

## U.S. Conditionally Suspends Two Key Economic Sanctions Against Burma

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On July 11, 2012, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) issued general licenses — General License Nos. 16 and 17 — that substantially lift two key features of the U.S. economic sanctions against Burma (Myanmar): the ban on new investment in Burma by U.S. persons and the ban on exportation of financial services to Burma. These general licenses implement President Obama's announcement in May 2012 that the U.S. government would increase economic engagement with Burma. The general licenses are in line with similar steps undertaken in the European Union, Canada and Australia to lift their own sanctions with respect to Burma. As a result, there may be new opportunities for many companies to enter Burmese markets. However, new business in Burma should be undertaken cautiously, given that certain U.S. economic sanctions against Burma remain in place (including a ban on imports from Burma), the two OFAC general licenses include some important conditions and the future of the Burmese political environment is unpredictable. In that regard, also on July 11, President Obama signed an executive order authorizing among other things the imposition of new sanctions against persons threatening the "peace, security, or stability of Burma" and against persons involved in certain trade between North Korea and Burma.<sup>1</sup> This order and the qualifications in the general licenses seem intended as a reminder that economic sanctions will remain an important aspect of U.S. policy towards Burma.

### A. New Investments Permitted, With Conditions

Under OFAC's "General License No. 17," U.S. persons are now permitted to make new investments in Burma for the first time since 1997, subject to a reporting requirement and potentially significant conditions. In particular, U.S. persons may:

- enter into a contract that includes the economic development of resources located in Burma;<sup>2</sup>
- enter into a contract providing for the general supervision and guarantee of another person's performance of a contract that includes the economic development of resources located in Burma;
- purchase a share of ownership, including an equity interest, in the economic development of resources located in Burma; and
- enter into a contract providing for the participation in royalties, earnings or profits in the economic development of resources located in Burma, without regard to the form of the participation.

<sup>1</sup> Exec. Order No. 13,619 of July 11, 2012, 77 Fed. Reg. 41,243 (July 13, 2012).

<sup>2</sup> The term "economic development of resources located in Burma" means "activities pursuant to a contract the subject of which includes responsibility for the development or exploitation of resources located in Burma, including making or attempting to make those resources accessible or available for exploitation or economic use." 31 C.F.R. § 537.302(a). The following are examples of "economic development of resources located in Burma" cited in the regulations: "a contract conferring rights to explore for, develop, extract, or refine petroleum, natural gas, or minerals in the ground in Burma; or a contract to assume control of a mining operation in Burma, acquire a forest or agricultural area for commercial use of the timber or other crops, or acquire land for the construction and operation of a hotel or factory." 31 C.F.R. § 537.302(b).

General License No. 17 expressly excludes transactions involving the “Burmese Ministry of Defense, 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.” In addition, this general license excludes transactions involving Burmese individuals or entities on OFAC’s Specially Designated Nationals and Blocked Persons List (SDN List), including those entities in which blocked parties own a 50 percent or greater stake. Such blocked parties include a number of senior Burmese government officials, financial institutions, mining companies and other private companies. In general, the current Burmese government, its subdivisions and agencies are not on the SDN List.<sup>3</sup>

General License No. 17 also requires any U.S. person engaging in new investment in Burma to comply with the U.S. Department of State’s “Reporting Requirements on Responsible Investment in Burma,” described at a website.<sup>4</sup> At that website, the State Department indicates that the reporting requirements will be subject to public notice and comment. The State Department currently appears to contemplate two distinct types of reports: (1) a report within 60 days of any new investment pursuant to an agreement, or pursuant to the exercise of rights under such an agreement, that is entered into with the Myanmar Oil and Gas Enterprise, and (2) an annual report by any U.S. person whose aggregate investment in Burma exceeds \$500,000. This second report would require information, which the State Department would release publicly, about arrangements for security of any facilities in Burma as well as, among other things, the following information:

- due diligence policies and procedures (including those related to risk and impact assessments) that address operational impacts on human rights, worker rights and/or the environment in Burma;
- policies and procedures on anti-corruption in Burma;
- policies and procedures for community and stakeholder engagement in Burma;
- policies and procedures related to hearing grievances from employees and local communities, including whether grievance processes provide access to remedies, and how employees and local communities in Burma are made aware of said processes; and
- global corporate social responsibility policies, including those related to human rights, sustainability, worker rights, anti-corruption and/or the environment.

Companies that are considering undertaking substantial new investment in Burma may wish to consider how they would answer these questions and consider participating in the public notice and comment process regarding the State Department reports.

