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# Myanmar: Anti-Corruption Compliance

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Myanmar is in the throes of significant political and economic change. Nearly 67 years after its independence from the United Kingdom and after more than 50 years of strict military rule, Myanmar has embarked on a path towards sustainable economic reform. The reform has, as its primary focus, the liberalisation of most market sectors and the active promotion of foreign direct investment, an objective shared by Myanmar's regional counterparts and consistent with Myanmar's commitments as an ASEAN member country.

Since the civilian government took political control in 2010 under the leadership of President Thein Sein, the pace of Myanmar's legal and regulatory commitments to support foreign direct investment has been remarkable. For example, since 2011 alone, Parliament has passed over 120 laws and a seemingly countless number of ministerial notifications and regulatory guidelines, many of which are aimed at facilitating market liberalisation and encouraging investment. With substantial domestic commitment of resources and assistance from international legal and regulatory experts, Myanmar continues to evaluate, draft and implement additional laws aimed at the country's long-term economic reform goals.

The initial results have been good. According to the World Bank, foreign direct investment is at record levels in Myanmar, growing from a paltry US\$330 million in the 2009–2010 fiscal year prior to implementation of economic reforms, jumping to US\$1.9 billion in 2011–2012, US\$2.7 billion in 2012–2013, US\$4.1 billion in 2013–2014 with investment expected to soar to a record of more than US\$8 billion in fiscal year 2014–2015. Economic growth rates mirror these positive figures, with GDP expected to expand an additional 8.5 per cent in the fiscal year 2014–2015, a pace that exceeds that of the South-East Asia region as a whole.

This record rate of investment, combined with the substantial presence of existing foreign operators, places investors and their counsel in a position of unique economic opportunity. However, it also poses inherent risks. One such risk is the potential for corruption, both in the private and public sector. It is critical that investors therefore be cognisant of the potential risks of exposure to corrupt or fraudulent practices and of their compliance obligations. This is particularly so for Myanmar, which has a historically dubious reputation as a corrupt state.

## Corruption – an overview

Until its recent focus on the promotion of foreign direct investment and market liberalisation, Myanmar has been largely a country closed to the scrutiny of and cooperation with the world at large, with the exception of some of its regional neighbors. As such, arguably little domestic or international focus was placed on the improvement and enforcement of corrupt practices. This has had an understandable impact on the perception of corruption in Myanmar, a perception that persists today. For example, according to Transparency International's most recent Corruption Perception Index, Myanmar ranks 156th out of 175 countries evaluated (see [www.transparency.org](http://www.transparency.org)). While this represents a slight improvement

over its past rankings, the numbers do indicate the potential for corruption. Domestic studies also highlight the issue. Recently, the Myanmar Centre for Responsible Business conducted a transparency survey on private companies. Of all 60 companies participating in the index, only five earned enough points to qualify to pass.

While experience suggests that the issue of corrupt and fraudulent behaviour in the public and private sectors is not as bad as public perceptions, a problem does exist. Myanmar is aware of these perceptions and of its need to improve anti-corruption efforts to further encourage and promote foreign investment. As part of a concerted effort to promote such investment, President Thein Sein vowed to fight corruption plaguing government ministries when he took the oath of office in March 2011, a vow that has seen some positive change.

To address the problem, Myanmar has focused on passage of and strengthening of anti-corruption laws and supporting the establishment of anti-corruption agencies, with additional focus on education. This focus is expected to not only improve the domestic anti-corruption environment, but also to improve international perceptions of corruption in Myanmar, a goal towards the improvement of international relations and foreign investment.

## Private corruption and enforcement mechanisms

When it comes to uncovering private corrupt activities, the vast majority of investigations are initiated by the private entities themselves or third-party entities. The practice areas affected are widespread, but more frequently involve private manufacturing and trading companies, accounting, banking and other service sectors. Relevant authorities, such as the Bureau of Special Investigation, that have minimal resources to uncover initial wrongdoing, are typically advised of possible wrongdoing, which then leads to comprehensive and often lengthy investigations that may be civil or criminal in nature.

In the private sector, fraudulent behaviour may be enforced under the Myanmar Penal Code, the most common means to address economic fraud. Historically, successful criminal prosecutions are few, but there is a new focus on uncovering and prosecuting private fraud.

