



SECP  
Insurance Division  
Karachi

[Karachi]

Before Tariq Hussain, Director (Insurance)

*In the matter of*

Pak Kuwait Takaful Company Limited

Show Cause Notice Issue Date: February 8, 2013

Date of Hearing: March 12, 2013

Attended By:

1. Mr. Syed Wajahatullah Quadri  
Chief Financial Officer  
M/s Pak Kuwait Takaful Company Limited;
2. Mr. Abdul Razzak Adam  
Legal Counsel  
M/s Sattar & Sattar, Legal Counsels.

Date of Order: April 08, 2013

**ORDER**

(Under Section 174, Section 187(h), Section 188 and Section 209(2) Read With Section 186, Section 189 and Section 209(9) of the Companies Ordinance, 1984)

.....

This Order shall dispose of the proceedings initiated against M/s Pak Kuwait Takaful Company Limited ("the Company") for alleged non-compliance of the provisions of Section 174, Section 187(h), Section 188 and Section 209(2) of the Companies Ordinance, 1984 (the "Ordinance").

**Background Facts**

2. Section 187 of the Ordinance determines the criteria for ineligibility of a person to become director of a company registered under that Ordinance, and Clause (h) of the said Section states that if a person is not a member of a company, then he / she cannot become the director of that company, however, certain exemptions have been given therein. The relevant provisions of Section 187(h) of the Ordinance provide that:

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SECURITIES & EXCHANGE  
COMMISSION OF PAKISTAN

Insurance Division, State Life Building-2  
4th Floor, Wallace Road, Karachi, Pakistan

Tel: +92-21-32461053, +92-21-32465469 Fax: +92-21-32423248 Web: www.secp.gov.pk



"Ineligibility of certain persons to become director. - No person shall be appointed as a director of a company if he-

...  
(h) is not a member

Provided that clause (h) shall not apply in the case of—

- (i) a person representing the Government or an institution or authority which is a member;
  - (ii) a whole-time director who is an employee of the company;
  - (iii) a chief executive; or
  - (iv) a person representing a creditor;
- ..." (Underlined to put emphasis)

3. The term "member" has been defined under Section 2(1)(21) of the Ordinance as:

"member" means, in relation to a company having share capital, a subscriber to the memorandum of the company and every person to whom is allotted, or who becomes the holder of, any share, scrip or other security which gives him a voting right in the company and whose name is entered in the register of members, and, in relation to a company not having a share capital, any person who has agreed to become a member of the company and whose name is so entered" (Underlined to put emphasis)

4. The Company is registered under the Ordinance, having paid share capital of Rs. 400,000,000/- as on December 31, 2011, and the pattern of shareholding of the Company as reported in the Annual Audited Accounts for the year ended December 31, 2011 is as follows:

Name of the Shareholder	No. of Shares	Percentage
Etiqa Overseas Investment Pte. Ltd, Malaysia	13,000,000	32.5
Pakistan Kuwait Investment Co. (Pvt) Ltd	12,000,000	30.0
Noor Financial Investment Co., Kuwait	6,000,000	15.0
Saudi Pak Industrial and Agricultural Investment Co. (Pvt) Ltd	4,000,000	10.0
Takaful Holdings Ltd, Dubai	2,500,000	6.25
Meezan Bank Limited	2,500,000	6.25
<b>Total</b>	<b>40,000,000</b>	<b>100</b>

5. It appeared from the perusal of the said pattern of shareholding of the Company that no Director of the Company holds shares of the Company, and accordingly, the provisions of Section 187(h) of the Ordinance have been violated thereby.

*M/s.*



6. As far as nomination of the directors in a company is concerned, the provisions of Section 209(2) of the Ordinance are relevant, which state that:

*"Where the company has a right to appoint or get elected any person as a director of any other company and a nominee of the company in exercise of such right has been so appointed or elected, the shares in such other company of an amount not exceeding the nominal value of the qualification shares which are required to be held by a director thereof, may be registered or held by such company jointly in its own name and in the name of such person or nominee, or in the name of such person or nominee alone."* (Underlined to put emphasis)

7. In view of the provisions of Section 209(2) of the Ordinance, a company having right to appoint or get elected any person as a director of another company, may nominate / get elected any person as director of another company, provided that the person so nominated / elected shall hold the shares of that other company of an amount not exceeding the nominal value of the qualification shares either in his / her own name or jointly in his/ her name and the name of the company which has nominated / got such person elected on the board of such other company.

