



SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN
Specialized Companies Division

SCD-SD (Enf)/KHI/SFL/2013/134

May 31, 2013

BEFORE THE EXECUTIVE DIRECTOR

IN THE MATTER OF SAFEWAY MUTUAL FUND LIMITED

**In Respect of Show Cause Notice under Section 282J(1) read with Section 282D
and Section 282M(1) of the Companies Ordinance, 1984 for Violation of
Regulations 55(5) of the Non-Banking Finance Companies and Notified Entities
Regulations, 2008**

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| Show Cause Notice | No.SCD-SD(Enf)/SFL/2013/60 dated March 22, 2013 |
| Date of Hearing | May 02, 2013 |
| In Attendance | <ol style="list-style-type: none">1. Mr. Nihal Cassim<ul style="list-style-type: none">- Chief Executive Officer of M/s Safeway Fund Limited- (also representing M/s Safeway Fund Limited and Muhammad Turab Hasny, Financial Accountant)2. Ms. Tehmeena Khan<ul style="list-style-type: none">- Chief Executive Officer of Safeway Mutual Fund Limited- Chief Financial Officer of M/s Safeway Fund Limited |

ORDER

1. This Order shall dispose of the proceedings initiated against M/s. Safeway Fund Limited (hereinafter referred to as the "**Company**") and its officers (hereinafter collectively referred to as the "**Respondents**") through a Show Cause Notice dated March 22, 2013 (hereinafter referred to as the "**SCN**") served under Section 282J(1) read with Section 282D and Section 282M(1) of the Companies Ordinance, 1984 (hereinafter referred to as the "**Ordinance**") for violation of Regulation 55(5) of the Non-Banking Finance Companies & Notified Entities Regulations 2008 (hereinafter referred to as the "**NBFCs & NE Regulations, 2008**").



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2. The Company is a Non-Banking Finance Company incorporated in Pakistan as public unlisted company in 1992 under the Ordinance. The Company is licensed by the Securities and Exchange Commission of Pakistan (hereinafter referred to as the "**Commission**") to undertake the businesses of asset management services under the Non-Banking Finance Companies (Establishment and Regulation) Rules, 2003 (hereinafter referred to as the "**NBFC Rules 2003**") and the NBFCs & NE Regulations, 2008. Presently the Company is managing two closed-end funds i.e. Safeway Mutual Fund Limited (hereinafter referred to as "**SMFL**") and Asian Stock Fund Limited (hereinafter referred to as "**ASFL**"). Further, in terms of Regulation 65 of the NBFCs & NE Regulations 2008, Extra Ordinary General Meeting of SMFL was held on January 31, 2013 wherein its shareholders approved conversion of SMFL from a closed end fund (Investment Company) to an open end scheme. Subsequently, the Commission has also approved the said conversion with effect from July 1, 2013.
3. The Company is 100% owned by its CEO, Mr. Nihal Cassim. It holds 20.20% of total shareholding of SMFL as of December 31, 2012, which means that indirectly Mr. Nihal Cassim owns 20.20% stake in SMFL.
4. Facts of the case leading to issuance of this Order are provided hereunder:

- (i) SMFL's exposures in the shares of Bank Alfalah Limited (BAFL) & DG Khan Cement Limited (DGKC) were in excess of the per party exposure limit of 10% as prescribed in Regulation 55(5) of the NBFCs & NE Regulations, 2008 since July 2011.

Regulation 55(5) of the NBFCs & NE Regulations, 2008 reads as follows:

"Exposure of a Collective Investment Scheme to any single entity shall not exceed an amount equal to ten per cent of total net assets of the collective investment scheme..."

- (ii) In terms of Regulation 55(13) of the NBFCs & NE Regulations 2008, the excess exposure shall be regularized within three months of the



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breach of limits unless the said period of three months is extended by the Commission on an application by the Asset Management Company. Regulation 55(13) of the NBFCs & NE Regulations, 2008 provides as follows:

"Where the Exposure of a Collective Investment Scheme exceeds the limits specified in sub-regulation (5), (6) or (9) of this regulation because of corporate actions including taking up rights or bonus issue or due to market price increase or decrease in net assets the excess Exposure shall be regularized within three months of the breach of limits unless the said period of three months is extended by the Commission on an application by the Asset Management Company."

- (iii) The Commission granted extension on an application submitted by the Company till December 30, 2011 in case of BAFL and till January 30, 2012 in case of DGKC respectively to bring the excess exposures in line with the afore-referred Regulation. No subsequent extension was granted by the Commission in this regard beyond the period stated hereinabove. However, the Company continued to remain non-compliant with the aforesaid regulatory requirement and did not bring SMFL's exposure limits in BAFL and DGKC within the extended time period and allowable limit of 10% of its total net assets.
- (iv) The Company was at times advised vide communiqués dated April 17, 2012, August 08, 2012, November 07, 2012 and December 20, 2012 to regularize the SMFL's excess exposures in the scrips to ensure compliance of the mandatory provisions of the said Regulation. However, the Company remained adamant and continued to disregard the Commission's advices to ensure compliance in the matter.
- (v) On account of the continuous violation of Regulation 55(5) of the NBFCs & NE Regulations, 2008, the Company, the CEO, the CFO and the Financial Accountant (members of the **Investment Committee**)



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were served with the SCN under Section 282J(1) read with Section 282D and Section 282M(1) of the Ordinance on March 22, 2013.

