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New Burma Act Would Hinder US Investment In Myanmar

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In late October, a bipartisan coalition of lawmakers introduced legislation in both houses of Congress that would impose sanctions targeting certain members of Myanmar's military. The legislation was developed in response to alleged human rights violations committed against the Rohingya people, a minority group that predominantly lives in western Myanmar, at the hands of Burmese military leaders. If enacted, the Burma Act of 2017[1] would mark a pullback of the easing of U.S. sanctions policy against Myanmar; President Barack Obama formally terminated the United States' Burmese sanctions program just over one year ago, in October 2016. Because of the Burmese military's extensive investments and connections throughout the country's economy, the Burma Act would present a challenge for prospective U.S. investors in Myanmar.

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History of U.S. Sanctions Targeting Burma/Myanmar

The United States first imposed sanctions against Burma in 1997 in response to large-scale repression of democratic demonstrators. The initial sanctions introduced by President Bill Clinton prohibited new investment in Burma by U.S. persons and forbid U.S. persons[2] from facilitating or approving new investment in Burma by non-U.S. persons. The George W. Bush administration strengthened U.S. sanctions targeting Burma through the issuance of three additional executive orders and the signing of two new laws. At its height, the Burma sanctions program:

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- Prohibited imports into the United States of Burmese-origin products;
- Prohibited the export of financial services to Burma by any party from the United States or by a U.S. person, wherever located; and
- Blocked the property and interests in property for a steadily widening list of individuals and entities, including Burmese government officials and entities owned or controlled by Burmese government officials or the government of Burma.[3]

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Following Myanmar's election of a quasi-democratic government in 2010, and the subsequent release from house arrest of State Counselor Aung San Suu Kyi, the Obama administration issued a series of executive orders that eased certain aspects of the

Burmese sanctions, including revoking the ban on the importation of Burmese-origin goods into the United States.

On Oct. 7, 2016, President Obama issued an executive order formally terminating the Burmese sanctions program. Following issuance of the executive order, the Office of Foreign Assets Control removed all individuals and entities targeted by the Burmese sanctions regulations (BSR) from the specially designated nationals and blocked persons (SDN) list and unblocked all property and interests in property previously blocked pursuant to the BSR. Certain Burmese individuals and entities remained on the SDN List pursuant to other sanctions programs.

Despite termination of the Burmese sanctions program, Myanmar continues to be a challenging business environment for non-Burmese investors and companies. Notwithstanding these challenges, some investors have deployed capital in Myanmar in sectors such as infrastructure and tourism.[4] These include foreign subsidiaries of U.S. companies, such as portfolio companies of multinational private equity firms with sales in Myanmar that, even without a physical presence, are reliant on local Burmese partners for distribution and other services.

Overview of Current Legislation

The Burma Act would impose restrictions on U.S. persons' dealings with — and provision of support for — members of the Burmese military.[5] These include the following:

- Prohibition against the provision of security assistance or engagement in military-to-military programs with the armed forces or security forces of Burma; and by extension, the Burmese economy more broadly.
- Reinstatement of import restrictions on jadeite and rubies from Burma.
- Designation of — and imposition of visa bans targeting — senior officials of the Burmese military or security forces who (1) played a direct and substantial role in the commission of human rights abuses; or (2) failed to investigate human rights abuses committed by subordinates.

In addition, the Burma Act would authorize the U.S. Treasury Department to restrict the opening or maintenance in the United States of correspondent or payable-through accounts by U.S. financial institutions on behalf of a foreign financial institution that holds property or conducts transactions on behalf of any senior official of the Burmese military or security forces that meets the above description.[6]

Consistent with the proposed legislation, at a Nov. 15, 2017, news conference in Yangon, Myanmar, Secretary of State Rex Tillerson stated that, while he would not recommend "broad-based economic sanctions" against Myanmar, targeted sanctions against people responsible for commission of human rights abuses might be appropriate. Both the Burma Act and Secretary Tillerson's comments are representative of the trend in U.S. sanctions policy in favor of sanctions that target specific actors and categories of transactions rather than broad country-based restrictions.

Unlike the United States, to date, the European Union has not introduced new sanctions on Myanmar. However, the EU's existing arms embargo on Myanmar remains in place (currently effective until April 30, 2018), and on Oct. 16, 2017, the Council of the European Union called for an end to alleged human rights violations and said it "may consider additional measures" if no improvements are made.[7]

Additional Challenges to U.S. Investors in Myanmar

Some experts estimate that the Burmese military controls up to 50 percent of the country's economy (and that an additional 20 percent of the economy is controlled by individuals and entities targeted under separate sanctions programs).[8] As a practical matter, enactment of the Burma Act in its current form would mean that a significant portion of the Burmese economy would be "off limits" to U.S. investors and businesses, either directly or because the partners, distributors, contractors and other entities on which they rely are owned or controlled by members of the Burmese military.

