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From: Simon MacMahon [simon.macmahon@sustainalytics.com]
Sent: Thursday, October 04, 2012 5:43 PM
To: BurmaPRA
Cc: Farnam Bidgoli; Melissa Chase
Subject: Public Comment - Reporting Requirements for Responsible Investment in Burma
Attachments: Draft Reporting Requirements on Responsible Investment in Burma - Sustainalytics submission 041012.pdf

Dear Burma Human Rights Officer,

Please find attached the Sustainalytics comment in response to Public Notice 7971, with regards to Reporting Requirements for Responsible Investment in Burma.

Sincerely,

Simon

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U.S. Department of State, DRL/EAP
Suite 7817
2201 C Street, NW
Washington, DC 20520

Re: Reporting Requirements on Responsible Investment in Burma

Dear Burma Human Rights Officer,

Sustainalytics is pleased to submit the following comments in response to the Department of State's information collection for the Reporting Requirements on Responsible Investment in Burma. Sustainalytics is a leading global provider of environmental, social, and governance (ESG) research and analysis, and we assist some of the world's largest asset owners, asset managers, and organizations in integrating ESG considerations into their investment decisions. Our submission to the Department of State is informed by our work providing research and analysis to clients concerned with the potential political, regulatory, and human rights risks of corporate involvement in high-risk countries, such as Burma.

Over the past year, Sustainalytics has grown cautiously optimistic at the reform process in Burma. We believe that new investment can act as a force for sustainable democratic development in Burma, improving standards of living and building capacity. However, with the legacy of abuses connected to foreign investment in Burma, Sustainalytics agrees with the Department of State that any investment must occur in a way that transparently addresses and mitigates the potential risk of complicity in human rights violations and/or the exploitation of the Burmese people.

Sustainalytics therefore applauds the Department of State's reporting requirements as a valuable initiative that will support the stated goal of the U.S. government to promote transparency and reform in Burma. We also believe that robust reporting requirements will allow investors and other members of civil society to hold companies accountable for the impact of their operations. Attached, as requested from the Department of State in Public Notice 7971, are our comments on:

- I. The necessity of proposed information collection for the proper performance of State Department functions;
- II. The burden of the proposed information collection; and
- III. Means by which to improve the quality, utility, and clarity of the information to be collected

Thank you for allowing Sustainalytics the opportunity to submit our comments and inform the development of the Reporting Requirements for Responsible Investment in Burma. Please do not hesitate to contact us if you have questions or would like additional information.

Sincerely,



Simon MacMahon
Global Director, Advisory Services
Sustainalytics

THE NECESSITY OF PROPOSED INFORMATION COLLECTION FOR THE PROPER PERFORMANCE OF STATE

DEPARTMENT FUNCTIONS

The Reporting Requirements are an excellent tool to support the U.S State Department's goal to promote political reform and support human rights and democracy in Burma, as well as a means by which the State Department can ensure that the recent easing of sanctions on Burma does not lead to the exploitation of the Burmese people or their natural resources.

In requiring the public disclosure of relevant information on policies on human rights, the environment, and corruption, the Department of State will facilitate a process by which other stakeholders can hold companies, as well as the Burmese government, accountable. Our clients will use this information to assess impacts and to identify areas on which they can engage with companies to improve their performance. Similarly, the disclosure of information will allow Burmese citizens to better exercise their rights vis-à-vis their government and parties invested in their country.

We also believe that robust reporting requirements from the United States will be a clear signal to other countries to impose similar responsibilities on their own nationals. Strong requirements from the United States will provide a clear template of best practices and set the bar for the rest of the world.

THE BURDEN OF THE PROPOSED INFORMATION COLLECTION

We do not find the reporting to be burdensome. The details requested are necessary components of a strong risk management programme and are requirements for investment in regions of the world that are at a high risk for violations of human rights and environmental degradation. The transparent disclosure of this "material" information to shareholders and other stakeholders is aligned with existing SEC guidelines related to risk disclosures. Access to this information will allow investors and other stakeholders to make informed decisions regarding their investment, involvement and/or engagement with companies.

MEANS BY WHICH TO IMPROVE THE QUALITY, UTILITY, AND CLARITY OF THE INFORMATION TO BE COLLECTED

1. Elimination of the 'not applicable' answer category

We note that the as part of Reporting Question 5, which requires companies to provide a summary of policies and procedures relating to human rights, worker rights, anti-corruption, and environmental policies and procedures, as well as Reporting Question 7, which requires companies to provide details regarding land acquisition if they have acquired property above specified thresholds, submitters have the option of responding "none" or "not applicable". We recommend that "not applicable" be struck from the list of potentially acceptable responses, and that any submitter who responds "none" be explicitly required to provide further detail, including an explanation of why the specified policies are not necessary in order for the company to invest and operate responsibly in Burma. The UN Special Rapporteur on Human Rights in Myanmar, Tomas Ojea Quintana, has noted the absence of a regulatory framework in place in Burma to prevent, protect against, or provide reparations for potential negative

impacts of corporate activity.¹ As such, companies are expected to have policies and programmes in place to fill this gap.

