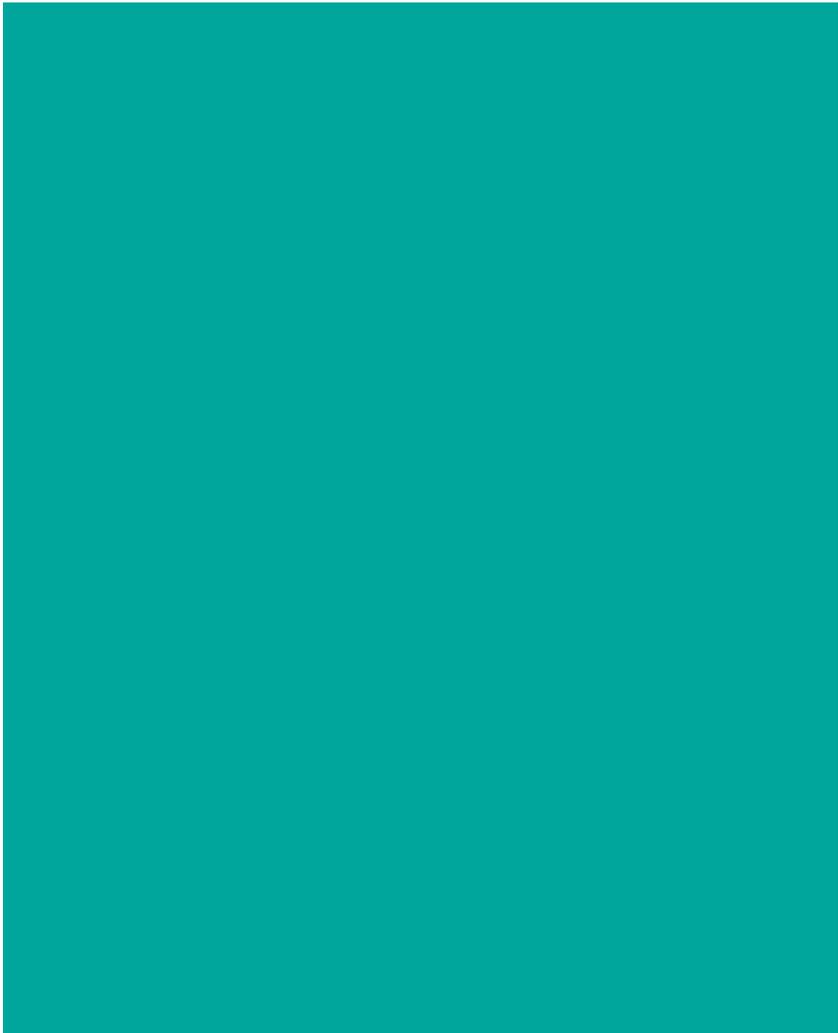


US Eases Financial
Services and
Investment Sanctions
Against Myanmar –
With Conditions



US Eases Financial Services and Investment Sanctions Against Myanmar – With Conditions

Introduction

In July 2012, the US Treasury Department's Office of Foreign Assets Control (OFAC) issued two general licenses that suspend financial services and investment sanctions against Myanmar. These measures, which follow Secretary of State Clinton's May visit to Naypyidaw and the appointment of the first US Ambassador to Myanmar in 22 years, respond to positive social and political reforms that have taken place in the country. While this undoubtedly signals a shift in US policy it also evidences a degree of caution by the US, which manifests itself through higher compliance burdens for US companies doing business in Myanmar.

For its part, the US has reason to be cautious. Myanmar's transition has the potential to be credited as a positive outcome of economic sanctions. But the country poses somewhat different challenges than other cases where sanctions have been lifted. The point of transition is less clear for Myanmar than in, for example, the Republic of South Sudan, with its succession from Sudan, or Libya, with the removal (and ultimate death) of Muammar Gaddafi. Here, the US seeks to support a nascent reform process, using economic sanctions as both carrot and stick to encourage further positive reforms.

The OFAC General Licenses

On July 11, 2012, OFAC issued General Licenses 16 and 17 that permit, respectively, the provision of certain financial services to Myanmar and new investments in Myanmar. Each of these activities was previously prohibited under the Burmese Sanctions Regulations (31 CFR Part 537) (BSR).

General License No.16 authorizes US persons to export or reexport financial services to Myanmar. This includes, among other services, transfers of funds to Myanmar and the provisions to persons in Myanmar of insurance services, investment or brokering services, banking services, loans, guarantees and extensions of credit. Thus, while previously prohibited under the BSR, US exporters may now extend lines of credit to customers in Myanmar. The General License does not authorize, however, in connection with the provision of security services, the provision of financial services to the Burmese Ministry of Defense, state or non-state armed groups (including the military – presumably also including any of the armed groups who have been fighting the government's forces), or an entity owned by any such entity. It also does not authorize the provision of financial services to entities and individuals who are Specially Designated Nationals (SDNs) of Myanmar (or any other country) appearing on the OFAC SDN List.

