

# HERZFELD & RUBIN P.C.

Going the Distance One Step at a Time

# Herzfeld & Rubin



## **AMCHAM MYANMAR AND AUSTRALIA-MYANMAR CHAMBER OF COMMERCE**

SULE SHANGRI LA, Yangon, Myanmar

September 29<sup>th</sup>, 2016

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- Herzfeld & Rubin was founded in 1948
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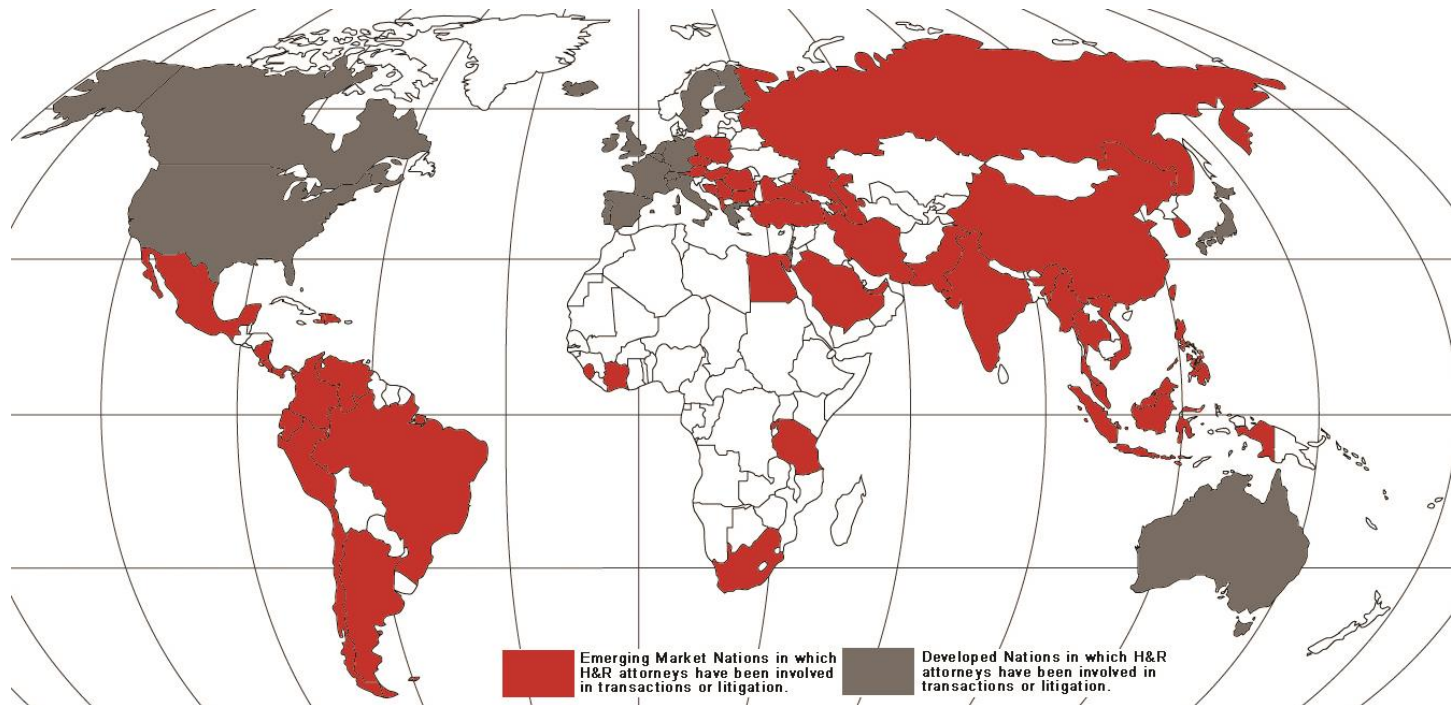
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- ▣ Mining and oil companies
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- ▣ Largest European and Asian automobile manufacturers
- ▣ Natural gas and oil pipeline equipment manufacturers

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## Legal background of the U.S. Burma Sanctions

- ❑ Trading with the Enemy Act, 50 U.S.C. sect. 1-44 (1917)
- ❑ National Emergencies Act (NEA), 50 U.S.C. sect. 1601-1651 (1976)
- ❑ International Emergency Economic Powers Act (IEEPA), 50 U.S.C. sect. 1701-1706 (1977)
- ❑ Foreign Operations, Export Financing, and Related Programs Appropriations Act (Public Law 104-208), sect. 570 (1997)
- ❑ Burma Freedom and Democracy Act of 2003 (PL 108-61), 50 U.S.C. sect. 1701 (2003) (“BFDA”)
- ❑ Tom Lantos Block Burmese Jade Act of 2008 (Public Law 110-286) 50 U.S.C. §1701 (2008) (“JADE Act”)
- ❑ Burma Sanctions Regulations, 31 C.F.R. Part 537 (fully reissued at 79 FR 37106-14 + 81 FR 31169-01)



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## Legal background of the U.S. Burma Sanctions (cont'd)

### *Executive Actions:*

1989 - Suspension of GSP

1997 - Executive Order 13047 – declared national emergency under IEEPA and prohibited new investment in Myanmar by “U.S. Persons”

2003 – Executive Order 13310 – sect. 3 and 8 revoked  
in 2013 – implemented BFDA import restrictions, prohibited financial services exports to Myanmar, targeted Myanmar officials and their families, and included three Myanmar banks on the SDN list.

