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**SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN
COMPANY LAW DIVISION
(REGISTRATION DEPARTMENT)**

*** **

No.CLD/RD/Co.84(5)/2010

Islamabad, August 11, 2011.

BEFORE

EXECUTIVE DIRECTOR (REGISTRATION)

IN THE MATTER OF

M/S. AL-HAMRA HILLS (PRIVATE) LIMITED
ORDER UNDER SECTIONS 196 AND 492 READ WITH
SECTION 476 OF THE COMPANIES ORDINANCE, 1984

Present

1. Mr. Ibrar Ahmed Advocate, Hajvary Law Group on behalf of the Company and the following respondents:
 - (a) Mr. Habib Ahmad, Chief Executive.....(Respondent No. 1 & 2)
 - (b) Mr. Shahid Rafiq, Director.....(Respondent No. 3)
 - (c) Mr. Rehan Ahmed Khan, Director.....(Respondent No. 4)
 - (d) Mr. Nauman Ansari, Director.....(Respondent No. 5)
 - (e) Mr. Parvez Ahmed Shahid, Director.....(Respondent No. 6)
 - (f) Mr. Shaukat Husain, Director.....(Respondent No. 8)
 - (g) Mr. Abdul Hafeez Sh., Company Secretary (Respondent No.10)
2. Nemo for Qazi Munir-ul-Haq, Director....(Respondent No. 7)
3. Mr. Waqas Ahmed, Director (Respondent No. 9) in person, along with Mr. Waseem Majid Malik, Head Legal Affairs, Innovative Investment Bank Ltd.

Dates of Hearing: April 20, 2011, May 13, 2011, May 27, 2011, June 22, 2011, July 08, 2011.

Place of Hearing: Islamabad

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ORDER

This Order shall dispose off proceedings initiated through Show Cause Notices dated 25-02-2011 and dated 17-03-2011 issued under sections 196 and 492 read with section 476 of the Companies Ordinance 1984 (the "Ordinance").

2. Brief facts leading to the Show Cause Notices are that M/s. Al-Hamra Hills (Pvt.) Limited, (the "Company") filed an application dated 27-04-2010, seeking sanction of the Commission for issuance of 97,296,100 shares at a discount of Rs. 4.50 per share. The approval was accorded vide Commission's letter dated 04-08-2010 in terms of section 84 of the Ordinance subject to compliance of the requirements of section 86 of the Ordinance. The Company, thereafter vide its letter dated 04-01-2011, sought extension in the period for issuance of shares at discount, which was also allowed vide letter dated 05-01-2011 in terms of section 84 of the Ordinance.

3. After granting requisite extension, the Commission received a letter dated 06-01-2011 from Ms Parveen A. Malik of M/s Saudi Pak Industrial and Agricultural Investment Company Ltd. (SPIAICO), bringing into the notice of the Commission that the Company agreed to underwrite right issue with underwriting / take-up commission of Rs. 4.00 to be paid to Arif Habib Group (AHG), which would bring subscription price of the share to Rs. 0.50 and would put the investment of the shareholders at loss, and would also resultantly dilute shareholding of the existing shareholders, which was made five years ago @ Rs. 10.00 per share and it would also damage investment of about ten institutions. To protect the right of all the stakeholders and to stop the violation of the law, the Commission restrained the Company vide letter dated 17-01-2011 from making any arrangement about the underwriting of shares, approved by the Commission at discounted price.

4. To get first hand information about such arrangements and to carry out inspection of the Company's record, the Commission also appointed its two officers as inspectors under section 231 of the Ordinance vide its order dated 20-01-2011. Inspection report was submitted on 21-01-2011. Relevant portion of the report concerning the issue reads as under:

"approval of the underwriting / take up commission to AHG was obtained in the Board of Directors' meeting held on 13-12-2010 with dissenting note of Ms. Parween A. Malik, EVP, Saudi Pak Industrial and Agricultural Investment Company Limited

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(Nominee Director). However, the approval of the revised offer of AGH has not been solicited by the Company in EOGM”.

