

United States Issues Final Investment Reporting Requirements for Burma/Myanmar

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On May 23, 2013, the U.S. State Department issued final “Responsible Investment Reporting Requirements” for Burma (also known as Myanmar). The long-awaited final rule confirms that U.S. persons will be required to submit: (a) detailed annual reports for new investment in Myanmar exceeding \$500,000, parts of which will be made available for public review; and (b) investment notification for any new investment with Myanma Oil and Gas Enterprise (MOGE) pursuant to an agreement or exercise of rights under such an agreement. U.S. businesses and individuals investing directly in Myanmar or indirectly via funds, joint ventures or participation in companies will need to monitor the flow of their capital into Myanmar to identify when reports to the State Department are required, ensure that they have access to the information required as part of the annual reports, and be aware of what information may be made public.

During Myanmar President Thein Sein’s ground-breaking visit to Washington, DC on May 20, the head of state encouraged U.S. business leaders to invest in his fast-opening country. The new Myanmar leadership has engaged in political reforms over the past year and a half, courted Western companies and passed a new foreign investment law in November 2012 (with implementing rules released on January 31, 2013). U.S. human rights groups, NGOs and certain U.S. politicians acknowledge reforms but remain wary of Myanmar’s policies and how outside investment may impact ordinary citizens.

The U.S. Government signaled in July 2012 that it would permit new investment in Myanmar as part of its sanctions reforms but impose reporting requirements in order to encourage investors to act responsibly in entering the market. The Treasury Department’s Office of Foreign Assets Control (OFAC) issued General License 17 under the Burmese Sanctions Regulations on July 11, 2012, which authorized new investment in Myanmar subject to a set of proposed investment reporting requirements to be administered by the State Department rather than OFAC. This novel approach was the subject of a lengthy and vigorous comment process by business and civil society groups which concluded with the final rules.

Businesses and individuals investing, or interested in investing, in Myanmar are asking the following questions:

What Investment Activity Triggers Reporting Requirements?

For any U.S. person, an annual report is required for aggregate “New Investment” in Myanmar over \$500,000. New Investment is defined at 31 C.F.R. § 537.311 to mean a wide range of investment activity related to the development or exploitation of resources located in Myanmar via contract, ownership or other arrangements. However, New Investment “does not include the entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology” where the contract does not include the specified development or exploitation of resources.

For New Investment pursuant to an agreement or exercise of rights under such an agreement with MOGE, there is a separate requirement to notify the State Department regardless of value (i.e., there is no \$500,000 threshold for this notification).

When Are Reports Due?

Annual reports are due 180 days after a U.S. person first exceeds \$500,000 in aggregate New Investment and annually on July 1 thereafter. U.S. persons who exceeded the threshold over 180 days before the final rules are allowed to report on July 1, 2013. MOGE notifications are due within 60 days.

What Investment Counts Towards the \$500,000 Threshold?

Any New Investment by a U.S. person is counted, regardless of how the investment arrives in Myanmar. This includes new investment (a) made directly by the U.S. person, (b) made as part of a joint venture or public-private partnership, (c) made indirectly via a subsidiary or investment in a fund or fund-of-funds, or (d) via investment in a third-country company whose main business activity is in Myanmar. OFAC-issued Frequently Asked Questions state that the \$500,000 includes aggregate New Investment over any time period (see FAQs 280-284). OFAC clarified, however, that facilitating New Investment or working for persons who are investing in Myanmar does not constitute New Investment. OFAC cautioned that what constitutes New Investment can be fact- and situation-specific and recommended erring on the side of caution in reporting.

How Does an Indirect Investor Know When “New Investment” Occurs?

A number of individual and company investors have asked when their capital should be counted towards the \$500,000 threshold. First, there must be actual investment. Merely signing an agreement to provide capital to a fund or business normally would not count. Second, an individual U.S. person investor would need to have contributed over \$500,000. Third, the indirect investment vehicle must have invested over \$500,000 specifically in items qualifying as New Investment in Myanmar.

The State Department and OFAC have not yet provided guidance on how to connect investment by a U.S. person with New Investment through a fund where there are multiple investors. For example, a U.S. person may invest \$600,000 in a private equity fund in which the U.S. person is one of ten investors in a \$6 million fund. It is not clear whether the U.S. investor should be counted as having exceeded the \$500,000 threshold when the fund invests its first \$500,001 in New Investment in Myanmar, when the pro-rata share for the investor exceeds \$500,000, or some other measure. It may be advisable for a U.S. person under these circumstances to request that the direct investor advise them when New Investment in Myanmar exceeds \$500,000 and consider seeking guidance from the State Department and OFAC.

What Information Is Required in an Annual Report and What Will Be Made Public?

The final reporting requirements generally provide for the same components as the July 2012 proposed requirements with several minor additions/adjustments following the comment process. Each annual report

includes a Public and U.S. Government version. The Public Report includes:

- 1-3. Name of submitter, acknowledgment of public reporting and a point of contact.
4. Overview of operations in Myanmar.
5. Policies, procedures and implementation steps relating to human rights, worker rights, environmental protection and anti-corruption.
6. Information regarding the use of security service providers, including provider certifications; human rights, anti-corruption and other standards; and oversight/auditing.
7. Information on property acquisition via purchase, use, lease or other rights, including regarding the impact of such activities on local parties or stakeholders.
8. Report on total payments valued over \$10,000 to each Government of Myanmar entity, sub-national or administrative governmental entity or non-state group.

The U.S. Government version includes all of the above (less the acknowledgement of publication) plus:

9. Identifying and providing contact information for the individual(s) responsible for preparing the report.
10. Information on any meetings or other communications with the armed forces of Myanmar and/or other armed group related to the submitter's investment in the country.
11. A summary of risks and/or impacts, risk minimization/mitigation steps, and policies and practices relating to human and worker rights, anti-corruption and environmental issues.

The final reporting requirements encompass a breadth of information and the preparation of initial reports may be challenging. U.S. investors and companies may wish to seek commitments of assistance from the funds, companies or agents directing investment on the ground in Myanmar. In addition, parties should assess how publication and subsequent public scrutiny may affect their business interests and, potentially, legal liabilities.

The final Responsible Investment Reporting Requirements are available at www.humanrights.gov/wp-content/uploads/2013/05/Responsible-Investment-Reporting-Requirements-Final.pdf.

OFAC's FAQs relating to Burma Sanctions are available at <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#268>.

If you have questions, please contact the Pillsbury attorney with whom you regularly work, or the authors.

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