THE SUN IS SETTING ON MYANMAR'S SANCTIONS REGIME

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Government Enforcement Alert

The United States imposed trade sanctions on Myanmar (a.k.a. Burma) beginning in May 1997 after determining that the military junta had committed large-scale repression of the democratic opposition in Burma.[1] The Burma sanctions program, administered by the U.S. Office of Foreign Assets Control ("OFAC"), barred most new investments in and the export of financial services to Burma, imports from Burma, and dealings with persons in Burma included on the OFAC Specially Designated Nationals and Block Persons ("SDN") list, by U.S. persons or involving the United States. The collective effect of these sanction measures, based on the applicable definitions of investments and financial services, was to substantially restrict trade and investments by U.S. persons or from the United States involving Burma. However, with the evolving transition to a democratic government in Burma, beginning in 2012, the United States has progressively eased its trade sanctions. Although dealings by U.S. persons or from the United States with Burmese SDNs were still barred, new investments in, and the export of financial services to, Burma, and most imports from Burma were authorized, except for new investments or the export of financial services involving an SDN or "the Burmese Ministry of Defence, including the Office of Procurement; any state or non-state armed group; or any entity in which any of the foregoing own a 50 percent or greater interest."

On 17 May, with the return to power in Burma of Aung San Suu Kyi's National League for Democracy (and in advance of President Obama's trip to Asia), the United States announced a further easing of the Burma sanctions program, including by issuing revised Burmese Sanctions Regulations (31 C.F.R. Part 537; the "Regulations"),which incorporates a number of important amendments,[2] and updating the SDN list to remove certain Burmese entities (although certain entities were added). The revisions specifically are intended to further support the movement of goods to and from, and within, Burma, allow certain transactions relating to U.S. individuals residing in Burma, and allow most transactions involving Burmese banks (as noted by OFAC in its announcement of the removal of certain banks from the SDN list, "[t]aken in concert with the regulatory amendments to allow most transactions with designated financial institutions, this leaves few OFAC restrictions remaining related to banks in Burma"). Although the changes do not materially broaden the scope of trade and investments now permitted for U.S. persons, because the prior easing had already authorized most trade and investments not involving Ministry or Defence or other armed groups, or an SDN, the newest changes should make it more feasible for U.S. persons to engage in business with Burma and, perhaps most importantly, suggest the United States remains committed to its policy of progressively lifting sanctions on Burma.

THE RECENT AMENDMENTS TO THE U.S. SANCTIONS REGIME

SDN/Prohibited Transaction Related Changes

OFAC had previously issued General Licence 20, which authorised transactions that are ordinarily incident to exports to or from Burma, including involving an SDN, provided the exportation is not to, or from, or on behalf of a

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person on the SDN list. This General Licence, which was due to expire in June, was apparently issued to deal with impediments to trade resulting from the reality that most exports to or from Burma have to move through Burma's main port in Yangon, the Asia World Port Terminal, which is owned and operated by a subsidiary of Asia World Co. Ltd ("Asia World"), an SDN. With the 2016 amendments, OFAC extended indefinitely General Licence 20, and also added a General Licence permitting certain transactions incident to the movement of goods within Burma (including transactions such as transporting goods from a warehouse in Burma for further distribution to retail outlets in Burma) provided the goods are not being sold to, or by, or on behalf of a person on the SDN list.

OFAC also added as part of the new amendments a General Licence under Section 537.525 of the Regulations that allows US persons to conduct most transactions otherwise prohibited by the Regulations that are "*ordinarily incident to the routine and necessary maintenance within Burma,*" which includes "*payment of living expenses and the acquisition of goods or services for personal use, of U.S. person individuals who reside in Burma.*" This complements the existing exemption in the Regulations for travel to or from Burma. Due to certain blocked parties having pervasive ownership interests in Burma, e.g. Asia World, that own toll roads, airports, hotels, electric companies, and supermarkets, this General Licence is significant and will make it much easier for U.S. persons to reside and work in Burma.