For U.S. companies and investors currently doing business in Myanmar, the new sanctions designations contemplated by the Burma Act may result in a greater need to reevaluate crucial in-country partnerships or contractual relationships.[9] Notably, U.S. companies are prohibited from doing business with any entity in which an SDN — or multiple SDNs taken together — hold a 50 percent or greater ownership interest. This aptly named "50 Percent Rule" means that U.S. companies are prohibited from dealing with certain entities — majority owned by one or more SDNs — that are not, themselves, included on the SDN list. OFAC also advises U.S. persons to proceed with caution when dealing with entities that are controlled by SDNs through means other than an ownership interest.

What Next?

Regardless of whether it becomes law, the introduction of the Burma Act is a useful reminder that U.S. sanctions policy can — and sometimes does — change quickly and is not always driven by the executive branch. In contrast to traditional military solutions, sanctions allow the U.S. government to increase — or decrease — pressure on a targeted country, entity or individual with relative ease.[10]

The unfortunate tradeoffs of flexibility in sanctions policy are increased uncertainty and compliance costs for U.S. companies, investors, their subsidiaries, and controlled interests doing business in politically turbulent economies, including Myanmar. These same concerns can also apply for non-U.S. companies that use the U.S. financial system to transact in such economies. Among other challenges, companies must continually monitor updates to U.S. sanctions regimes and ensure that their internal controls (including policies, due diligence requirements, restricted party and restricted country screening procedures) reflect the current state of play with respect to U.S. sanctions policy, including potential legislative and executive developments, to avoid harm to their business interests when changes occur unexpectedly. U.S. companies and investors may benefit from pursuing structural protections at the negotiation stage (e.g., contractual termination rights) when approaching business opportunities with parties or in regions that could foreseeably become future sanctions targets.

The Burma Act still is in its preliminary stage; however, U.S. companies and investors who are conducting — or contemplating — business in Myanmar should monitor the situation closely (as we will).

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[1] The House of Representatives bill is entitled the "BURMA Act of 2017," while the Senate bill is entitled the "Burma Human Rights and Freedom Act of 2017."

[2] "U.S. persons" generally include U.S. citizens and permanent residents, wherever they are located in the world; persons physically located in the United States, regardless of nationality; and U.S.-organized entities and their foreign branches.

[3] Unlike U.S. sanctions targeting Cuba or Iran, the Burmese Sanctions Regulations ("BSR") were not "comprehensive sanctions," as U.S. persons were permitted to export products and non-financial services to Burma (provided that the transactions did not involve parties targeted by U.S. list-based sanctions).

[4] See Reuters, IFC Myanmar investment to rise to $ bln in three years, (Dec. 12, 2014), https://www.reuters.com/article/myanmar-ifc/ifc-myanmar-investment-to-rise-to-1-bln-in-three-years-idUSL3N0TW3RK20141212; Institutional Investor, Investors Have High Hopes as Myanmar Prepares to Pick a President, (Mar. 8, 2016), https://www.institutionalinvestor.com/article/b14z9pc3bm81cb/investors-have-high-hopes-as-myanmar-prepares-to-pick-a-president; Deal Street Asia, Myanmar is a land of opportunities & presents a long-term growth strategy, (Mar. 6, 2016), https://www.dealstreetasia.com/stories/32340-32340/

[5] This description is based on House and Senate bills found at https://democrats-foreignaffairs.house.gov/sites/democrats.foreignaffairs.house.gov/files/Taiwan%20Leg.pdf; https://www.congress.gov/bill/115th-congress/senate-bill/2060/text.

[6] See PBS, Tillerson says U.S. considers individual sanctions for Myanmar, (Nov. 15, 2017), https://www.pbs.org/newshour/world/tillerson-says-u-s-considers-individual-sanctions-for-myanmar; NYTimes, Rex Tillerson Tells Myanmar Leaders to Investigate Attacks on Rohingya, (Nov. 15, 2017), https://www.nytimes.com/2017/11/15/world/asia/rex-tillerson-myanmar-aung-san-suu-kyi.html

[7] Council of the European Union, Press Release, Myanmar/Burma: Council adopts conclusions, (Oct. 16, 2017), http://www.consilium.europa.eu/en/press/press-releases/2017/10/16/myanmar-burma-conclusions/#

[8] WSJ, Buzz Over Post-Sanctions Myanmar Fades for Many U.S. Investors, (Aug. 28, 2015), https://www.wsj.com/articles/buzz-over-post-sanctions-myanmar-fades-for-many-u-s-investors-1440796685; See also Financial Times, Myanmar: the military-commercial complex (Feb. 2, 2017), https://www.ft.com/content/c6fe7dce-d26a-11e6-b06b-680c49b4b4c0

[9] The prohibitions of the Burma Act generally would not extend to foreign-organized subsidiaries that are owned or controlled by U.S.-organized investors or businesses.

[10] As a general matter, sanctions imposed by Congressional act are more difficult to amend than sanctions imposed by executive order.