



**Comment of EarthRights International on the Reporting Requirements
for Responsible Investment in Burma**

January 2016

OMB Control Number: 1405-0209

Information Collection Title: Reporting Requirements for Responsible Investment in Burma

Bureau of Democracy, Human Rights, and Labor
C/O Jennifer Stein, Rm 7822
U.S. Department of State
2201 C Street NW
Washington, D.C.

EarthRights International (ERI) respectfully submits this comment to the U.S. Department of State (“State Department”) as part of the review process for the U.S. Reporting Requirements for Responsible Investment in Burma (the “Reporting Requirements”). We urge the State Department to renew and strengthen the Reporting Requirements to ensure new U.S. investment activity in Burma is conducted responsibly and transparently and promotes, rather than undermines, the democratic reform process.

The November 2015 Burmese elections were a historic milestone in the country’s transition towards democracy after decades of military dictatorship. The success of the National League for Democracy (NLD), and statements by President Thein Sein and the military leadership that they will respect the outcome, will undoubtedly lead to an influx of new investment. But despite this progress, significant challenges remain. In renewing the national emergency with respect to Burma in May 2015, President Obama emphasized that “concerns persist regarding the ongoing conflict and human rights abuses in the country, particularly in ethnic minority areas and Rakhine State” and “Burma’s military operates with little oversight from the civilian government and often acts with impunity.”¹ This remains true. Past patterns and ongoing conflict and human rights abuses associated with foreign investment projects and other business activities present ample reason to remain concerned that new investment could undermine the democratic reform process.

The Reporting Requirements are an important tool through which the U.S. government can promote transparency and accountability, support political reform, and obtain information to monitor and assess whether new U.S. investment activity in Burma is furthering U.S. foreign policy goals as intended. Removing or weakening the Reporting Requirements during this critical transition period would weaken the NLD and civil society’s push for transparency and efforts to combat corruption, and a return to secretive foreign investment in an economy still dominated by military crony-owned companies would exacerbate conflict, land rights disputes,

¹ Message from the President of the United States, Continuation of the National Emergency with Respect to Burma, 114th Congress, 1st Session, House Doc. 114-39 (May 18, 2015) *available at* <https://www.gpo.gov/fdsys/pkg/CDOC-114hdoc39/pdf/CDOC-114hdoc39.pdf>.

corrupt management, and other human rights threats.

While in Burma last week, Deputy Secretary of State Antony J. Blinken reiterated the commitment to ensure U.S. companies contribute positively to the reform process, specifically promising that “the United States will continue to promote responsible investment by our companies in Myanmar, which we believe is strengthening new local businesses and industries and building human capital, not just extracting resources.”² The Reporting Requirements are one of the key tools in our arsenal to fulfill that promise.

We thus urge the State Department to reaffirm its commitment to promoting responsible foreign investment in Burma and renew the Reporting Requirements. At the same time, however, we observe that the Reporting Requirements have not been as effective in meeting their goals as they could be. We therefore urge that the Reporting Requirements should be strengthened in key respects, to eliminate loopholes that undermine their effectiveness and to enhance the quality and utility of the information provided. As set forth in Part V, below, the State Department should:

- Clarify that the Reporting Requirements apply to facilitating new investment;
- Clarify that the Reporting Requirements apply equally to “passive” and hands-on investors;
- Require that local partners and business relationships must be disclosed;
- Remove the option of confidential reporting of risk mitigation under #11;
- Make clear that failure to comply with the Reporting Requirements will lead to enforcement actions and penalties; and
- Ensure that Burmese translations are available.

I. Relevant background on EarthRights International

ERI has been working since 1995 to assist communities in Burma to raise their concerns regarding the impacts of corporate activities, particularly extractive operations; to mitigate those impacts; and to seek justice and redress when those operations violate their human rights and damage the environment. This work includes in-country fact-finding and research on corporate activities and impacts, policy advocacy, engagement with stakeholders (including the corporations themselves), training and capacity building for communities and local organizations, and, where necessary, litigation.

ERI has deep and long-standing ties to communities and community-based organizations throughout Burma and on the Thai-Burma border. More recently, ERI has opened an office inside Burma, from which we work directly with numerous civil society organizations in the country. ERI is therefore all too familiar with the information gap that has historically made monitoring of corporate activities and engagement with investors difficult and, in many cases, impossible.

² Remarks of Antony J. Blinken, Deputy Secretary of State, Press Conference in Naypyitaw, Burma (January 18, 2016) available at <http://www.state.gov/s/d/2016d/251347.htm>.

As part of its mission to empower communities with information about threats to their human and environmental rights, ERI has developed substantial expertise on environmental and human rights impact assessments, including the concept of due diligence. In addition, ERI participates in the Publish What You Pay U.S. coalition and served as legal counsel to Oxfam America in litigation aimed to secure and defend robust transparency rules implementing Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Section 1504”). ERI is therefore well positioned to advise on many of the technical and legal aspects of disclosure and transparency regimes.

ERI participated in the original review process for the Proposed Reporting Requirements by submitting comments on our own behalf and in two joint NGO submissions, and in publishing a guide, entitled *Detailed Guidance on Reporting for the Proposed Reporting Requirements on Responsible Investment in Burma*, which is listed as a resource on the State Department’s Frequently Asked Questions (FAQs) page. We have reviewed many of the reports submitted by U.S. companies under the Reporting Requirements, provided analysis on the strengths and weaknesses of certain reports, and urged the Administration to enforce compliance. We have used information in the reports to engage with U.S. companies investing in Burma. We have also designed trainings for Burmese civil society on how the Reporting Requirements work, and how the information contained in them can be used for effective engagement with the Burmese Government and U.S. as well as non-U.S. companies in Burma. We intend to continue to utilize the information in these reports to engage with companies in Burma and to support Burmese civil society in utilizing the information to engage with companies and the Burmese Government.