## **B. Provision of Financial Services Permitted, With Conditions**

OFAC’s “General License No. 16” permits the exportation and re-exportation of financial services to Burma, which U.S. law had prohibited since 2003. Specifically, the following types of activities are now authorized:

- funds may be transferred, directly or indirectly, from the United States or by a U.S. person, wherever located, to Burma; and

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<sup>3</sup> Note, however, that the SDN List is not exhaustive. The limitation on the general license regarding entities in which blocked parties own a 50 percent or greater stake reflects a broader policy that is memorialized in other OFAC regulations. See, e.g., 31 C.F.R. § 544.411.

<sup>4</sup> <http://www.humanrights.gov/burmaresponsibleinvestment/>.

- U.S. persons may provide, directly or indirectly, to persons in Burma, insurance services, investment or brokerage services (including but not limited to brokering or trading services regarding securities, debt, commodities, options or foreign exchange), banking services or money remittance services; loans, guarantees, letters of credit or other extensions of credit; or the service of selling or redeeming traveler's checks, money orders and stored value.

There are conditions in General License No. 16 similar to those in the general license authorizing new investment: no financial services may be provided for transactions involving the Burmese Ministry of Defense, any "state or non-state armed group," any person on the SDN List, or any entity in which any of the foregoing own a 50 percent or greater interest. In addition, General License No. 16 does not authorize debiting any blocked accounts. Unlike the general license for new investment, General License No. 16 does not include any particular reporting requirements, though transactions under the license would remain subject to OFAC's standard five-year recordkeeping requirements.<sup>5</sup>

### **C. Some Restrictions on Trade With Burma Remain in Place**

Despite OFAC's issuances of General Licenses No. 16 and 17, it is important to be mindful that key U.S. economic sanctions against Burma remain in place. These include broad prohibitions against engaging in transactions involving Burmese individuals or entities on the SDN List, including entities in which a blocked party owns a 50 percent or greater interest. The importation of Burmese-origin goods into the United States remains prohibited. In addition, the exportation or re-exportation of defense articles or defense services to Burma remains prohibited pursuant to the International Traffic in Arms Regulations,<sup>6</sup> and exports or re-exports of certain goods, technology or software to Burma remain controlled by the U.S. Department of Commerce, Bureau of Industry and Security. Finally, financial institutions should remember that the jurisdiction of Burma remains subject to special measures under Section 311 of the USA PATRIOT Act, as do two Burmese-based banks, Myanmar Mayflower and Asia Wealth.<sup>7</sup> The measures regarding the jurisdiction of Burma contain an exception for transactions that are, in effect, authorized by the financial-services general license.<sup>8</sup> There is no such exception for the two named banks, however, and as a result U.S. financial institutions may not maintain correspondent or payable-through accounts for those institutions, notwithstanding General License No. 16.

### **D. Recent European Union, Canadian and Australian Actions**

Prior to OFAC's issuances of the two general licenses, the European Union, Canada and Australia substantially suspended or lifted their respective economic sanctions against Burma. Below is a brief summary:

- On May 14, 2012, the Council of the European Union issued Council Regulation No. 409/2012, which suspends, for a one-year period, import, export and investment restrictions on Burma's natural resources industries. It came into force on May 16, 2012, and is directly applicable in all member states.
- On April 24, 2012, Canada lifted a number of sanctions, including prohibitions on imports from Burma, exports to Burma, the provision of financial services to Burma and the acquisition of financial services from Burma.

<sup>5</sup> See 31 C.F.R. § 501.601.

<sup>6</sup> See 22 C.F.R. § 126.1.

<sup>7</sup> 31 C.F.R. §§ 1010.651-.652.

<sup>8</sup> See 31 C.F.R. § 1010.651(b)(3).

- On June 7, 2012, Australia announced that it would lift its autonomous travel and financial sanctions on Burma. This took effect on July 3, 2012.

Despite the recent moves to lift key economic sanctions, like the U.S., the European Union, Canada, and Australia continue to enforce arms embargoes against Burma. In addition, Canada maintains asset blocking measures against certain designated Burmese persons.

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The U.S. government has opened new business opportunities for U.S. companies interested in investing in Burma or providing financial services. Nevertheless, there are conditions to the two new general licenses, some activities do remain restricted and, should the political situation in Burma deteriorate, the bans on new investment and on the provision of financial services could be re-imposed. Accordingly, companies seeking to do business in Burma should proceed cautiously.