

# PUBLIC SUBMISSION

<b>As of:</b> October 04, 2012 <b>Received:</b> October 03, 2012 <b>Status:</b> Posted <b>Posted:</b> October 04, 2012 <b>Tracking No.</b> 1jw-8178-y586 <b>Comments Due:</b> October 04, 2012 <b>Submission Type:</b> Web
--

**Docket:** DOS-2012-0046

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-2012-0046-0002

Comment on DOS-2012-0046-0001

---

## Submitter Information

**Name:** John Goyer

**Address:**

1615 H Street NW

Washington, DC, 20062-2000

**Email:** jgoyer@uschamber.com

**Phone:** (202) 463-5359

**Organization:** US Chamber ofCommerce

---

## General Comment

Comments Concerning Reporting Requirements for Responsible Investment in Burma in response to Public Notice 7971, submitted on behalf of the US Chamber of Commerce, the National Foreign Trade Council, and the US-ASEAN Business Council.

---

## Attachments

FINAL VERSION Comments Concerning Reporting Requirements on Responsible Investment in Burma(1)

## **Comments Concerning Reporting Requirements for Responsible Investment in Burma**

In response to Public Notice 7971

**Submitted by**

**U.S. Chamber of Commerce**

**National Foreign Trade Council**

**U.S. ASEAN Business Council**

October 1, 2012

The U.S. Chamber of Commerce, the National Foreign Trade Council, and the U.S.-ASEAN Business Council welcome the opportunity to provide comment on the Reporting Requirements that have been proposed as a necessary condition for investment in Burma. We commend the Administration's decision to suspend all sanctions that bar investment without discrimination among industry sectors. This will provide commercial opportunities for U.S. companies, who bring with them high standards of corporate governance, transparency, and labor and environmental protection. Investment by American companies in Burma will bring in capital, technology, and jobs, and the people of Burma should benefit substantially as a result.

**Reporting requirements.** We find the precedent set by the imposition of reporting requirements worrisome. Our global competitors face no such burden. Indeed, the published request for comment raises the basic question, "whether the proposed information collection is necessary for the proper performance of our [Department of State] functions."

An unbiased reading of U.S. national security interests — and the place of Burma in them — neither warrants the reporting requirements *per se*, nor justifies them as necessary at all to the proper performance of State's functions. The Department will always have independent and multiple sources of intelligence on the course that Burma as a country takes, so long as the normal diplomatic relations now in place are preserved. While the requirements may be politically necessary, they are a dead weight opportunity cost and may well discourage investment by U.S. persons in Burma that would otherwise take place. In any event, we believe that inclusion of the reporting requirements as a condition to General License #17 is misplaced. Failure to strictly comply with these new reporting requirements, especially if inadvertent, should not be subject to the penalties for noncompliance with an OFAC license.

As to questions of transparency and "responsible conduct," U.S. companies must comply with the Foreign Corrupt Practices Act which has proven a bulwark for transparency, and, in a globally wired world, the strategic importance of reputation constitutes an operational imperative. Ironically, the prescriptive nature of the reporting requirements will probably prevent investment by U.S. entities, save for the relatively few large companies with global reach

that have established policies and procedures on risk management, human rights, labor practices, environmental protection, social investment, *etc.*, readily available on their corporate websites. That is not to minimize the substantial burden of tracking, assembling, and entering relevant data, as the draft reporting requirements necessarily entail.

Procedures such as the ones required to be disclosed here have historically been treated as proprietary by many companies. This is especially so on the environmental side where specific quantitative limitations in risk matrices which are intended as guidance may be poorly understood by the public, become the basis for legal action, or transform into soft law. Additionally, many companies do not share detailed health, safety, environmental and social due diligence practices, as these are closely tied to business development and may reveal by implication a company's commercial intentions. We suggest that State clarify that the reporting requirements are satisfied by company-wide or higher level governance documents (e.g., a company's sustainability report), addressing the company's activities globally rather than specific to Burma. This would reduce risks of public disclosure and may also result in the inclusion of more information in the Public Report.