II. The Reporting Requirements promote U.S. foreign policy goals

The U.S. Government is committed to supporting the Burmese people in their struggle for a peaceful, prosperous and democratic Burma. The “guiding principles” of the Obama Administration’s strategy “to recognize positive steps undertaken to date and to incentivize further reform” in Burma include: supporting political and economic reforms, building transparency and accountability, empowering local and civil society, promoting responsible international engagement, strengthening respect for and protection of human rights, as well as ensuring U.S. companies support “broad-based, sustainable development in Burma.”³ The Reporting Requirements and the information they provide serve each of these aims and further enable the State Department to assess the extent to which new U.S. investment furthers the policy goals of improving human rights protections, facilitating political reform, and promoting inclusive and sustainable development.

New U.S. investment activity that benefits entities and individuals responsible for human rights abuses and who act to obstruct democratic reform would undermine these policy goals. This risk is heightened by the fact that, despite the NLD’s election success, military and crony-owned companies continue to dominate the economy. Burmese authorities have not yet established a legal or political framework to guard against risks that business activity could reinforce corrupt

³ U.S. State Department, Bureau of East Asian and Pacific Affairs, U.S.-Burma Relations: Fact Sheet (December 18, 2015) available at <http://www.state.gov/r/pa/ei/bgn/35910.htm>.

patronage networks, cause environmental degradation, or contribute to forced labor and other human rights abuses. The information collected pursuant to the Reporting Requirements allows the U.S. Government to monitor that risk and engage with companies as necessary. For example, disclosures about the military officials U.S. corporations meet with in connection to their investments, as required by the Reporting Requirements, generate useful information about the reach of Burmese military-related entities into the Burmese economy and allows the U.S. Government to identify and engage with persons or entities on corruption and human rights impacts and risks.

The Reporting Requirements also provide the State Department with critical information about new investments with the Myanmar Oil and Gas Enterprise (MOGE), a vital but notoriously opaque player in Burma's economy. Natural gas has long been Burma's largest export, but Burma's petroleum sector has also been plagued by rights violations and corruption. Moreover, the U.S. Government has remained concerned about MOGE's transparency and accountability.⁴ Information from the U.S. investors' reports allows the U.S. Government to track investment that involves MOGE and identify opportunities and needs for engagement to prevent abuse.

Now is not the time to step back from this key tool. U.S. companies are just starting to re-engage with the oil and gas sector – for example, Chevron and ConocoPhillips commenced offshore exploration activity at the end of 2015 – and new oil and gas block auctions are expected in the near future. It thus remains vital that the State Department have information about U.S. companies' relationships with MOGE, payments to the government and government owned entities, contacts with armed groups, security arrangements, and policies and procedures for mitigating and preventing rights violations.

The Reporting Requirements also support the government's broader policies on business and human rights, and the ongoing process to develop a National Action Plan on Responsible Business Conduct “to promote responsible business conduct abroad, consistent with the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.”⁵ The Obama Administration has explained that the Reporting Requirements “encourage companies to uphold high standards of human rights in new and challenging investment climates” and that “[t]he U.S. government hopes companies will apply human rights due diligence efforts beyond their investment in Burma as they realize the risk mitigation value

⁴ See e.g. U.S. Department of State, Responsible Investment Reporting Requirements Frequently Asked Questions (Sept. 23, 2013) <http://www.humanrights.gov/dyn/responsible-investment-reporting-requirements-frequently-asked-questions.html> [hereinafter “Reporting Requirements FAQs”].

⁵ The White House, Announcement of Opportunity to Provide Input into the U.S. National Action Plan on Responsible Business Conduct (Nov. 20, 2014) *available at* <https://www.whitehouse.gov/blog/2014/11/20/announcement-opportunity-provide-input-us-national-action-plan-responsible-business->.

in this approach.”⁶ The Reporting Requirements thus remain an important component of the U.S. Government’s broader foreign policy goals.

III. The information provided by the Reporting Requirements is necessary

Local communities and civil society groups in Burma continue to have extremely limited access to revenue payment information they can use to hold their government accountable, and project-related information critical to safeguarding and defending their human rights. The Reporting Requirements provide one of the few exceptions, giving communities and civil society access to information that can amplify their demands for accountability, transparency and democracy.

As ERI has emphasized in our prior submissions on the Reporting Requirements, the information collected would not otherwise be publicly available. The Reporting Requirements are one of the only sources of information about security arrangements with the Burmese Government, which few companies proactively disclose, as well as payments to the Burmese Government and state-owned entities like MOGE.⁷ Similarly, environmental, social and human rights impact assessments, resettlement and land acquisition policies with respect to Burma have generally not been made public. To ERI’s knowledge, no U.S. company operating in Burma had ever voluntarily disclosed an environmental, social, or human rights impact assessment before the Reporting Requirements were put in place.

