



# SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN INSURANCE DIVISION

[Karachi]

Before Mr. Shahid Nasim, Executive Director (Insurance)

*In the matter of*

M/s Excel Insurance Company Limited

Date of Show-Cause Notice: February 15, 2011  
Date of Company's Reply: February 25, 2011  
Date of Hearing: April 6, 2011  
Hearing Attended By: Mr. Ijaz Ahmed, Advocate - Legal Counsel of the Company  
Date of Order: June 16, 2011

## ORDER

(Under Section 29 Read with Section 11(1), Section 63(1) and Section 157 of  
The Insurance Ordinance, 2000)

This Order shall dispose of the proceedings initiated against M/s Excel Insurance Company Limited (hereinafter referred to as ("the Company")) for making default in complying with the requirements of Section 29 of the Insurance Ordinance, 2000 ("the Ordinance").

### *Background Facts*

The relevant facts for the disposal of this case are briefly stated as under:

1. Section 11(1)(b) of the Ordinance, states that:

*"An insurer registered under this Ordinance shall at all times ensure that the provisions of this Ordinance relating to minimum statutory deposits have been complied with;"*

2. AND the provisions of Section 29 of the Ordinance state that:

*"1. Every insurer shall, in respect of the insurance business carried on by him in Pakistan, deposit and keep deposited with the State Bank of Pakistan, in one of the offices in Pakistan of the State Bank of Pakistan for and on behalf of the Federal Government the required minimum amount specified in sub-section (2), either in cash or in approved securities estimated at the market value of the securities on the day of deposit, or partly in cash and partly in approved securities so estimated.*



1030

2. For the purposes of this section the required minimum amount is, either:

- (a). the higher of ten million rupees and ten per cent. (10%) of the insurer's paid-up capital; or
- (b). such amount as may be prescribed by the Commission"

3. The Company was asked to confirm the increase in their paid up share capital as on December 31, 2010, vide Commission's letter dated January 5, 2011. The Company vide their letter of January 6, 2011, replied that the paid up share capital has been increased to Rs.250,000,000/-. In this view, the Company was required to maintain its statutory deposits of Rs.25,000,000/- i.e. higher of Rs.10,000,000/- and 10 percent of the paid up share capital, as soon as the Company raised its paid up share capital to Rs.250,000,000/-.

4. The letter of the State Bank of Pakistan dated February 10, 2011 numbered Bkg. U-10/Sec./4677/ins-155-2011 revealed that the Company has deposited 5-Years Pakistan Investment Bonds worth Rs.4,711,731/- with the State Bank of Pakistan, on February 4, 2011, in addition to their existing deposits of Rs.20,175,735/-, making up a total of Rs.24,887,466/-.

5. The recent history of the statutory deposits of the Company had been as follows:

Date	Paid-Up Capital	Statutory Deposit	Required Deposits	Excess/(Shortfall)
December 19, 2010	200,000,000	20,175,735	20,000,000	175,735
December 20, 2010	250,000,000	20,175,735	25,000,000	(4,824,265)
February 3, 2011	250,000,000	20,175,735	25,000,000	(4,824,265)
February 4, 2011	250,000,000	24,887,466	25,000,000	(112,534)
<b>Show Cause Notice under Section 29 read with Section 11(1), Section 63(1) and Section 157 of the Insurance Ordinance, 2000 was issued on February 15, 2011</b>				
March 21, 2011	250,000,000	24,887,466	25,000,000	(112,534)
March 22, 2011	250,000,000	25,076,769	25,000,000	76,769

#### Show-Cause Notice

6. On February 15, 2011, a Show-Cause Notice under Section 29 read with Section 11(1), Section 63(1) and Section 157 of the Ordinance was served to the Directors and Chief Executive of the Company, whereby the Company was asked to clarify their position as to why the penalty under Section 63(1) and Section 157 of the Ordinance may not be imposed on them for not maintaining the required levels of statutory deposits at all times, thereby making contraventions of the provisions of Section 29 and Section 11(1)(b) of the Ordinance.

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### Company's Reply

7. The Company submitted their reply to the Show-Cause Notice through their letter of February 25, 2011. The relevant parts of the Company's reply are briefly quoted as under:

*"...as per our record the Face Value of investment is Rs.25,300,000 and market value is Rs.24,887,466 whereas the 10% Minimum Statutory Deposit comes to Rs.25,000,000 and the excess of Rs.300,000 is worked out on the basis of face value of investments.*

*It is however stated that if your esteemed Commission is of the view that even this small amount being the difference of Rs.112,534/- only be also deposited then we will further deposit the said amount immediately upon receipt of confirmation from your end.*

*In view of the facts narrated above, we earnestly request you to kindly condone the same with the request that the proceedings in this behalf be filed as submitted."*

8. The abovementioned reply of the Company reveals that the Company is not aware of the provisions of Section 29(8) of the Ordinance, whereby the State Bank of Pakistan has been empowered to conduct valuations of the securities being kept with it, in pursuance of Section 29 of the Ordinance.

