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International Trade Alert

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If you read one thing…

- On October 7, 2016, President Obama issued an Executive Order that effectively eliminates sanctions against Myanmar (referred to as Burma by the White House) and removes the sanctions designations of formerly restricted parties under the Burma sanctions program.
- Despite the lifting of sanctions, many U.S. and Burmese officials and stakeholders maintain strong concerns. Accordingly, new opportunities in Burma may involve complex political and reputational risks.
- Certain sanctions authorities remain in place that could be utilized by the White House to redesignate or reinvoke sanctions against delisted Burmese entities and individuals. Additionally, other sanctions programs remain in effect and are potentially applicable to transactions involving Burmese counterparts.

Burma Sanctions Lifted—Political and Reputational Risks Remain

President Obama issued an Executive Order on Friday, October 7, 2016, that effectively lifts all executive branch sanctions against Burma by terminating the long-standing national emergency relating to Burma and revoking the Executive Orders that authorized past sanctions. The President also provided notification to Congress as required to waive certain legislative sanctions against Burma. These actions fulfill the commitment President Obama made on September 14, 2016, following meetings with Burmese State Counsellor Aung San Suu Kyi, and they complete the President's efforts over the past four years to bring reform to Burma.

The Executive Order effectively eliminates the Burmese Sanctions Regulations (BSR), which had been administered by the U.S. Department of Treasury's Office of Foreign Assets Control (OFAC) under 31 C.F.R. part 537. As of October 7, 2016, the BSR are no longer in effect and will be removed from the U.S. Code of Federal Regulations. The Executive Order also removes all blocked persons from OFAC's Specially Designated Nationals and Blocked Persons (SDN) List who had been blocked pursuant to the BSR.

These regulatory changes create a pathway for U.S. businesses to move forward with transactions involving Burmese counterparts formerly designated to the SDN List, including entities affiliated with the Burmese military, such as Myanmar Economic Corporation (MEC) and Myanmar Economic Holdings

Limited (MEHL). In effect, the U.S. government has eliminated the legal risk of doing business with former Burmese SDNs. However, pursuing opportunities involving such Burmese entities and individuals could expose U.S. business to political and reputational risk, where the views and interests of State Counsellor Aung San Suu Kyi and her party, the National League for Democracy (NLD), will strongly influence optics and exposure in the United States.

Background on BSR

The BSR were a fixture of U.S. foreign policy for nearly 20 years and significantly prohibited U.S. persons from engaging in transactions with Burmese counterparts. President Bill Clinton established the sanctions program in 1997 in response to the Burmese military junta's persistent repression of democratic political opposition. The sanctions continued to expand through the course of President George W. Bush's subsequent tenure. Congress supplemented sanctions against Burma through two primary pieces of legislation: the Burma Freedom and Democracy Act of 2003 (Pub. L. 108-61 or "BFDA Act") and the Tom Lantos Block Burmese JADE (Junta's Anti-Democratic Efforts) Act of 2008 (Pub. L. 110-286 or "JADE Act").

Over the course of this time, the United States maintained a broad importation ban on Burmese products and a widespread visa ban against persons involved with impeding Burma's transition to democracy. Additionally, the United States designated more than a hundred Burmese entities to the SDN List, often on the basis of direct ties to the country's military junta.

Recent U.S.-Burma Relations

Beginning in 2012, President Obama began to scale back the sanctions and also restored diplomatic relations with Burma due to the positive trend toward democratic rule in the country. In particular, the Burmese government transitioned to a nominally civilian administration in 2011 under President Thein Sein, following the first general election in 20 years and four decades of military rule. Burma's election commission approved 19 political parties to participate in the 2012 parliamentary by-elections, which included the victorious NLD led by Aung San Suu Kyi. President Thein Sein further pledged in 2012 to reduce the government's control over core sectors of Burma's economy, including finance, energy, telecommunications and health care. Following these events, the Obama Administration worked to build U.S. ties with Burma and started to gradually ease sanctions, while also seeking to maintain a firm position on persistent human rights and proliferation concerns.

The four-year shift in U.S.-Burma relations saw additional sanctions relief in May 2016 following the election of the NLD's Htin Kyaw to the presidency and culminated in the announcement of a broader bilateral partnership in September 2016. In particular, the United States and Burma now intend to work together towards a bilateral investment treaty, improvements to labor standards and human rights, and combating money laundering, corruption and trafficking. Moreover, the President issued a proclamation on September 14, 2016, to restore Burma's duty-free trade benefits under the Generalized System of Preferences (GSP), which is scheduled to take effect on November 13, 2016.