Companies like Coca-Cola that have taken their obligations under the Reporting Requirements seriously have played an important role in promoting respect for international standards in Burma and contributed positively to a broader dialogue around the importance of robust due diligence. The Coke reports speak honestly and openly about the risks of investing and operating in Burma and the company’s successes and some of its shortcomings in preventing and

⁶ U.S. State Department, Bureau of Democracy, Human Rights and Labor, U.S. Government Approach on Business and Human Rights (May 1, 2013) *available at* <http://www.humanrights.gov/dyn/u.s.-government-approach-on-business-and-human-rights>.

⁷ We are aware that Burma recently published its first conciliation report under the Extractive Industry Transparency Initiative (EITI), and that disclosures about extractive companies’ payments to the Burmese Government may become increasingly available pursuant to that regime. However, while that report represents a promising start, it omits smaller mining companies, thereby excluding about 50% of revenue from the mining sector. *See* Steve Gilmore, *Extractive Industries Transparency Initiative (EITI) shines light on resource sector*, THE MYANMAR TIMES (Jan. 22, 2016), *at* <http://www.mmtimes.com/index.php/business/18615-extractive-industries-transparency-initiative-eiti-shines-light-on-resource-sector.html>. The gap is especially troubling for the jade mining industry, which is allegedly controlled largely by the military and cronies of the former regime and is notorious for harsh environmental impacts and links to corruption, human rights and labor abuse. Moreover, EITI only addresses the extractive industries and does not include the many other sectors in which investment can have serious human rights impacts, such as the garment, beverage, and agro-business sectors.

mitigating negative impacts.⁸ By being so frank, Coke has given communities, investors, and the U.S. government a reasonable basis to engage with it and troubleshoot human rights issues that may arise. The level of detail about due diligence processes, identified risks and concerns, and steps taken to ensure that Coke and its partners are mitigating serious risks has provided critical transparency necessary to build trust with local communities and civil society, and set an example for other companies to emulate.

Ball Corporation's report provides another positive example.⁹ The information disclosed in Ball's 2015 report has assisted civil society and local communities to understand the terms under which the Burmese Government works with Ball and other companies operating in the Thilawa Special Economic Zone (SEZ), where Ball is constructing an aluminum can factory. Local and international organizations have repeatedly criticized the Burmese Government and other investors in the SEZ for the forcible eviction of villagers from their land, without proper notice or adequate compensation for relocation, in violation of Burmese law and international standards.¹⁰ The information that Ball included about the cost of its land lease at the SEZ may assist the Thilawa residents in their negotiations with the government for appropriate compensation. Ball's report also discloses information that reflects how the Burmese Government has generally handled companies investing in the SEZ, which will enable civil society and local communities to more effectively engage with non-U.S. companies and the Burmese Government itself.

The framework of the Reporting Requirements has also encouraged voluntary reporting by U.S. companies, regardless of whether they are legally required to report. Gap, Inc., for example, submitted a detailed report that engaged seriously with the risks and impacts it has faced in its business relationships in Burma, steps it has taken to address those impacts, and outstanding issues that it is continuing to address.¹¹ Renewing the Reporting Requirements will continue to

⁸ The Coca-Cola Company, Responsible Investment in Myanmar Report (submitted December 12, 2013) *available at* <http://photos.state.gov/libraries/burma/895/pdf/TCCCStateDepartmentResponsibleInvestment%20in%20MyanmarReport121213.pdf>.

⁹ See Ball Corporation, Responsible Investment in Myanmar Report (submitted July 1, 2015) *available at* <http://photos.state.gov/libraries/burma/895/pdf/20150701BallCorporationPublicReport.pdf>.

¹⁰ See e.g., EarthRights International, Analysis of the Affected Communities' Rights and Remedies Under Myanmar Law and JICA's Guidelines: A Briefer on the Thilawa Special Economic Zone (2015) https://www.earthrights.org/sites/default/files/thilawa_briefer_-_earthrights_international.pdf; Physicians for Human Rights, et al., A Foreseeable Disaster in Burma: Forced Displacement in the Thilawa Special Economic Zone (November 2014) *available at* https://s3.amazonaws.com/PHR_Reports/Burma-Thilawa-English-Report-Nov2014.pdf; EarthRights International, Analysis of EIA for Phase 1 of Thilawa SEZ (November 2014) *available at* https://www.earthrights.org/sites/default/files/thilawa_eia_analysis.pdf.

¹¹ See Gap Inc., Responsible Sourcing in Myanmar, (submitted August 25, 2014) http://photos.state.gov/libraries/burma/895/pdf/Gap_Inc_Myanmar_Public_Report-8_25_14FINAL.pdf; Gap Inc., Updated Report: Responsible Sourcing in Myanmar (submitted

incentivize responsible conduct and provide a platform for voluntary reporting by U.S. companies who want to show that their investment does not contribute to human rights abuses.

Without the Reporting Requirements, however, companies are extremely unlikely to make much, if any, of this information available to the public. Although some companies have voluntarily reported, a number of companies have rebuffed efforts by investors and NGOs to encourage reporting; some, in fact, have insisted that they will only report once they are legally required to do so. If there were no legal requirements, most companies – especially companies in the most problematic economic sectors – would refuse to disclose this basic information. U.S. investment is just beginning to ramp up in Burma, and a failure to renew Reporting Requirements would eliminate this key tool before it even has a chance to work.

IV. Reporting Requirements are an appropriate way to promote responsible investment without overburdening companies

The Reporting Requirements are an appropriate way for the U.S. Government to continue to promote responsible U.S. investment while easing sanctions, without over burdening companies. Despite industry suggestions during the initial comment period that transparency around new investment in Burma might somehow make U.S. companies less competitive, or discourage U.S. companies from investing in Burma,¹² there is no evidence that those predictions have come true. U.S. companies that have taken compliance with the Reporting Requirements seriously have emerged as leaders in responsible investment, and U.S. investment is on track to ramp up significantly in the next few years.

