the shareholders....*

*... the execution of the transaction by allegedly two unauthorized persons, we, respectfully seek to submit that the transaction was executed as per the AGM resolution The AGM resolution did not require that the cheque be signed by the CEO or Company Secretary and it is unthinkable- that any share holders meeting would go into such details thus micro-managing the affairs of the company and venturing into the Board's domain. It is a very common practice by the companies that there are several competent persons as authorized signatories and cheques are signed by the persons available at that point in time. The said two signatories were the authorized signatories for cheque signing since well before the transaction was executed and they were signing cheques in the normal routine business of the Company.*

*Your third observation was regarding non-execution of agreement of transfer of shares and the assignment agreement was also executed belatedly. It is submitted that law does not require that agreement of transfer of shares must always be in writing. If it were the case of millions of written contracts will have to be executed daily to sanctify the share sale and purchase deals in the stock exchanges of the country, which would make the trade in shares a cumbersome procedure. A course of dealing, correspondence between the parties and mode of payment, all form the basis of an agreement and can be proved and enforced before the court of law."*

*The aforesaid letter also defined the term "due diligence" by stating:*

*"In '2002 CLC 1177' the Lahore High Court has defined the term 'due diligence' as performance of act with care and caution expected of a reasonable and prudent man in particular circumstances."*

#### **First Hearing of the Case**

19. The first hearing of the said case was conducted at 11-30 a.m. on April 12, 2011 before the Executive Director (Insurance) which was attended by Mr. Aziz Nishtar, Advocate from Messrs Nishtar and Zafar (representing the Company as Its Legal Counsel). Mr. Abbas Qurban, Director, Mr. Tahir Mehmood, Director and Mr. Fahad Alam, the Company Secretary. The legal counsel submitted written arguments before the Executive Director (Insurance) In continuation to the reply dated February 21, 2011 of the Company to the Show Cause Notice. Brief submissions made in the arguments .are stated below:--

*"(a) The notice has been issued without a statement of jurisdiction as enforcement of Companies Ordinance (hereinafter the "Companies Ordinance") issues is inherently the domain of the Enforcement Division of the SECP and all the legal framework under the Ordinance so provide in the Ordinance, we would seek to know under which sections or the regulation/order the Insurance Division has assumed powers to assume jurisdiction over enforcing and alleged Companies Ordinance non-compliance.*

*(b) Issuance of notice under section 12 of the Insurance Ordinance 2000 (hereinafter the "Ordinance") for an alleged breach of section 208 of the Companies Ordinance is essentially stretching the Jurisdiction of Ordinance and the Insurance Division to a company low issue without sufficient ground. The Companies Ordinance is a full legal framework, under which the breaches of Law and their respective remedies and penal provisions. It does not provide in that law that any alleged breach of Companies Ordinance would be penalized under a provision of the Insurance Ordinance. As is evident from the transaction under reference in your notice the money*

*invested was from the shareholders' money and not from the Insurance proceeds to which essentially applies.*

*(c) Issuance of notices to almost each person who has ever been director of the Company shows lack of proper understanding of the matter as to who committed an alleged breach. Many a director was not at all related to the matter at any time to the transaction under reference. Including their into the long list of alleged law breaching persons is sheer waste of precious government time and harassment for law abiding citizens of the country."*

The remaining paragraphs of the said written arguments state the same grounds as stated above in point 18 above.

20. In addition to the above stated written arguments, the legal counsel of the Company stated that the whole Issue is not an Insurance Ordinance, 2000 issue; in fact it is related to section 208 of the Companies Ordinance, 1984.