With respect to transactions involving Burmese SDNs, including certain banks, the recently implemented changes resulted in:

the removal of seven state-owned enterprises in the banking, timber and mining industries, including three state-owned banks (Myanmar Economic Bank ("MEB"), Myanmar Foreign Trade Bank, and Myanmar Investment and Commercial Bank) from the SDN list;

the formal addition to the SDN list of six companies that are majority owned by Steven Law and Myanmar's largest conglomerate, Asia World, which are already on the SDN list (although any entity 50% or more owned by an SDN is also considered an SDN even if not specifically listed) (Steven Law is the managing director of Asia World); and

the addition of several Burmese banks, Ayeyarwady Bank, Innwa Bank and Myawaddy Bank, to the General Licence authorizing certain transactions with designated SDN banks (Section 537.531 of the Regulations):

The removal of the three state-owned banks from the SDN List is significant. U.S. sanctions had substantially impacted the operations of these banks. Additionally, the removal of MEB from the SDN list will make it easier for U.S. persons and entities to work with the Yangon Stock Exchange ("YSX"), which is majority-owned by MEB. A sanction-free stock exchange may avoid or at least reduce sanction issues when the YSX, which is currently open only to domestic investors, finally opens to U.S. and other foreign investors. This is, however, expected to take some time as it will require the passage of a new Myanmar Companies Act, which is expected to go before the Myanmar Parliament sometime in 2016. The addition of the six Asia World-affiliated companies to the SDN list is likely to be inconsequential, as U.S. firms and individuals are already barred from doing business with entities connected to Steven Law or the Asia World Group.

Prohibited Exportation of Financial Services

The exportation or re-exportation (whether directly or indirectly) to Burma of any financial services from the United States or by a U.S. person (wherever located) is prohibited, unless otherwise authorised. While this prohibition, given how financial services are defined, appears to impose substantial restrictions on trade by U.S. persons or

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from the U.S. with Burma, a General Licence (Section 537.529 of the Regulation) authorises the exportation or re-exportation of financial services to Burma, so long as not involving an SDN (unless permitted by another General License, such as relating to certain banks) or "the Burmese Ministry of Defence, including the Office of Procurement; any state or non-state armed group; or any entity in which any of the foregoing own a 50 percent or greater interest." The recent 2016 amendments do not affect this prohibition or associated General License.

Prohibition on the Importation of Burmese Jadeite or Rubies

The importation into the United States of any jadeite or rubies mined or extracted from Burma and any articles of jewellery containing jadeite or rubies mined or extracted from Burma is generally prohibited. The recent 2016 amendments do not affect this prohibition, which affects one of Myanmar's most lucrative industries.

Prohibited New Investment

U.S. persons previously were barred from new investments in Burma. However, a previously issued General License authorized U.S. persons to make new investments, or approve, finance, facilitate or guarantee new investment by foreign persons, provided that such new investment (a) is not pursuant to an agreement, or pursuant to the exercise of rights under such an agreement, that is entered into with the Burmese Ministry of Defence, state or non-state armed groups (which includes the military), or entities owned 50% or more by any of the foregoing; or (b) involves any person blocked under the Burma sanctions program (Section 537.530 of the Regulations).

U.S. persons (both individuals and entities) engaging in new investment in Burma are, however, subject to a reporting requirement, in compliance with the requirements set forth in the State Department's "*Reporting Requirements on Responsible Investment in Burma,*" The threshold used to be set at any aggregate investment exceeding US$500,000, but with the 2016 amendments, it has been reported that the threshold may be raised to US$5,000,000. This may be significant as the previous reporting requirement reportedly has discouraged a number of U.S. investors from investing in Burma.

THE TAKEAWAYS

The 2016 relaxation of the Burma sanctions program, in combination with the prior easing of U.S. strictures, has made it much easier to conduct business, by allowing U.S. persons considerably greater flexibility in trading with and investing in Burma. The added General Licences and amended SDN List have made it easier for U.S. persons to reside and work in Burma. Also, the banking related changes have aided a number of Burmese banks, which now may participate more fully in investment and trade activities, as well as U.S. persons seeking to trade with and invest in Burma, which now have available additional resources for financial services in Burma. Finally, the General Licenses authorizing transactions incidental to exports to and from Burma and the distribution of products within Burma should resolve significant logistical challenges for U.S. persons seeking to trade with Burma.

Nonetheless, even with the easing of the U.S. sanctions, hurdles to doing business with Burma remain, including relating to the international banking system. Anti-money laundering requirements continue to apply and can require U.S. and other banks to follow special due diligence protocols when dealing with jurisdictions where money laundering may be a concern, such as Myanmar. Also, because of the prior and the continuation of some U.S. sanctions, including the listing of many substantial Myanmar companies on the SDN list, banks remain cautious in dealing with Burma.

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However, Myanmar, as the last sizeable economy in Asia that remains markedly underdeveloped and untapped, presents a huge and growing opportunity for U.S. and U.S.-affiliated investors. Hopefully, as banks become more familiar dealing with Burma, and, particularly, if the remaining U.S. sanctions disappear into the sunset, more and more opportunities should be realized.

Notes:

[1] Executive Order 13047

[2] 31 C.F.R. Part 537

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