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Back to the Future: New Executive Order Restarts Myanmar Sanctions

On February 11, 2021, President Joe Biden issued an [Executive Order](#), “Blocking Property with Respect to the Situation in Burma” (the “Executive Order”). The Executive Order is in response to a February 1 coup by the Burmese military, following an election in which the country’s elected leader, Aung San Suu Kyi and her National League for Democracy (“NLD”) party prevailed despite opposition from the armed forces.¹ Following the coup, President Biden demanded that Myanmar reverse course, and threatened to impose new sanctions if the demand was not met.²

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The Executive Order immediately imposes sanctions on a number of Burmese officials and entities, and opens the door for additional, broad-ranging sanctions if the current situation in Myanmar persists. The Executive Order marks the reinstatement of country-based sanctions targeting Myanmar, which the Obama administration terminated in 2016. Although the Executive Order’s prohibitions are currently not as restrictive as the former Burmese Sanctions Regulations were at their height, companies that conduct business or invest in Myanmar should be alert to the potential for evolving, and escalating, restrictions.

The Executive Order

The Executive Order imposes blocking sanctions on any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, to:

- Operate in the defense sector of the Burmese economy or any other sector of the Burmese economy as determined by the Secretary of the Treasury, in consultation with the Secretary of State;
- To be responsible for or complicit in, or to have directly or indirectly engaged or attempted to engage in actions or policies that have undermined democratic processes, threatened peace and stability, limited freedom of expression or assembly, or caused human rights abuses in Burma;
- To be a leader or official of the military or security forces of Burma, the Government of Burma (on or after February 2, 2021), or related entities;
- To be a political subdivision, agency, or instrumentality of the Government of Burma;
- To be a spouse or adult child of any person blocked pursuant to the Executive Order;
- To have materially assisted, sponsored, or provided financial, material, or technological support to, or goods or services to or in support of any person blocked pursuant to the Executive Order; or
- To be owned or controlled by, or acting for or on behalf of, directly or indirectly, the military or security forces of Burma or a person blocked pursuant to the Executive Order.

¹ Alice Cuddy, *Myanmar coup: What is happening and why?*, BBC News (Feb. 9, 2021), <https://www.bbc.com/news/world-asia-55902070>

² David E. Sanger, *Declaring Democracy Won’t Be Subverted, Biden Demands Russia and Myanmar Reverse Course*, The New York Times (Feb. 3, 2021), <https://www.nytimes.com/2021/02/03/us/politics/biden-myanmar-russia.html?searchResultPosition=2>.

Concurrent with issuance of the Executive Order, the Office of Foreign Assets Control (“OFAC”) within the U.S. Department of the Treasury designated eight Burmese individuals and three Burmese entities to the Specially Designated Nationals And Blocked Persons (“SDN”) List:

- Designated Individuals: Ye Aung; Aung Lin Dwe; Soe Htut; Mya Tun Oo; Ye Win Oo; Tin Aung San; Myint Swe; and Sein Win.
- Designated Entities: Cancri Gems & Jewellery Co., Ltd.; Myanmar Imperial Jade Co., Ltd.; and Myanmar Ruby Enterprise

Implications

As an initial matter, any person or entity designated pursuant to the Executive Order will be added to OFAC’s SDN List and subject to ordinary blocking requirements. Specifically, U.S. persons will be required to (1) block (or freeze) any assets of parties designated pursuant to the Executive Order that come within the U.S. person’s possession or control; (2) reject prospective transactions involving parties designated pursuant to the Executive Order; and (3) in each of the foregoing scenarios, file required reports with OFAC within 10 days.

Pursuant to OFAC’s 50 Percent Rule, the restrictions imposed on parties designated pursuant to the Executive Order automatically extend to any entity in which the designated person—individually, or in the aggregate with other SDNs—holds a 50% or greater interest. Application of OFAC’s 50 Percent Rule underscores the importance for covered parties to conduct thorough due diligence of prospective counterparties in Myanmar, including their significant beneficial ownership, particularly given the Burmese military’s extensive involvement in the country’s economy.³

In addition, any transaction with a party designated pursuant to the Executive Order will expose U.S. persons to civil penalties of up to \$307,922 or twice the value of the impermissible transaction (whichever is greater) per violation.

The Executive Order also authorizes the expansion of sanctions targeting Myanmar in a number of familiar ways, including

- Industry-Based Sanctions: The Executive Order currently targets the defense sector of the Burmese economy, but authorizes future sanctions against “any other sector of the Burmese economy as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State.” The U.S. government adopted a similar approach with respect to Venezuela. In November 2018, President Trump issued Executive Order 13850, authorizing OFAC to impose sanctions against parties who operate in Venezuela’s gold sector *or* engage in “transactions involving deceptive practices or corruption and the Government of Venezuela.” In ensuing months, OFAC leveraged Executive Order 13850 to target additional, key sectors of the Venezuelan economy, including the energy and financial sectors. It is foreseeable that the U.S. government could seek to pursue a similar, escalating approach to the situation in Myanmar.
- Government-Focused Sanctions: Currently, the Executive Order allows for the discretionary designation of persons determined to be officials of the Government of Burma or political subdivisions of that government. The United States imposed similar targeted restrictions against the Venezuelan government, before ultimately issuing

³ As noted above, the Executive Order authorizes OFAC to designate any party determined to be “owned or controlled by, or acting for or on behalf of, directly or indirectly, the military or security forces of Burma or a person blocked pursuant to the Executive Order.” OFAC’s 50 Percent Rule speaks only to ownership and not to control. See [OFAC FAQ 398](#). An entity that is controlled (but not owned 50% or more) by one or more blocked persons is not considered automatically blocked pursuant to OFAC’s 50 Percent Rule. *Id.* Entities in Myanmar that are controlled by the Burmese military are not automatically blocked pursuant to the Executive Order, unless the entity is majority owned by one or more SDNs.

a blocking order against the Venezuelan government in August 2019, effectively creating the current partial embargo. It is possible that the U.S. government could ultimately pursue a similar approach here.

- Extraterritorial Applicability: The Executive Order authorizes OFAC to target, *inter alia*, any person, regardless of nationality, determined (1) to operate in targeted industries of the Burmese economy (currently, the defense sector); and (2) to have materially assisted, sponsored, or provided support (including goods or services) to or in support of a party designated under the Executive Order. Because this authority is not cabined to U.S. persons, OFAC could leverage the Executive Order to pressure third countries and their nationals not to engage in transactions with parties sanctioned pursuant to the Executive Order. In recent years, OFAC has demonstrated an increased willingness to flex this extraterritorial authority in the context of other sanctions programs, and it is possible that OFAC could adopt a similar strategy with respect to Myanmar.

The Executive Order represents the United States' initial response to the February 1 coup in Myanmar. However, as discussed above, the Executive Order authorizes the rapid escalation of sanctions, if the situation in Myanmar should persist (or deteriorate). The Biden administration's swift imposition of sanctions in response to the coup underscores the need for U.S. and non-U.S. persons alike to assess any potential sanctions exposure in response to the first round of designations under the Executive Order, and to continue to monitor for further developments.