5. The above stated facts indicated that directors of the Company, *prima facie*, did not follow the prudent commercial practices. As a matter of fact, the BOD of the Company was legally bound to discuss the agenda of the meeting specifically payment and arrangements with reference to underwriting commission with judiciousness, keeping in view the spirit of section 82 of the Ordinance, while exercising their powers under the provisions of Section 196 of the Ordinance. It is pertinent to mention here that the Company also gave its viewpoint in the presentation held on February 09, 2011, before the senior officers of the Commission and the legal position was fully explained by the senior officers to the Company at that occasion. The Company, thereafter, dropped the idea of making underwriting arrangement with AGH on this intervention of the Commission. It also did not apply for further extension and informed the Commission vide letter date February 23, 2011 that they would follow the Ordinance and the rules and regulations made thereunder in the matter and would also comply with law in future.

6. To know the viewpoint of the Company and other respondent Directors, Show Cause notices in terms of sections 82, 196 and 492 read with section 476 of the Ordinance were issued. In response, Mr. Ibrar Ahmed, Advocate appeared on behalf of the Company and respondents No. 1 to 6, 8 and 10. He argued that the Company and its Board of Directors did nothing wrong that would attract the provisions of section 492 of the Ordinance. He also argued that the law does not put any bar or restriction upon a private Company to make underwriting arrangements. He also submitted a detailed reply dated 27-05-2011 in support of his contention, thereby, emphasizing on the following points:-

- (a) Arif Habib Group (AGH) floated the impugned proposal of charging “underwriting fee” and “take-up commission” through their letter dated 02-11-2010 addressed to Mr. Nauman Ansari, nominee Director of Faysal Bank Limited (FBL) for the first time and there was no earlier occasion to bring this fact into the notice of the respondents.
- (b) SECP approved issuance of right shares at discounted rate vide letter dated 04-08-2010 so question of any omission or concealment of any material fact relating to the transaction from SECP, at the relevant time, on the part of the Company or its directors, did not arise at all.
- (c) The impugned proposal of charging “underwriting fee” and “take-up commission” only came to surface on 02-11-2010 which was

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subsequent to the SECP's approval. This proposal was discussed in 8th Board of Directors (BOD) meeting, dated 08-11-2010.

- (d) The impugned proposal was thereafter conditionally approved during the 9th BOD Meeting held on 13-12-2010 with a clear majority vote. There was no alternate business development plan available at that time so question of "prudent commercial practice" was fully addressed. He invited the attention to "Resolution-3" which was in the following words:-

"3. AHHL's management will try to bring new investment in the project over the next 3 months at better terms than that put forward by Arif Habib Group in which case the new investor can buy out AHG's shares at its investment price plus KIBOR+2%."

- (e) M/s. Al-Hamra Hills Private Limited and its directors / respondents did nothing contrary to law which rendered them to imposition of penalty under section 492 of the Ordinance.
- (f) The very basis of Show Cause Notices is a BOD Resolution dated 13-12-2010 which was conditionally passed on the basis of project feasibility, business projections and financial position of the Company and was subject to confirmation through EOGM hence steps before its confirmation and implementation were pre-mature. Even otherwise this BOD Resolution passed by the respondent directors was not against any provision of law hence no Show Cause Notice could not be issued on its basis.
- (g) The impugned notices had been issued in excess of jurisdiction resulting in exercise of jurisdiction not vested in the authority. The impugned notices did not comprehensively describe the provisions of law which were alleged to have been violated by the answering respondents/Company.

7. The respondent No. 7 (Qazi Munir-ul-Haq, Nominee Director of Bank of Khyber) did not respond to the Show Cause Notices sent to him at the address notified on Form 29 dated 31-10-2009. In order to provide an opportunity of hearing, the Company was also asked vide letter No.CLD/RD/Co.84 (5)2010, dated 01-07-2011 to inform Mr. Qazi to appear before the Executive Director (Registration) in person or through duly authorized representative. It is pertinent to mention here that Mr. Qazi was not present in BOD Meeting held on 13-12-2010 for the purpose. He was represented by Mr. Wahedna. Having no alternative, I further precede against him *ex-parte*.

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8. The respondent No. 9, Mr. Waqas Ahmed, Nominee Director of Innovative Investment Bank Ltd., appeared in person, alongwith Mr. Waseem Majid Malik, Head Legal Affairs, Innovative Investment Bank Ltd (the Bank). He stated that he opposed the idea of underwriting / take-up commission with reference to further issue at discounted price, but he could not brought this fact into the notice of the Commission like that Ms Parveen A. Malik of SPIAICO did. He also made written submissions through letter dated 11-07-2011 and stated the events with reference to winding up of the Bank till appointment of Provisional Manager. He told that he fully tried to protect the interest of the Bank with reference to scheme of underwriting / take up commission. However, he could not produce any material evidence as to opposing the proposal of underwriting of shares approved at discounted price of Rs. 4.50 per share.

