

U.S. Significantly Eases Sanctions on Burma

Highlights

- The primary U.S. sanctions against Burma, prohibiting new investment in or the provision of financial services to Burma, were suspended on July 11 via two general licenses permitting such activities.
- However, the provision of financial services to and investment involving contracts with the Burmese Ministry of Defense, state or non-state armed groups (including the military), any individual or entity listed as a Specially Designated National (with whom all transactions are prohibited), or any entity 50% or more owned or otherwise controlled by the foregoing continues to be prohibited, as is the importation of Burmese products to the United States. These are the primary remaining sanctions.
- Any new investment in Burma that exceeds \$500,000 triggers an annual public reporting requirement containing disclosure related to human rights, labor matters, environmental impact, land acquisitions, security arrangements, engagement with local communities, corporate social responsibility, and payments to Burmese government entities.
- The U.S. government has stated that it continues to monitor the situation in Burma, and the underlying sanctions regulations remain in place. In the event U.S. policy is reversed and the new general licenses are suspended or revoked, current regulations would permit a U.S. investor to sell any investment made in reliance on the licenses to a non-U.S. person. However, this is no guarantee that any future re-imposition of sanctions would permit the liquidation of investments.

Discussion

Almost two months after widely publicized comments by Secretary of State Hillary Clinton announcing that U.S. economic sanctions against Burma would be suspended, the U.S. Department of State and the Department of the Treasury's Office of Foreign Assets Control ("OFAC") have taken action to ease those sanctions. On July 11, 2012, through the release of two general licenses, OFAC effectively removed two of the three main prohibitions contained in the Burmese Sanctions Regulations: the ban on new investment in Burma and the prohibition on the export of financial services.

The third prohibition, the restriction on the import of Burmese products, remains in place. The general licenses also contain important exceptions excluding Burmese Specially Designated Nationals (“SDNs”) and entities controlled by the Burmese military, and any new investment in Burma exceeding \$500,000 will trigger an annual public reporting requirement.

New Investment in Burma

OFAC General License No. 17¹ with respect to the Burmese Sanctions Regulations, titled “Authorizing New Investment in Burma” (“General License 17”), broadly authorizes new investment subject to compliance with certain reporting requirements. However, investments still may not be made pursuant to any agreement with the Burmese Ministry of Defense, any state or non-state armed group (including the military), or any entity 50% or more owned by the foregoing. Furthermore, General License 17 does not authorize transactions with any person designated by OFAC as an SDN or with any entity 50% or more owned or otherwise controlled by an SDN.

Any U.S. person engaging in a newly authorized investment in Burma must adhere to certain reporting requirements outlined in the Department of State’s “Reporting Requirements on Responsible Investment in Burma” (the “Reporting Requirements”).² There are two key requirements in relation to new investments.

First, U.S. investors must notify the Department of State of any new investment entered into pursuant to an agreement with the Myanmar Oil and Gas Enterprise (“MOGE”) within 60 days of such an investment.

Second, U.S. investors must file an annual report with respect to any aggregate investment in Burma exceeding \$500,000 (the “Annual Reporting Requirement”). The Annual Reporting Requirement must be submitted in two versions: (1) a public version, and (2) a version for use by the State Department and other U.S. government agencies. The public version of the report requires disclosure regarding the following topics and policies, but provides no substantive requirements regarding the contents of those policies (nor, for that matter, that the investor have such policies in place):

- **Operations**, including the name of the company operating in Burma, the nature of the business, the location of operations in Burma, and the approximate number of employees;

¹ Available at <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/burmagl17.pdf>.

² The Reporting Requirements may be found at <http://www.humanrights.gov/wp-content/uploads/2012/07/Burma-Responsible-Investment-Reporting-Reqs.pdf>.