9. On March 8, 2011, the Company's Directors and Chief Executive were called to attend a hearing on March 30, 2011 before the Executive Director (Insurance), Securities and Exchange Commission of Pakistan.

10. The Managing Director of the Company vide his letter of March 22, 2011, requested to condone the matter and showed his unavailability to attend the hearing, which was scheduled for March 30, 2011.

11. The Company vide their another letter of March 22, 2011, stated that:

*"We are pleased to apprise you that we have purchased Investment Certificates from Pak Oman Investment Company Limited for Rs.112,534/= to meet your objection as pointed out by you according to Insurance Ordinance 2000.*

*Please also find attached a list showing break up of investment and deposited with State Bank of Pakistan to meet the difference in Paid-Up- Capital of the Company which now stands Rs.25,000,000/= (Statutory Deposit) as on 31<sup>st</sup> December, 2010 which you may confirm from the State Bank of Pakistan.*

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1032

Please also refer 2<sup>nd</sup> last paragraph of our letter dated February 25<sup>th</sup>, 2011 wherein we have already shown our consent to make payment of Rs.112,534/= in the shape of investment which we did.

We trust you will be satisfied that our Paid-Up-Capital has been valued on market value and the hearing scheduled on 30<sup>th</sup> March, 2011 in this connection you show cause notice served to us may please be condoned, please confirm."

12. On March 22, 2011, the Company made additional deposits of Rs.189,303/- in the form of 3-Years Pakistan Investment Bonds with face value of Rs.200,000/-, thereby reaching an excess deposit level of Rs.76,769/-. The State Bank of Pakistan vide their letter of March 25, 2011, also confirmed the same.

13. On March 29, 2011, another hearing notice was issued to the Company's Directors and the Chief Executive, whereby they were asked to attend the hearing on April 6, 2011 before the Executive Director (Insurance), Securities and Exchange Commission of Pakistan.

#### *Proceedings of the Hearing & Subsequent Submissions*

14. On April 6, 2011, the hearing in the matter was conducted, which was attended by Mr. Ijaz Ahmed, Advocate, the legal counsel of the Company.

15. Before the start of the hearing, Mr. Ijaz Ahmed submitted a 'Vakalatnama' in his favor, which was signed by four Directors of the Company. Mr. Ijaz Ahmed further stated that he would soon submit the 'Vakalatnama' which shall be signed by the remaining three Directors of the Company.

16. During the course of the hearing, the legal counsel stated:

- a. THAT the severity of the non-compliance is not so high, as the amount of non-compliance was too negligible i.e. Rs.112,534/-. Secondly, the non-compliance committed by the Company has not adversely affected the interests of the stakeholders.
- b. THAT if the Company is above the solvency requirement then the abolishment of the requirement of keeping the statutory deposits with the State Bank of Pakistan may be exercised by the Commission under Section 29 of the Insurance Ordinance, 2000. And, the Company is well above the minimum required level of solvency.

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1033

- c. THAT the matter may please be condoned and a stern warning may be issued to the Company for breaching the requirement of the applicable law.

17. On April 13, 2011, the legal counsel of the Company, Mr. Ijaz Ahmed submitted 'Vakalatnama' which was signed by the all the Directors of the Company. Through the same letter, he submitted the 'Synopsis of Submissions'. Under this document, he pleaded the case while stating:

*"...The scheme of Insurance Ordinance, 2000 also provides a gradual enforcement process under the said Ordinance focused at compliance rather than punishment. The enforcement process begins with section 60 which empowers the Commission to issue directions to an insurer if the Commission believes on reasonable grounds that an insurer registered under the Insurance Ordinance has failed or is about to fail, to comply with the conditions of registration set out in section 11 of the Insurance Ordinance.*

*Only if such directions are not complied with by the insurer then the penal provisions of Section 63 or 157 can be resorted to.*

*It is an admitted position in this case that the Excel Insurance had deposited the statutory deposit required under section 29 within a very short time from December 31, 2010 which was the date by which the capital was to be raised to Rs.250 million. The shortfall of a very small amount of Rs.112,534, which was pointed out by the Commission, on account of difference in face value (which was Rs.25,300,000 and accordingly in excess of the required amount of Rs.25,000,000) and prevailing market value was also deposited.*

