

KIRKLAND ALERT

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US Government Allows New Investment in Burma, Prohibited for Nearly 15 Years

Much anticipated after statements this past May by the U.S. Department of State that U.S. sanctions targeting Burma would be lifted, the U.S. Department of the Treasury, Office of Foreign Assets Control (OFAC) authorized new investment in Burma, also known as Myanmar, on July 11, 2012. U.S. investment in Burma pursuant to this new authorization that exceeds \$500,000 in aggregate must comply with new reporting requirements aimed at encouraging “greater transparency” and “responsible investment.” OFAC also lifted the ban on providing U.S. financial services to Burma, subject to certain limitations.

The implications of the announcements could be substantial for U.S. investors who have had an interest in pursuing commercial opportunities in Burma, but have had to cede opportunities to investors from other countries whose laws did not prohibit such activities. U.S. investors who now move ahead in Burma, however, will need to exercise due diligence to ensure that any new engagement does not run afoul of remaining restrictions, such as prohibited business with designated persons and entities. Questions also will likely arise in particular situations related to interpreting the new authorizations, such as how the \$500,000 “in aggregate” threshold for reporting is to be calculated.

OFAC General License Authorizes New Investment in Burma

New [OFAC General License \(GL\) No. 17](#) broadly authorizes new investment in Burma that has been prohibited for the past 15 years pursuant to Executive Order authority and the International Emergency Economic Powers Act (IEEPA) and Foreign Operations, Export Financing and Related Programs Appropriations Act of 1997 (BFDA). President Obama stated that easing the restrictions, which signaled support for the current reform efforts of President Thein Sein, Aung San Suu Kyi and others, would allow “U.S. companies to responsibly do business in Burma” and “provide immediate incentives for reformers and significant benefits to the people of Burma.”

The GL notes that “new investment” is defined in OFAC’s regulations (31 C.F.R. §§ 537.311, 537.302 and 537.316), which generally encompasses most investment activities. Pursuant to the statutory authority, the U.S. Secretary of State waived the ban on new U.S. investment, paving the way for the OFAC authorizations.

Limited Exceptions to the New Investment Authorization

U.S. investment involving the Burmese Ministry of Defense, state or non-state armed groups (including the Burmese military), or entities owned 50 percent or greater by the foregoing is not authorized. U.S. investors may also not enter into agreements involving parties designated on OFAC’s Specially Designated Nationals and Blocked Persons List (SDN List) pursuant to the Burma sanctions program, or entities owned 50 percent or more by such parties.

U.S. Investment Exceeding \$500,000 Must Submit “Responsible Investment” Reports

U.S. investors with investment in Burma pursuant to the new GL that in the aggregate exceeds \$500,000 must [report](#) certain information to the State Department. The reporting requirement applies to any new investment, regardless of “corporate form.” U.S. investment in any amount entered into the Myanmar Oil and Gas Enterprise (MOGE) must notify the State Department in writing at [\[\[email\]\]@state.gov](mailto:[]@state.gov) within 60 days of the new investment.

Information required by the so-called “Responsible Investment” report required for U.S. investment exceeding \$500,000 will be in part released publicly by the State Department. The reporting requirement is intended to provide visibility to the U.S. government into the effects of new U.S. investment, including on “the political transition in Burma.” Reporting parties will submit both a public version and non-public version of the report. Both reports request information related to:

- the nature of the investment;
- due diligence and procedures aimed to:
 - protect human rights, worker rights and the environment
 - prevent bribery
 - encourage community engagement including grievance procedures
 - achieve general corporate social responsibility
- engagement of security service providers;
- real property acquisition, including procedures to ascertain ownership rights and any dislocation or resettlement of people related to such acquisition; and
- aggregate payments exceeding \$10,000 to any particular governmental agency.

The non-public report also requires information about any communications with the Burmese military and any risk mitigation undertaken following due diligence related to human rights, worker rights or environmental issues. Any reporting entity wishing to claim Freedom of Information Act (FOIA) protection for requested information must provide a “detailed explanation” for withholding the information consistent with the FOIA requirements. Reports, which may be either on a fiscal or calendar year basis, are due annually on April 1.

OFAC Authorization of U.S. Financial Services

OFAC also lifted the ban on the exportation or reexportation of U.S. financial services to Burma, directly or indirectly, in newly issued [GL No. 16](#), subject to similar exceptions as those related to OFAC’s new investment authorization. GL No. 16 generally does not authorize U.S. financial services to the Burmese Ministry of Defense, state or non-state armed groups (including the Burmese military), any party designated on OFAC’s SDN List pursuant to the Burma sanctions program, any entity owned 50 percent or more by the foregoing, or any debit to a blocked account. However, transfers involving a financial institution whose property or interests in property are blocked under the Burma sanctions are authorized provided the account is not on the books of a U.S. person financial institution (which includes overseas branches of U.S. entities).

President’s New Executive Order Expands Sanctions to Persons Undermining Burma’s Current Reforms

In an apparent counterweight to the substantial lifting of the broad sanctions targeting Burma, a new [Executive Order](#) authorizes the U.S. Department of the Treasury to designate parties that engage in certain actions that undermine the current political reforms and peace process underway in Burma. Any party owned or controlled, or to have acted for or on behalf of such a party, or a party providing assistance to a person designated pursuant to the Executive Order, also may be subject to designation.

Remaining Sanctions Targeting Burma

Some sanctions targeting Burma remain, in addition to the designations under the Burma sanctions program and exceptions to the new authorizations noted above. Most notably, an import ban prohibiting importation into the United States of Burmese origin goods remains in effect. The ban is imposed by statute, such as the BFDA and Tom Lantos Block Burmese Jade Act. The BFDA import ban as well as other Burma sanctions will expire on July 26, 2012, unless Congress approves legislation to extend this authority, which currently is under consideration.

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