5. The Respondents vide their letter dated April 12, 2013 in response to the SCN conceded that SMFL's investment in BAFL and DGKC were above the 10% threshold limit for a considerable period while the Commission had quite often reminded the Company to regularize the excess exposures. However, the Respondents maintained that the non-compliance was not to disregard or disrespect the law but they were acting in good faith by holding excess exposures in the said scrips to provide better returns to the investors.
6. They also contended that the shares of BAFL & DGKC were moving towards fair value, which would outperform the market, generating substantial gains for SMFL's investors who had waited patiently for these investments to perform and the premature sale of the scrips would be detrimental to the investors' interest. They also contended that the excess holding in BAFL and DGKC had contributed to the SMFL's above average performance, which benefited its investors. The Respondents also emphasized that during the period from July 2011 to December 2012 (18 months) BAFL and DGKC had provided dividend adjusted returns of 94% & 143.90% compared with 35.30% returns earned by the KSE-100 Index respectively. It was also stated that the benefit of an amount of Rs.117.94 million was derived by the investors out of excess holding of BAFL & DGKC in SMFL's portfolio during the period from July 2011 till December 2012. Further, it was also reiterated that had the excess holding been disposed of to comply with the mandatory exposure limit of 10% under the law, the investors would not have reaped the benefit of upward movement in the prices of these scrips. Hence by doing so they actually had acted in the best interest of the shareholders.
7. The Respondents also stated that they had requested for further extension to regularize the excess exposure, which was not acceded to by the Commission. As an effort, the Company also approached the Mutual Funds Association of Pakistan (MUFAP) in March 2012 to take up this matter with the Commission from an industry perspective.



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8. The Respondents claimed that almost 90% of SMFL's investors supported their decision to continue holding the said shares even if their exposures had increased above 10% due to market movement. In this regard, copies of letters from the shareholders of SMFL were also provided by the Company as evidence.
9. The Respondents also reiterated that neither the Company nor any of members of the Investment Committee had attained any incremental benefit out of excess exposures in said scrips. They also claimed that due to this investment strategy, SMFL was able to avail the ranking amongst the top 25 performing equity funds in the world in 2012 while during the period from July 2011 to March 2013 the size of SMFL grew by 79.65%, which equally benefited all its majority and minority shareholders.
10. The Respondents have also submitted that the excess holding in BAFL was disposed of on April 05, 2013 to reduce SMFL's exposure below 10% of net assets as per requirements of the law. Similarly, its excess investment in DGKC was also sold out on April 8, 9 and 12, 2013. In this regard, the Respondents have also provided duly affixed details of SMFL's equity holding on April 30, 2013, which shows that its exposures in BAFL and DGKC are reduced to 9.42% and 9.68% of its net assets as on April 30, 2013.
11. The Respondents through their submissions provided during the hearing held on May 02, 2013 and vide their letters dated April 12, 2013 and May 06, 2013, have assured of their intent and commitment to work for the best interest of the investors within the prescribed regulatory framework. They have also committed that if an excess exposure occurred in future, they will proactively regulate the same within the stipulated time period of three months unless an extension is granted by the Commission. The Respondents requested that in view of the Company's conflicted position wherein almost 90% of SMFL's investors had allowed them to carry the excess exposures in the said scrips, its above average performance during the past year and their subsequent compliance by regularizing the excess exposures, their actions of earlier non-compliance in the matter may kindly be condoned.



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12. I have perused the record placed before me and the written reply filed by the Respondents. I have also heard the arguments and submissions made by the Respondents during the hearing on the issues raised in the SCN and have come to the following conclusion that:

- i) The portfolio of SMFL contained investments in the shares of BAFL and DGKC in excess of the allowable exposure limit of 10% of its net assets.
- ii) SMFL was granted extension by the Commission till December 30, 2011 in case of BAFL and till January 30, 2012 in case of DGKC respectively to regularize the excess exposures and that no further extension was granted by the Commission thereafter.
- iii) The Company was repeatedly advised by the Commission to bring SMFL's excess exposures in the said scrips within the prescribed limit of 10% of its net assets. However, despite repeated advices, the management continued to carry on with the excess exposures in clear violation of Regulation 55(5) of the NBFCs & NE Regulations, 2008.
- iv) Almost 90% of SMFL's shareholders had allowed the management in writing to continue to hold the investments in excess of the prescribed limit of 10% of net assets acknowledging that the investments were subject to market risk.
- v) No subsequent purchases in BAFL & DGKC were made by the Company during the period from July 2011 to December 2012.
- vi) SMFL's investors did not suffer any loss on account of excess exposures in the said scrips, instead significant appreciation in their share prices was observed during the period.
- vii) Subsequent to issuance of the SCN, SMFL's excess holding in BAFL & DGKC was disposed of in April 2013 to bring the exposures within the regulatory limit of 10% of its net assets.