8. In this regard, the Articles of Association of the Company at its Para 89 determines the nominal value of qualification shares to be held by a Director of the Company, which is Rs. 5,000/-. However, the proviso to the said requirement appears to override the provisions of Section 209(2) and Section 187(h) of the Ordinance, and hence, it appears not to be in line with the requirements of the law. Para 89 of the Articles of Association of the Company states that:

*"The qualification of a Director shall be his holding shares of the value of Rs. 5,000/- (Rupees Five Thousand) at least in his own name provided that Directors representing interest holding the shares of the requisite value need not themselves hold the qualification shares. A Director, who is a member and who is required to hold qualification may act as a Director before acquiring his qualifications but shall in any case acquire the same within two months from appointment."* (Underlined to put emphasis)

9. In the light of Section 209(2) of the Ordinance, each Director of the Company was required to hold the shares of an amount not exceeding the nominal value of the qualification shares i.e. Rs. 5,000/-, either in his / her name alone or jointly in his / her own name and the name of the entity nominating such Director on the Board of the Company, to act on its behalf.

10. Furthermore, the provisions of Section 188(1)(a) of the Ordinance state that:

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"Vacation of office by the directors. - (1) A director shall ipso facto cease to hold office if—

- a) he becomes ineligible to be appointed a director on any one or more of the grounds enumerated in clauses (a) to (h) of section 187;  
..." (Underlined to put emphasis)

11. Therefore, in the light of Section 188(1)(a) of the Ordinance, it appears that the Company is operating without Directors. And, in this respect, it additionally appears that the Company has also contravened the provisions of Section 174(1) of the Ordinance, regarding minimum number of Directors. Relevant provisions of Section 174(1) of the Ordinance state that:

"Minimum number of directors.- (1) Notwithstanding anything contained in any other law for the time being in force,-

- (a) every single member company shall have at least one director;  
(b) every other private company shall have not less than two directors; and  
(c) every public company other than a listed company shall have not less than three directors,

appointed and elected in the manner provided in this Ordinance.  
..." (Underlined to put emphasis)

12. In view of the foregoing paras, it appeared that the Company has failed to comply with Section 174, Sections 187(h) & 188 and Section 209(2) of the Ordinance, which attracts penal provision as provided under Section 186, Section 189 and Section 209(9) of the Ordinance, respectively.

### Show Cause Notice

13. Accordingly, the Show Cause Notice was issued on February 8, 2013 under Section 174, Section 187(h), Section 188 and Section 209(2) Read With Section 186, Section 189 and Section 209(9) of the Ordinance to the Chief Executive, Directors and the Shareholders of the Company, calling upon them to show cause as to why the penalty, as provided under Section 186, Section 189 and Section 209(9) of the Ordinance, should not be imposed upon the Company, its Directors and/or its Shareholders for not complying with provisions of Section 174, Sections 187(h) & 188 and Section 209(2) of the Ordinance.

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

14. In response to the said Show Cause Notice, the Company, vide its letter of February 22, 2013, stated that:

*Handwritten signature*



"...The directors of Pak-Kuwait Takaful Company Limited have been elected in accordance with the applicable provisions of Companies Ordinance 1984 ("Ordinance"). All relevant sections of the Ordinance have been complied with and there is therefore no breach on the part of Pak-Kuwait Takaful Company Limited to warrant any penalties. Accordingly we would like to set the record straight as follows:

Pak-Kuwait Takaful Company Limited is the first Islamic insurance Company in Pakistan making it the most experienced and financially strong Takaful operator. Our shareholders comprise of institutional investors from all over the world. These include the following:

- Etiqa Overseas Investments Pte Ltd, Malaysia
- Pakistan Kuwait Investment Co (Pvt) Limited, Pakistan
- Noor Financial Investment Company, Kuwait
- Saudi Pak Industrial and Agricultural Investment Co. (Pvt) Limited, Pakistan
- Takaful Holdings Limited, Dubai, UAE
- Meezan Bank Limited, Pakistan

All of the above mentioned organizations are international institutions which have invested in our company by acquiring shares in accordance with the provisions of the Ordinance. Being institutional investors our shareholders are allowed under the Ordinance to nominate their nominees to represent them on Pak-Kuwait Takaful Company Limited Board of Directors without having to require the nominees to hold qualification shares. This is clearly provided in Section 187(h)(i) of the Ordinance. The Section states:

"Section 187(h)(i): Ineligibility of certain persons to become director. No person shall be appointed as a director of a company if he-

(h) is not a member

Provided that clause (h) shall not apply in the case of-

(i) a person representing the Government or an institution or authority which is a member."

