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60–Day Notice of Proposed Information Collection: Reporting Requirements for Responsible Investment in Burma

Comment On: DOS-2012-0046-0001
Agency Information Collection Activities; Proposals, Submissions, and Approvals: Reporting Requirements for Responsible Investment in Burma

Document: DOS-2012-0046-0003
Comment on DOS-2012-0046-0001

Submitter Information

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Government Agency Type: Federal
Government Agency: DOS

General Comment

Please see attached file for our comments regarding proposed reporting requirements for responsible investment in Burma.

Sincerely,

Adam Kanzer
Domini Social Investments

Attachments

Domini Comments DRL Burma Reporting

October 3, 2012

U.S. Department of State, DRL/EAP
Suite 7817
Burma Human Rights Officer
2201 C Street, N.W.
Washington, DC 20520

Re: ***Title of Information Collection*****: Reporting Requirements on Responsible Investment in Burma**

Dear Burma Human Rights Officer:

We are writing to you on behalf of Domini Social Investments LLC in response to your request for comments on the proposed Reporting Requirements on Responsible Investment in Burma. Domini is an SEC-registered investment adviser with approximately $1 billion in assets under management. We manage a family of mutual funds for individual and institutional investors.

Domini is a founding member of the Conflict Risk Network (CRN), and strongly supports CRN's comments, submitted to the State Department under separate cover.

We believe the interests of long-term investors are aligned with the State Department's policy goals in Burma. We are strongly supportive of the proposed reporting requirements for two reasons. First, reporting can act as a meaningful accountability mechanism that can allow the State Department to monitor corporate activity to ensure that the lifting of sanctions is serving its intended purpose. Second, *public* reporting enables investors and members of civil society to participate in this process to ensure that investment in Burma is undertaken responsibly. Institutional investors, who have legal and financial incentives to closely monitor their holdings, can play a particularly important role encouraging responsible investment in Burma if we are equipped with the right information.

Our Approach to Corporate Investment in Burma

Our investment approach is focused on two aspirational objectives: ecological sustainability and universal human dignity. These twin goals define our global investment standards[1] and our work as shareholders to engage with corporations to improve their social and environmental performance and mitigate risks to investors and other stakeholders. All potential investments in the Domini Funds are subject to our social, environmental and governance analysis.

[1] Domini's Global Investment Standards are available at http://www.domini.com/GlobInvStd/index.htm.

Domini has consistently excluded companies from our portfolios that have significant investments in Burma, with limited exceptions. We have also engaged with corporations to encourage them to cut ties with the military regime.[2] We have devoted substantial time and resources over the years to direct engagement with companies in our portfolios on a wide range of human rights and environmental issues.

Today, we are cautiously optimistic that responsible investment in Burma will help to solidify democratic reforms. Our caution, however, is tempered by serious concerns that the desire to exploit Burma's natural resources and cheap labor market will override the very serious obstacles to democratic reform that remain. We have begun to reach out to companies in our portfolios to better understand their response to this new environment.

The following are among the key questions we will seek to answer when evaluating companies making investments in Burma:

- Who benefits from the products and services?
- Does the corporate investment create a significant revenue stream for the military?
- Are there allegations of abuses tied to the company?
- What due diligence processes has the company put in place to address environmental and social risk?

We believe the State Department's proposed reporting requirements will provide us with useful information to allow us to differentiate between responsible and irresponsible investment in Burma. As discussed below, however, we believe the requirements could be strengthened in a number of areas.

The 'Burden' of Accountability

Rather than viewing reporting as a "burden," reporting should be viewed as a necessary means to avoid and mitigate human rights violations and environmental harm. Prudent mechanisms designed to increase accountability and reduce harm benefit all parties, including the corporations investing in Burma. Corporations unwilling to bear these costs should not be making investments in sensitive areas of the world. Corporations that do so without appropriate due diligence and public accountability may find that the burdens of doing business in these regions far outweigh the expected costs of reporting. In either case, it is clear to us that unaccountable corporate activity imposes too great a burden on Burmese people and their hopes for a stable democracy.