21. During the hearing the following queries and/or information on the matter was called from the Company on the case:-r

- (a) Was any due diligence report made and presented before the Board of Directors on the basis of which the decision of investment in the shares of DIBL was made?
- (b) Is DIBL a listed concern now?
- (c) Have the shares been transferred to the Company's name now?
- (d) Reason for purchasing shares of DIBL at a price of Rs. 11.956 per share, although, the shareholders had approved price of Rs. 10.179 per share?
- (e) Carrying of the transaction without permission of Chief Executive Officer and Company Secretary, as they were authorized to carry on the transaction. Ex-CEO of the Company. Mr. Abdul Halim Nasri has intimated the Commission that the transaction was carried out without his approval/ authorization.
- (f) Is it a prudent decision to give away Rs. 60 Million without any agreement?

- (g) The agreement for Assignment and Transfer of shares was entered on August 554, 2009, almost fifteen months after the date of transaction which means that during those fifteen months the Company was not entitled to any right of profit attached to those shares in spite of paying Rs.59.78 million.
- (h) The Agreement presented by the Company does not bear official stamp of Fazal-e-Rabbi Steel Limited ("FRSL"), neither was it signed by any witnesses on behalf of FRSL?
- (i) Restriction on the sale of shares of DIBL by the SBP.
- (j) Does the notice of AGM and the statement of material facts under section 160(I)(b) of the Ordinance 1984 state that the shares were not transferable in the name of the Company and/or the restriction conditions of SBP on the sale of shares of DIBL were mentioned in the notice?

The above stated queries were responded by the Company as follows:—

- (a) Due Diligence was carried on and the Board of Directors took the decision on the basis of the due diligence report.
- (b) No. DIBL is not a listed concern as yet.
- (c) The shares have not been transferred in the name of the Company as yet.
- (d) The Company stated that share prices in the market continuously keeps on changing and subsequent to our purchase within four months.. SECP itself approved a pre-IPO offer price of Rs. 13.25 per share of DIBL. Therefore, the shares of DIBL were purchased at low per share price and' the Company did not pay any excessive amount as alleged by the Commission.
- (e) The Company stated that signing the cheque does not in any case mean that the transaction was carried out without authorization/permission of the CEO or Company Secretary as there are many officials authorized to sign cheques or other Instruments on behalf of the Company. The Company further stated that if the Ex-CEO of the Company states that transaction was carried out without his approval/ authorization, he shall be called to Pakistan and he should be cross questioned on the matter.

- (f) The Company stated that it is prudent to give away almost 60 Million without any agreement because oral agreements are also binding on the parties to the contract.
- (g) The Company stated that in the current market conditions it is not viable for companies to enter in to contracts on each and every sale and purchase of shares. Even then in order to protect the Company's right on the matter, an agreement was entered with FRSL, the sponsor shareholder of DIBL's shares.
- (h) The Company did not provide any explanation on the matter and said that the Commission may inquire independently from FRSL to ascertain the correct position.
- (I) The Company failed to present any cogent reasoning for the said purchase despite restriction on the sale of shares by SBP.
- (J) The notice of AGM and the statement of material facts under section 160(I)(b) of the Ordinance 1984 does not state any fact about the restriction by SBP on the sale of shares of DIBL.

22. On the basis of the replies put forward, the Company was advised to submit the following documents before the Executive Director (Insurance) for further deliberation on the case:--

- Due Diligence Report approved by the Board of Directors for investment in DIBL.
- Approval of SECP for pre-IPO price of Rs. 13.25/share.
- Minutes of the BOD Meeting approving authorization for signing of Cheques.
- Correspondence with the SBP on the transfer of shares.
- Notices issued to FRSL for transfer of shares.

23. In addition to the above, the minutes of the meeting held on November 29, 2010 were also presented before the Company for discussion. The legal counsel of the

Company was not aware of the meeting and the contents of the Minutes of the Meeting. Therefore, the legal counsel requested the Executive Director Insurance to adjourn the hearing proceedings and provide the Company another opportunity to be heard on the matter. The Executive Director — Insurance acceded with the request made by the legal .counsel of the Company and adjourned the hearing proceedings.

