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4 February 2009

KAZAKHSTAN TAKES CONTROL OF TWO BANKS

In line with Baker & McKenzie's practice of keeping clients informed of important legal developments that might influence your business, we would like to draw your attention to the following recent changes in Kazakhstan's banking sector.

Overview

On 2 February 2009, Kazakhstan took steps to take control of two of its largest banks, JSC BTA Bank and JSC Alliance Bank. BTA Bank and Alliance Bank are the largest bank and the fourth largest bank, respectively, in Kazakhstan.¹

BTA Bank

On 2 February, the press-service of the Government of Kazakhstan made a public announcement that the Government had taken a decision to cause BTA Bank to issue 29,915,425 new voting shares and to sell those shares to the national management holding company JSC National Welfare Fund Samruk-Kazyna (“**Samruk-Kazyna**”). This mandatory issuance will result in Samruk-Kazyna's acquiring complete control over BTA Bank (by holding 78.14% of the bank's voting shares) and in dilution of the existing shareholders to 21.86%.²

The purchase price for the shares is set at 8,401 tenge per share, which was the opening price for BTA Bank's shares at the Kazakhstani Stock Exchange on 2 February.³ The total price for the shares is 251,319,485,425 tenge (approximately US \$2.06 billion, at the exchange rate in effect on that date). On 4 February BTA Bank put a statement on its website in which it confirmed that

¹ According to the Interfax-1000: CIS Banks ranking prepared by the Interfax Center of Economic Analysis, BTA is the largest, and Alliance Bank is the fourth largest, bank in Kazakhstan by assets (data for the first half of 2008).

² Under Kazakhstan's Law on Joint Stock Companies dated 13 May 2003, a holder of a qualified majority of the voting shares, i.e., 75% or more of the voting shares, has almost unrestricted control over the company. The constituent documents of a company may provide that certain matters require unanimous approval, but this would be rare.

³ During the preceding trading day, Friday, 30 January, the price for BTA Bank's shares fell by approximately one third, to close at 8,401 tenge. The acquisition price of 8,401 tenge is less than one-tenth the highest price for the shares in early 2008. Under recent amendments to Kazakhstan's banking legislation, the purchase price in a mandatory share issuance to the Government shall be based on the “market price” (which is undefined) as of the date on which the Government takes its decision.

Samruk-Kazyna had transferred 212 billion tenge (approximately US \$1.7 billion) to the bank's account. It is unclear whether such US \$1.7 billion represent a part of the purchase price.

Also on 2 February, the FMSA⁴ dismissed the chairman of BTA Bank's board of directors (Mukhtar Ablyazov) and the deputy chairman of the management board (Jaksylyk Jarimbetov). According to the FMSA, they were dismissed because their actions violated the "interests of the bank's depositors and existing legislation."⁵ Mr. Ablyazov, in turn, expressed his disagreement with the state's actions in a letter sent to the mass media.

On 2 February, Arman Dunayev, the Deputy Chairman of Samruk-Kazyna's management board (and former Chairman of the FMSA) was appointed to BTA Bank's board of directors and a former Chairman of the National Bank of Kazakhstan (Anvar Saidenov) was appointed as an adviser to the Chairman of BTA Bank's Management Board. On the next day (3 February), BTA Bank's Board of Directors appointed Mr. Dunayev as the Board's Chairman. The Board of Directors also appointed two new members to the bank's Management Board (Saudyakas Mameshtegi and Seitikali Rakhimov).

The Government pointed out in its 2 February announcement that the acquisition of control over BTA Bank was "necessary to protect interests of the bank's depositors and creditors and ensure stability of the bank and the Kazakhstan's banking system" because, it stated, BTA Bank had violated applicable adequacy ratio and liquidity ratio.

The FMSA put a statement on its website in which it clarified that on 1 February the FMSA Board issued resolution No. 20 pursuant to which the FMSA, on the basis of Articles 17 and 17-2 of the Banking Law, applied to the Government with a request to consider acquiring new shares of the bank in an amount necessary for improving the bank's financial condition and ensuring its compliance with prudential requirements and other mandatory requirements and limits. The recommended amount was 251.3 billion tenge.

In its statement, the FMSA also specified particular violations by BTA Bank on the basis of which the FMSA took its decision. Such violations include BTA Bank's failure to perform certain client payment orders in December 2008 and January 2009, which qualify as "systematic breach of contractual obligations in respect of payment and money transfer obligations." In addition, the FMSA pointed out that on 30 January BTA Bank informed the National Bank that it was unable to fully or partially perform its payment obligations to the National Bank. The recently re-appointed head of the National Bank of Kazakhstan, Grigori Marchenko, publicly stated on 2 February that BTA Bank was on a verge of default and was able to stay afloat only because of weekly short-term financing provided by the National Bank.

The shares are being issued and purchased by Samruk-Kazyna pursuant to recent amendments to the Banking Law⁶ and other legislation which authorize the Government to cause a bank issue shares to the Government if the bank violates the applicable capital adequacy ratio or liquidity ratio.⁷ In accordance with the Banking Law, new shares will be issued to Samruk-Kazyna

⁴ The Agency of the Republic of Kazakhstan on Regulation of Financial Markets and Financial Organizations.