*It is respectfully submitted that the proper course in this case for the Commission was to issue a direction for deposit of the shortfall if any and if such direction was not complied within a reasonable time, only then a Show Cause Notice could have been issued...The Hon'ble Supreme Court has observed in the case reported as 1997 SCMR 1934 (relevant part at page 1950) that public authorities are created to serve the citizens and public functionaries should guide and help the citizens in complying with the formalities.*

*The non-compliance, if any, has occurred on account of inadvertence and there has been no intention to deviate from the statutory requirements. It is further submitted that Excel Insurance has fulfilled the Solvency requirements at all relevant times and accordingly is in fact entitled to exemption from the requirement of statutory deposit..."*

18. The legal counsel of the Company under the document 'Synopsis of Submissions' states that the Commission should have issued a direction under Section 60 of the Ordinance before imposing a penalty under Section 63(1) and Section 157 of the Ordinance. However, the legal counsel of the Company under his submission does not take into account that under Section

13



1034

60 of the Ordinance, the words "*the Commission may*", which invariably mean that it is on the discretion of the Commission to issue the direction under Section 60 of the Ordinance.

19. The Commission, while giving the Company an opportunity of being heard, issued the Show Cause Notice for the contravening the provisions of Section 11(1) and Section 29 of the Ordinance, which is punishable under Section 63(1) and Section 157. Therefore, the Commission not only gave an opportunity of being heard to the Company, but also gave the Company, an implicit message to remove the shortfall with immediate effect. But, the Company deposited the remaining amount on March 22, 2011 i.e. exactly one month and seven days after the issuance of the Show Cause Notice.

20. The exemption from the requirement of the statutory deposit merely on the basis of the fact that the Company maintains the required level of solvency at one particular stage can not be given, practically. This is because of the fact that the solvency position of a particular entity changes at every point in time, which means that at some point in time, an entity is solvent, whereas at some other time, the entity goes insolvent. Therefore, the Commission, despite the fact that it has been empowered to abolish the requirement of maintaining the statutory deposit, can not practically exercise this power in the best interests of the policyholders.

21. On May 2, 2011, the legal counsel of the Company filed several orders which were passed by the Commission, against the insurance companies, and condoned them and warned them from not repeating the contravention of the Ordinance in future.

#### *Consideration of the Submission*

22. 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 the Section 29 read with Section 11(1) of the Ordinance, therefore, it could be legitimately inferred that the default was committed knowingly and willfully.

21



1035

### Conclusion

23. After carefully examining the written arguments of the Company and studying the facts and findings of the case as mentioned in the above paras of this Order, the default of Section 29 read with Section 11(1) of the Ordinance for 92 consecutive days is established. For which, the penalty as provided under Section 63(1) and Section 157 of the Ordinance can be imposed on the Company.

Section 63(1) states that:

*“The Commission may issue a direction to cease entering into new contracts of insurance if it believes on reasonable grounds that an insurer registered under this Ordinance has failed, or is about to fail, to comply with the conditions of registration set out in section 11.”*

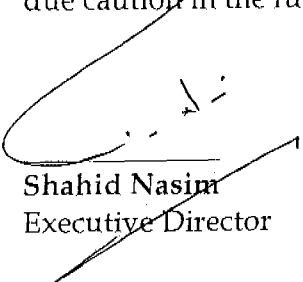
And, Section 157 states that:

*“Any insurer or any person acting on behalf of an insurer, who carries on any class of insurance business in contravention of any of the provisions of sections 5, 6 and 29, or does any one or more of the acts constituting the business of insurance in relation to any insurance business carried on in contravention of any of the said sections shall be punishable with fine which may extend to two million rupees.”*

24. However, the Company has met the mandatory requirement of statutory deposit on March 22, 2011, which is evident from SBP's letter dated March 25, 2011. Also, the contravention has *prima facie* not affected the interests of the policyholders of the Company.

### Order

25. In view of the foregoing material information and the fact that the Company had a compliant track record and such non-compliance has apparently not adversely affected the interests of the policyholders or the shareholders, I, in exercise of powers conferred on me under Section 157 the Ordinance, will take a lenient view and instead of imposing a fine, hereby, **condone** the contravention by the Company. The Chief Executive, the Directors and the Company itself is, hereby, **warned** and advised to exercise due caution in the future whilst complying with the requirements of the law.

  
Shahid Nasim  
Executive Director