### **Second Hearing of the Case**

24. Second hearing of the said case was conducted at 10-30 a.m. on June 14, 2011 before the Executive Director (Insurance) which was attended by Mr. Aziz Nishtar, Advocate from Messrs Nishtar and Zafar (legal counsel). Mr. Abbas Qurban, Director. Mr. Tahir Mehmood, Director and Mr. Fahad Alam the Company Secretary.

25. The legal counsel of the Company started the proceedings on the case and stated that if the chronology of events is seen, the events occurred in the following manner:--

- March 7, 2008. Board Resolution
- March 31, 2008. Approved by the Shareholders at AGM
- May 16, 2008. Certificate of Registration
- May 24, 2008 Payment for Purchase of Shares

The chronology of events clearly depicts that the transaction was approved by the shareholders of the Company before the Company had obtained Certificate of Registration as a Takaful Company. With this the legal counsel of the Company invited attention towards section 12(l)(a) of the Ordinance 2000, under which the Show Cause Notice was issued to the Company, and section 12(4) of the Ordinance 2000. It was stated that for the" purpose of deciding the case on the notion of sound and prudent management. Section 12(1) (a) should be read in conjunction with section 12(4) of the Ordinance 2000 which states that:--

*"12(4) The insurer or applicant shall not be regarded as conducting its business in a sound and prudent manner if it fails to conduct its business with due regard to the interests of policy holders and potential policy holders."*

The legal counsel asserted that since the said investment was carried out from the shareholder Fund of the Company and did not affect the Interests of the policyholders and potential policyholders of the Company, therefore, the criteria of sound and prudent management has not been breached in this particular case.

26. In addition to the above the Company was asked to respond on the following:--

- (a) Were the shareholders informed about the conditional license of DIBL and was due diligence done or not?
- (b) Did the Chief Executive Officer and Company Secretary give approval to Mr. Shoaib and Mr. Ayaz Dawood to execute the transaction?
- (c) What return did the Company generate on the said investment?

The legal counsel of the Company replied to the above stated questions as:—

- (a) Yes, the shareholders were- Informed about the conditions Imposed on sale of shares of DIBL by the SBP.
- (b) No satisfactory response was given by the attendees to the hearing. Mr. Tahir Mehmood, Director present at the hearing,' served the Company in the capacity of Company Secretary at the time the transaction was approved and executed was asked if he had given his approval to Mr. Shoaib and Mr. Ayaz Dawood to execute the transaction. Mr. Tahir Mehmood stated that as a Company Secretary his role was to fulfill all the legal formalities incidental to the transaction and did not authorize the said persons in writing to execute the transaction.
- (c) Irrelevant question, whether the Company has generated return on its investments or not is not the concern of the Regulator.

27. The company reiterated that all the fundamental processes under the law were carried out for the transaction and documentary evidence for the said has also been provided to

the Commission. It was also reiterated that the section 12(l)(a) should be read along with section 12(4) of the Ordinance 2000 for deciding the outcome of the case.

**Consideration of Company's Submissions**

28. The contention of the Company stated as point 19(a), is unwarranted. Through S.R.O. 666(l)/2009, the officials of the Insurance Division were delegated powers by the Commission to be exercised under the Companies Ordinance, 1984 and the Insurance Ordinance. 2000.

29. The contents of the written submission stated as point 19 (b) are also denied as the, contention of the Commission is that the Company had failed to carry out the said transaction with due care and diligence. Therefore, Notice was issued to the Company under section 12 of the Ordinance 2000.

30. In response to the contention of the Company stated as point 19(c), It is stated that the Notice was issued to the former directors so that the Commission can ascertain the. extent of involvement of all the former directors in the non- compliance and the reason to issue the Notice to the current Directors was that the current Board of Directors in the meeting held on November 29, 2010 had accepted that default was made In the past by the former Directors and also that the current Directors are responsible for managing the affairs of the Company and representing the Company in the case.