2. More explicit alignment with global standards

We are strongly supportive of the references to relevant current global standards such as the United Nations Guiding Principles on Business and Human Rights, as well as the OECD Guidelines for Multinational Enterprises. We believe that these references should be both expanded and made even more explicit. For example:

- Reporting Requirement 5 on Human Rights, Worker Rights, Anti-Corruption, and Environmental Policies and Procedures
 - Item A should provide an explicit reference to Principle 16 of the United Nations Guiding Principles and the ILO Declaration on Fundamental Principles and Rights at Work.
 - Item C should include references to the globally recognized right to Free, Prior and Informed Consent.²
 - Item D should provide an explicit reference to the United Nations Guiding Principle 19, regarding mechanisms for integrating and responding to human rights impacts, and Guiding Principle 22, which calls for access to remedy.
- Reporting Requirement 6 on Arrangements with Security Service Providers should include references to the Voluntary Principles on Security and Human Rights.³
- Reporting Requirement 7 on Property Acquisition should include references to Free, Prior and Informed Consent; as well as the International Finance Corporation's Handbook for Preparing a Resettlement Action Plan.⁴

There are a number of additional industry-specific guidelines that the reporting requirements could also refer to. While the Department of State cannot compel adherence to any of these standards, we believe that by clearly linking the Reporting Requirements to the globally-accepted best practices on human rights, land compensation, labor, environment, and anti-corruption, the Department of State will guide companies towards understanding and implementing strong policies in these areas.

3. Reporting on the Progress of Investments and the Implementation of Programmes

The draft Reporting Requirements call for an annual report to be filed by a company with investment in Burma. However, there are no specifications in place with regards to continued reporting; from our understanding of the Requirements, a company could potentially submit identical comments on due diligence and policies year-on-year. We believe that this is a significant weakness of the current Reporting Requirements and encourage the State

¹Progress Report of the Special Rapporteur on the situation of human rights in Myanmar, 7 March 2012

²United Nations Declaration on the Rights of Indigenous Peoples, http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

³Voluntary Principles on Security and Human Rights, http://www.voluntaryprinciples.org/files/voluntary_principles_english.pdf

⁴[http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_resettle/\\$FILE/ResettlementHandbook.PDF](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_resettle/$FILE/ResettlementHandbook.PDF)

Department to require companies to provide updates on progress and information in regards to the implementation of the policies and programmes disclosed.

Stakeholders, including both the State Department but also civil society, need timely information in order to best assess the impacts of corporate involvement, and the outcomes of the company's policies to mitigate risk. We note that this is in line with Guiding Principle 20, which calls on businesses to track their policies and programmes "in order to verify whether adverse human rights impacts are being addressed", and Guiding Principle 21, which specifically calls for reporting to be external, in order to allow for transparency and accountability to stakeholders.

4. Public Disclosure of Military Communications and Risk Mitigation

We note that the Reporting Requirements specify that Items 9-11, including Military Communications and Risk Mitigation, do not need to be included in the Public Report. We strongly disagree with this. In light of the fact that the draft requirements provide a mechanism for a submitter to explain why it believes the State Department should designate information in its reporting as confidential or otherwise exempt from disclosure, we believe that the de facto designation of items 9-11 as confidential is unnecessary.

The information disclosed under Risk Mitigation is absolutely critical if stakeholders are to assess corporate involvement and should be mandatory. The identification and mitigation of risks and impacts is a key indicator of the preparedness and capacity of companies to operate in high-risk environments. Equally, disclosure of Military Communications will allow stakeholders to better understand how companies are interacting with the military. In our experience, even those companies that implement strong policies with independent security service providers may still rely on or otherwise work with the military in order to secure their operations. This is a frequent area of concern and transparency around any cooperation or interaction will allow us to better understand the impetus, nature, and impacts of such interaction.

5. Clarification on inclusion of subsidiaries, contractors, and supply chain partners.

The draft Reporting Requirements specify application to "any U.S. person undertaking new investment", either with the Myanmar Oil and Gas Enterprise, or that which in aggregate exceeds USD 500,000. The requirements do not specify whether they apply to parent corporations or subsidiaries, nor do they note whether they are applicable to companies acting as contractors to operations in Burma, even if such contracts exceed USD 500,000. Furthermore, although Reporting Requirement 5 does call for disclosure on supply chain in Burma, Item A narrows the topic to those policies that address operational impact. Further clarity on the scope of applicability of these requirements is necessary, including an explicit reference to supply chain and/or financing relationships.