

KAZAKHSTAN ADOPTS NEW LAW ON CURRENCY REGULATION AND CONTROL

Kazakhstan recently passed a new Law on Currency Regulation and Currency Control (the "Currency Law"). As the agency responsible for currency control regulation, the National Bank of Kazakhstan (the "NBK") also adopted the following acts in concert with this legal reform:

- Rules for Carrying Out Currency Transactions in Kazakhstan approved by the Resolution of the NBK Board No. 134 dated October 29, 2005 ("Rules 134");
- Rules for Monitoring the Currency Operations of Non-Residents Performing Activities in Kazakhstan approved by the Resolution of the NBK Board No. 112 dated October 14, 2005 ("Rules 122"); and
- Amendments to the NBK Instruction on Organisation of Export and Import Currency Control in the Republic of Kazakhstan.

Please note that any references to 'residents' and 'non-residents' in this update means Kazakhstan residents and non-residents for currency control purposes. Any reference to a 'bank' means a Kazakhstan bank.

General Observations

The Currency Law entered into force on December 18, 2005 and brought about a number of important changes:

1. The Currency Law is more detailed than the previous rules. The currency laws from 1996 were basic and cover certain aspects of currency regulation. The new law has plugged some of these holes while reiterating a number of rules contained in the old law. The structure of the Currency Law is unfortunately somewhat incoherent and in application may cause confusion. For instance, the provisions on the licensing and registration of currency operations are scattered over various articles.

2. The new Law provides for some new definitions, including:

- So-called "banks' own operations", which are broadly defined as any currency operations effected by a resident who is a party to a currency contract performed on that resident's behalf and at their own expense;
- "direct investments" means: funds, securities, possessions, property rights, including intellectual property rights and other property, where: (a) any of the above are contributed as payment for shares or participating interests; and (b) as a result of that contribution, a person owns ten (10) or more per cent of the voting shares or participating interests of a given legal entity;
- the new definition of "financial loan" includes: traditional credits; bank deposits made by foreign affiliates of a bank in order to raise capital on international capital markets; and the financing of any transactions by third parties; and
- "commercial credit" is defined as a delay of payment under an export or import agreement made directly between a supplier (or seller) and a consignor (or buyer) of goods, work or services.

3. The Currency Law introduced three levels of control over currency operations:

- a notification regime;
- a registration regime; and

- a licensing regime

4. The Currency Law softens and/or cancels the licensing regime for currency control operations from January 1, 2007 forward. At that point, the NBK will switch to a registration and notification regime for a number of currency operations.

5. The Currency Law brings about a significant change for the opening of a foreign bank account by resident legal entities. Under the new law, in some cases mere registration is required, whereas before a license was necessary.

6. From January 1, 2007, the law will eliminate the need to register and license the opening of bank accounts abroad. In these cases, mere notification will be required (except where banks open such accounts).

7. The Currency Law introduced the concept of "currency monitoring". This monitoring activity will be carried out by the NBK over branches and representative offices of non-resident legal entities which (a) have been operating in Kazakhstan more than one (1) year; and (b) are involved in: (i) the production of crude oil, natural or accompanying gas, (ii) construction, (iii) services associated with the production of minerals, (iv) architecture, engineering and other technical services, and (v) research and development work. The Currency Law and Rules 122 now mandate reporting to the NBK on a regular basis.

8. The Currency Law requires residents to credit export proceeds into Kazakh bank accounts with a few exceptions, including the scenario where export proceeds are credited into a foreign bank account in order to secure the obligations of the resident under a loan agreement with a non-resident lender (i.e. a collection account). This requirement is referred to as "repatriation" in the Currency Law.

Notification Regime

The notification regime was presented in addition to the registration and the licensing regimes. The notification regime requires residents to notify the NBK of their currency operations. The NBK will then issue a confirmation of its receipt of the relevant notice.

1. Submission of the Contract

As a general rule, a resident party to a currency operation contract need not submit a copy of the currency operation contract to the NBK. However, Rules 134 allow the NBK to request a copy of the contract in order to confirm the basic features of the deal.

2. Cases for Notification

Notifications must be made in the following cases:

- banks must notify the NBK of their "own" operations:
 - when that bank's operations envisage the receipt of property or funds in Kazakhstan and/or a commitment to return property or funds to a non-resident for any amount exceeding \$300,000;
 - when that bank's operations envisage the transfer of funds or property from Kazakhstan and/or a commitment to return funds or property to a non-resident for any amount exceeding \$10,000;
- other residents and professional securities market players must notify the NBK when:

- they exercise their rights and obligations with respect to the underlying assets of derivative financial instruments (direct investments are not subject to this requirement);
- unless otherwise stipulated by the Currency Law, residents must notify the NBK when: they acquire securities or investment funds shares; contribute to the charter capital of a company; or conduct operations related to derivative financial instruments (direct investments are not subject to this requirement);
- individuals open accounts with foreign banks located in OECD member countries or country members of the Financial Action Task Force on money laundering;
- when legal entities which are not banks open foreign accounts, unless otherwise stipulated by the Currency Law;
- any resident or non-resident must notify the NBK when they acquire immovable property, unless otherwise stipulated by the Currency Law (irrespective of whether they are banks or not).