Other means of enforcement may be sought through Myanmar's Stock and Securities Exchange Law, which provides for prosecution and recovery of funds for fraudulent or impermissible behaviour in the stock and securities trade.

Money-laundering enforcement has most recently been enhanced with the passage of the Money Laundering Eradication Law, which seeks to more aggressively assist authorities by providing tools for the recovery and forfeiture of monies tied to illicit or criminal activities. This is an important step in improving the ability of authorities to more easily locate and seize fruits of illegal activities and prosecute those responsible. This law is assisted by the recently passed Anti-Money Laundering Rules, establishment of a special police unit for financial crimes and Rules Combating the Financing of Terrorism.

Forms of financial misconduct may be processed through the Financial Institutions of Myanmar Law and the Foreign Exchange Management Law, both of which focus criminal provisions on fraud and other wrongdoing committed in financial institutions.

As it relates to claims of antitrust violations, claims are most typically brought through Myanmar's Competition Law, which provides a means to prosecute or otherwise penalise business activity that is proven to be anti-competitive. Here, too, claims in Myanmar are infrequent in practice, due largely to the lack of governmental resources.

Historically, the number of investigations of private sector frauds and other wrongful behaviour by business institutions and their managers has been low, due largely to a lack of commitment and resources. This is changing, however, as the Myanmar authorities have increased the legal tools available and have focused additional resources on the problem. This has already resulted in an increase in investigative activities by the relevant authorities. While there are few cases that have been reported and prosecuted from as a result of the new focus, it is expected that 2015 and 2016 will see an increase in publicly reported prosecutions.

It is also worth noting that a company may be presumed liable for the wrongdoing committed by its employees if they committed it during the conduct of their roles. This is a presumption that may be defeated; however, if it can be proven that the wrongdoing employee was acting not on the behalf of the company, but in his or her own capacity or for his or her own benefit.

### Overview of the Anti-Corruption Law

The prosecution of corrupt activity, while addressed in several separate civil and criminal law provisions, sees its primary focus in Myanmar's Anti-Corruption Law. The law does not criminalise private corruption per se, but takes action against government services and political rights holders involved in corrupt or illicit activities. This law, which was recently amended in 2014, now makes it easier to prosecute government wrongdoers involved in seeking or receiving bribes from both the public and private sectors. The law also establishes an Anti-Corruption Commission to investigate and prosecute violations of Myanmar's Anti-Corruption Law.

Under Myanmar's anti-corruption enforcement regime, the Anti-Corruption Commission now has the power to take investigative and prosecution action on its own initiative. In addition, it may also act at the request of the President, Parliament or in response to complaints brought forth by aggrieved parties.

These important amendments and the political commitments from the current government portend a continued strengthening of the anti-corruption legal framework and culture. This is a significant step forward, but much remains to be done to strengthen Myanmar's anti-corruption regime to a point of equity with many of its international partners.

### Impact of overseas anti-corruption laws in the US and UK

The US Foreign Corrupt Practices Act (FCPA) prohibits the bribery of "foreign officials". It is extraterritorial in effect and affects all US companies and persons as well as foreign companies and persons if they issue securities on a US Exchange or otherwise engage in activities in furtherance of a bribe in US territory. Importantly, in pursuing potentially unlawful acts under the FCPA, the US Department of Justice has adopted an expansive definition of what it means to be committing an act of bribery in the US and has interpreted it to catch the transfer of money through US bank accounts including,

potentially, all US-dollar transactions that are cleared through bank accounts in the US.

The FCPA also contains a books and records provision requiring issuers to make and keep accurate books, records and accounts, which, in reasonable detail, accurately and fairly reflect the issuer's transactions and disposition of assets. In addition, the FCPA's internal controls provision requires issuers to devise and maintain reasonable internal accounting controls aimed at preventing and detecting FCPA violations. These provisions apply to all companies, both US and non-US, that have their securities issued on a US exchange. They are expansive provisions and have been used to prosecute companies in cases where bribes have been paid to private individuals.

The UK Bribery Act 2010 (the Bribery Act) covers bribery of private persons as well as public officials. It also has extraterritorial application. For example, the Bribery Act prohibits offering or accepting a bribe outside the UK provided that the offender has a close connection with the UK. Persons with a "close connection" include British citizens and organisations incorporated in any part of the UK. Similarly, the Bribery Act's corporate offence – which occurs when an organisation fails to prevent those performing services on its behalf from paying bribes – applies not only to organisations incorporated under UK law, but also to any other company carrying on a business, or part of a business, in the UK, regardless of where the act of bribery takes place.