- **Human Rights, Worker Rights, Anti-Corruption, and Environmental Policies and Procedures**, including policies and procedures regarding the following: due diligence relating to impact on human rights, worker rights, and the environment; anti-corruption efforts; community and stakeholder engagement; employee and community grievances; and global corporate social responsibility;
- **Arrangements with Security Providers**, including the names of and duties and responsibilities of such providers, and whether the provider is a signatory to the International Code of Conduct for Private Security Providers;
- **Property Acquisition**, including, for acquisitions of property above certain monetary or size thresholds, summaries of policies and procedures related to verification of land ownership, use rights, dislocation, and resettlement and other information; and
- **Payments to the Burmese Government**, including payments to each Burmese government entity claiming authority over the new investment segregated by type, unless payments to such entity total less than \$10,000 in the reporting year.

In the public version, the investor is permitted to redact trade secrets or commercially sensitive information, if and to the extent that the redacted information is exempt from disclosure under the Freedom of Information Act. The non-public version submitted to the U.S. government must contain the redacted information as well as two additional sections: (1) information regarding meetings or other communications between the investor and the Burmese military, and (2) the investor's summary of risks related to human rights, worker rights, and environmental issues, along with any risk mitigation measures put in place in response to those risks.

The State Department's proposal for the content of the Reporting Requirements is subject to public notice and comment, with comments due 60 days following the publication of the notice in the Federal Register, which is expected in the coming days.

As noted by various U.S. government officials and alluded to in the press release by OFAC announcing the general licenses, the steps taken to ease the sanctions against Burma are designed so that, should the political developments prompting the easing of sanctions be reversed, the United States will be able to quickly reinstate the previous restrictions by revoking the new licenses. The underlying sanctions regulations remain in place. This approach creates a degree of uncertainty for U.S. persons contemplating new investments in Burma, and every potential investor will need to carefully consider the consequences should the general licenses be revoked in the future. In making that assessment, it is useful to note that the current Burmese sanctions, unlike other sanctions programs, permit U.S. persons to sell interests in Burmese investments acquired prior to the original imposition of investment sanctions (other than those involving SDNs) to non-U.S. persons. However, there is no

guarantee that this provision would be duplicated for investments made pursuant to the general licenses if sanctions were to be re-imposed.

Export of Financial Services to Burma

OFAC General License No. 16³ with respect to the Burmese Sanctions Regulations, titled “Authorizing the Exportation or Reexportation of Financial Services to Burma” (“General License 16”), has the effect of suspending the general ban on the exportation or re-exportation of financial services to Burma subject to two key limitations. However, the prohibition against the export or re-export of U.S. financial services to Burma remains in place with respect to (1) the Burmese Ministry of Defense, state or non-state armed groups (including the military), or entities 50% or more owned by the foregoing, but only if the financial services are provided in connection with the provision of security services, and (2) any person listed as an SDN, or any entity 50% or more owned or otherwise controlled by an SDN. This second limitation does not prevent the transfer of funds to or from an account held by a financial institution whose property is blocked under the Burmese Sanctions Regulations, however, provided the account is not on the books of a U.S. financial institution.

New SDN Designations

In conjunction with the release of the general licenses, and further underscoring the caution with which the U.S. government is approaching the easing of sanctions on Burma, the President issued a new Executive Order⁴ allowing for the imposition of targeted sanctions against individuals or entities who obstruct the nascent political reform process or the peace process with ethnic minorities, commit human rights abuses, or engage in certain arms trade with North Korea. Those participating in activities covered by the new Executive Order risk being designated by OFAC as an SDN.

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If you have any questions, please feel free to contact any of your regular contacts at the Firm, or Ken Bachman or Paul Marquardt of our Washington office, listed on our website at <http://www.clearygottlieb.com>.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

³ Available at <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/burmag116.pdf>.

⁴ Available at <http://www.whitehouse.gov/the-press-office/2012/07/11/executive-order-blocking-property-persons-threatening-peace-security-or->.

NEW YORK

One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS

12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS

Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON

City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW

Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE

Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME

Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN

Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG

Bank of China Tower
One Garden Road
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING

Twin Towers – West (23rd Floor)
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES

CGSH International Legal
Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO

Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299