31. The legal counsel of the Company stated in the hearing that due diligence had been conducted and the board of directors of the Company had taken the decision to invest in the shares of. DIBL on the basis of due diligence report.

However, on the Commission's request, the Company failed to present the due diligence report and other related information before the Commission. Whereas, the' Company in its letter dated May 5, 2011, while submitting the documents as advised in the first hearing by the Executive Director — Insurance, stated:—

*"....In this connection we would further like to submit that the Board was aware of the fact that listing process of DIBL has been started and third party due diligence by DIBL*



*external auditors is in fined stage, so the Board made its decision on the basis of that available information.”*

The said statement clearly states that the Board of Directors made the decision on the basis of available information and that information was reliant on the working of the external auditors of DIBL and the Company, internally did not carry on feasibility on the said investment. The Company, therefore, has even failed to submit the working of the external auditors of DIBL or any other related document before the Commission. This makes the Commission believe that the Company did not carry on any due diligence for investment of almost Rs.60 million and had falsely stated in the hearing proceedings that the investment was carried out on the basis of due diligence report.

32. The Commission is of the view that the investment in the shares of DIBL should have been done at the breakup value as approved by the shareholders in the first AGM of the Company, whereas, the Company states that the process of Initial Public Offering of DIBL had started investment date and therefore the Company made the investment on market value instead of breakup value of the shares.

In this connection, the reply of the Company dated February 21, 2011 to the Show Cause Notice stated:-

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*“The market value was determined keeping in view the expected cash flows, business plans, profile of assets and liabilities, growth prospects and branch network, which was fully taken into consideration while determining the purchase value.”*

Since the Commission believes that the Company had not performed any due diligence as stated in point 31 above, therefore, firstly, the Company was not in a position to ascertain the market value of the shares. Secondly, the Company stated that the Commission itself had approved pre-IPO offer price of Rs.13.25 within four months of the transaction; however, the approval of the Commission at Rs.13.25 per share was a subsequent event and construing approval of the Commission as jurisdiction of paying a higher price for shares, when the Company has not carried on any due diligence for ascertaining market value, cannot be taken as a cogent reason.

33. The legal counsel of the Company stated in the hearing proceedings that the restriction on the sale of shares of DIBL was in the knowledge of the shareholders of the Company. Whereas,

the minutes of the 13th Meeting of the Board of Directors of the Company dated March 6, 2009 states:--

*"Chairman (Mr. Jamil Ahmed Qureshi) Inquired about the background of this transaction and questioned on how such an initiative could be taken when it was known that there is a lock-in period on the sponsor shares of DIBL. The question was responded by Mr. Shoaib that DFTL, inadvertently entered into this transaction through first Dawood Investment Bank Limited (FDIBL) because of the unawareness of the condition of license imposed by SBP on the sponsors of DIBL and that FRSL was one of the sponsors. The Board's opinion was that FDIBL being, one of the sponsor shareholders, should have been aware of this specific restriction."*

The above stated paragraph clearly states that the Company entered into this transaction because of unawareness of the conditional license of DIBL by SBP, whereas, the legal counsel of the Company falsely stated that even the shareholders were aware of the said restriction by SBP on the sale of shares of DIBL.

34. The legal counsel of the Company in the second hearing stated that the section 12(1) (a) of the Ordinance 2000 should be read with section 12(4) of the Ordinance 2000, by which the Company infers that since the policyholders and potential policyholders of the Company have not been affected<sup>^</sup>, therefore section 12(1)(a) of the Ordinance 2000 is not applicable in this case.

The above stated justification of the Company is not acceptable as section 12(4) of the Ordinance 2000 does not preclude that mismanagement in the shareholders' money is not covered. If such is the case, then it means that the management of the Company has every right to mismanage its shareholders money under the Ordinance 2000. In addition to the foregoing, it is stated that Ordinance 2000 itself gives ample cover to the Shareholders money, as it is required for every life insurance/family takaful company registered under the Ordinance 2000, to maintain a separate shareholder fund and the Ordinance 2000 separately requires solvency requirements for the Shareholders Fund. Therefore, it is the duty of the management

of the Company, that every due caution is exercised while utilizing the funds of the Company.