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13. The Company was advised time and again by the Commission to regularize SMFL's excess exposures in line with the applicable regulatory framework through letters dated April 17, 2012, August 08, 2012, November 07, 2012 and December 20, 2012 and to report compliance, however, the management of the Company remained adamant on their act and ignored the Commission's advices in the matter. Such an act of the Company gives rise to sheer disrespect of the NBFCs Regulatory Framework and encourages lawlessness in the industry, which cannot be allowed. Further it also puts the other Asset Management Companies (AMCs) at disadvantage and impedes level playing field for the other market participants in the sector. The AMCs have been licensed by the Commission to carry out their businesses within the prevailing regulatory framework and therefore, are expected to comply with the mandatory regulatory requirements. In view of the above-mentioned facts, it is established that the default under Regulation 55(5) of the NBFCs & NE Regulations, 2008 was committed by the Company, which is punishable under Section 282J(1) of the Ordinance. The said Section is reproduced hereunder for ease of reference:

"282J. Penalty for failure, refusal to comply with, or contravention of any provision of this Part.- (1) Notwithstanding anything contained in any other provision of this Ordinance, if a NBFC [or the notified entity] or its officers (including auditors) fails or refuses to comply with, or contravenes any provision contained in this Part or of any of the provisions of the rules [or regulations] made under section 282 B [or regulation, circular or directive or] 108 any direction or order passed by the Commission under the provisions contained in this Part or knowingly and willfully authorizes or permits such failure, refusal or contravention, shall, in addition to any other liability under this Ordinance, be also punishable with fine the amount of which shall not exceed [fifty] million rupees:

Provided that if the failure, refusal, default, contravention is committed by NBFC [or the notified entity], every director, manager, or other officer [or person responsible for the conduct of its affairs] shall, unless he proves that the failure or contravention or default took place or committed without his knowledge, or that he exercised all diligence to prevent its commission, be deemed to be guilty of the offence."

14. The Respondents have already acknowledged the issues raised in the SCN and conceded that the SMFL's excess exposures in BAFL & DGKC were in violation



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of Regulation 55(5) of the NBFCs & NE Regulations, 2008 despite various reminders from the Commission. It is also established that the continuation of default was known and willful on part of the Respondents. However this default as pleaded by the Respondents was intended to achieve the better results for the investors. Now the question arises, should such a situation and contravention of the regulatory framework be allowed to one AMC while keeping the other AMCs (who comply with the regulations) at a disadvantageous position. I am of the view that such situations of excess exposures might have also occurred with the other AMCs who had opted for immediate compliance. Therefore, I am of the considered opinion that all the AMCs must be treated equally and culture of compliance and respect of law must be observed.

15. As regards the Respondents' insistence that SMFL's investments in BAFL & DGKC were generating substantial gains for its investors and premature sale of their excess holding would have been detrimental to the investors' interest, it would be apt to mention that the investors could have gained even more had the investments were diversified even within the same sectors i.e. Cement sector and the Banking sector. It is observed that the scrips like Kohat Cement Factory Limited, Maple Leaf Cement Factory Limited and Cherat Cement Company Limited produced much higher returns than DGKC within the Cement sector during the period from July 2011 to December 2012. Similarly, Meezan Bank Limited also generated comparable returns with BAFL in the Banking Sector. The Company instead of looking for better comparable alternative investment opportunities within the sectors chose to retain investment in the same scrips beyond the admissible time limits despite various reminders from the Commission, and brought the investment exposures within limits only after issuance of the SCN from this office.
16. Indeed the investors of SMFL gained on their investments on account of continued default by the Company of the said Regulation. However, it is also established that the continuation of this default was deliberate and willful on part of the Respondents. The Company disregarded repeated advices from the Commission to bring the excess exposures within the admissible limits. The Company only regularized the excess exposures after issuance of the SCN. Though the law permits to impose penalty of up to Rupees fifty million on



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willful contravention of the NBFCs Regulatory framework, however, I am taking a lenient view and hereby impose penalty only of Rs.500,000/- (Rupees five hundred thousand only) on the Company. The members of the Investment Committee are strictly warned and advised to be careful in future and abide by the prevailing regulatory framework in letter and spirit.

17. The matter is disposed of in the above manner and the Company is directed to deposit the penalty amount in the account of the Commission maintained in the designated branches of MCB Bank Limited not later than thirty (30) days from the date of this Order and furnish the copy of deposit challan to the undersigned.
18. This Order is issued without prejudice to any action, which may be taken or warranted for the above said defaults under any other provision of the law.


(Shahid Nasim)
Executive Director

Announced on May 31, 2013
Karachi.