It is in consonance with this exception which is provided in the Ordinance that Para 89 of Pak-Kuwait Takaful Company Limited's Articles of Association also does not require nominees of shareholders to hold qualification shares. Para 89 states as follows:

"The qualification of a Director shall be his holding shares of the value of Rs. 5,000/- (Rupees Five Thousand) at least in his own name provided that Directors representing interest holding the shares of the requisite value need not themselves hold the qualification shares."

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All directors of Pak-Kuwait Takaful Company Limited are the nominees of the shareholders and are not required to hold qualification shares. The nominations were received by the Company Secretary from the shareholders more than 14 days prior to the date of the Extra Ordinary General Meeting on which elections were to be held in accordance with Section 178(3) of the Ordinance. For good order we are enclosing the following nomination letters and email for your record and perusal.

- June 9, 2010 Nomination Letter from Etiqa Overseas Investments Pte Ltd, Malaysia
- June 10, 2010 Nomination Letter from Pakistan Kuwait Investment Co (Pvt) Limited, Pakistan
- June 10, 2010 Nomination Letter from Noor Financial Investment Company, Kuwait
- June 11, 2010 Nomination Letter from Saudi Pak Industrial and Agricultural Investment Co. (Pvt) Limited, Pakistan
- June 14, 2010 Nomination Email from Takaful Holdings Limited, Dubai, UAE
- June 11, 2010 Nomination Letter from Meezan Bank Limited, Pakistan

In accordance with Section 184 of Ordinance, Pak-Kuwait Takaful Company Limited obtained consent from its institutional shareholders nominees confirming their intention to participate in the upcoming election and submitted the relevant Form 27 and Form 28 to the SECP.

The nominees of the shareholders were elected as directors at Extra Ordinary General Meeting held on June 27, 2010 in accordance with Section 178 of the Companies Ordinance 1984. Copy of the Minutes of the Extra Ordinary General Meeting where the directors were elected is also enclosed for your review.

The election of the shareholders nominees as the new Directors of Pak-Kuwait Takaful Company Limited was formally notified to the SECP on Form 29 within 14 days from the date of the elections. The copy of the Form 29 filed with the SECP is enclosed with this letter for your files.

The name of duly elected Directors has also been appearing on Form A which has been filed for the year 2010 and Form A filed for the year 2011 by Pak-Kuwait Takaful Company Limited. Copies of both these corporate forms filed with SECP are also enclosed.

It should also be appreciated that in accordance with Section 178(1) of Ordinance more than 35 days before the Extra Ordinary General Meeting on which the election of directors was to be held, Pak-Kuwait Takaful Company Limited's Board of Directors adopted a resolution setting out the number of directors to be elected at the upcoming Extra Ordinary General Meeting and sent a notice to the shareholders to nominate individuals for the elections as required under Section 178(1) of the Companies



Ordinance 1984. Copy of the Board Resolution and Nomination Request is enclosed hereto.

*Against this backdrop, it may please be noted that Pak-Kuwait Takaful Company Limited has not in any way breached the provisions of the Ordinance and/or its Articles and its Directors have been validly elected. There is therefore no legal question of any Pak-Kuwait Takaful Company Limited Directors having been disqualified and/or any penalty being levied on the company for not having a validly constituted Board of Directors in place...* (Underlined to put emphasis)

15. The annexure to the reply of the Company reveal that the Board of Directors of the Company had passed a resolution in their 31<sup>st</sup> meeting, which was held on April 26, 2010 that:

*"RESOLVED that the number of Directors to be elected in the next election of the Board of Pak-Kuwait Takaful Company Ltd. is proposed to be fixed at nine (9) and the same is being recommended to the Share Holders for approval in the upcoming AGM."*

16. The extracts of the minutes of the 7<sup>th</sup> Annual General Meeting of the Company which was held on April 26, 2010 (i.e. on the same day on which the 31<sup>st</sup> meeting of the Board of Directors was held) state that:

*"Resolved that the number of directors to be elected in the next election of the Board of Pak-Kuwait Takaful Company Ltd. has been approved to be nine (9)."*

17. The Agenda Item No. 2 and Notes thereon as mentioned in the Notice of Extra Ordinary General Meeting of June 27, 2010 states as follows:

*"...2. To elect nine Directors of the company as fixed by the Board under section 178 of the Companies Ordinance, 1984. The retiring directors are:*

- i. Dato Aminuddin Md. Desa*
- ii. Mr. Shamsul Hasan*
- iii. Dr. Datuk Syed Othman Bin Syed Husin Allhabshi*
- iv. Mr. Rana Ahmed Humayun*
- v. Mr. Osman Kassim*
- vi. Mr. Irfan Siddiqui*
- vii. Mr. Suleman Shah*
- viii. Ms. Fozia Fakhar*

*All the retiring Directors shall be eligible to offer themselves for re-election...*

**NOTES:**

- 1. Any person who seeks to consent election to the office of Director of the Company shall file with the Company at its registered office a notice of*



intention to offer himself/herself for election not later than fourteen days before the date of the Extraordinary General Meeting alongwith a written consent to act as director.