That some investors have hesitated to jump into Burma is hardly surprising given the political uncertainty prior to the November elections and the transition of power, as well as very real concerns over continuing human rights abuse, persistent conflict, and rampant corruption that all make doing business risky and complicated and ethically questionable. The World Bank continues to rank Burma near the very bottom in terms of ease of doing business, with a rank of 177 out of 189 for 2015, and 167 out of 189 for 2016.¹³ The State Department's 2015 Investment Climate Statement for Burma advises companies that:

[T]he country has many laws and regulations that are outdated and inadequate. Property rights are not well established and land confiscation is a major concern. Investor protection and the criteria for foreign investment are not well-defined, and in addition to weak rule of law there are no proper mechanisms and instruments for enforcing contracts

July 1, 2015)

<http://photos.state.gov/libraries/burma/895/pdf/20150701GapIncMyanmarPublicReport.pdf>.

¹² *E.g.* Comment letter from the National Association of Manufacturers on the Reporting Requirements for Responsible Investment in Burma (Public Notice 7971) (submitted October 4, 2012) accessible at http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201302-1405-001.

¹³ World Bank Group, Ease of Doing Business in Myanmar, <http://www.doingbusiness.org/data/exploreconomies/myanmar/#close>.

and property rights and for settling disputes. A lack of reliable data and information adds to the frustration that many foreign investors experience when attempting to look up market and consumer base information as well as capital and financial indicators. Investment approval procedures are not transparent, overly bureaucratic and complex, and exclude foreign participation in certain sectors.¹⁴

Furthermore, there continue to be “high levels of corruption,” “[b]ribes are expected – and given – to facilitate many official transactions, from the smallest to the largest” and “[m]any economists and businesspeople consider corruption one of the most serious barriers to investment and commerce in Burma.”¹⁵ Transparency International rated Burma 157 out of 177 countries in its Corruptions Perceptions Index for 2013, with a score of 21 out of 100, and 156 out of 175 in 2014, with no change in score.¹⁶

Among all of these reasons for U.S. investors to be cautious, it is exceedingly unlikely that answering a five-page questionnaire, with supporting documents, has deterred any prospective investors. Moreover, any investor who is deterred by answering these basic questions is unlikely to be a constructive presence in Burma. Foreign investment, including U.S. investment, can be constructive or destructive, and constructive engagement is far more likely if companies are willing to disclose basic information about their investments. On balance, the danger of destructive investments that could destabilize the country is far greater than the danger that a useful investment might be deterred by the Reporting Requirements. Thus, if any investment is deterred, that is likely to be a *good* result, in line with U.S. foreign policy goals.

Although one of the objections to the Reporting Requirements was that competitors from other countries do not face similar requirements, that picture is changing. For example, disclosure of payments to foreign governments is becoming the norm internationally; extractive companies from the European Union, Canada, and Norway are already required to make such disclosures. And the need to make such disclosures has not proved an obstacle to investment; as one example, the Norwegian oil company Statoil, one of the most proactively transparent companies, was recently awarded an offshore oil block by the Government of Burma.¹⁷ The company recently published payments to foreign governments on a project-by-project basis under Norway’s mandatory disclosure rules for extractive industries.

Even if U.S. investors do have unique requirements, this is a positive aspect of the Reporting Requirements, because it allows U.S. investors to distinguish themselves as transparent and respectful of human rights, labor rights, and the environment. The largest foreign investor in

¹⁴ U.S. State Department, Burma Investment Climate Statement (2015), at 3, *available at* <http://www.state.gov/documents/organization/241712.pdf>

¹⁵ U.S. State Department, Burma Investment Climate Statement (2015), at 22, *available at* <http://www.state.gov/documents/organization/241712.pdf>

¹⁶ Transparency International, Myanmar, <https://www.transparency.org/country/#MMR>.

¹⁷ *See Myanmar awards Statoil, Conoco Phillips deep sea exploration contract- paper*, REUTERS, (May 3, 2015) <http://www.reuters.com/article/myanmar-Oil-exploration-idUSL4N0XU04W20150503>.

Burma is China, but the perception that Chinese companies operate in Burma with little regard for local communities or transparency has led to a popular backlash against Chinese investment.¹⁸ The Reporting Requirements help U.S. companies to avoid a similar reputation.

Moreover, the time and effort required to compile the report should not be unduly onerous. The majority of the information required is already readily available to the reporting companies, such as company policies and procedures, and information companies are already required to track under other provisions of U.S. law, such as government payments.

We strongly believe that to the extent investors expend significant time in responding to the Reporting Requirements, the vast majority of that time can be attributed to *conducting the due diligence that the Requirements are intended to promote*, rather than to filling out the form itself. In this context, it is surely a good thing when investors find that the Reporting Requirements encouraged them to take the time for a proper consideration of the risks of investing in Burma. The Reporting Requirements reflect the considered judgment of the U.S. Government that the experience of reviewing internal policies and procedures, conducting proper due diligence on human rights, labor rights, environmental responsibility, land rights, and corruption risk in order to prepare a company's initial report provides benefits both to the company and the foreign policy goals of the United States that are well worth the effort required. Moreover, the burden of providing subsequent updates after filing an initial report should be limited; therefore, investors who are filing second or third reports will need significantly less time than was necessary for their first report. The Reporting Requirements strike an appropriate balance, allowing the U.S. Government to ensure new U.S. investment activity does not undermine U.S. foreign policy goals without overburdening U.S. investors.