The fact that conduct may not constitute an offence under local law does not necessarily mean it is permitted under the FCPA or the Bribery Act. Companies doing business in Myanmar are advised not only to comply with domestic legislation, but should also be fully aware of the far-reaching extraterritorial effect of both the FCPA and the Bribery Act.

### Compliance

While Myanmar has taken significant steps towards improving the investigative and enforcement mechanisms available to it in combating both public and private corruption, there is still an important need for foreign investors to take a proactive and cautious approach to ensure that they are minimising potential liabilities, both under domestic and foreign anti-corruption laws.

Formulation of comprehensive compliance training programmes is critical to ensuring that company executives and employees are aware of the legal obligations they and the company have domestically and internationally. This is even more important in Myanmar, where an anti-corruption regime is only in its early stages, where enforcement and interpretation is inconsistent and where there may be a cultural acceptance of some forms of impermissible behaviour. Important steps taken at the preventive stages to prepare and implement compliance programmes may lessen the likelihood of future investigations, liabilities and expenditures.

### Conclusion

Myanmar is a dynamic and evolving foreign investment destination. With its valuable natural resources, large domestic population and a concerted focus by the government on the liberalisation of its economy, it is expected that the robust interest will increase. As investors continue to enter the country, they do so in a jurisdiction in which the laws, regulations and enforcement mechanisms have naturally lagged behind those of its international partners. Anti-corruption is one such area. The initiative is there and great strides have been made, but uncertainty remains in some regulatory and enforcement sectors despite a clear long-term commitment to improving the anti-corruption efforts.

It should be noted, however, that no efforts will immediately change the challenging anti-corruption environment in which domestic and foreign business operators are exposed in Myanmar. It is for this reason that investors should be diligent in their efforts to understand the risks and the legal restrictions and protections available (both domestic and international), and should work to develop programmes to minimise such risk through education, evaluation and compliance. A carefully designed and implemented investment strategy, including anti-corruption compliance initiatives, can help an investor, its executives and employees understand the constantly evolving anti-corruption landscape in Myanmar and limit potential liabilities accordingly.



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Michael Ramirez is a senior consultant and manager of Tilleke & Gibbins' Myanmar practice, overseeing client services in the region. In this capacity, Michael works with the local and regional Myanmar attorney team and directly advises clients on commercial and dispute resolution matters in Myanmar.

Michael is a senior member of the firm's dispute resolution group, where he has assisted major international clients in a wide range of domestic and international disputes, including product liability, employment, customs and excise, and transportation and logistics disputes. Michael also serves as a client adviser on the strategic aspects of claims management for international litigation, cross-jurisdictional disputes, and compliance with international anti-corruption laws, including the Foreign Corrupt Practices Act (FCPA).

Supplementing Michael's practice is his representation of clients in arbitration and mediation. This experience includes representation in regional enforcement proceedings, as well as acting with a team of litigators in domestic and international claims resolutions. Michael is a member of the Chartered Institute of Arbitrators.

Michael has authored and co-authored numerous published articles on Thai and Myanmar law on topics including arbitration, foreign investment law, and civil and criminal liability. He is a regular presenter on dispute resolution and commercial practice topics and has been the recipient of the American Bar Association's Rule of Law Award for his presentations on attorney ethics. Michael is actively involved in promoting and developing the Yangon office's pro bono practice, through which he is committed to serving INGOs and locally based organisations.

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Our firm represents the top investors and the high-growth companies that drive economic expansion in Asia in the key areas of commercial transactions and M&A, dispute resolution and litigation, and intellectual property.

Tilleke & Gibbins advises clients on anti-corruption matters in Southeast Asia. Many countries we work in are attractive destinations for foreign investment. They are also high-risk environments for corruption, asset concealment, fraud and other forms of economic crime. The US government has made prosecutions under the Foreign Corrupt Practices Act (FCPA) a national priority, and more cases under the UK Bribery Act are expected. In addition, ASEAN governments are increasing their own anti-corruption efforts. Failing to curb or prevent corruption can have devastating economic, legal and reputational consequences.

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- Advising clients on the FCPA and the UK Bribery Act.
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- Performing anti-corruption risk assessments.
- Overseeing internal corporate investigations.
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