3. Time for Notification

As a general rule, residents must notify the NBK after the currency operation contract has been concluded, but not later than: (a) seven (7) working days after either of the parties thereto has begun discharging its obligations under the contract; or (b) not later than thirty (30) calendar days if the contract is for the opening of a foreign bank.

4. Reporting Duty

The Kazakhstan resident party has a duty to report any changes to the currency operation contract within thirty calendar days after the relevant changes have been made. In addition, the Kazakhstan resident party must report quarterly.

5. Certificate of Notification

To confirm receipt of the notification, the NBK must issue a certificate of notification to the applicant within ten days of the receipt of notification. The applicant is given a new certificate when changes to the currency operation contract are made. These changes include: any increase of a loan amount; a change in the currency, parties, subject matter or term of the contract; or the place of residence of the Kazakhstan resident party or non-resident party.

Registration Regime

1. Submission of the Currency Operation Contract

Registration of the currency operation includes registration of the currency operation contract. Thus, as with the previous registration regime, the submission of the relevant contract is required.

2. Registration

Registration is required where the following preconditions arise:

- if the amount of the currency operation envisaging the receipt of property or funds in Kazakhstan and/or commitment to return property or funds to a non-resident exceeds \$300,000;

- if the amount of the currency operation envisaging transfer of property or funds from Kazakhstan and/or commitment to return property or funds by a non-resident exceeds \$10,000;
- in the case of a “financial loan” or “commercial credit”, where the debt of the resident under the currency operation contract exceeds \$300,000; or
- in the case of a “financial loan” or “commercial credit”, where the debt of the non-resident under the currency operation contract exceeds \$10,000;

Subject to the foregoing preconditions, the following transactions must be registered with the NBK:

- unless otherwise stipulated by the Currency Law, any payments between residents and non-residents under commercial credits extended for a term of more than 180 days (or when the commercial credit is extended for less than 180 days, the credit was actually repaid or discharged 180 days after the date that the credit arose);
- any financial loans advanced by residents to non-residents and by non-residents to residents for more than 180 days (or when the financial loan is extended for less than 180 days, where the loan was actually repaid or discharged after 180 days);
- any direct investments of residents outside Kazakhstan and direct investments of non-residents in Kazakhstan;
- any acquisition by non-residents of securities issued by residents (including shares of resident investment funds) in the form of a contribution to the charter capital of a resident or an initial placement of securities issued by a resident in international capital markets (including the issue of depository receipts for the resident’s securities). Direct investments are not subject to this requirement;
- any lease payments by non-residents or residents (in the case of immovable property, including an ongoing concern) made 180 days earlier than the anticipated date of the transfer of access to the leased property; or
- non-residents or residents with a purchase price debt outstanding more than 180 days;
- any payment by resident legal entities and any payment by non-residents to residents with respect to the acquisition of ownership rights to immovable property;
- any payment by resident legal entities and any payment by non-residents to residents with respect to the acquisition of intellectual property rights;
- any transfer and receipt of funds or other property by residents with respect to the performance of obligation of a joint venture participant; or
- the opening by a resident legal entity of foreign bank accounts designated for financing expenses connected with maintenance of branches and representative offices of this legal entity;

3. Registration Exemptions

The following operations are exempt from registration:

- agreements on sovereign foreign loans, non-sovereign foreign loans under a sovereign guarantee and operations made under such agreements;
- commercial credits associated with the export or import

of goods in respect of which 'transaction passports' are issued for the total amount of the currency contract;

- banks' "own" operations, except when a non-resident purchases a bank's shares from a resident which is not a bank or a resident which is not a bank purchases a non-resident's shares or participating interests from a bank;
- the acquisition of state securities issued in Kazakhstan by non-residents;
- the acquisition of Kazakhstan depository receipts by non-residents;
- the acquisition by non-residents of securities issued by residents, where the acquisition is made on the basis of

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a broker's services agreement concluded with a resident broker, except for the initial placement of a non-resident's securities on international capital markets or the issuance of depository receipts issued for a resident's securities;

- the acquisition of securities issued under laws of foreign states, where the acquisition is made by non-residents on a secondary market, including depository receipts issued with respect to residents' securities; and
- currency operations carried out by Kazakhstan establishments located abroad.