V. Enhancing the quality, utility and clarity of the information to be collected

Experience with the Reporting Requirements thus far has demonstrated their utility in furthering U.S. foreign policy interests, informing and empowering civil society and local communities, and promoting responsible business practices. But the experience to date has also demonstrated certain areas in which the Reporting Requirements can and must be improved. ERI urges the State Department to strengthen the Reporting Requirements as outlined below to eliminate loopholes that undermine their effectiveness and enhance the quality, utility and clarity of the information collected.

A. Clarify that the Reporting Requirements apply to facilitating new investment.

In order to prevent a major possible loophole that would make a mockery of the Reporting Requirements, the State Department must clarify that the Reporting Requirements apply equally to new investment and facilitating new investment. Otherwise, U.S. companies might choose to evade the Reporting Requirements simply by structuring their investment through a foreign subsidiary.

¹⁸ See, e.g., Thomas Fuller, *Resentment of China Spreading in Myanmar*, The New York Times (May 19, 2014), available at <http://www.nytimes.com/2014/05/20/world/asia/anti-china-resentment-flares-over-myanmar-mine.html>.

Under the Burma sanctions program, both “investment” and “facilitation” of investment have been prohibited. The facilitation prohibition, codified in 31 CFR § 537.205(a), provides that

U.S. persons, wherever located, are prohibited from approving, financing, facilitating, or guaranteeing a transaction by a person who is a foreign person where the transaction by that foreign person would be prohibited by § 537.202 or § 537.204 of this part if performed by a U.S. person or within the United States.

This provision is key to the sanctions program, because the direct investment prohibition applies only to U.S. persons. Without the facilitation provision, U.S. companies could simply set up a foreign subsidiary to carry out investments on their behalf.

The facilitation provision is written to prohibit facilitating investment by foreigners that would be prohibited if performed by a U.S. person. As provided by 31 CFR § 537.530(b), any new investment by U.S. persons, of course, is only allowed if the investor complies with the Reporting Requirements. Thus, the only reasonable interpretation of this framework is that U.S. persons are only allowed to facilitate investment that *also* complies with the Reporting Requirements.

The State Department’s FAQs, however, do not address facilitating new investment, and the Government has not, to our knowledge, clearly articulated that, just as facilitation was equally prohibited under the old sanctions program, facilitation is equally subject to the Reporting Requirements under the current program.

Failure to require reporting for facilitating new investments would give corporate bad actors an easy way to avoid reporting, undermining the whole Reporting Requirements framework. The Reporting Requirements cannot effectively promote U.S. policy goals if only the corporations already predisposed to respect human rights, labor rights, and environmental protection will submit reports, and other companies will simply structure their operations in a manner to avoid reporting.

Although the existing regulations are clear that facilitating new investment is only permitted to the extent that that investment complies with the Reporting Requirements, to the extent there is any confusion, this should be clarified in the Reporting Requirements and, if necessary, in the regulations themselves. In any event, the State Department should clearly indicate that facilitation requires compliance with the Reporting Requirements in the same manner as direct investment.

B. Clarify that the Reporting Requirements apply equally to “passive” and hands-on investors.

One of the most concerning aspects of the reports submitted thus far is the distinction some companies have tried to draw between hands-on and “passive” investment to disclaim any responsibility for reporting required information. The Reporting Requirements make no distinction between the character of investments and no exception for “passive” investors. The State Department’s Frequently Asked Questions (FAQs) are also clear that the Reporting Requirements apply equally to such investors: “*any* U.S. person” engaging in new investment exceeding \$500,000 “is required to report, regardless of whether the investor is *directly or indirectly* involved in carrying out business operations in Burma.”¹⁹

Despite this, some companies have suggested that the requirement to disclose human rights and due diligence policies does not apply to them because they are merely “passive investors” rather than active participants. These companies’ reports have declined to report on their human rights, worker rights, anti-corruption, and environmental policies and procedures, arrangements with security service providers, property acquisition practices, payments to the Burmese government, or even the general nature of their investments in Burma.

The Capital Group Companies, for example, provided no detail about the extent and nature of these investments in their initial reports, and justified their failure to report on the grounds that their investments in Yoma Strategic Holdings, Ltd. (“Yoma”) are merely “passive.”²⁰ This is unacceptable and especially disturbing because Yoma has extensive operations in plantation agriculture and real estate, sectors that are notorious for land confiscation, labor abuse, and environmental destruction.²¹ If all investment funds with a “passive” relationship to their

¹⁹ Reporting Requirement FAQs, *supra* note 4.

²⁰ See e.g. Capital Guardian Emerging Markets Restricted Equity Fund for Tax-Exempt Trusts, Reporting Requirements on Responsible Investment in Burma Public Report (submitted July 1, 2013) available at <http://photos.state.gov/libraries/burma/895/pdf/BurmaReportCGEMRestrictedTETs1July2013.pdf>; Capital Guardian Emerging Markets Equity DC Master Fund, Reporting Requirements on Responsible Investment in Burma Public Report (submitted July 2, 2013) available at <http://photos.state.gov/libraries/burma/895/pdf/CGEMEDCMaster0612013.pdf>; Emerging Markets Growth Fund, Inc. Reporting Requirements on Responsible Investment in Burma Public Report (submitted July 2, 2013) available at <http://photos.state.gov/libraries/burma/895/pdf/EMGF0612013.pdf>.