2. A member entitled to attend and vote at the meeting is entitled to appoint a proxy. The instrument of proxy duly executed in accordance with the Articles of Association of the Company must be deposited at the registered office of the company at least 48 hours before the time of holding the meeting."

18. The minutes of the Extra Ordinary General Meeting of June 27, 2010 revealed that:

"...The shareholders were informed that the following nine nominations for Directorship were filed with the company along with notices for their intentions to offer themselves for election as Directors under section 178 (3) for the next term of three years:

- i. Dato Aminuddin Md. Desa
- ii. Mr. Shamsul Hasan
- iii. Mr. Rana Ahmed Humayun
- iv. Dr. Datuk Syed Othman Bin Syed Husin Alhabshi
- v. Mr. Irfan Siddiqui
- vi. Mr. Osman Kassim
- vii. Mr. Suleman Shah
- viii. Ms. Fozia Fakhar
- ix. Mr. Ahmad Shahril Azuar Jimin

Since the number of members who have offered themselves for election is not more than the number of directors to be elected as fixed by the Board of Directors under section 178 (1) of Companies Ordinance 1984, the shareholders approved election of above mentioned persons as Directors of the company for the next term of three years and the following resolution was passed:

"RESOLVED that Dato Aminuddin Md. Desa, Mr. Shamsul Hasan, Mr. Rana Ahmed Humayun, Dr. Datuk Syed Othman Bin Syed Husin Alhabshi, Mr. Irfan Siddiqui, Mr. Osman Kassim, Mr. Suleman Shah, Ms. Fozia Fakhar and Mr. Ahmad Shahril Azuar Jimin stand elected as Directors of the company for the next term of three years with effect from June 27, 2010." (Underlined to put emphasis)

19. To summarize, the reply of the Company and the annexure thereto reflect that the Company has followed the procedure for the election of Directors as laid down under Section 178 and Section 184 of the Ordinance, however, the provisions of the Ordinance relating to the nomination of the Directors by the Company's shareholders that are institutional investors as laid down under Section 209(2) of the Ordinance





along with the provisions of Section 187(h) of the Ordinance have not been accounted for. The Company is of the view that since all the shareholders of the Company are institutional investors, and since the Articles of Association at its Para 89 in its proviso lays down that persons nominated by the interests to act as Directors of the Company shall not be required to hold shares in their name, which is, as per the Company, very much in line with the provisions of Section 187(h) of the Ordinance, the Company's Directors need not to hold shares in their names. As per the Company's reply, the Company has considered all of its shareholders as "institution" falling under the scope of the exemptions as provided in the Proviso to Section 187(h) of the Ordinance.

### Hearings of the Case & Subsequent Developments

20. Although, the Company had not requested for a hearing in the matter, the Commission, on its own motion, had scheduled the hearing in the matter for March 12, 2013 at 12:00 p.m., which was communicated to the Company via the Commission's hearing notice no. ID/Enf/PKTCL/2013/15765 dated February 28, 2013.

21. Accordingly, the hearing in the matter was attended by Mr. Syed Wajahatullah Quadri, Chief Financial Officer of the Company (who will be referred to as the "Company's representative" hereinafter), who was duly assisted by Mr. A. Razzak Adam, Advocate of M/s Sattar & Sattar, Legal Counsels.

22. Brief proceedings of the hearing of March 12, 2013 are as follows:

- a. Prior to the start of the hearing proceedings, the Company's representative and Mr. A. Razzak Adam, Advocate handed over the Power of Attorneys to the Commission;
- b. The said Power of Attorneys were signed by Mr. Imtiaz Bhatti, Managing Director / Chief Executive Officer of the Company, who was empowered by the Board of the Company to represent the Company and its Directors before the Commission in any proceedings, and in this regard, reference was made to the resolution of the Board of Directors of the Company dated March 7, 2013. Accordingly, the extracts of the said resolution of the Board were also provided to the Commission in which Mr. Imtiaz Bhatti, Managing Director / Chief Executive Officer was authorized by the Board to represent the Company and its Directors in any proceedings that may be brought against the Company by any department of the Commission in relation to the manner in which the affairs of the Company have been managed in the past. The said resolution of the Board also empowered / authorized Mr. Imtiaz Bhatti, Managing Director / Chief Executive Officer of the Company to delegate this power to any of the employees of the Company, which has been delegated to the Company's representative.



