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Myanmar: anti-corruption compliance

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Following the National League for Democracy's landslide victory in the November 2015 elections, the new civilian government cabinet, under the leadership of President Htin Kyaw and political leader Aung San Suu Kyi, was sworn into office in March 2016. The new NLD government has pledged to implement major reforms to the country's political, legal, economic, social, and democratic developments, in hopes to undo years of political economic stagnation caused by over half a century of military governance. Myanmar's latent move toward sustainable economic reform first began under the leadership of former President Thein Sein, during which Myanmar witnessed significant improvements in its legal and regulatory commitments to support foreign direct investment. The reform has, as its main 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. For example, since 2011, Parliament has passed many new 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, the new government of Myanmar has vowed to continue evaluating, drafting and implementing additional laws aimed at the country's long-term economic reform goals. In fact, the chair of the NLD's economic committee, Han Tha Myint, mentioned in December 2015 that the new government does not intend to turn the bureaucracy of the former administration upside down amid fresh efforts to alleviate corruption.

According to the World Bank, foreign direct investment is at record levels in Myanmar, growing from a paltry net inflow of US\$901.133 million in the 2009–2010 fiscal year prior to implementation of economic reforms, jumping to US\$3.137 billion in fiscal year 2014–2015. Economic growth rates mirror these positive figures, with GDP growth of 7 per cent recorded in the fiscal year 2014–2015, a pace that exceeds that of the South-East Asia region as a whole. GDP growth per capita also recorded an impressive 6.1 per cent in the same fiscal year.

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 147th out of 168 countries evaluated, alongside Chad and the Democratic Republic of the Congo (see 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. The Myanmar Centre for Responsible Business conducted its second transparency survey on private companies in 2015, modelled after Transparency International's Transparency in Corporate Reporting – Assessing the World's Largest Companies TRAC report. The report, which was published in July 2015, highlighted that only 12 companies out of the 62 companies surveyed reported on anti-corruption programming, making it the section with the least amount of published information.

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, former 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. The battle against corruption continues under the leadership of the new government, which made this a major theme of their election campaign last year.

To address the problem, Myanmar has focused on passage and strengthening of anti-corruption laws and supporting the establishment of anti-corruption agencies, with additional focus on education. This focus is expected not only to improve the domestic anti-corruption environment, but also to improve international perceptions of corruption in Myanmar, a goal toward 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, triggering 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. In September 2015, the Central Bank of Myanmar also published Anti-Money Laundering/Combating and Financing of Terrorism guidelines for financial institutions, which implements some of the International Financial Action Task Force's recommendations in accordance with the International Monetary Fund's AML/CFT guidelines. Until 2006, Myanmar was named in the International Financial Action Task Force's list of 'Non-Cooperative Countries and Territories.'

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 anticompetitive. 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 fraud 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. However, while there are few cases that have been reported and prosecuted as a result of the new focus, the number of publicly reported prosecutions remains low.

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 and updates on the anti-corruption regime

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. Most recently in July 2016, the Parliament approved an amendment to the Anti-Corruption Law, which stipulates that the President and the speakers of both houses appoint no more than five members to the Anti-Corruption Commission with a view to strengthening the body and for cost-savings purposes. According to statistics released by the Anti-Corruption Commission, 2,214 complaints were received during the period from 10 March 2014, to 30 June 2016. Out of these 2,214 complaints, only 508 were looked into by the Anti-Corruption Commission as the rest were said to lack detailed information or evidence, or were deemed to be not related to corruption. The work of the Anti-Corruption Commission has been met with mixed reactions thus far, as among the 508 complaints investigated by the Anti-Corruption Commission, the Anti-Corruption Commission only took action in relation to 19 cases, in which 11 persons were eventually sentenced to imprisonment and fines, while 40 others were terminated or were given a serious warning in accordance with the Anti-Corruption Law. The other 488 complaints out of the 508 were transferred to be handled by the respective departments where the subjects of the complaints were based for administrative action to be taken.