Termination of OFAC Sanctions

The President's October 7, 2016, Executive Order effectively terminates the long-standing OFAC sanctions regime affecting Burma. Practically speaking, only a narrow set of executive branch sanctions remained in effect prior to last week's Executive Order: the Burmese SDN listings pursuant to the BSR and corresponding property blocking requirements; limitations on certain banking and financial transactions; and an import ban on Burmese-origin jadeite and rubies. All of these sanctions have been lifted by the new Executive Order, and all property and interests in property that had been blocked pursuant to the BSR are now unblocked.

Authorities Remain for Enforcement of Past Violations and Designations Under Other OFAC Sanctions Programs

Nonetheless, OFAC still retains authority to continue or initiate investigations and enforcement actions for apparent violations of the BSR as operative at the time of the underlying activities. Moreover, the Executive Order does not preclude the possibility of delisted Burmese individuals and entities being redesignated under other U.S. sanctions programs (e.g., counter-narcotics or other policy-based sanctions) in the future if the White House has reason to do so.

Waiver of JADE Act Sanctions

With respect to the JADE Act, the Executive Order reissues a waiver of the financial sanctions imposed on parties affiliated with the Burmese military junta (e.g., MEC and MEHL) under Section 5(b) of the Act, but does not terminate the law itself, and the visa ban against Burmese military officials remains in place. Authority to rescind the financial sanctions waiver remains in place if either the current or a future administration determines to do so. Accordingly, it will remain important for businesses considering opportunities in Burma to maintain a close eye on U.S. policy and concerns in Washington in the months ahead, as well as to cultivate a close understanding of the interests and intersection of political forces within Burma.

Corresponding Measures to Facilitate Financial Transactions

To supplement President Obama's lifting of sanctions, the U.S. Department of Treasury's Financial Crimes Enforcement Network (FinCEN) also issued exceptive relief for Burma, allowing U.S. financial institutions to provide correspondent account services to Burmese banks, subject to certain due diligence obligations under Section 312 of the USA PATRIOT Act and its implementing regulation, 31 C.F.R. 1010.651.

Importantly, Burma remains a jurisdiction of primary money laundering concern under Section 311 of the USA PATRIOT Act, and FinCEN has reiterated that Burma has not sufficiently addressed corruption issues, accountability issues, or the implementation of new reforms to mitigate the threat of money laundering and terrorist financing. Therefore, the exceptive relief to enable correspondent account services is particularly qualified by Burma's ongoing engagement and cooperation toward improving these outstanding concerns.

Looking Ahead: Political and Reputational Risks

As a result of the Obama Administration's actions, the predominant risks of doing business with former Burmese SDNs are political and reputational rather than specifically legal. Although the Obama Administration has lifted sanctions and has signaled a move toward engagement with the Burmese military, various parties have expressed concern over the decision. For many members of Congress and the NGO community, Burma's outstanding human rights issues remain key concerns, particularly with respect to labor standards, trafficking and the plight of Burma's stateless Rohingya Muslim community. Moreover, many worry that President Obama's actions remove pressure from the Burmese military, which retains substantial control and influence in Burma's government and economy.

In an effort to communicate these concerns, Senators Ben Cardin and John McCain co-introduced the Cardin-McCain Burma Strategy Act of 2016 on September 13, 2016. The legislation sought to set benchmarks and guidelines on sanctions relief, given the context of "on-going challenges for democracy, good governance, ethnic reconciliation, legal reforms in the extractives sector, and the treatment of military-owned enterprises." Given the President's decision to lift sanctions outright, the legislation will remain largely symbolic, unless revised and reconsidered.

For its part, the U.S. Department of State has reiterated that the United States will work to develop new policies to address remaining challenges with Burma, "including the disproportionate role of the military in the economy and the need for responsible and transparent investment and business practices." Additionally, the State Department reiterated the need to strengthen "Burma's ability to combat money laundering and terrorist financing, an effort that is critical to Burma's reintegration into the international financial system." Moreover, it is likely that State Counsellor Aung San Suu Kyi and the NLD will seek to create domestic regulatory mechanisms in an effort to supervise and maintain limitations on transactions with entities controlled by, or affiliated with, the Burmese military.

Due to the risk of asymmetry on the U.S. side between the White House, lawmakers in Congress and human rights groups relative to their differing policy, political, economic and human rights concerns and interests—and in anticipation of responsive domestic policy changes on the part of Burma—businesses considering new opportunities in the country will need to ensure a proper read of the dynamic U.S.-Burma relationship over the remaining tenure of the Obama Administration and into the incoming administration. Moreover, we expect that businesses moving forward with opportunities in Burma will need to bolster their Corporate Social Responsibility programs, ensure proper standards for anti-money laundering and combating the financing of terrorism, and comply with the Foreign Corrupt Practices Act, in addition to any sector-specific compliance and risk mitigation measures. We continue to advise clients on the legal and business risks associated with conducting business in Burma and effectively managing the political and reputational risks that remain following the lifting of sanctions.

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