9. After listening the submissions of the respondents and taking into consideration the facts on record, and the legal position as described under sections 82 and 492 of the Ordinance and the basic concept of underwriting commission as stated in "Black's Law Dictionary" (Fifth Edition) and discussed by different authors.

(1) Provisions for the payment of underwriting commission contained in Section 82 of the Ordinance reads as under:-

82. **Power to pay certain commissions, and prohibition of payment of other commissions, discounts, etc.** - (1) It shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in or debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in or debentures of the company if-

- (a) The payment of the commission is authorized by the articles;
- (b) The commission paid or agreed to be paid does not exceed such rate per cent of amount as may generally or in a particular case be fixed by the Commission; and
- (c) The amount or rate per cent of the commission paid or agreed to be paid is -
 - (i) In the case of shares or debentures not offered to be public for subscription, disclosed in the prospectus; or

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(ii) In the case of shares or debentures not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and delivered before the payment of the commission to the registrar for registration and, where a circular or notice, not being a prospectus, inviting subscription for the shares or debentures, is issued, also disclosed in that circular or notice; and

(d) The number of shares or debentures which persons have agreed for a commission to subscribe absolutely is disclosed in the manner aforesaid.

(2) ¹Definition of the word 'underwrite' and 'underwriter'

(i) **Underwrite.** To insure life or property. To agree to sell bonds, etc., to the public, or to furnish the necessary money for such securities, and to buy those which cannot be sold. An underwriting contract, aside from its use in insurance, is an agreement, made before corporate shares are brought before the public, that in the event of the public not taking all the shares of the number mentioned in the agreement, the underwriter will take the shares which the public do not take; "underwriting" being a purchase, together with a guaranty of a sale of the bonds.

(ii) **Underwriter.** Any person, banker, or syndicate that guarantees to furnish a definite sum of money by a definite date to a business or government in return for an issue of bonds or stock. In insurance, the one assuming a risk in return for the payment of a premium.

One who agrees to purchase an entire security issue for a specified price, usually for resale to others. A person who has acquired securities from an issuer or control person, pursuant to contract or exchange and intends to reoffer or resell said securities to the public.

Term refers to any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributor's or seller's commission.

¹ "BLACK LAW DICTIONRY" (Fifth Edition)

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(3) ²Concept of 'underwriting commission' in the corporate world.

The concept of "underwriting" do not appear to be applicable to a private limited company. The expression 'underwriting' literally means the giving of a guarantee. It is a well-known business term and is commonly used in company's matters.

In this connection, it may be defined as the entering into a contract with a company by which a person (known as 'underwriters*') agrees that if the shares by the company to the public for subscription are not taken up by the public, he will himself take up the shares and pay for them. As a matter of fact, an underwriter guarantees the purchase of company's shares by the public.

The amount payable to the underwriters for giving such undertaking (i.e. guarantee) is known as the 'underwriting commission'. The 'underwriting commission' is paid to the underwriters whether or not they are called upon to take up any of the shares or debentures. In fact, the commission is paid to the underwriters not for the shares or debentures taken by them, but for the risk to which they are exposed in placing the shares before the public. Thus, the underwriting commission is paid on all the shares offered to the public for which the underwriting agreements is made i.e., on all the shares specified in the underwriting agreement.

A public company cannot proceed to allot shares to the public unless the shares have been subscribed upto the amount of 'minimum subscription'.

A public company which issues a prospectus cannot commence its business unless the shares upto the amount of 'minimum subscription' have been allotted. Thus, a public company which invites the public to subscribe for its shares must ensure that the shares of the value upto the amount of minimum subscription are taken up by the public. It is, therefore, usual for the public companies to make an underwriting agreement with some financial institutions (i.e. underwriters) for the shares upto the amount of minimum subscription.

