

US GOVERNMENT ISSUES ADVISORY ON HEIGHTENED RISKS ASSOCIATED WITH DOING BUSINESS IN BURMA

The Biden Administration has put US and international companies and financial institutions on notice regarding the wide-ranging legal risks of doing business with and in Burma, including under the Foreign Corrupt Practices Act ("**FCPA**"), Treasury Department Office of Foreign Assets Control ("**OFAC**") sanctions, Commerce Department Bureau of Industry and Security ("**BIS**") export controls, US anti-money laundering laws and regulations, and US human rights laws. Given the strong focus by the US Department of Justice and other enforcement agencies on adequate risk assessments and compliance frameworks, all companies are well advised to consider their exposure to the delineated risks in their business, and ensure that their compliance framework adequately mitigates those risks within the company's risk tolerance set by senior management or the Board.

On January 26, 2022, the US Departments of State, Treasury, Commerce, Labor, Homeland Security, and the Office of the US Trade Representative issued an advisory, "Risks and Considerations for Businesses and Individuals with Exposure to Entities Responsible for Undermining Democratic Processes, Facilitating Corruption, and Committing Human Rights Abuses in Burma (Myanmar)" ("**Advisory**"), informing relevant stakeholders of the heightened legal and reputational risks associated with doing business in Burma and its military regime. The whole of government approach underscores the focus of the US Government and should amplify for those potentially impacted by the Advisory the need to take action as appropriate.

The Advisory identifies key entities and sectors that provide economic resources for Burma's military regime and informs businesses and individuals associated with these entities and sectors of the restrictions that have been imposed by the US, other countries, and international organizations. In particular, the Advisory states that state-owned enterprises ("**SOEs**") in Burma regularly provide economic

resources for Burma's military regime. The Advisory discourages businesses and individuals from engaging with these SOEs due to their alleged corruption. Burmese SOEs are alleged in the Advisory to be involved in corruption, forced and child labor, surveillance and internet freedom restrictions, and other human rights abuses. The Advisory also highlights gems and precious metals, real estate and construction projects, and arms and military equipment as high risk and sensitive sectors in Burma. The Advisory states that given the lack of government regulation, transparency, and oversight, these sectors are rife with potential for money laundering, corruption, terrorist financing, and human rights abuses. The Advisory urges businesses and individuals involved with these entities and sectors to understand the legal impediments and significant risks associated with such involvement and conduct appropriate due diligence if they are directly or indirectly involved in operations or supply chains connected to the Burmese military regime.

KEY RESTRICTIONS

The Biden Administration has taken a number of actions against Burma's military regime in response to the February 1, 2021 military coup. On February 11, 2021, President Biden signed [Executive Order](#) ("EO") 14014 "Blocking Property with Respect to the Situation in Burma." On the same day OFAC imposed blocking sanctions on 10 individuals and three entities including Myanmar Imperial Jade Co., Ltd., Cancri Gems & Jewellery Co., Ltd., and Myanmar Ruby Enterprise, adding them to the list of [Specially Designated Nationals and Blocked Persons](#) (the "**SDN List**"). In May 2021, OFAC [added](#) nine military-appointed cabinet members, three adult children of previously designated military officials, and four members of the State Administration Council to the SDN List who are believed to be connected to the Burmese military or security forces and allegedly responsible for the military coup. In addition, on January 31, 2022, OFAC [added](#) seven individuals and two entities connected to Burma's military regime to the SDN list, including top government officials and major entities that provide financial and military equipment support to Burma's military sector. US persons are prohibited from engaging in transactions that involve any property or interests in property of such SDNs, unless authorized by an OFAC license or exemption.

In March 2021, BIS applied a presumption of denial to license applications for the export and re-export of items to Burma's military and security services. BIS also moved Burma from its previous Country Group B designation to the more restrictive Country Group D:1 which "makes certain license exceptions or portions of license exceptions unavailable for Burma, or imposes conditions on the use of such license exceptions." BIS also added Burma to the list of countries subject to "military end user" and "military end use" restrictions. Under the Export Administration Regulations ("**EAR**")'s Military End Use and Military End User ("**MEU**") Rule, an exporter, re-exporter, or transferor requires an EAR license if they know or have reason to know that covered items (including certain commercial aircraft and aircraft parts) are intended (1) for a "military end use" or (2) to a "military end user" in China, Russia, Venezuela, and now Burma, even if the item is intended for civilian use.

Additionally, BIS added the Ministry of Defence, the Ministry of Home Affairs, Myanmar Economic Corporation ("**MEC**"), and Myanmar Economic Holdings Limited ("**MEHL**") to its Entity List. The BIS Entity List includes non-US persons

that are subject to specific licensing restrictions in addition to those found elsewhere in the EAR. BIS can add any person to the Entity List simply by asserting that it has a "reasonable cause to believe that [the person] has been involved in activities contrary to the national security or foreign policy interests of the United States." In July 2021, BIS also added four copper mining companies that have revenue-sharing agreements with MEHL to the Entity list, including Wanbao Mining, Ltd., Myanmar Wanbao Mining Copper, Ltd., Myanmar Yang Tse Copper, Ltd., and King Royal Technologies Co., Ltd. Accordingly, US and non-US companies are prohibited from the unlicensed export, reexport and transfer of goods, technology and software subject to the EAR to the listed entities.