However, since the Board had authorized the Managing Director / Chief Executive Officer of the Company to delegate this power to any of the employees of the Company, therefore, the power could not have been delegated to Mr. A. Razzak Adam, Advocate of M/s Sattar & Sattar, Legal Counsels, as he was not an employee of the Company as on the date of hearing. And, accordingly Mr. A. Razzak has not been considered as the Company's representative for the purpose of the hearing in the matter;

- c. The Company's representative (Mr. Syed Wajahatullah Quadri, Chief Financial Officer) was asked to present the stance of the Company, to which the Company's representative stated that the Company has already submitted its contentions to the Commission vide Company's letter dated February 22, 2013;
- d. The Company's representative further mentioned that the Company has been filing Form A and Form 29 with the Commission, which have been accepted by the relevant Company Registration Office of the Commission. Moreover, all the shareholders of the Company are institutional shareholders, and they have been constituted as a result of the joint ventures of the Government of Pakistan, like Government of Pakistan has a sizable shareholding in M/s Pak Kuwait Investment Co. Limited, which is one of the shareholders of the Company;
- e. The Company's representative further pointed out that the Company has been treating and interpreting each of its shareholders as "institution", which fall under the exemption given by Section 187(h) of the Ordinance;
- f. It was then clarified to the Company's representative that the rule of interpretation requires that if the law does not explicitly defines any term and if that term has an ambiguous or a broader meaning, then that term may draw its meanings from the words surrounding it, therefore, the word "institution" will draw its meanings from its surrounding words i.e. "Government" and "authority", which implicates that a public sector entity can only fall under the definition of the term "institution" to the extent of its utilization in the Proviso to Section 187(h) of the Ordinance;
- g. Additionally, the meaning of the term "institution" was also clarified to the Company's representative by referring to the Black's Law Dictionary (9<sup>th</sup> Edition), wherein the word "institution" was defined as:

1. *The commencement of something, such as a civil or criminal action.*
2. *An elementary rule, principle, or practice.*
3. *An established organization, esp. one of a public character, such as a facility for the treatment of mentally disabled persons... (Underlined to put emphasis)*

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- h. Mr. A. Razzak Adam, Advocate, insisted that the term "institution" has a vast meaning and it covers all the shareholders of the Company, and thus, no Director of the Company is required to hold shares in the Company as per the exemption given under Section 187(h) of the Ordinance;
- i. Thereafter, Mr. A. Razzak Adam, Advocate was asked to provide specific legally admissible references to support his argument / views and interpretation of the term "institution", to which he pledged to provide concrete evidences / references by March 27, 2013 in support of his views and interpretation of the term "institution".

23. Subsequent to the hearing of March 12, 2013, the Company vide its letter of March 26, 2013 had provided references to support interpretation of the term "institution". The explanation given by the Company is detailed as follows:

*"Institution means not only the Government Institution but it could be Social, Religious, Educational, Research, Industrial, Civil Society or NGO's*

*Financial Institution means an institution that provides financial services for its Clients or members. Broadly speaking there are three major types of Financial Institution.*

- (a) Depository Institution: Such as Banks, Nuinding Societies, Credit Unions, Trust Companies and Mortgages Loan Companies.*
- (b) Contractual Institutions: Insurance Companies and pension funds.*
- (c) Investment Institutions: Investment Banks, Underwriters, Brokerage firms.*

*Institutional Investors: Institutional investors includes Banks, Insurance Companies, retirement or pension funds, hedge funds, investment and advisors and mutual funds. The Institutional investors will have a lot of influence in the Management of Corporation because they will be entitled to exercise the voting rights in the Company. They can actively engage in corporate governance."*

24. Along with the abovementioned letter of March 26, 2013, the Company had forwarded the Wikipedia's version of the definition / description of the word "institution", which states that:

*"...The term 'institution' is commonly applied to customs and behavior patterns important to a society, as well as to particular formal organizations of government and public services..."*

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25. From the perusal of the description of the term "institution" as given by Wikipedia, it appears that the same also explicitly stresses more on the governmental / public entities.