4. Registration Timeframe

A resident must apply for the registration of a currency operation: (a) before the parties have begun discharging their obligations under the relevant currency contract; (b) within thirty calendar days after 180 days, in the case of a commercial credit or financial loan; or (c) prior to any operations with a foreign bank account where the account is held by a resident legal entity.

5. Reporting Duty

A resident must notify the NBK of any changes to a registered currency contract made while the currency contract is in force. This notice must be given not later than thirty days after the changes have been made. In addition, the Kazakhstan resident party must report quarterly to the NBK.

6. Certificate of Registration

The NBK registers a currency operation within ten working days after the resident has submitted a complete set of required documents.

Licensing Regime

1. Conditions Precedent to the Receipt of Licenses

For operations that require the receipt of single-use or operational licenses, there are two general conditions precedent to the receipt of such licenses:

- the absence of tax debts;
- the absence of debts on loans received at the expense of budget funds, governmental loans, or on claims arising out of the enforcement of state guarantees.

For fulfilment of the above conditions precedent, an applicant must provide the following documents to be issued by the competent state authorities (note: these documents must have been issued no sooner than thirty days prior to the date of application):

- a document confirming the absence of tax debts as issued by the tax body;
- a document confirming the absence of tax debts as issued by a customs body;
- a document from the central budgetary competent body confirming the absence of debts on loans received at the expense of budget funds, governmental loans, or on claims arising out of the enforcement of state guarantees;
- a document from the local executive body confirming the absence of debts on loans received at the expense of local budget.

The following operations now require a license:

1) When a resident grants a "commercial credit" to a non-resident for more than \$10,000 for a period exceeding 180 days (or 365 days with respect to certain goods under a list established by the Government). Such licenses are issued as single-use licenses.

2) The following operations related to charter capital, securities and derivative instruments:

- the purchase of a non-residents' securities by a resident;
- the purchase of shares of a non-resident investment fund by a resident;
- a contribution by a resident to the charter capital of a non-resident; and
- operations with derivatives between residents and non-residents.

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Normally these licenses are issued for a single use; except for operational licenses issued to brokers, dealers and management companies. The licensing requirements do not apply to banks, insurance organisations, organisations managing the pension assets, and accumulative pension funds that independently manage their assets. These requirements do not apply if the operations fall under the definition of a "direct investment".

3) The opening of a foreign bank account by a resident, except for the following:

- if the bank account is opened by an individual resident in a foreign bank located in an OECD or Financial Action Task Force on Money Laundering country;
- if the bank account is opened by an individual resident in a foreign bank located in states where such individual resides (note: after that person's return to Kazakhstan, such individual residents must close their foreign bank accounts or apply for a license);
- if the bank account is opened by a bank;
- if the bank account is opened by a resident financial organisation for the purpose of carrying out transactions with financial instruments on the international securities' markets;
- if the bank account is opened by a resident legal entity for the purposes of financing the expenses related to the branches and representative offices of such legal entities;
- if the bank account is opened by a resident legal entity for the purposes of making contributions to the charter capital of a legal entity, where so required under the laws of the foreign state where the resident intends to make the charter capital contribution; or
- if the bank account is opened by a resident legal entity for the purposes of transferring funds to secure the resident's obligations to non-residents under loans obtained from non-residents.

Certain licensing requirements will remain in effect until after December 31, 2006 and will be substituted by registration or notification requirements thereafter.

Transition Periods

Rules 134 provide for the following transitional rules in implementing the new Currency Law:

- Licences and registration certificates issued by the NBK prior to the date of enactment of Rules 134 (December 18, 2005) are in force until the obligations envisaged by the licensed operation are discharged in full;
- A resident who obtained a licence or registration certificate prior to the date of enactment of Rules 134 must submit reports in the manner stipulated by Rules 134;
- A resident who obtained a licence or registration certificate prior to the date of enactment of Rules 134 for operations that are not subject to licensing or registration under Rules 134 may, at his own discretion, return that licence or registration certificate and apply for a registration certificate or notification certificate under Rules 134;
- If a resident applied for, but has not received, a licence or registration certificate prior to the date of enactment of Rules 134 and if such licence or registration certificate is still required under Rules 134, no additional application is needed. However, such resident will receive a registration certificate or notification certificate as established by Rules 134;
- Under commercial credits advanced by non-residents to residents in respect of which: (a) registration certificates were issued prior to the date of enactment of Rules 134 and (b) commercial credits are advanced for export or import requiring a "transaction passport" for a total amount of the relevant currency contract; no report must be submitted for the relevant registration certificate. However, such residents must inform the NBK in writing if their obligations under the currency contract were fully discharged. ☺



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