What is perhaps the most important anti-corruption update in the past year is the 'President's Office Guidelines on Accepting Gifts' which was issued just one working day after the assumption of power of the new government. The guidelines ban civil servants from accepting gifts from anyone that would seek to benefit from the civil servant's position, subject to a few exceptions. In the guidelines, 'gifts' include money, gold, silver, air tickets, hotel stays, meals and even golf membership fees. While not prohibiting civil servants from accepting gifts altogether, the value of each permissible individual gift must not exceed 25,000 kyat, whereas the total value of gifts received from an individual or organization are limited to not more than 100,000 kyat in a single year. The guidelines prescribe a few exceptions, namely where gifts are given during recognized religious holidays, whereby such gifts must not exceed 100,000 kyat in value, or where gifts are provided on account of a familial or personal relationship. For diplomacy reasons, it is also permitted for civil servants to accept gifts from foreign governments worth more than 400,000 kyat, as well as money for travel, medical expenses, or for scholarships—although such provisions have been criticized as presenting a loophole in its enforcement. The government's commitment to enforcing the guidelines has been encouraging thus far, when a media company was said to be in violation of the guidelines by gifting 5 million kyat in cash to an assistant of an official in conjunction with the Myanmar New Year celebrations. The government announced that the funds will be redirected toward social projects.

These important amendments and the political commitments 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 United States 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 United States.

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 United Kingdom provided that the offender has a close connection with the United Kingdom. Persons with a 'close connection' include British citizens and organisations incorporated in any part of the United Kingdom. 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 United Kingdom, 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.

Summary

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 to 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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Nwe Oo is a senior attorney-at-law in Tilleke & Gibbins' Myanmar office. Practicing primarily in the firm's corporate and commercial group, Nwe is a skilled litigator with far-reaching experience in both civil and criminal commercial matters. As a former prosecutor, he has substantial experience handling primary cases, appeals, and amendment cases in the Divisional Court and Supreme Court of Myanmar.

For almost a decade, Nwe acted as an expert legal adviser to numerous local Myanmar firms, including a leading information technology company, where he served as in-house counsel. In this role, Nwe handled human resources and employee affairs, tax, commercial memorandums of understanding and agreements, company formation and business matching, franchise agreements and management, consultancy and project management, and investment negotiations. With Tilleke & Gibbins, Nwe is active in advising clients on intellectual property and commercial matters, including customs and tax, project development, corporate formation, joint ventures, distribution and franchising, and employment law.

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Sher Hann Chua is a consultant in Tilleke & Gibbins' Yangon office. Sher Hann's practice focuses on intellectual property and corporate and commercial matters. She has strong business acumen and a habitual commitment to helping companies capitalise on their strengths and maintain their competitive edge. Sher Hann has represented a broad range of clients across industries that include energy, food and beverage, real estate, media and entertainment, information technology, and automotive. She has regularly appeared before trademark registrars and government bodies on behalf of brand owners in negotiations, enforcement actions, and regulatory affairs.

Prior to joining Tilleke & Gibbins, Sher Hann was an associate at a leading law firm in Kuala Lumpur, Malaysia, where she advised on intellectual property, technology, franchising, and regulatory issues. Sher Hann received a law degree from the University of Reading, and she holds a master's degree in intellectual property from University College London, a top-ranked university in the United Kingdom. She is admitted to the Malaysian Bar and is fluent in English, Bahasa Malaysian and Chinese.

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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 South-East 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.

Through our multi-jurisdictional presence, we assist clients seamlessly across borders. Our attorneys and consultants are deeply knowledgeable about local business practices and cultures, which allows us to provide a unique blend of legal and practical advice in this complex field. We provide the following anti-corruption services:

- Advising clients on local anti-corruption laws, regulatory regimes, and business culture.
- Designing, advising, and implementing compliance programmes.
- Advising clients on the FCPA and the UK Bribery Act.
- Conducting anti-corruption due diligence on agents, partners, and M&A targets.
- Performing anti-corruption risk assessments.
- Overseeing internal corporate investigations.
- Defending and prosecuting corruption-related allegations.
- Assisting with asset recovery and protection.



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