26. In addition to the Wikipedia's version of definition / description of the term "institution", the Company had also provided the definition / description of the terms "financial institution" and "institutional investors", as available on the website of Wikipedia. Wikipedia describes "financial institution" as:

*"In financial economics, a financial institution is an institution that provides financial services for its clients or members..." (Underlined to put emphasis)*

Here, Wikipedia has mentioned that financial institution in financial economics is considered to an institution that provides financial services. Wikipedia itself confines the scope of the definition to the extent of financial economics only. Moreover, if we read the definition / description of financial institution with the same for the term "institution", we may draw an understanding that a financial institution can be a governmental / public entity that provides financial services to its clients / customers.

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29. Moreover, as mentioned earlier that as per the Annual Audited Accounts for the year ended December 31, 2011 and Form A of the Company following entities are the shareholders of the Company:

- Etiqa Overseas Investments Pte Ltd, Malaysia
- Pakistan Kuwait Investment Co (Pvt) Limited, Pakistan
- Noor Financial Investment Company, Kuwait
- Saudi Pak Industrial and Agricultural Investment Co. (Pvt) Limited, Pakistan
- Takaful Holdings Limited, Dubai, UAE
- Meezan Bank Limited, Pakistan

30. Meezan Bank Limited, Pak Kuwait Investment Co. (Pvt) Limited and Saudi Pak Industrial and Agricultural Investment Co. (Pvt) Limited fall under the definition of 'company' and 'financial institution' as defined in the Ordinance. However, the remaining shareholders are foreign entities.

31. It is further evident from the pattern of shareholding of the Company that the Directors of the Company do not hold shares of the Company. In terms of the Para 89 of the Articles of Association of the Company, Directors representing interest holding need not themselves hold qualification shares.

32. In terms of Section 187(h) of the Ordinance, no person shall be appointed as a director of a company if he is not a member, as defined in the Ordinance. The only exceptions to this general rule is carved out through the Proviso to Section 187(h) of the Ordinance, which provides that Clause (h) shall not apply to a person representing the Government or an institution or authority which is a member, a whole time director who is an employee, a chief executive officer and a person representing creditor.

33. However, since the term 'institution' has not been defined under the Ordinance or the General Clauses Act, 1987, therefore, it may be interpreted relying on the established principles of *Ejusdem generis* and *Noscitur a sociis* (Lord Macmillan: "The meaning of a word is to be judged by the company it keeps"). It is settled jurisprudence that

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where two or more words, which are susceptible of analogous meaning, are coupled together *noscitur ex sociis* they are understood to be used in cognate sense. They take as it were the color from each other, the meaning of more general being restricted to a sense analogous to that of less general (Maxwell on Interpretation of Statutes - 12<sup>th</sup> Edition, Page 289. Also see MD 1984 SC 385).

34. In simple words, in order to ascertain the meaning of any word or phrase that is ambiguous or susceptible to more than one meaning, resort is had to the other words with which the ambiguous word is associated in the statute. Similarly, if several words are connected by a copulative conjunction a presumption arises that they are of the same class unless of course a contrary intention is indicated (Crawford on Statutory Construction, Page 325).

35. In context of Section 187(h) of the Ordinance, when all the three terms i.e. "Government", "institution" and "authority" are read together it becomes evident that the term "institution" being general in nature would draw its color from the less general terms i.e. "Government" and "authority". This class in essence is referring to public bodies and not to general bodies lacking public character. Consequently, the term "institution" used in proviso (i) of Section 187(h) *ibid* would not include any institution but only such institutions that enjoy characteristics of a public body. This interpretation is fortified from conjunctive reading of the Ordinance.

36. If, in case, the word "institution" is taken in its ordinary business sense, it can be argued that a host of entities may be covered under it including foreign companies and corporations. This interpretation, however, is contingent on it being aligned with other provisions of the Ordinance, particularly Section 183 of the Ordinance, since sub-Section (a) is wide enough to cover different entities. If for the sake of argument it is admitted that entities such as foreign corporations can be classified as institutions in terms of Section 187(h) of the Ordinance, then the nominee of the foreign corporation will not be a member of the company, but the nominee will have to go through the process of election in accordance with Section 178 of the Ordinance and will remain in office for a term of three years in accordance with Section 180 of the Ordinance, and cannot be removed in terms of Section 183 of the Ordinance. The exclusion of Section 178, Section 180 and Section 181 of the Ordinance as provided in Section 183 of the Ordinance will not be available to foreign corporations. This will imply that a person, who is not a member of the company, is on its board and such person will not be considered nominee of the foreign corporation on whose strength of shareholding he was elected. Resultantly, there will be no control of the foreign company on the elected director, which the legislature could not have intended, keeping in mind the scheme of provisions on directors.