²¹ See e.g. Reuters, Company Profiles: Yoma Strategic Holdings Ltd. <http://www.reuters.com/finance/stocks/companyProfile?symbol=YOMA.SI> (“Yoma Strategic Holdings Ltd. (YSH) is Singapore-based investment holding company. The Company is engaged in the development of land, sale of private residential properties, agricultural, construction, piling, as well as design and project management for real estate developments in Myanmar and the People’s Republic of China.... The operations in Myanmar are principally the sale of land development rights and houses, construction related services, automotive services, agricultural activities and tourism services. The operations in Myanmar principally includes rental of properties.”)

Burmese investment targets were to take the same position, U.S. capital could flood high-risk sectors – such as extractives, plantation agriculture, and infrastructure development – without providing the transparency needed to ensure that these investments are not in fact harming U.S. foreign policy interests and undermining the democratic reform process in Burma.

The U.S. Burma sanctions regime is predicated on the understanding that new investments in Burma may exacerbate human rights abuses, conflict, and corruption and could frustrate U.S. foreign policy interests. This concern is not limited to direct, hands-on investors. As the FAQs note, “enterprises can have impacts on local populations both directly and through their business relationships,” and “the human rights impacts of U.S. investment in Burma may be direct or indirect.” Under the UN Guiding Principles on Business and Human Rights (“the UN Guiding Principles”), “[t]he responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate.” International standards concerning responsible corporate investment, including the OECD Guidelines for Multinational Enterprises (“OECD Guidelines”), which the U.S. has endorsed, demand human rights due diligence from all companies that operate internationally, and apply equally to active and passive investors.

Although there should be no doubt that the Reporting Requirements currently do apply to passive investors, the apparent lack of enforcement actions against passive investors who have not fully complied with the Reporting Requirements may lead to the appearance of an exception. The State Department must ensure that companies do not interpret the language of the Reporting Requirements to avoid required disclosures. Therefore, in renewing the Reporting Requirements, the State Department must make clear that all investors in Burma are expected to report thoroughly on their activities; “passive” investors – just like hands on investors – should explain in detail the nature and scope of their investment and the due diligence, if any, they have conducted. And if U.S. investors do not report, the Government must take appropriate enforcement action.

C. Require that local partners and business relationships must be disclosed.

Another concerning feature of some reports has been the failure to disclose local Burmese business partners. Local partnerships are often where the rubber meets the road when it comes to human rights and environmental impacts in Burma. For example, an international oil company may have state-of-the-art human rights and land acquisition due diligence policies, but hire a Burmese contractor to build the pipeline who does not apply the same standards. Such a case is likely to result in the same instances of land-grabbing, widespread environmental impacts, and episodes of severe repression that have dogged major foreign investments such as the Shwe Gas Project.

ERI believes this sort of secrecy undermines the benefits of public disclosure because it enables U.S.-based investors to “launder” their responsibilities through anonymous Burmese entities. The U.S. Government notes in the FAQs that information on business partners would help the government to “better calibrate U.S. policy . . . and to encourage and assist businesses to

develop” robust due diligence and risk management procedures.²² But this does not go far enough.

For the Reporting Requirements to incentivize positive, responsible investment behavior, companies must disclose the names of their local partners, including subsidiaries, subcontractors, suppliers, joint ventures and other investment vehicles. This information empowers the U.S. Government and civil society groups to have more productive exchanges with companies, thereby assisting U.S. investors to mitigate the adverse impacts of their investments. It also ensures the U.S. Government and civil society can monitor business partnerships to ensure secret dealings do not undermine the democratic reform process and benefit those responsible for the legacy of corruption and rights abuses that have plagued the country for decades.

The experience of Coke, which did identify its local partners, is illustrative of the importance of publicly disclosing this information and the risks in failing to do so. Coke’s 2015 updated report notes that despite conducting thorough due diligence before entering the market in Myanmar, it only recently discovered that one of the directors of its Burmese subsidiaries is also a director and shareholder of a company that operates jade mines in Myanmar, a sector long plagued by human rights abuse and corruption, and still subject to U.S. sanctions.²³ Coke’s report acknowledges that despite the fact that its “original due diligence was based on the best information available at the time,” it failed to pick up on this connection until it received information from Global Witness and conducted additional due diligence in 2015. Coke’s transparent reporting enabled groups to engage with Coke productively and allowed the company to identify a potentially serious problem it may otherwise not have been aware of.

By contrast, other companies have not identified their local partners. Hercules Offshore, Inc., for example, reported that its due diligence procedures include its “Burmese supplier” but never actually identify the local supplier.²⁴ Coke’s experience shows that companies like Hercules Offshore may have no idea who their local partners are or what other activities they may be involved.

Clarification that companies are required to disclose the identities and ownership of their local Burmese business partners, including local contractors, suppliers and other business relationships, is vital to ensuring the Reporting Requirements fulfill their intended purposes of transparency and accountability and enabling U.S. investors to effectively prevent and/or mitigate negative consequences of their investment.

²² Reporting Requirements FAQs, *supra* note 4.