The underwriting is in the nature of insurance which covers the risk against the shortfall in public response to purchase the shares or debentures offered by a company. As a matter of fact, when the shares are offered to the public, the company would like to assure success of its issue. In order to prevent the failure of an issue, the companies generally make underwriting agreement with financial

² A Textbook of Company Law by P.P.S. Gogna (India) – Revised third Edition 2000

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institutions (i.e. underwriters) who in consideration of their commission, agree to take up the shares to the extent to which they are not taken up by the public.

Briefly the concept is summarized as under:-

- (i) It is paid to those who give an undertaking to take the shares of the company if they are not taken up by the public.
- (ii) It is paid on entire issue i.e., on all shares offered to the public whether or not they are taken by the underwriters.
- (iii) It is paid on those shares which are offered to the public for subscription. Thus, it is not paid on the shares which are not offered to the public.
- (iv) It is a sort of insurance premium paid to the underwriters to cover the risk of under-subscription.

10. After taking all the circumstances into consideration as a result of hearing, facts on record and details given in the preceding paras, I am of the firm view that underwriting arrangements can only be made in case of public subscription and if the public fail to subscribe, the underwriter takes up the shares and gets his commission according to contractual obligations. The concept in this regard is crystal clear that the underwriter is paid commission for the risk he is exposed to in the placing of shares before the public.

11. In case of a private Company, say in the instant case limited numbers of private shareholders are involved, and no justifications for making underwriting arrangements arise. The intention of making or not making subscription is known and can be easily ascertained at any time before subscription day. Therefore, no risk can be visualized for which underwriting arrangements are made and hefty amount of underwriting commission is paid.

12. I have also specifically noted that after January 18, 2011 when the Company was restrained for making any arrangement with reference to underwriting commission, the Company reviewed its decision in line with relevant provision of law. As a matter of fact the Company did not apply for any further extension, rather presented the matter in EOGM for further arrangements, as envisaged in its BOD meeting referred to above. The stand taken by the Company's legal counsel that the underwriting commission arrangements in case of private limited company are not barred under section 82 of the Ordinance is not understandable, in view of the discussion made in preceding paras.


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13. I am also of the view that if the Company should have disclosed such arrangements of underwriting commission in its first application dated 27-04-2010, then we would have disposed off the application in some different way, keeping in view the provisions of section 82 of the Ordinance. None disclosure and omission of above said arrangements in original application made by the Company speaks of concealment of the facts which attracts the provisions of section 492 of the Ordinance. Had Ms. Parveen A. Malik not brought the above said facts in the notice of the Commission then there would have been some serious re-precautions about the whole episode. The whole exercise made the Company reveals that it omitted material facts about underwriting commission and thus concealed it from the regulator while obtaining approval for issuance of shares at discount and thus violated the provision of sections 196 and 492 of the Ordinance. As a matter of fact the BOD can only exercise its powers subject to the provision contained in the Ordinance and its Memorandum and Articles of Association and can do nothing contrary to the provisions of the Ordinance as was done in the BOD meeting referred to above. The decision made in the said BOD meeting was against the business norms and prudent commercial practices prevalent in the corporate world.

14. I, therefore, in exercise of the powers under sections 196, 492 read with section 476 of the Ordinance impose penalties on the defaulting directors as mentioned against their names:

	<u>Under section 492</u>	<u>Under Section 196</u>
1. Mr. Habib Ahmad, Chief Executive	100,000	25,000
2. Mr. Shahid Rafiq, Director	100,000	25,000
3. Mr. Rehan Ahmed Khan, Director	100,000	25,000
4. Mr. Nauman Ansari, Director	100,000	25,000
5. Mr. Parvez Ahmed Shahid, Director	100,000	25,000
6. Qazi Munir-ul-Haq, Director	100,000	25,000
7. Mr. Shaukat Husain, Director	100,000	25,000
8. Mr. Abdul Hafeez Sh., Company Secretary	- Nil -	- Nil -

15. However, Mr. Waqas Ahmed, nominee director of Innovative Investment Bank Limited. is warned to be careful in future.


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16. The Company and the defaulting directors are, hereby, directed to deposit the amount of penalty (Rs. 875,000) in the Commission's account within 30 days of the receipt of this Order and furnish original receipt/challan of the same to this office for record. The Chief Executive and directors are also advised to remain careful in compliance of the provisions of law in future.



(NAZIR AHMED SHAHEEN)
Executive Director (Registration)

Announced at Islamabad
on August 11, 2011