General License 17 authorizes new investment in Myanmar by US persons. The term "new investment" is defined to include entering into contracts for the development of resources located in Burma, including natural, agricultural, commercial, financial, industrial, or human resources. New investment also includes purchase of an ownership share or participation in royalties or profits of an economic development of resources in Myanmar including, for example, participation in joint ventures. Like General License 16, General License 17 does not apply to investments undertaken under an agreement with the Burmese Ministry of Defense, state or non-state armed groups (including the military), an entity owned by any such entity, or an SDN.

Reporting Requirements for New Investments

US persons engaging in new investments in Myanmar under General License 17 are subject to new and unprecedented reporting requirements. These include separate reporting for investments with the Myanmar Oil and Gas Enterprise (MOGE), the national and sole oil and gas company in Myanmar, and investments valued at more than US\$500,000 in aggregate. In the case of investments with MOGE, the investing US company is required to simply notify the US Department of State within 60 days. Reports required for US companies investing more than US\$500,000 in Myanmar are more burdensome. They entail annual reporting on the company's responsible investing program, in both a public version and a more extensive US Government version.

The reports for persons investing more than US\$500,000 in Myanmar are extensive. They require, among other things, a description of the nature and extent of investments, as well as copies or a summary of policies and procedures implemented by the investor for its Myanmar operations that relate to human rights, worker rights, anticorruption, the environment and the acquisition of real property in Myanmar. Investors must also disclose any arrangements with security forces in Myanmar, as well as all payments to entities of the Government of Myanmar that exceed US\$10,000 in the aggregate to that entity during the reporting year. The non-public versions of these reports must also include disclosures of communications with the armed forces of Myanmar or other armed groups, and the results of due diligence conducted with regard to human rights, worker rights and environmental issues, as well as any steps taken to mitigate risks identified through due diligence.

US investors in Myanmar that are subject to reporting requirements will need to pay particular attention to its reports. Given their public nature, answers indicating no or insufficient compliance programs may invite public criticism from international human rights or environmental groups. They may also draw government scrutiny to weak or non-existent compliance programs. In addition, failure to report or incorrect reporting could subject the investing company to civil and criminal penalties for submitting false statements to the US Government.

The reporting requirements will soon be published in the Federal Register and subject to public comment. An overview of the proposed requirements is available at www.humanrights.gov.

Continuing US Economic Sanctions Against Myanmar

US companies considering new opportunities or investments in Myanmar must be mindful of ongoing US sanctions. While not a comprehensive embargo, the US Treasury Department's BSR continue to prohibit US companies and their non-US branches (not non-US subsidiaries, as such) from broad types of activities in and involving Myanmar.

Notwithstanding the General Licenses, US companies are prohibited from dealings or transactions that involve SDNs. They may not transfer, pay, export, withdraw or otherwise deal in any property in which SDNs have an interest. At present, more than 100 individuals and entities have been designated as SDNs under the Myanmar sanction program including many senior officials and agencies of the Government of Myanmar. In addition, OFAC considers SDNs to include entities 50 percent or more owned by an SDN.

This has important implications for transactions involving banks in Myanmar, many of which – such as Innwa Bank, Myawaddy Bank, and Myanmar Investment and Commercial Bank – remain on the SDN List. US companies may not export or reexport financial services to these banks. But, under General License 16, they may transfer funds to or from an account of an SDN financial institution in Myanmar, provided that the account is not on the books of a US financial institution.

Other important prohibitions under the BSR also remain in effect. They include a ban on imports into the US on all products of Myanmar. Of course, pressure from US investors in the country and the US pledge to support and reward further political reforms could soon lead to the easing the import ban.

The BSR also prohibit facilitation by US persons (including approving, financing, facilitating or guaranteeing) of transactions by foreign persons that would be prohibited if performed by a US person or within the United States. Lastly, the current ban on exports to Myanmar of defense articles under the International Traffic in Arms Regulations also remains in effect.

Executive Order 13619

In conjunction with General Licenses 16 and 17, the President issued Executive Order 13619. The Order authorizes the Secretary of the Treasury to add to the SDN List any person or entity inhibiting the Myanmar's democratic transition. This includes persons or entities found to have threatened the peace, security or stability of Myanmar, involved in human rights abuses in Myanmar, or involved in arms sales with North Korea. US companies investing in Myanmar are advised to continually monitor new SDN designations and periodically rescreen business partners against the SDN List.

Conclusion

The lifting of US sanctions against financial services and new investment in Myanmar offers significant investment possibilities to both US and non-US companies, but it also imposes considerable compliance obligations. Investors must take these into account, as well as restrictions imposed under the pre-existing US sanctions regime, before embarking on new business in Myanmar. This calls for careful planning and a commitment to implementing, monitoring and enforcing strong compliance programs. And, as circumstances continue to evolve in Myanmar, US companies must keep apprised of changing economic sanctions regimes to adapted compliance programs to new requirements.

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