⁵ The Banking Law permits the FMSA to terminate such officials for, among other things, failing to comply with Kazakhstani legislation.

⁶ *Law On Banks and Banking Activity in the Republic of Kazakhstan* dated 31 August 1995 (the "**Banking Law**").

⁷ *Law On Making Amendments to Certain Legal Acts of the Republic of Kazakhstan Relating to Stability of Financial System* dated 23 October 2008.

without the need for approval by any of the bank's management bodies, such as the board of directors or shareholders. Pursuant to the recent amendments, the bank's shareholders will not have a preemptive right to purchase the shares issued to Samruk-Kazyna. (Please refer to our Legal Alert dated 28 January for more detail about the recent amendments to the Banking Law.)

The Government stressed that it does not intend to hold the shares indefinitely and plans to sell the shares once the bank's financial position improves. The Government also indicated that it is looking for a strategic investor to purchase Samruk-Kazyna's newly acquired shares.

Under the Banking Law, the Government will be required to sell the shares after the bank's financial position improves so that it complies with the prudential requirements and other applicable requirements. The Government must sell the shares within one year after it purchased them. However, if the bank's financial position does not improve, this term can be extended indefinitely until the financial position improves. The FMSA will determine whether the bank's financial position improved on the basis of certain tests, including certain subjective tests. It may not be entirely clear when such tests are satisfied.

Neither the Government nor BTA Bank has made any public statement as to whether the Government's acquisition of control is expected to have any effect on the bank's obligations under its agreements with third parties.

On 3 February, Standard & Poor's put BTA Bank and its two subsidiaries, JSC Temirbank and JSC Mortgage Organization BTA Ipoteka, on its CreditWatch list.

Alliance Bank

On 2 February, the Government's press-service issued a press release stating that the majority shareholder of Alliance Bank, Seimar Alliance Financial Corporation ("SAFC"), offered to sell the Government 76% of the voting shares in Alliance Bank for the symbolic price of 100 tenge (i.e., less than US \$1). SAFC stated that it would not be able to support the bank's capitalization and financial stability.

The press release states that Samruk-Kazyna is considering the offer. It is unclear when the acquisition will close, but the head of Samruk-Kazyna, Kairat Kelimbetov, indicated that it is expected to occur "in the next few days." As a result of the proposed acquisition, Samruk-Kazyna will own 76% of the bank's voting shares and SAFC will hold approximately 7.4% of the voting shares, while the remaining shares (ordinary voting and preferred) will continue to be in free circulation.⁸

The Government has not announced any changes in the management of Alliance Bank. In a press release published on its website on 2 February, the bank stated that its management bodies are operating in their current membership and that any future changes will be carried out in accordance with the applicable corporate legislation.

⁸ There has been no public announcement of whether, pursuant to Article 25(3) of the Law on Joint Stock Companies dated 13 May 2003, the Government will offer to purchase the shares of the Bank's remaining shareholders as a result of its acquisition of more than 30% of the bank's voting shares.

Unlike the situation with BTA Bank, the Government did not mention any breaches of Kazakhstani banking rules by Alliance Bank. However, the Minister of Finance reportedly said on 2 February that SAFC applied to the Government with an offer to sell its shares in the bank because the bank had recently incurred significant liabilities relating to certain sophisticated financial instruments that it held in its portfolio. Those instruments, according to the Minister, created significant exposure of Alliance Bank to its counterparties, which Alliance Bank had not expected to occur.

On 2 February Samruk-Kazyna and Alliance Bank reportedly signed a memorandum pursuant to which Samruk-Kazyna agreed to advance to Alliance Bank US \$200 million by way of an 8% deposit with a term until the end of 2009. The purpose of the deposit is to boost Alliance Bank's liquidity reserves. The deposit is said to be convertible into the bank's shares. However, the terms of any such conversion (e.g., rate of conversion, the possible rights of other shareholders, etc.) have not been announced. If the deposit is converted, Samruk-Kazyna will then hold more than 76% of the voting shares.

Unlike the situation with its shares in BTA Bank, the Government did not mention in its press release whether Samruk-Kazyna intends to sell its shares in Alliance Bank once its financial situation improves. Since the acquisition of the Alliance Bank shares is a negotiated purchase (as opposed to the mandatory share issuance of new BTA Bank shares), Samruk-Kazyna is not obliged under Kazakhstan's banking law to sell the bank's shares in the future. It was reported, however, that the head of Samruk-Kazyna, Kairat Kelimbetov, said that Samruk-Kazyna may sell the shares within five years after the bank's financial position stabilizes. The Prime Minister reportedly stated that SAFC does not have a call option to purchase its shares back from Samruk-Kazyna once the latter decides to sell them.

As with the BTA Bank situation, neither the Government nor Alliance Bank has made any public statement as to whether the Government's acquisition of control is expected to have any effect on the bank's obligations under its agreements with third parties.

On 3 February, Standard & Poor's put Alliance Bank on its CreditWatch list.



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