RISK MITIGATION MEASURES

As the Advisory suggests, it is strongly recommended for companies with exposure to Burma to implement appropriate compliance programs and conduct enhanced due diligence to mitigate the risk of engaging in conduct that may expose them to significant reputational, financial, and legal risks, including violations of US anti-corruption, sanctions, export controls, and money laundering laws.

Corruption Risk Mitigation

The Advisory notes that Burma's junta-controlled SOEs play a dominant role in the natural resources sector where corruption is disproportionately high. Accordingly, businesses and individuals subject to the FCPA involved in dealings with Burma's SOEs are on notice of high corruption risk.

Considering the high corruption risks, businesses and individuals should consider whether they need to update their anti-corruption risk assessment regarding their Burmese business and ensure that their compliance framework is currently adequate to properly manage those risks within the company's risk tolerance. At a minimum, companies should consider the need for heightened or refreshed due diligence on their business counterparties to address these risks.

Sanctions Risk Mitigation

In general, as the Advisory recommends, companies should employ a risk-based approach to sanctions compliance by developing, implementing, and routinely updating a sanctions compliance program which should incorporate at least five essential components of compliance: (1) management commitment; (2) risk assessment; (3) internal controls; (4) testing and auditing; and (5) training. Although Burma is not currently the subject of country-wide sanctions, it is considered a high-risk country from a sanctions compliance perspective.

To mitigate OFAC sanctions risk, companies should ensure they implement appropriate internal controls, such as screening of counterparties and their direct and indirect owners, conduct customer and transaction due diligence, and seek contractual representations and undertakings regarding sanctions compliance.

Export Controls Risk Mitigation

As noted above, BIS has already added military and regime entities in Burma, as well as SOEs and commercial companies that provide support to Burma's military, to the BIS Entity List. As a result, export, reexports, or transfers (in-country) of

items subject to the EAR in which the listed entities are a party to the transaction now require a license from BIS, and applications for such licenses are generally denied.

To mitigate the risk of participation in EAR-prohibited exports involving persons on the BIS lists, companies, financial institutions, and individuals should adopt a risk-based approach to (a) first identify transactions that involve persons listed on the BIS lists through customer, payment and transaction screening, and (b) then conduct enhanced due diligence on any such transactions to confirm, by certification and/or evidence of a license from the exporter, that the transactions do not violate the EAR or any other US law requirements. If the company determines that the transaction involves EAR items, it should seek written confirmation from its counterparty regarding potential US export licensing requirements and whether the parties have obtained required BIS licenses.

US enforcement authorities will expect companies to identify customers and counterparties that are on the BIS lists and take reasonable steps to mitigate EAR risk, such as by (i) obtaining a certification of EAR compliance to the customer's activity through the customer's account, (ii) confirming that the counterparty has policies and procedures that make the certification credible, and (iii) also by not providing trade finance to such parties without first confirming that the financing will not involve any EAR items (unless there is an applicable BIS license).

Money Laundering Risk Mitigation

As the Advisory notes, entities with ties to the US financial system should be aware that US financial institutions are required to comply with the Bank Secrecy Act ("**BSA**") and its implementing regulations administered by the Treasury Department's Financial Crimes Enforcement Network ("**FinCEN**"). BSA requirements generally include establishing anti-money laundering ("**AML**") programs, filing currency transaction reports, and reporting suspicious activity. It is best compliance practice for US financial institutions to take a risk-based approach to identify, assess, and mitigate their money laundering and terrorist financing risks. In particular, the Advisory suggests that a financial institution may ask its customers—including customers engaged in business potentially related to Burma—for additional information to establish a risk profile and understand the nature of the customer relationship.

The Advisory asserts that Burma faces significant money laundering risks and gaps in implementing its AML legal framework. Because of the lack of regulation and transparency, several key sectors in Burma's economy are rife with potential for money laundering. For this reason, FinCEN designated Burma in 2003 as a jurisdiction of "primary laundering concern" pursuant to Section 311 of the USA PATRIOT Act and prohibited US financial institutions from maintaining correspondent accounts for Burmese banks. Noting some progress in the Burmese AML regime, FinCEN issued an administrative exception in 2016 to permit US financial institutions to maintain correspondent accounts for Burmese banks under certain conditions, including the requirement to use enhanced due diligence procedures. However, FinCEN declined to rescind its designation of Burma as a primary money laundering concern under Section 311 given a list of continuing concerns with respect to the jurisdiction.