## Legal background of the U.S. Burma Sanctions (cont'd)

### *Executive Actions (cont'd):*

2007 – Executive Order 13448 – expands sanctions criteria by including human rights abuses, public corruption, and support for government (i.e. “cronies”)

2008 – Executive Order 13464 – expands the authority to cover state-owned or controlled enterprises

2012 – Executive Order 13619 – expands authority to target those opposed to peace process, and involved in arms trade with North Korea

2013 – Executive Order 13651 – prohibits imports of jadeite and rubies

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## Specially Designated Nationals (“SDN”) List

- A compilation of several hundred Myanmar and other nationalities’ names listed in the Annex to Executive Orders 13310, 13448 and 13464, plus additional names added or delisted thereafter. Complete list can be found at:  
<http://www.treasury.gov/SDN>
- U.S. persons (both companies and individuals, wherever located) are prohibited from engaging in any transaction with a SDN-listed party, defined as one owned, or controlled, directly or indirectly, 50% or more by an SDN – **but see** OFAC Guidance August 13<sup>th</sup>, 2014  
([https://www.treasury.gov/resource-center/sanctions/Documents/licensing\\_guidance.pdf](https://www.treasury.gov/resource-center/sanctions/Documents/licensing_guidance.pdf)).
- Exceptions granted by OFAC license.

## Financial Sanctions not related to the U.S. Burma Sanctions

- ❑ Myanmar has been found to be a jurisdiction with “strategic AML/CFT (Anti-Money Laundering and Counter-Financing of Terrorism) deficiencies” by the Financial Action Task Force (FATF). FATF has since “graduated” Myanmar from its “grey” list in June, 2016.
- ❑ USA Patriot Act (Public Law 107-56) (2001) + U.S. Bank Secrecy Act 31 USC sect. 5311 et seq. (1970)
- ❑ Enforced by the Financial Crimes Enforcement Network (FinCEN) of U.S. Treasury Dept.
- ❑ FinCEN has designated Myanmar in 2004 as a primary money laundering regime and, to date, has not rescinded that finding, despite the fact that President Obama has now exempted all Myanmar financial institutions from the provisions of Section 311 of the USA Patriot Act **AND** FATF has taken Myanmar off its lists.

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USA Patriot Act (Public Law 107-56)(2001), Section 312  
(cont'd):

“... financial institutions covered by the final rule must take reasonable steps to: (1) determine the identity of all nominal and beneficial owners of the private banking account; (2) determine whether any such owner is a senior foreign political official and, thus, is subject to enhanced scrutiny (described below); (3) determine the source(s) of funds deposited into the private banking account and the purpose and expected use of the account; and (4) review the activity of the account to ensure that the activity is consistent with the information obtained about the source of funds, the stated purpose and the expected use of the account, as needed to guard against money laundering, and to report any suspicious activity.”

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## Financial Sanctions not related to the U.S. Burma Sanctions (cont'd)

- Section 312 of the USA Patriot Act requires U.S. financial institutions to perform “enhanced” due diligence with regard to correspondent accounts established or maintained for foreign financial institutions and private banking accounts established or maintained for non-U.S. Persons. The new Treasury Dept.’s “Customer Due Diligence (CDD)” Rule, which became effective on July 11th, 2016, is similar to the requirements of Section 312 of the USA Patriot Act.
- The following U.S. financial institutions are covered by the correspondent banking provisions of the Section 312 final rule: (1) banking institutions; (2) securities broker-dealers; (3) futures commission merchants and introducing brokers in commodities; and (4) mutual funds.

## Financial Sanctions not related to the U.S. Burma Sanctions (cont'd)

- The final rule also applies to correspondent accounts maintained for the following foreign financial institutions:
  - (1) a foreign bank;
  - (2) a foreign branch of a U.S. bank;
  - (3) a business organized under a foreign law that, if it were located in the United States, would be a securities broker-dealer, futures commission merchant, introducing broker in commodities, or a mutual fund; and
  - (4) a money transmitter or currency exchanger organized under foreign law.