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[2] For information on our successful engagement with Toyota Motor, please see http ://www.domini.com/about-domini/News/Press-Release-Archive/Investor-Pressure-Moves-20101005.doc_cvt.htm. Additional background on our human rights work is available at http://www.domini.com/shareholder-advocacy/Human-Righ/index.htm.

Key Recommendations

As noted above, we endorse the full set of comments submitted by the Conflict Risk Network. We would like to offer the following additional comments that we believe are of particular importance:

1. ***Section 11: Risk Mitigation reporting should be public.***

Risk mitigation reporting is a core area of interest for investors. This section may, in fact, be the most important area of interest for investors. According to the United Nations Guiding Principles on Business and Human Rights:

> The responsibility to respect human rights requires that business enterprises have in place policies and processes through which they can both know and show that they respect human rights in practice. Showing involves communication, providing a measure of transparency and accountability *to individuals or groups who may be impacted and to other relevant stakeholders*, including investors. … Formal reporting by enterprises is expected where risks of severe human rights impacts exist, whether this is due to the nature of the business operations or operating contexts. The reporting should cover *topics and indicators concerning how enterprises identify and address adverse impacts on human rights.* (Paragraph 21, emphasis added)

The current draft reporting framework states that risk mitigation information need not be included in a company's public report. In our view, this is inconsistent with the text and spirit of the Guiding Principles, and significantly weakens the impact of the reporting framework as an accountability mechanism. For the virtuous cycle of reporting to work, investors and civil society must be sufficiently informed.

Detailed and thorough due diligence is critical for responsible investment in Burma. Investors need to know which companies have an effective and comprehensive approach. We expect to find significant differences between companies, as we do in other human rights areas. Without risk mitigation reporting and, as discussed below, performance reporting, investors will not have the information they need to differentiate between responsible and irresponsible investors in Burma. If we cannot see how companies have identified and mitigated risks, we cannot utilize these reports to mitigate these risks in our own portfolios, or to engage with corporations to more effectively address them on the ground. Standardized reporting by corporate investors in Burma will provide investors with important leverage to effectively engage with corporate management, and improve practices. It will also allow us to make more informed investment decisions.

In the State Department's briefing on May 17 2012, the Administration specifically addressed its desire to seek accountability through transparency. If this information remains confidential, however, the reporting framework's use as an accountability mechanism will be significantly impaired.

2. ***Companies should provide progress reports on the implementation of their policies.***

Section 5 of the current draft reporting requirements seeks information on corporate policies and procedures, but does not request reports on the implementation of these policies, including progress made and obstacles encountered. This is a very serious omission.

Corporate human rights policies have become relatively commonplace, but we still find material differences in the implementation of these policies. We have engaged with a broad range of corporations on human rights issues, both as they affect corporate operations and corporate supply chains. Although we recognize the importance of strong policies and procedures, company efforts to implement these policies and address challenges on the ground are of the utmost importance.

Policy-setting and due diligence are only the beginning steps in the establishment of a human rights program. The real work is done over time, as companies work towards continuous improvement and respond to changing conditions. Although developing a human rights and environmental policy is a prerequisite for fulfilling corporate human rights responsibilities, a policy itself does not guarantee that a company is avoiding human rights and environmental risks in practice. Without ongoing focused implementation efforts, a policy can be an empty vessel.

Progress reports provide informed investors with the detail necessary to understand whether a company is serious about its human rights commitments. These reports can also be critically important engagement tools as they help to identify areas of strengths and weaknesses, allowing investors to recommend – and hold companies accountable for – areas for improvement. More importantly, these reports can be used by corporate management to gauge their progress and improve their human rights performance over time.

In addition to the risk mitigation report provided pursuant to Section 11, these performance reports can also provide critical information for all stakeholders seeking to improve human rights conditions on the ground by identifying systemic, recurring problems and offering various models for addressing these challenges. Corporate reporting that lacks this level of detail will be of limited use to investors, corporate managers or other stakeholders. We believe that the State Department's ability to assess the impact of new investment in Burma will be similarly impaired.

A number of companies in a range of sectors publish regular reports on the implementation of their human rights policies. We would be pleased to share good examples of corporate human rights reporting if it would be useful.