37. Here is a need to understand that nominee directors are those who are nominated / appointed directly on the board of directors of a company, without election, due to special rights. Where a body corporate, institution etc. is a shareholder

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in a company and it nominates a person to contest the election of directors then such director is an elected director and not a nominee director. Although in common parlance he may also be referred to as nominee of so and so company as he has been elected on the strength of that company's voting power. Similarly, where such a director is elected on the basis of shareholding of another company / institution, he is required to be member of a company unless it falls in the exemption specified in the Proviso of Clause (h) of Section 187 of the Ordinance i.e. it is Government, authority and institution. Therefore, in the instant case, the most plausible interpretation would be that the meaning of the term "institution" will be judged by the company it keeps in Section 187 of the Ordinance i.e. Government and authority and would admit to its definition entities only of public nature.

38. Similarly, financial institution cannot be considered to be an institution for the purpose of Section 187(h) of the Ordinance because had that been the intention of the legislature, the prefix "financial" should have been added by the legislature.

39. It would be appropriate to consider Section 183 of the Ordinance, which pertains to election and removal of directors representing special interests. Ideally, this provision should be aligned with Section 187 of the Ordinance. Therefore, criteria may be that any corporation, company or body corporate which is formed under any law in force and owned or controlled, whether directly or indirectly, by the Federal Government or a Provincial Government may fall under the definition of institution. The expression "owned" may include holding more than 50 percent shareholding, and the term "control" may include the right to appoint majority of directors or to control management or policy decisions, exercisable by a person individually or through any person action in concert, directly or indirectly, whether by virtue of shareholding, management right, shareholders agreement, voting agreement or otherwise.

40. Hence, in the light of the above, the only logical interpretation would be that the word "institution" will have the color of the words surrounded by it and will only admit to its definition entities of public nature. Similarly, only the financial institutions having public character will enjoy the exemption of Section 187(h)(i) of the Ordinance.

41. Hence, in view of the above, it is evident that the provisions of Section 187(h) of the Ordinance have been contravened, as there is no exemption allowed to the Company's Directors who are nominated / appointed by its institutional shareholders.

42. In this regard, it may further be inferred / interpreted that the Company has no Director on its Board, in terms of the provisions of Section 188 of the Ordinance, which means that Section 174 of the Ordinance regarding minimum number of directors has also been violated.

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43. However, as far as the provisions of Section 209(2) of the Ordinance are concerned, it predominantly provides that the investments of the company should be held in the name of the company barring certain exceptions stated therein. One of those exceptions is the qualification shares held by the nominee of the company. Before interpreting this provision further, it may further be noted that this Section is only applicable to companies i.e. companies registered under the Ordinance or the Companies Act, 1913 and not to body corporates and other entities such as foreign corporations. Further, the Ordinance does not prescribe any threshold for share qualification for a director except that the director will be a member of a company unless exempted under Section 187(h) of the Ordinance.

44. The articles of a company usually prescribe for such qualifications so that a director has a personal interest in the company. If the articles do not require a share qualification, the shareholders may elect as director, any person not otherwise disqualified in terms of Section 187 of the Ordinance. Therefore, in the event such a provision is contained in the articles, only then Section 209 of the Ordinance will be attracted. The requirement for "not exceeding the nominal value of the qualification shares" stated in Section 209(2) of the Ordinance corresponds to the requirement of qualification shares stated in the articles of a company. Moreover, the word "may" occurring in Section 209(2) of the Ordinance does not imply that the requirement of share qualification is discretionary. Thus, if the requirement is prescribed in the articles of a company then shares may be held or registered by such company either jointly in its name and in the name of such person or nominee or in the name of such person or nominee alone.

45. In this view, the Company's Directors were required to hold shares of an amount not exceeding the nominal value of the qualification shares, the value of which is mentioned in the Articles of the Company i.e. Rs. 5,000/-, either in their names or jointly in their names and the names of the respective shareholders, nominating / appointing them on the Board of the Company. Here, the shareholders would obviously mean those entities that fall under the definition of a "company" as laid down under the Ordinance.

46. Thus, in compliance of the provisions of Section 209(2) and Section 187(h) of the Ordinance, the Company's Directors that were appointed by the companies registered under the Ordinance, were required to hold shares of an amount not exceeding Rs. 5,000/- either in their names or jointly in their names and the names of the respective nominating shareholders.

47. In this view, the Company's Directors, representing those shareholders that fall under the definition of "company" as defined under the Ordinance, have also contravened the provisions of Section 209(2) of the Ordinance.





