



DOING BUSINESS IN MYANMAR – COMPLIANCE RISKS AND HOW TO MANAGE THEM

Briefing for British Chamber Members

This note provides a summary of a UKTI and British Chamber briefing on sanctions, corruption and compliance in Myanmar given by Herbert Smith Freehills at the British Ambassador's Residence in Yangon on 3 December 2014.

1. SANCTIONS

1.1 European Union ("EU") Sanctions

EU sanctions have effectively been reduced to an embargo on trade in arms and military equipment.

1.2 United States ("US") Sanctions

1.2.1 US sanctions are still in place but have been significantly relaxed by the issue of general licences authorising dealings in most areas.

1.2.2 However, the restrictions in 1.2.3 continue to apply to US persons. The following are considered to be **"US Persons"**:

- (A) companies incorporated in the US and their branches (regardless of where the branches are located). Non-US subsidiaries of US companies are not covered;
- (B) employees and officers of US companies and their branches (regardless of the nationality and location of those employees and officers);
- (C) all persons physically located in the US;
- (D) US citizens and "Green Card" holders; and
- (E) non-US companies with a sufficient business presence in the US (e.g. offices, management or staff are located in the US).

1.2.3 US Persons are restricted as follows:

- (A) no dealings whatsoever with persons designated as "Specially Designated Nationals" ("**SDNs**") by OFAC (the department of the US Treasury responsible for administering US sanctions), or with entities that are 50% or more owned by one or more SDN, or parties acting on behalf of SDNs;
- (B) no "new investments"¹ or "financial services" involving Myanmar's Ministry of Defence (including the Office of Procurement) or state or non-state armed groups;

¹ Defined broadly to include entry into agreements for (i) the economic development or exploitation of resources located in Myanmar; (ii) the general supervision and guarantee of another person's performance of a contract that includes the economic development of resources in Myanmar; (iii) the purchase of a share of ownership, including an equity interest, in the economic development of resources located in Myanmar; and (iv) the participation in royalties, earnings or profits in the economic development of resources located in Myanmar. The term does not include the entry into, performance of, or financing of a contract to sell or purchase goods, services, or technology, unless such contract includes any of the aforementioned activities.



- (C) there are reporting requirements² to the US Department of State for all "new investments" involving the Myanmar Oil and Gas Enterprise (MOGE) (the commercial arm of the Ministry of Energy) or exceeding \$500,000. These apply only to US entities engaging in new investments, not to US persons employed by non-US persons or US persons facilitating a non-US company's investment; and
- (D) no "facilitation" of a non-US person transaction which would be prohibited if carried out by a US person. This prohibition is particularly relevant to US directors of non-US companies.

1.2.4 Non-US persons may be designated as SDNs if they "materially assist, sponsor, or provide financial, material, or technical support" to an SDN or the Myanmar Government or assist in human rights abuses.

1.3 Risks arising from the Sanctions Regime

- 1.3.1 Breach of the EU or US sanctions regime by EU or US persons respectively amount to a criminal offence.
- 1.3.2 If US persons are involved in Myanmar business this may trigger reporting requirements and heightened scrutiny or result in inadvertent breaches. It may therefore be advisable under certain circumstances to ring-fence US directors and US affiliates from participating in Myanmar business.
- 1.3.3 Repatriation of fees or royalties from Myanmar may be restricted.
- 1.3.4 Loan facilities or insurance contracts may include wide representations and warranties regarding dealings with sanctioned countries regardless of whether the borrower or insured is subject of a particular sanctions regime.
- 1.3.5 The US can easily re-instate the wide ranging sanctions regime by rescinding the General Licenses, as the sanctions remain "on the books".

2. ANTI-BRIBERY AND CORRUPTION

2.1 US Foreign Corrupt Practices Act 1977 ("FCPA")

- 2.1.1 The FCPA applies to
 - (A) US "issuers"³ and "domestic concerns";
 - (B) employees and agents of US "issuers" and domestic concerns;
 - (C) US citizens and "Green Card" holders;
 - (D) non-US entities with their principal place of business in the US; and
 - (E) any person who causes an act in furtherance of a corrupt payment to take place in the US.

² Reporting requirements are potentially onerous and require the investor to provide details not only about the investment, but also about the investor's policies and procedures in relation to human rights, workers' rights, anti-corruption and environmental protection.

³ A company is an "issuer" if it is listed on a national securities exchange in the US (either stock or American Depository Receipts), or the company's stock trades in the over-the-counter market in the US and the company is required to file reports with the Securities Exchange Commission (SEC).



- 2.1.2 It is worth noting that the FCPA has wide extra-territorial scope and is one of the most widely enforced anti-corruption statutes in the world.
- 2.1.3 The FCPA prohibits the provision of anything of value to non-US public officials⁴ with a view to wrongfully influencing the official in order to obtain or retain business, but excludes:
 - (A) facilitation payments⁵;
 - (B) payments expressly authorized by local law; and
 - (C) reasonable bona fide expenditure relating to (i) execution of a contract with a government, and (ii) promotion or demonstration of products.
- 2.1.4 The FCPA requires companies to keep accurate books and records and to maintain sufficient internal accounting controls.
- 2.2 **UK Bribery Act 2012 ("UKBA")**
 - 2.2.1 The UKBA applies to
 - (A) UK companies;
 - (B) UK nationals or residents;
 - (C) non-UK companies carrying on business in the UK; and
 - (D) any person committing a bribery offence in the UK.
 - 2.2.2 Like the FCPA, the UKBA has extra-territorial reach.
 - 2.2.3 The UKBA prohibits providing or offering anything of value with corrupt intent. Unlike the FCPA, the UKBA covers bribery in both the public and private sectors and does not contain an exemption for facilitation payments.
 - 2.2.4 The UKBA has a corporate offence of failing to prevent bribery by those "associated" with the company. This may cover bribery by any employee or third party or intermediary performing services for or on behalf of a company. The sole defence to this is if a company has put in place "adequate procedures" to prevent bribery by its "associated" persons.
- 2.3 **Myanmar Anti-Corruption Act 2013**
 - 2.3.1 The Myanmar Anti-Corruption Act prohibits bribery of public officials. The Act includes an express prohibition of giving gifts and entertainment with corrupt intent. Although facilitation payments are not expressly mentioned, it is likely that they fall within the definition of "bribe" used in the Act.
- 3. **HOW TO MITIGATE SANCTIONS AND BRIBERY AND CORRUPTION RISK**
 - 3.1 Perform due diligence checks on counterparties. The greater the risk, value or complexity of the transaction, the more detailed the due diligence should be.
 - 3.2 Include appropriate representations and warranties and termination provisions in your contracts. Take a risk-based approach.

⁴ "Foreign officials" include employees of State Owned Enterprises" (SOEs).

⁵ Facilitation payments are "grease payments" made to speed-up routine government actions which involve non-discretionary acts to which the payer is entitled (e.g. customs clearance, providing water and electricity or provision of telecoms services).



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- 3.3 Ensure you have an appropriate compliance programme in place which should include policies and procedures aimed at monitoring your business and your intermediaries going forward.

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Herbert Smith Freehills has advised a number of its multinational clients on investing into Myanmar and has built up significant experience on the ground. The firm's Corporate Crime & Investigations team is the largest in the APAC region with expertise in both contentious and non-contentious matters.

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