### **Conclusion**

35. I have carefully examined and given-due consideration to the submissions of the Company and have also referred to the provisions of the Ordinance 2000. I am of the view that a default Under the relevant provision of the Ordinance 2000 is established.

36. Before proceeding further, I find it relevant to discuss the duties of the Directors and the Chief Executive. The Directors and the Chief Executive Officer of a Company, in addition to the day-to-day running of the Company and the management of its business, also have some 'fiduciary' duties i.e. duties held in trust and some wider obligations imposed by statute on them and on the Company. The Directors and the Chief Executive of the Company are supposed to be well aware of their legal, obligations and the Company's legal obligation in the aforesaid matter along with the consequences of the said defaults.

37. The Company also has failed to prove before the Commission that the Chief Executive Officer and the Company Secretary had authorized Mr. Shoaib and Mr. Ayaz Dawood to execute the transaction. Moreover, the Commission is also in receipt of reply to the Show Cause Notice by the Ex-Chief .Executive Officer of the Company, Mr. Abdul Halim Nasri, which is duly signed by him. The Ex-CEO of the Company states in his submission that the transaction was carried out without his approval/authorization.

38. The legal counsel of the Company, representing the Company on the case, has been falsely stating facts on the case before the Commission as mentioned in Points 31 and 33 above.

39. The Board of Directors of the Company as stated in point 14, have already acceded with the fact that mismanagement was done in carrying out this transaction and the document stating it has been signed off by the then Chairman of the Board of Directors, for and on behalf of the Company.

40. The Company has failed to get the shares transferred to its name despite the fact that the condition on the sale of shares of DIBL by SBP lapsed on March 16, 2010.

41. The carrying out of this transaction without due care and diligence has not only led to the contravention of section 12(1)(a) of the Ordinance 2000, but also to a contravention of section 39 of the Ordinance 2000 and/or section 209 of the Ordinance 1984.

42. However, it is Important to note that the Company had been pursuing for resolution of the transfer of the shares with FRSL as is evident from the submissions made by the Company and has also initiated legal proceedings, against FRSL.

43. However, this contravention has clearly affected the interests of the shareholders of the Company as the investment after almost four years of the date of the transaction was transferred in the name of the Company, and the Company had to bear additional litigation costs against FRSL because of the fact that the Company did not adhere to the principles of due care and diligence in making this Investment decision.

44. The Company via its letter dated March 8, 2012 informed the Commission that the shares of DIBL have been transferred in the name of the Company based on which the Commission via letter dated March 13, 2012 advised the Company to submit documentary evidence before the Commission evidencing such transfer. The Company via its letter dated March 14, 2012 submitted its CDC account statement and the No-Objection Certificate issued by the State Bank of Pakistan dated(sic) stating that the State Bank has allowed the transfer of the shares of DIBL to other parties other than the sponsor shareholders.

#### **Order**

45. Keeping in view that the shares of DIBL have been transferred in the name of the Company, evidencing that the Company's management has, taken steps to comply with the provisions of section 39 of the Ordinance 2000 w.r.t. the shares of DIBL, thereby the Company's intention to abide by the applicable laws is noticeable, therefore, I, in exercise of powers conferred on me under section 156 the Ordinance. Instead of

imposing a penalty onto the Company and its Directors, take a lenient view and do not impose any fine. However, I also sternly WARN the Directors of the Company and the Company itself to exercise due care in the future whilst complying with the requirements of the law.

Moreover, the Company and its Management is advised that the Company should adopt a transparent and fair understanding while taking such type of decisions and comply with the Ordinance in letter and spirit.

HBT/33/SEC

Order accordingly.