### Consideration of Company's Submissions

48. I have carefully examined and given due consideration to the written and verbal submissions of the Company, its Directors and its shareholders (through the Company's representative, Mr. Syed Wajahatullah Quadri, Chief Financial Officer of the Company) and those of Mr. A. Razzak Adam, Advocate, and have also referred to the provisions of the Ordinance and other legal references, I am of the view that there has been an established default of Section 187(h), Section 174 read with Section 188 and Section 209(2) of the Ordinance, as the Company's Directors were required to become the members of the Company, jointly or otherwise, in compliance of Section 187(h) of the Ordinance, as none of the shareholders of the Company can be considered as "institution" in terms of the proviso of Section 187(h) and Section 209(2) of the Ordinance.

49. However, before proceeding further, I find it relevant to discuss the duties of the Directors. The Directors, 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 duties imposed by statute and breach of these statutory duties will usually be a criminal offence, punishable by fine or imprisonment. Hence, the Directors are gauged against a higher standard of accountability which requires them to be vigilant and perform their duties with due care. In the instant case, however, the Directors have failed to perform their duties with due care and prudence. As the Directors are supposed to be well aware of their legal obligations in connection with the aforesaid statutory requirement of Section 187(h) of the Ordinance, which has also plunged the Company, its Directors and its shareholders into default of Section 174 read with Section 188 and Section 209(2) of the Ordinance as well, as aforesaid, therefore, it could be legitimately inferred that the default was committed.

### Conclusion

50. After carefully examining the arguments and studying the facts and findings of the case as mentioned in the above paras of this Order, the default of Section 187(h), Section 174 read with Section 188 and Section 209(2) of the Ordinance is established. Therefore, the penalties as provided under Section 186, Section 189 and Section 209(9) of the Ordinance can be imposed onto the Company and/or its Directors.

51. Section 186 of the Ordinance states that:

*"Penalties. - Whoever knowingly and willfully contravenes or fails to comply with any of the provisions of sections 174 to 185 or is a party to the contravention of the said provisions shall be liable to a fine which may extend to ten thousand rupees and may*



*also be debarred by the authority which imposes the fine from becoming or continuing a director of the company for a period not exceeding three years."*

52. Section 189 of the Ordinance states that:

*"Penalty for unqualified person acting as director, etc.- If a person who is not qualified to be a director or chief executive or who has otherwise vacated the office of director or chief executive describes or represents himself or acts as a director or chief executive, or allows or causes himself to be described as such, he shall be liable in respect of each day during which he so describes or represents or acts, or allows or causes himself to be described, as such, to fine which may extend to two hundred rupees."*

53. And, Section 209(9) of the Ordinance provides that:

*"If default is made in complying with any of the requirements of sub-sections (1) to (8), the company, and every officer of the company who is knowingly and wilfully in default, shall be liable to a fine which may extend to five thousand rupees and to a further fine not exceeding two hundred rupees for every day after the first during which the default continues."*

#### Order

54. In exercise of the power conferred on me under Section 186, Section 189 and Section 209(9) of the Ordinance, I, instead of imposing the penalties, take a lenient view, and thus, condone the Company due to the following reasons:

- a. that the Company and its management had no intentions to violate the aforesaid provisions of the law, and that it was truly a difference of interpretation of the term "institution" as envisaged under Section 187(h) of the Ordinance; and
- b. that the effect of such contravention has not grossly harmed the interest of the Company's shareholders.

55. Further that the "Directors" of the Company are hereby directed to ensure compliance with the Proviso of Section 185 of the Ordinance by not exercising the right of their office till the compliance of the provisions of Section 187, Section 174 and Section 209(2) of the Ordinance have been made. Moreover, the Company, its "Directors" and shareholders are advised to present a report on the status of compliance with the provisions of Section 187, Section 174 and Section 209(2) of the Ordinance, within 30 days from the date hereof, provided further that if the compliance with the said provisions of the Ordinance is still to be made after the expiry of 30 days from the date of this Order, the Company, its "Directors" and shareholders shall present the

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updated status report within 30 days thereafter, and this shall continue until the compliance has been fully made.

56. Also, the Company is hereby issued a stern warning that in case of similar non-compliance in future a stronger action against the Company will be taken.

57. This Order is issued without prejudice to any other action that the Commission may initiate against the Company and / or its management (including the Chief Executive Officer of the Company) in accordance with the law on matters subsequently investigated or otherwise brought to the knowledge of the Commission.

**Tariq Hussain**  
Director