3. ***Companies should aggregate their investments, and identify the parent.***

We recommend that the reporting framework be clarified to allow investors to more easily identify the corporate investor. If, for example, a global corporation has numerous subsidiaries that are making investments in Burma, the investor should be able to easily tie these reports together and identify the publicly traded parent company. Although many stakeholders will need to identify the entity making the direct investment, institutional investors will have difficulty utilizing these reports if a ticker symbol or CUSIP for the ultimate parent company is not provided.[3]

These reports should also identify key business and trading partners in order to ensure that public companies that do not have operations on the ground, but have placed orders through intermediaries, including buying agents, are covered.

4. ***It should be clear that reporting covers indirect impacts through supply chains, and through bank financing.***

Section 5 of the draft reporting requirements mentions "supply chain" in one place, but then specifically references "operational impacts" in Section 5a. We would recommend that the requirements clarify that they are intended to include corporations that source manufacturing or raw materials from Burma, but have no physical operations there.

We understand that these draft reporting requirements are issued pursuant to OFAC General License No. 17, and that OFAC General License No. 16 covers "export of financial services" to Burma. We are therefore unclear whether these reporting requirements would apply to financial institutions that may, for example, be financing projects in Burma or otherwise providing financing or credit to individuals or entities based in Burma, or doing business there. We believe it is critical for banks and insurers to be included in these requirements, and note that a number of major banks already have human rights policies in place, including formal policies and procedures to conduct due diligence on the social and environmental impacts of their project finance activities.

5. ***We recommend that human rights responsibilities be more clearly spelled out.***

We strongly support the State Department's decision to tie these reporting requirements to the United Nations' Guiding Principles on Business and Human Rights. We would caution, however, that most companies are not familiar with the Guiding Principles, and many that are familiar with the Principles have not operationalized them. In addition, many companies are not familiar with the International Bill of Rights or the Core ILO Conventions. A simple reference to the Guiding Principles will therefore be of little use to these companies. We would strongly suggest that each element of the reporting framework cite the relevant provision of the Guiding Principles, and note relevant standards and principles that are implicated. For example, section 6, regarding "Arrangements with Security Service Providers," should cite the Voluntary Principles on Security and Human Rights, and section 7, regarding "Property Acquisition," should include the concept of Free, Prior and Informed Consent, and cite the United Nations Declaration on the Rights of Indigenous Peoples.

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[3] There are, of course, technical details that will need to be worked through here, but we note that the Environmental Protection Agency has been able to work through this issue with respect to its Greenhouse Gas Reporting Program.

The State Department may also wish to consider providing an appendix with guidance to companies on other existing relevant legal requirements, such as the Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 1504, the California Transparency in Supply Chains Act, and the general prohibition on importation of goods made by forced labor, which was recently reaffirmed by Congress.

6. ***Section I: MOGE Investment Notifications should be made public.***

Aung San Suu Kyi has been clear that foreign investors should not conduct business with MOGE, which has historically provided the military regime with its largest source of revenues. MOGE has been a serious source of human rights and environmental violations and a main source of concern for large-scale corruption. To accurately distinguish "responsible" from "irresponsible" investments in Burma, investors will need this information.

7. ***Section 5 and 11: "Not Applicable" should be removed, "None" should require reasons for reporting as "None."***

The instruction to indicate "'none', 'not applicable,' or another appropriate response' in Sections 5 and 11, should be removed. All companies investing in Burma should have appropriate policies and procedures, and should conduct a human rights and environmental impact assessment as a part of their due diligence. We would be very concerned to see a company that otherwise meets these reporting requirements indicate "not applicable." In addition, the inclusion of this option suggests that the State Department envisions situations where these risk mitigation efforts would not be necessary. We cannot envision such a situation. If these options cannot be removed, we would strongly recommend that any company that selects "none" or "not applicable" be required to explain their answer in their public report.

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We thank you again for the opportunity to provide these comments, and hope that they are helpful in strengthening the reporting requirements. If you have any questions, we would be happy to discuss these comments or provide further information.

Sincerely,

Adam Kanzer
Managing Director & General Counsel

Shin Furuya
Vice President, Responsible Investment Research
Engagement Specialist