

US State Department Guidance on Reporting Requirements for Responsible Investment in Myanmar

The US State Department has published further guidance regarding the reporting obligations of US Persons making significant new investments in Myanmar, including to clarify that failure to comply with the Reporting Requirements may lead to the imposition of civil or criminal penalties.

US Persons seeking new business opportunities in Myanmar should be aware of the Reporting Requirements and carefully review the reporting and disclosure obligations to ensure compliance with these requirements, as well as the Burmese Sanctions Regulations (BSR) generally.

In a previous [client briefing](#) we explained that as a condition of relaxing economic sanctions relating to Myanmar (also known as Burma), the US Government would require US Persons making significant new investments related to the economic development of resources in Myanmar to file annual reports with the US State Department providing information on a range of corporate responsibility topics, including steps taken by such investors to mitigate the risk of contributing to or otherwise being implicated in corruption and human rights abuses.

For purposes of the Reporting Requirements, the terms "new investment" and "economic development of resources" in Myanmar are defined in the BSR, administered by the US Treasury Department's Office of Foreign Assets Control (OFAC).¹ For the purposes of the BSR, the term "new investment" includes, among other things, the following activities undertaken pursuant to a contract, or exercise of rights under a contract, entered into with the Government of Myanmar or an entity in Myanmar:

- the purchase of a share of ownership, including an equity interest, in the economic development of resources located in Myanmar; or
- the 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.

Activities considered to involve the economic development of resources in Myanmar are those engaged in pursuant to a contract the subject of which includes responsibility for the development or exploitation of resources (including natural, agricultural, commercial, financial, industrial and human resources, but not including not-for-profit educational, health or other humanitarian programmes or activities) located in Myanmar, including making or attempting to make those resources accessible or available for exploitation or economic use.

The Reporting Requirements apply to US Persons making new investments in Myanmar exceeding US\$500,000 (in aggregate over any period) or undertaking any new investment pursuant to an agreement, or exercise of rights under an agreement, with Myanma Oil and Gas Enterprise (MOGE).

The Reporting Requirements took effect on 1 July 2013, and in September 2013 the US Government released further [guidance](#) in the form of answers to a series of "Frequently Asked Questions". The guidance expressly states that it does not constitute a binding legal interpretation of the Reporting Requirements and investors considering whether they are subject to the Reporting Requirements are encouraged to consult the text of the

¹ 31 CFR Part 537.

[Reporting Requirements](#) and/or to seek legal advice. OFAC also previously had published answers to a set of "Frequently Asked Questions" about the BSR, including the Reporting Requirements, in March 2013.²

Below, we highlight some key aspects of the new guidance.

Failure to comply with the Reporting Requirements may entail civil or criminal penalties

The guidance emphasises that US Persons who engage in new investment in Myanmar, authorised under BSR General License 17 issued on 11 July 2012, but fail to comply with the Reporting Requirements, as required in Section (e) to General License 17, may be subject to civil or criminal penalties for non-compliance with the BSR.

OFAC is the US Government entity that determines whether a BSR violation has occurred and if so whether to pursue a civil penalty. In addition, where it deems appropriate, OFAC may make criminal referrals to the US Department of Justice. Violations of the BSR may be subject to civil fines of up to US\$250,000 or twice the value of the transaction in question (whichever is greater) per violation and, upon conviction for wilfully committing, attempting to commit or conspiring to commit a violation, criminal penalties of fines up to US\$1,000,000 per violation or up to 20 years imprisonment for an individual, or both.³

In every case where investors are unsure whether they are required to submit a report, the guidance recommends erring on the side of caution.

Attempts to circumvent the Reporting Requirements

The guidance warns against attempting to avoid the application of the Reporting Requirements through the use of intermediate non-US companies or other structures. In particular, the guidance states that:

Investors may make investments directly in Burma, or via joint-ventures, joint partnerships, through partially-owned or wholly-owned subsidiaries, contracts, subcontracts, franchises, or a range of other investment vehicles. The Reporting Requirements do not limit disclosure obligations based on the form of an investment or the percentage equity stake held, (even when, for example, other stakeholders are non-U.S. persons) or based on whether the investor itself has operations in Burma.

Frequency of reports and notifications

Reports must be submitted to the State Department within 180 days of the US\$500,000 threshold being reached, and then annually on 1 July thereafter, even where the interim period does not constitute a full year. Each submitter may decide to report on activity on a fiscal or calendar year basis, but must identify the time period covered by the report.

Where a notification is due because a US Person is undertaking any new investment of any value pursuant to an agreement, or pursuant to the exercise of rights under such an agreement, with MOGE, such notification will be due within 60 days of the investment.

Human rights and corruption

As noted in our previous briefing, the annual reporting requirement includes disclosure of a summary or copies of the relevant investor's policies and procedures relating to environmental and social risk assessment, anti-corruption, community and stakeholder engagement, mechanisms for hearing grievances from employees and local communities and corporate social responsibility. If no such policies or procedures exist this must be stated in the report.

The guidance emphasises the US Government's ongoing concerns regarding corruption and human rights abuses in Myanmar. In relation to workers' rights, investors are referred to the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights, and the ILO Declaration on Fundamental Principles and Rights at Work as sources of guidance on how to assess and respond to human rights risks, particularly where the investor has not already adopted and implemented policies consistent with these standards.

² See http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/ques_index.aspx#burma

³ See the US Treasury Department Office of Foreign Assets Control's Economic Enforcement Guidelines, available at: http://www.treasury.gov/resource-center/sanctions/Documents/fr74_57593.pdf.

Payments transparency

In addition to reporting on steps taken to address corruption risks, investors subject to the Reporting Requirements must disclose total payments made to any Government of Myanmar entity, including State-owned enterprises and non-State entities that possess or claim to possess governmental authority over investment activity in Myanmar, and valued at over US\$10,000 during the reporting year.

The type and amount of each payment made – for example, whether it constitutes a fee, a tax or a tariff – must also be specified.

Property acquisition and land use

The Reporting Requirements also call for reporting of information relating to land-use and in this regard the guidance states that: "*[p]roperty acquisition and land use in Burma, particularly in ethnic and conflict areas, routinely involves land seizures, forced evictions, temporary land abandonment due to conflict, and the involuntary resettlement of vulnerable populations.*" The guidance cautions that forced evictions may occur in Myanmar to make room for foreign investment and that investors should engage in due diligence regarding real property, including to ensure any financial/material arrangements to compensate previous users of the property were implemented.

Public availability

Each person submitting an annual report is required to submit one version to the US Government containing all the required information, and one version that will be made publicly available and which does not contain information regarding (i) the persons responsible for preparing the report, (ii) communications with armed forces or armed groups in Myanmar related to the submitter's investments, and (iii) specific risk prevention and mitigation steps taken by the investor. The guidance notes a growing trend towards corporate disclosure to showcase responsible investment practices, and to date five such public reports are listed by the State Department as having been submitted in 2013⁴.

⁴ See the website of the US Embassy in Rangoon, available at <http://burma.usembassy.gov/reporting-requirements.html>.

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