²³ The Coca-Cola Company, Responsible Investment in Myanmar 2015 Update (submitted June 30, 2015) *available at*

<http://photos.state.gov/libraries/burma/895/pdf/20150630TCCCMyanmarDueDiligenceReport.pdf>

²⁴ Hercules Offshore, Inc., Public Report on Responsible Investment in Burma (submitted July 1, 2014) *available at* <http://photos.state.gov/libraries/burma/895/pdf/20140707160139167.pdf>;

Hercules Offshore, Inc., Public Report on Responsible Investment in Burma (submitted July 1, 2013) *available at* <http://photos.state.gov/libraries/burma/895/pdf/HerculesOffshoreonBurma.pdf>

D. Remove the option of confidential reporting of risk mitigation under #11.

Access to information on measures taken to identify, mitigate and prevent human rights and environmental risks and actual impacts identified is absolutely vital for local communities affected or potentially affected by new investment. It is key to accuracy and quality control and to the goal of promoting responsible business conduct in Burma, and it is precisely what would most help facilitate informed engagement by civil society actors with companies around risk, appropriate mitigation strategies and remediation as necessary.

While the State Department notes that it “encourages” submitters to provide this information in the public reports “whenever possible . . . to increase transparency and access to information,” that is not enough. The absence of a public disclosure requirement to reveal environmental or human rights risks to the communities that will be affected by them is inconsistent with the OECD Guidelines, which require companies to publicly report environmental risks, encourage wider disclosure of and communication about social, environmental and other risk factors, policies and company performance, and recognize that many companies are already doing so to demonstrate a commitment to socially acceptable practices.²⁵ It is also inconsistent with the UN Guiding Principles, which emphasize that communicating to stakeholders what companies have been doing regarding human rights risk is a crucial aspect of due diligence processes. The Guiding Principles specifically encourage companies to “know and show” that they respect human rights in practice, where “showing” includes communicating transparently and accountably to affected communities, institutional investors and other stakeholders.²⁶ The International Finance Corporation’s Performance Standards on Environmental and Social Sustainability also recognize the importance of risk and impact assessments, which include effective community engagement through disclosure of project-related information and consultation with local communities.²⁷

Disclosure of non-financial information is increasingly expected from companies operating around the world. A number of European countries already require, or provide strong incentives, for companies to disclose such information, and by the end of 2016, all European Union member countries will require it. In 2014, the European Union adopted a directive requiring corporate disclosure of non-financial information, including environmental, social and governance-related

²⁵ OECD Guidelines for Multinational Enterprises, Commentary on Disclosure, paras. 33-4, (2011) available at <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

²⁶ Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, pg. 20, available at <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>

²⁷ International Finance Corporation, Performance Standards on Environmental and Social Sustainability (2012) available at http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Document.pdf?MOD=AJPERES.

information, which must be transposed into national legislation by the end of 2016, with reporting to start by 2017.²⁸

Companies stand to gain by disclosing information on non-financial risk. As the experience of Coke, which chose to disclose this information, demonstrates, companies that are open to discussing human rights challenges are viewed as more credible in claiming to respect human rights. This is true for a much broader range of disclosures as well. It is in the interest of corporations to work with all stakeholders—including affected communities, civil society, and investors—to take advantage of their unique expertise and experiences to lessen their exposure to financial, operational, reputational, regulatory and legal risks.

We strongly urge the State Department to ensure the Reporting Requirements are able to fully meet the goals of promoting responsible investment and informing and empowering civil society and local communities to protect their rights by removing the option of confidential reporting on risk mitigation and prevention to ensure they have the information they need to do so.

E. Make clear that failure to comply with the Reporting Requirements will lead to enforcement actions and penalties.

As noted above, although the Reporting Requirements apply to passive investors, enforcement action apparently has not been taken against such investors who have not fully complied with the Requirements or those who have failed to comply altogether.

The FAQs make clear that failure to comply with the Reporting Requirements should lead to penalties:

A U.S. person engaging in new investment in Burma who fails to submit required reports is not in compliance with the conditions of General License No. 17 and may be subject to an enforcement action and possible civil and criminal penalties. Investors who are uncertain about whether their activities constitute new investment in Burma may want to err on the side of caution by submitting a report.²⁹

The lack of enforcement actions thus far, however, may lead some U.S. investors to believe that there are no penalties for failure to report, or for failure to report completely. Unfortunately, former Assistant Secretary Michael Posner contributed to this misimpression. In a hearing before

²⁸ Directive 2014/95/EU of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance (22 October 2014) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0095>. See also European Commission, *Non-Financial Reporting*, http://ec.europa.eu/finance/company-reporting/non-financial-reporting/index_en.htm#news (last updated January 15, 2016).

²⁹ This information is out of date, because General License No. 17 has been superseded by the recodification of the Burma sanctions regulations, and compliance with the Reporting Requirements is now mandated by 31 CFR § 537.530.

the Tom Lantos Human Rights Commission in February 2013, Assistant Secretary Posner was asked, “What, if any, consequences or penalties will companies face if they provide incomplete or inaccurate information? And what if they fail to report at all?” Assistant Secretary Posner did not clearly state that civil and criminal penalties would apply for violations of General License No. 17; instead, he said (in part): “There is no coercive authority, as you put it, or as you implied, but I think that this is going to be a first step to put companies on notice the U.S. Government is paying attention to these issues, we have expectations, and I think a number of companies already have come to us and said we want to figure out how to do this in a responsible way.”³⁰

There appear to be a number of U.S. companies with substantial new investments in Burma that have not submitted required reports. APR Energy, for example, signed a contract in February in 2014 to develop a power generation plant outside Yangon, which has been operational since May 2014.³¹ APR’s press release announcing the substantial new investment quotes U.S. Secretary of Commerce Penny Pritzker as saying “APR Energy is a tremendous example of the work US businesses are doing to support economic development in Myanmar”³² and the State Department has repeatedly referenced APR Energy’s operations when discussing U.S. investment in Burma.³³ In response to inquiries about its operations in Burma from the Business and Human Rights Resource Centre in 2014, APR Energy responded it “remains fully aware of the purpose and necessity of the regulatory guidelines respecting the awareness of human rights conditions including as required the OFAC reporting requirements. It understands the importance of these reporting requirements and how they can help with important human rights, peace and stability initiatives.”³⁴ Yet APR Energy has not filed a report and despite its knowledge of APR Energy’s investment, the State Department and OFAC have apparently taken no action to enforce compliance.