## Responsible Investment Reporting Requirements

<http://www.humanrights.gov/wp-content/uploads/2013/05/responsible-investment-reporting-requirements-final.pdf>

- 1) A requirement that any *U.S. Person* undertaking new investment pursuant to an agreement, or pursuant to the exercise of rights under such an agreement, that is entered into with Myanmar Oil and Gas Enterprise (MOGE) notify the Department of State of such investment (“MOGE Investment Notification”); and
- 2) A requirement that any *U.S. Person* whose aggregate investment in Burma exceeds \$5,000,000 provide information as set forth in the U.S. State Department Regulation (“Annual Reporting Requirement”).



## U.S. actions announced on September 14<sup>th</sup>, 2016

1) The United States will terminate the National Emergency with respect to Myanmar and will revoke the Executive Order-based framework of the Burma sanctions program. At that time, the sanctions imposed under OFAC's Burmese Sanctions Regulations will no longer be in effect. OFAC will formally remove the Burmese Sanctions Regulations from the Code of Federal Regulations and take other administrative actions as necessary.

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## U.S. actions announced on September 14<sup>th</sup>, 2016

- 2) Continuation of JADE Act's ban on the issuance of visas for travel to the United States by former leaders of the SPDC regime, officials involved in the repression of human rights, other key supporters of the regime, and their immediate family members.
- 3) Continuation of the restrictions on U.S. sales of military equipment or services to the Tatmadaw
- 4) The United States will restore Generalized System of Preferences (GSP) trade benefits to Myanmar
- 5) State Department's Responsible Investment Reporting Requirement will be removed

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## U.S. Generalized System of Preferences (GSP)

Legal authority- 19 USC sect. 2461 et seq.

(<https://ustr.gov/sites/default/files/uploads/factsheets/Trade%20Topics/Trade%20and%20Development/GSP/GSP%20statute%2019%20USC%202461%20et%20seq.pdf>)

Regulations – 15 CFR Part 2007

([https://ustr.gov/sites/default/files/USTR-Regulations-Pertaining-Eligibility-GSP-Program-15-CFR-Part-2007\\_0.pdf](https://ustr.gov/sites/default/files/USTR-Regulations-Pertaining-Eligibility-GSP-Program-15-CFR-Part-2007_0.pdf))

GSP Guidebook –

(<https://ustr.gov/sites/default/files/The%20GSP%20Guidebook.pdf>)

## U.S. Chamber of Commerce Report – “U.S. Myanmar Commercial Relations – The Next Phase” (2016)

<https://www.uschamber.com/file/us-myanmarcommercialrelations-thenextphase-pdf>

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## U.S. actions announced on September 14<sup>th</sup>, 2016

6) Treasury Department's Specially Designated Nationals (SDN) list will be amended to move names of individuals and companies involved in trade with North Korea and the trafficking of drugs and gems to other SDN lists, thus eliminating the Burma SDN list.

*Question:* what will happen to companies under Union of Myanmar Economic Holdings and the Myanmar Economic Corporation, which control multiple interests in agro-farming, airlines, banking, minerals, tourism and trading industries? Some of them may be involved in arms trade with North Korea.

*Question:* what will happen to Steven Law and the Asia World group, and to U Tay Za and the Htoo Group, among others? Some of them have been alleged by the Treasury Dept. to be involved in drug trafficking and/or arms trade with North Korea.

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U.S. actions announced on September 14<sup>th</sup>, 2016

*Question:* What will happen to the enforcement of Section 312 of the USA Patriot Act? To quote a foreign banker in Myanmar:

*“I believe that even if 312 requirements go away, banks like ours will continue to carry out the enhanced due diligence on Myanmar banks or companies as Myanmar would still be considered a high risk jurisdiction due to AML/CFT (yes, despite having been taken off the “grey” list) and other factors. FinCEN is not the only reason why we don't treat Myanmar like other ASEAN countries.”*

## U.S. Treasury Department's Office of Foreign Asset Control Licenses

### *Reporting Requirements*

An affected party has to report transactions with SDN parties or property, or transactions which may have been rejected, or any license issues

### *Penalties*

Civil Penalties – up to \$250,000

Criminal Penalties – up to \$1,000,000/violation AND up to 20 years of imprisonment

## U.S. Treasury Department's Office of Foreign Asset Control Licenses (cont'd)

### *Recordkeeping Requirements*

- All documents involving an OFAC action have to be maintained no less than five years, although OFAC may require a specific period
- Records to be maintained in a readily accessible format in the original language



## Recommended Compliance Procedures

- Have a comprehensive compliance program, and annually audit your own employees' actions
- Undertake thorough ("enhanced") due diligence on your customers/partners on a continuous basis (i.e. subject to disclosure of "material" events)
- Use standardized contracts which are fully compliant with OFAC and other government rules, and implement document retention policies
- Voluntarily disclose alleged violations
- Timely compliance with reporting requirements

## Discussion

- A) the practical extent of the changes proposed by President Obama
- B) the key areas of opportunity and risk for business with regard to Myanmar
- C) potential next steps in the sanctions process

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