As the Advisory notes, Burma's money laundering risk has only been heightened by its recent military coup. Under the current situation, FinCEN may very easily lift the administrative exception and reimpose the restrictions which cover financial institutions such as US banks and branches of non-US banks in the US among others, to again prohibit them from opening or maintaining correspondent accounts for Burmese banks. When/if that happens, not only must US financial institutions cease the provision of correspondent relationships with Burmese institutions, but they must also ensure that they do not provide indirect correspondent services through the correspondent accounts of other non-US financial institutions. Covered financial institutions that fall short of their USA PATRIOT Act and BSA requirements may face civil and criminal penalties. Both US financial institutions and non-US financial institutions may wish to assess their current direct or indirect relationships with the Burmese financial sector and prepare to take quick action to address any reimposition of the currently suspended Section 311-based restrictions with respect to Burma.

The Advisory particularly emphasizes money laundering risks in Burma's gems and precious metals sector and real estate sector and recommends several ways for companies and investors to mitigate such risks. In particular, the Advisory notes that US businesses maintaining a physical presence in Burma should investigate to determine whether payments are benefiting designated entities and should take appropriate measures to ensure their compliance with applicable requirements related to US money laundering controls. The Advisory lists the following non-exhaustive list of red flags for potential real estate-based money laundering in Burma that businesses should consider when assessing money laundering risk and conducting due diligence:

- Significant and unexplained geographic distance between agent, customer, and property
- Customers with unclear true beneficial ownership or controlling interest
- High-value cash payments
- Counterparties, government or otherwise, that are not subject to monitoring or supervision
- The speed of the transaction
- Successive transactions
- Introduction of unknown or substitute parties at the late stage of a transaction
- Third party vehicles (e.g., newly established corporations) used to obscure the ownership of the buyer
- Extremely over- or under-valued transactions

According to the Advisory, if any of these red flags are detected, businesses and individuals are encouraged to conduct increased know-your-customer practices to ensure that customers provide satisfactory responses to address concerns. US financial institutions and foreign-located money services businesses subject to the BSA are required to file reports with FinCEN consistent with their suspicious

activity reporting obligations. Non-US financial institutions may have similar suspicious transaction reporting obligations in their own jurisdictions.

Human Rights Due Diligence Tools

The Advisory identifies several government resources for human rights compliance, including:

- the US Department of Labor's Comply Chain, which provides information on due diligence measures specific to forced labor and child labor in supply chains;
- the US Department of Labor's Better Trade Tool, which links trade data to available information on labor exploitation around the world and offers users an additional level of detail.

The Advisory also identifies multiple sources to provide guidance for human rights best practice and heightened due diligence in high-risk regions, including:

- the UN Guiding Principles on Business and Human Rights;
- the OECD Guidelines for Multinational Enterprises;
- the International Labour Organization (ILO) publication, "Combating Forced Labour: A Handbook for Employers and Business;" and
- the Office of the High Commissioner for Human Rights guide on "The Corporate Responsibility to Respect Human Rights" (OHCHR guide).

The Advisory also encourages businesses engaged with public and private security around their operations to implement the Voluntary Principles on Security and Human Rights, which provide guidance in providing security around business operations in a manner that respects human rights.

Furthermore, businesses exporting products, and services with surveillance capabilities are encouraged by the Advisory to implement the US Department of State Guidance on Implementing the UN Guiding Principles for Transactions Linked to Foreign Government End-Users for Products or Services with Surveillance Capabilities. The Guidance provides practical human rights guidance to US businesses to prevent their products or services from being misused by regime end-users to commit human rights abuses. Given the references in the Advisory, companies would, if the situation arose, have to explain why they did not follow these guidance documents in developing their due diligence practices.

CONCLUSION

We have seen an increasing use of advisories by the Biden Administration to advise the business community of specific legal risks of doing business in high-risk jurisdictions. These advisories both provide guidance and important signals regarding current enforcement priorities. They also put companies on notice regarding the government expectation that such risks be managed adequately. Companies ignoring these risks do so at their own peril. Although the Advisory is explanatory only and does not have the force of law, it clearly provides context for

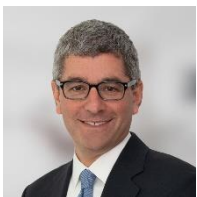
the US government's expectations and compliance standards. Businesses and individuals should review the information in the Advisory and adjust their compliance strategies accordingly.

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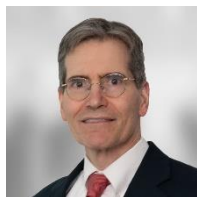
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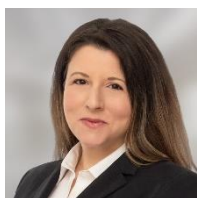
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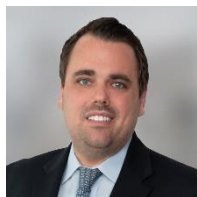
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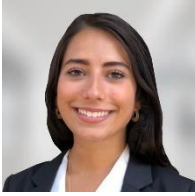
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