³⁰ Human Rights in Burma, Hearing before the Lantos Human Rights Commission, House of Representatives, 113th Congress, 1st sess. (February 28, 2013)

http://tlhrc.house.gov/docs/transcripts/2013_02_28_Burma/FINAL.pdf.

³¹ See APR Energy, Press Release: APR Energy begins producing power in Myanmar (June 6, 2014) available at <http://www.aprenergy.com/content/apr-energy-begins-producing-power-myanmar>.

³² *Id.*

³³ See e.g. U.S. Embassy in Rangoon, Department of State, U.S. Economic Engagement with Burma (June 2014) http://photos.state.gov/libraries/burma/895/pdf/U_S_%20Economic%20Engagement%20with%20Burma.pdf (listing APR Energy one of the “leading U.S. companies... that have established operations in Burma”); Antony J. Blinken, Deputy Secretary of State, Remarks at the U.S.-ASEAN Business Council Annual Gala, Washington, D.C. (June 15, 2015) available at <http://www.state.gov/s/d/2015/243873.htm> (noting “Last year, a U.S. company called APR Energy reached an agreement with the Government of Myanmar to bring power to 6 million people, a deal they’re already poised to expand.”)

³⁴ Response from APR Energy to the Business and Human Rights Resource Centre (BHRRC), <http://business-humanrights.org/sites/default/files/documents/APR-ENERGY-response.pdf>.

Similarly, Hilton Worldwide has not filed a report, but it has been doing business in Burma since at least 2013, and has contracts to manage six major hotels, two of which are already open.³⁵ In response to a letter from investors in June 2015³⁶ Hilton said it was in the process of reviewing the Reporting Requirements and would provide an update soon, but it has apparently not done so.³⁷

The State Department must send a clear message that reporting is not voluntary, and it must enforce compliance by penalizing companies that fail to report, or fail to fully report. We urge the State Department and OFAC to clarify the penalties for non-compliance in renewing the Reporting Requirements and describe the steps it will take to monitor and enforce compliance.

F. Ensure that Burmese translations are available.

The State Department should also take steps to make investors' reports available in Burmese to ensure the Reporting Requirements have their full intended effect as a tool for local community engagement. Language remains a barrier for many of the communities and civil society organizations that most need this information. At the moment, the reports are usable only by Burmese civil society organizations that have English language abilities or the resources to afford translation, which can be prohibitively expensive and difficult to come by. The State Department should encourage companies to submit their reports in both Burmese and English, and where companies do not provide a Burmese version, the State Department should make translations available.

VI. Conclusion

This is a critical moment in Burma's democratic reform process, and the U.S. must fulfill its promise to support that process by ensuring U.S. investment does not undermine progress. The

³⁵ See e.g. Hilton Worldwide, Hilton Worldwide Enters Myanmar and Signs Management Agreement with LP Holding Co, Ltd for First Hilton Hotels & Resorts Branded Hotel in Yangon, (March 6, 2013) <http://news.hiltonworldwide.com/index.cfm/news/hilton-worldwide-enters-myanmar-and-signs-management-agreement-with-lp-holding-co-ltd-for-first-hilton-hotels-resorts-branded-hotel-in-yangon>; Hilton Worldwide, Hilton Worldwide Signs Agreement for Five Hilton Hotels & Resorts Properties in Myanmar, (June 11, 2014) <http://news.hiltonworldwide.com/index.cfm/newsroom/detail/26988>; Hilton Worldwide, Hilton Worldwide Continues Expansion in Myanmar with Hilton Ngapali Resort & Spa Opening (Jan. 6, 2015) <http://news.hilton.com/index.cfm/news/hilton-worldwide-continues-expansion-in-myanmar-with-hilton-ngapali-resort-spa-opening>.

³⁶ Letter from EIRIS Conflict Risk Network to Christopher J. Nassetta, President and CEO, Hilton Worldwide Holdings Inc. (June 23, 2015) available at http://crn.eiris.org/files/Joint%20Investor%20Letter%20to%20Hilton%20on%20Burma_Jun%202015.pdf.

³⁷ See Business and Human Rights Resource Centre, *Investors call on 3 companies to submit robust reports under US Gov'ts Burma reporting requirements*, <http://business-humanrights.org/en/investors-call-on-3-companies-to-submit-robust-reports-under-us-govts-burma-reporting-requirements>.

Reporting Requirements are an important tool through which the U.S. Government can promote transparency and accountability, support political reform, and ensure new U.S. investment activity in Burma furthers U.S. foreign policy goals as intended. We urge the State Department to renew and strengthen the Reporting Requirements, as described above, to ensure they have their full intended effect.

Respectfully submitted,

Michelle Harrison
Staff Attorney

Jonathan Kaufman
Legal Advocacy Coordinator

Marco Simons
General Counsel

EarthRights International