As to burden, the estimated average of 21 hours *per* response seems extremely low, especially given the need for broad, multidisciplinary review of a company's submittal. The time required could be significantly reduced by clarifying that reporting requirements are satisfied by company-wide or higher level governance documents as described above. Also, for many companies, clarification is needed as to whether separate reporting is required for each legal entity or whether an overall company report is sufficient. When is the \$500,000.00 reporting threshold met? Is it met when the company's total investment reaches this amount or when each legal entity separately reaches the threshold? Additionally, the proposed reporting requirement is only applicable to new investment by U.S. persons, but many multinational companies will find that investment by non-U.S. persons is often intertwined with U.S. persons, making the reporting requirement more challenging than may have been envisioned. Reporting requirements should not burden U.S. companies unduly in terms of cost or time effort.

It is not clear whether the Public Report will be a copy of the Government Report version indicating where information has been redacted or if it may be a more general report with a note on the omitted items. We suggest that this be clarified.

### **New Investment**

As a preliminary matter, it would be helpful to define the scope of "new investment" and the meaning of the term "resources" for purposes of this reporting requirement. During several industry meetings, the State Department has suggested that the reporting requirements are not intended to encompass the extraordinarily broad scope of the term "new investment" as used in the OFAC regulations. Under the Burmese Sanctions Regulations, 31 C.F.R. 537.311, "new investment" includes:

- The entry into a contract that includes the economic development of resources located in Burma;
- Entering into a contract for the general supervision and guarantee of another person's performance of a contract that includes the economic development of resources located in Burma;
- Purchasing "a share of ownership, including an equity interest, in the economic development of resources located in Burma," or
- Participating "in royalties, earnings, or profits in the economic development of resources located in Burma, without regard to the form of the participation."

Because this definition is broad, it can be interpreted to include almost any expenditure of funds. For example, while it is clear that a contract with a distributor is not "new investment", it is not clear whether related or incidental activities with a distributor may be "new investment". Further clarification from OFAC or a narrower scope of the State Department's reporting requirement would be extremely helpful, preferably before any reporting requirement comes into effect.

We suggest that the reporting requirements be clarified to include investment in natural resources, joint ventures, partnerships, or infrastructure development, but not in supply chain activities, dealings with independent distributors in Burma, or dealings with third-country entities where the U.S. entity is not exporting directly to Burma. Additionally, there is confusion as to which government payments or bank deposits would be within the scope of the reporting requirements. To the extent the Administration seeks to include a broad range of activities, we request a published (illustrative) list of activities that qualify as "new investment." It would also be helpful to publish a non-inclusive list of examples of activities that are outside the scope of "new investment" and thus not subject to the reporting requirements.

### **Human Rights, Worker Rights, Anti-Corruption and Policies and Procedures**

Clarification is needed as to whether State is seeking policies and procedures from the U.S. party and its affiliates or whether State is also seeking policies and procedures of local partners (*i.e.*, independent distributors). It seems that the Reporting Requirement does not extend to the latter but we seek confirmation as to this understanding.

For a country with Burma's history, which is now just opening up to foreign contact, it may take some time to achieve the full measure of the OECD guidelines. Will the State Department provide guidance to companies with regard to human rights, anti-corruption and the environment for emerging countries/economies that is tailored to the on-the- ground realities in Burma?

### **Property Acquisition**

The requirement in Section 7.d and 7.e regarding historical information is problematic. Providing complete and accurate information on prior resettlements or dislocations would be extremely difficult, and any submittal of this nature would be unreliable or possibly misleading. Although a requirement to submit information from public records might provide a partial solution, it is unclear the extent to which public records could be counted on to be complete and accurate.

## **Risk Mitigation**

Please clarify whether the due diligence summary applies only to activities meeting the new investment reporting threshold. As drafted, it would appear that the reporting requirement applies to all due diligence in the country — this would prove to be unduly burdensome and would discourage anything but the most traditional forms of new investment.

**Sunset provisions.** At a general level, we urge that the reporting requirements be conditioned by a sunset provision. This could be tied to Executive Order 13047 which is renewed annually, or to the Burmese Freedom and Democracy Act (P.L. 112-163) just renewed through 2015. This would allow for an adequately empirical “trial run” of reporting and a realistic assessment of actual costs *versus* benefits.

