# U.S. Sanctions Update

## REMAINING SANCTIONS MANAGEABLE

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The United States has lifted most of its sanctions on Myanmar: the country is now open for U.S. business. It is a formative environment, however, and the U.S. sanctions that remain makes a Myanmar investment more challenging for U.S. companies and multinationals with U.S. affiliates than for companies elsewhere. The EU, UK and Australia have lifted their sanctions and no Asian country maintains sanctions. For most companies subject to the reach of U.S. law, however, the remaining sanctions, such as the Specially Designated Nationals (SDN) list discussed below, should be manageable.

### Current U.S. Sanctions

Prior to July 2012, the Burmese Sanctions Regulations (BSR) prohibited transactions with and blocked the property of certain entities and individuals associated with the previous military government. Sanctions prohibited exports of financial services, new investment and imports from Myanmar to the United States. In addition, the U.S. Treasury Department imposed "special measures" under the USA PATRIOT Act, which imposed heightened due diligence obligations on U.S. banks and prohibited them from opening or maintaining correspondent accounts with banks in Myanmar.

Where do these sanctions stand now? Trade with Myanmar now is largely unrestricted. The comprehensive import ban has been lifted, although there is still a prohibition on imports of jadeite, rubies and jewelry containing them.

The U.S. continues to maintain its list of sanctioned individuals, entities and government enterprises in Myanmar (Specially Designated Nationals, or SDNs). Transactions are prohibited with SDNs or any entity in which an SDN owns a 50 percent or greater interest. Transactions are also prohibited with Myanmar's Ministry of Defense, including the Office of Procurement, and any other state or non-state armed group in conflict with the Myanmar government.

Under the Treasury Department's Office of Foreign Asset Controls (OFAC) General License No. 16, exports of financial services are now permitted subject to certain restrictions including a prohibition on dealing with blocked parties. In February 2013, OFAC issued General License No. 19, authorizing transactions with four SDN banks (Asia Green Development Bank, Ayeyarwady Bank, Myanma Economic Bank, and Myanma Investment and Commercial Bank). Three Myanmar banks (Innwa

Bank, Myawaddy Bank and Myanma Foreign Trade Bank) remain on the SDN List.

The USA PATRIOT Act special measures remain in place, however, complicating the entry of U.S. financial institutions into Myanmar as well as global institutions that observe U.S. sanctions requirements. Although leading local banks are starting to build compliance capacity and are looking for opportunities to connect to the global banking system, major U.S. banks have been reluctant to engage, weighing the legal risks and their own internal compliance costs against the economic prospects.

## New Investment

Also in July 2012, OFAC issued General License No. 17, which authorized new investment in Myanmar subject to investment reporting requirements administered by the State Department. The State Department issued its final "Responsible Investment Reporting Requirements" for Myanmar on May 23, 2012. Reporting is required in two situations.

First, an annual report is required for aggregate new investment in Myanmar over U.S.$500,000. The BSR define new investment to mean the economic development or exploitation of resources located in Myanmar via contract, ownership or other arrangements. Specifically, new investment includes any of the following activities when undertaken pursuant to an agreement or the exercise of rights under an agreement that is entered into with the government or nongovernmental entity in Myanmar:

- Entry into a contract that includes the "economic development of resources" located in Myanmar
- Entry into a contract providing for the general supervision and guarantee of another person's performance of a contract that includes the economic development of resources located in Myanmar
- Purchase of a share of ownership, including an equity interest, in the economic development of resources located in Myanmar
- Entry into a contract providing for the participation in royalties, earnings, or profits in the economic development of resources located in Myanmar, without regard to the form of the participation.

The definition of new investment specifically excludes contracts to sell or purchase goods, services, or technology where the contract does not include any of the above activities.

When calculating the threshold amount, new investment is counted regardless of how the investment is made, whether directly by the U.S. person, part of a joint venture or public-private partnership, indirectly via a subsidiary or investment fund, or via investment in a third country company whose main business activity is in Myanmar. The threshold includes aggregate new investment over any time period. However, facilitating new investment or working for persons who are investing in Myanmar does not constitute new investment and therefore would not be subject to the Reporting Requirements.

Reports are due July 1 of each year or within 180 days of exceeding the U.S.$500,000 threshold for an initial report if the 180 days is reached before July 1, 2014. The reports are intended to promote transparency and corporate social responsibility. The public version of the report must include information on such topics as human rights, worker rights, environmental protection and anti-corruption policies and procedures, the use of security service providers, property acquisition, and payments over U.S.$10,000 to any national or sub-national government entity or non-state group acting with governmental authority over the investment. The non-public version must include information on meetings or other communications related to the investment with the armed forces of Myanmar and/or other armed groups and information on risks considered by the investor relating to human rights, worker rights, anti-corruption and environmental issues as well as risk mitigation and due diligence.

In addition, secondly, there is a separate requirement to notify the State Department of any agreement with the Myanma Oil and Gas Enterprise within 60 days regardless of value, i.e., there is no U.S.$500,000 threshold for this notification requirement.

## Managing Risks and Conducting Due Diligence

Companies face both legal and reputational risks in Myanmar. In addition to sanctions, the Foreign Corrupt Practices Act and anti-money laundering laws are serious concerns. The Financial Action Task Force lists Myanmar as a country with anti-money laundering and counterterrorism financing deficiencies. Transparency International lists Myanmar as 172 out of 176 countries in its corruption perceptions index.

Screening for SDNs is the principal sanctions compliance challenge not only when making acquisitions but also entering into contracts or ventures with business partners or representatives. The paucity of public records on the ownership of shares, real estate or intellectual property makes due diligence difficult. Crony links to the former military government are shrouded and the forced relocation of ethnic populations makes clear title to property murky. The U.S. Government is initiating a process to encourage SDNs to get off the list and has developed criteria to encourage them to become more transparent and to cut ties to the former military government.

Whether the investment reporting requirement applies will depend on the type of economic activity. Reporting would not be required if a U.S. company is only supplying goods or services, although certain activities such as leasing office space may trigger the requirement. If acting through non-U.S. intermediaries such as a fund, only the U.S. person's investment over the threshold amount would be subject to reporting. Companies buying or leasing land or acquiring local enterprises, especially those in extractive industries entering into resource development contracts, are the primary targets of the reporting requirement.

They must be prepared for scrutiny not only by the U.S. Government but by non-governmental organizations which will monitor the reports. Even if not covered, however, some companies may consider filing reports voluntarily or publicizing their activities in other ways to promote their corporate social responsibility credentials.

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