**Comprehensive transparency.** The modest aggregate investment threshold of \$500,000.00 suggests that the Department seeks a very granular catalogue of financial transactions in Burma by U.S. persons. In order to foster comprehensive transparency among all parties, we recommend that the reporting requirements be extended to all U.S. persons regardless of source or tax status — corporate, foundation, other grant or individual payment. Indeed, NGOs and other groups with long experience operating in Burma may have established best practices and methods that would be helpful to other organizations and to companies that seek to operate in that market. If the Department’s judgment is that the reporting information will aid in the proper performance of its functions in Burma, then all U.S. actors should be placed under the same reporting obligation.

This reporting requirement may cause substantial harm to the competitive position of companies and also conflict with standard confidentiality provisions of normal international agreements that typically provide that information shall be considered confidential and shall not be disclosed to any other person or entity without the other party’s prior written consent. This reporting requirement may need to be modified to exclude confidential information per the relevant contract, since the mandatory reporting requirement may discourage Burma from contracting with U.S. entities.

**Transaction Threshold.** With respect to reporting payments to each Government of Burma entity and/or any sub-national or administrative entity that possesses or claims to possess authority over new investment activities in Burma, we recommend that the threshold be raised to \$100,000.00 to be consistent with the Securities and Exchange Commission’s August 22

adoption of Rule 13q-1, pursuant to Section 1504 of Dodd Frank Wall Street Reform and Consumer Protection Act. In the rule, the SEC mandated reporting of payments that are not *de minimus*, defined as \$100,000.00 or more.

**Military Communications.** With respect to the “Military Communications” reporting requirement: the language that a submitter must document communications with armed forces, comprehensively defined, “that were material to the submitter’s investments in Burma” is unclear and overly burdensome, since nearly all communications with a host government’s security forces could be considered “material.” As drafted, the requirement simply is not feasible.

The reporting requirements also create the impression that the State Department will be looking to “encourage” U.S. companies to use “Security Service Providers which are signatories to the International Code of Conduct for Private Security Service Providers.” It seems unlikely that many security providers in Burma (if any) are signatories to the International Code of Conduct for Private Security Service Providers, and those few that are will be able to leverage premiums. Thus, these reporting requirements are likely to put U.S. firms at a competitive disadvantage vis-à-vis other companies whose home governments do not impose such wide ranging reporting requirements.

As a general principle, companies requiring security for operations must work closely with host governments and their security forces. These ongoing, regular relationships are critical to develop appropriate mechanisms and operating procedures to ensure a secure operating environment for workers and facilities. The contacts are also an important way to ensure that all parties involved in providing security comply with international laws and standards governing human rights, including those set forth in the Voluntary Principles on Security and Human Rights. In many countries, host governments compel companies to work with specific state security agencies/officials who bear responsibility to protect sector assets. In other countries, companies have leeway to hire outside contractors to assist with security. Regardless of the specific type of security arrangement, companies’ ongoing contact with the host government’s security forces is critical to the ability to operate successfully.

Burma will not be unique in this regard. Indeed, given the country’s rapidly changing state of political affairs, companies will need to work closely with the host government’s military and security structure in order to design, implement, and monitor appropriate security measures that will both keep workers safe and comply fully with international human rights laws and standards. Companies in all likelihood will need to communicate multiple times daily with host government armed forces to share information on security conditions and potential threats, report security incidents, and request security assistance.

Given these expected extensive contacts, requiring submitters to track and report meetings and/or communications and related information (name, rank, group affiliation, nature of meeting) would

be both tremendously burdensome and expensive – requiring companies to create new monitoring databases and employ additional support staff to track, assemble, and enter data. At the same time, reporting such contacts and/or communications would provide little-to-no value in helping the U.S. government achieve its stated goal of “evaluat[ing] whether easing the ban on investment by U.S. persons advances U.S. foreign policy goals to address the national emergency with respect to Burma.”

We recommend that State modify this requirement so that it not apply to any regular, ongoing, or routine operational contact with the armed forces of Burma, including:

- Communications to share information on security conditions related to planning, protection operations, and force posture adjustments;
- Communications related to reporting of security incidents; and
- Communications related to requests for the government’s assistance.

\*\*\*