



THE ASIA-PACIFIC INVESTIGATIONS REVIEW 2019

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Global Investigations Review

www.globalinvestigationsreview.com

The Asia-Pacific Investigations Review 2019

A Global Investigations Review Special Report

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This article was first published in October 2018
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The Asia-Pacific Investigations Review 2019

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Cover image credit: ismagilov/iStock/Thinkstock

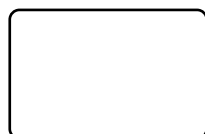
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ISBN: 978-1-78915-108-4

Printed and distributed by Encompass Print Solutions
Tel: 0844 2480 112

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Preface

Global Investigations Review is the hub of the international investigations community, bringing practitioners together through our journalists' daily news, GIR Insight resources and GIR Live events. **GIR** gives our subscribers – mainly in-house counsel, private practice lawyers, government enforcement agencies and forensics advisers – the most readable explanation of all the cross-border developments that matter, enabling them to stay on top of their game. Over the past 12 months, our reporters have conducted roundtables on the cost of investigations and the future of investigations firms, interviewed government enforcers, refreshed our surveys showcasing Women in Investigations and the top firms in investigations (the GIR 100) and – after a successful court decision – obliged the DOJ to release the names of unsuccessful candidates for Foreign Corrupt Practices Act monitorships.

Complementing our journalists' original work, this annual report gives readers the 'front-line' view from selected practitioners. Each is invited to reflect on the complex issues that they – and their in-house clients – face in internal and government investigations every day. All authors are leaders in their field and we are grateful to them all for their time and energy. We encourage readers and co-authors to share feedback and comments.

If you would like to get involved in future editions or have thoughts for us, please contact edward.perugia@globalinvestigationsreview.com.

We hope you enjoy reading *The Asia-Pacific Investigations Review 2019*.

Global Investigations Review

London

August 2018

Myanmar: Continuing the Fight against Corruption

Sher Hann Chua and Nwe Oo
Tilleke & Gibbins

Under the governance of the National League for Democracy government, Myanmar has witnessed many remarkable improvements in its legal, social and economic commitments in the past year. Infrastructure development aside, the reform has been largely focused on the liberalisation of market sectors and the promotion of foreign direct investment – an objective that is shared by Myanmar’s regional counterparts and consistent with Myanmar’s commitments as an ASEAN member country. Most notably, the Myanmar Investment Law 2016 was passed in October 2016 and the new Myanmar Companies Law 2017 was enacted in December 2017, symbolising the government’s pledge to facilitate market liberalisation and encourage investment. The lifting of sanctions by the United States in 2016 has also created opportunities for more foreign investors. The steady growth in investment, combined with the substantial presence of existing foreign operators, places investors in a position of unique economic opportunity in one of the last emerging economies in the world. However, such circumstances also pose inherent risks, including the potential for corruption in both the private and public sectors. It is critical that investors therefore be cognisant of the potential risks of exposure to corrupt or fraudulent practices, and of their compliance obligations.

In the past year, Myanmar has taken a few significant strides in its fight against corruption. On 24 November 2017, a new 12-member Anti-Corruption Commission led by former Minister U Aung Kyi was formed. As of 31 May 2018, the new Anti-Corruption Commission has received and handled a total of 3,045 complaints. In May 2018, the embattled Finance Minister U Kyaw Win tendered his resignation after media reported that he was under investigation for alleged corruption. This announcement came just weeks after the arrest of the Director General of the Food and Drug Administration of Myanmar, Dr Than Htut, for corruption probes. In the same month, the Anti-Corruption Commission entered into a memorandum of understanding with the South Korean Anti-Corruption and Civil Rights Commission, to enhance anti-bribery and corruption cooperation and knowledge sharing. On 21 June 2018, the parliament enacted its fourth amendment to the Anti-Corruption Law 2013, which extended the powers of the Anti-Corruption Commission.

Corruption – an overview

For over five decades, Myanmar has been a country largely closed to the scrutiny of and cooperation with the world at large, with the exception of some of its regional neighbours. Therefore, compared with other developing nations, little domestic or international focus has, in the past, been placed on the improvement and enforcement of corrupt practices. This has had an understandable impact on the perception of corruption in Myanmar; one that persists today, even as foreign direct investment continues to grow.

Myanmar is ranked at 130 out of 180 countries and territories in the Corruption Perception Index 2017 released by Transparency International, a few steps up from the previous edition of the index, which placed it at 136 out of the 176 countries and territories

evaluated. This marks a continued progress, yet also represents the country’s prevalent potential for corruption, as well as room for further improvement. Although the issue of corrupt and fraudulent behaviour in the public and private sectors is not always as bad as the public perception of it, a problem does exist and this cannot be ignored. Myanmar is aware of these perceptions and of its need to improve anti-corruption efforts to further encourage and promote foreign investment. To address the problem, Myanmar has focused on the 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, which is a step towards the overall goal of improvement of international relations and foreign investment.

Overview of anti-corruption laws and updates on the anti-corruption regime

The prosecution of corrupt activity in Myanmar, while addressed in several separate civil and criminal law provisions, such as the Official Secrets Act 1923 and the Civil Service Law 2013, is primarily provided for in the Penal Code of 1860 and the Anti-Corruption Law 2013.

The Penal Code of 1860 stipulates several offences related to bribery. Section 161 of the Penal Code lays down the general offence of bribery, stating that:

whoever, being or expecting to be a public servant, accepts or obtains, or agrees to accept, or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or for bearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person with the Union Parliament or the Government or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Because of the wording of these provisions governing bribery, such offences can only be committed by public servants. The provisions governing electoral bribery offences, however, are not limited to public servants. For instance, section 171B of the Penal Code provides that such offences can be committed by:

whoever gives a gratification to any person with the object of inducing him or any other person to exercise any electoral right or of rewarding any person for having exercised any such right or accepts either for himself or for any other person any gratification as a reward for exercising any such right or for inducing or attempting to induce any other person to exercise any such right commits the offence of bribery.

In practice however, private individuals offering bribes can be charged for abetting convicted public servants in the crime.

The Anti-Corruption Law 2013 defines corruption as:

the direct or indirect abuse of one's position as an authoritative person in order to perform an act, refrain from performing a lawful act, give someone his legitimate right, wrongfully prohibit a person from his legitimate right, such as by giving, accepting, receiving, attempting to receive, offering, pledging, or discussing by any means of a consideration from a person concerned for himself or any other or any organization.

The definition of an authoritative person covers public servants, foreign public servants, individuals holding political positions, senior officials, as well as administrators or representatives of public organisations. The law does not explicitly criminalise private corruption per se, but a broader interpretation of the provisions and the spirit of the law would suggest that private corruption is similarly prohibited under the Anti-Corruption Law 2013. The law is nonetheless primarily used to take action against government services and political rights holders involved in corrupt or illicit activities, and stipulates a maximum punishment of 15 years' imprisonment and a fine.

The Anti-Corruption Commission of the Republic of the Union of Myanmar was also established in 2014 under the auspices of the law, and is empowered to investigate and prosecute violations of anti-corruption laws in the country. The Anti-Corruption Commission 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 any person. Under the latest amendment enacted on 21 June 2018, the Anti-Corruption Commission is empowered to issue orders requiring private organisations to establish business ethical codes and anti-bribery and corruption policies. The Anti-Corruption Commission also holds the power to determine that a person has a general reputation of being corrupt and initiate investigations, based on prima facie evidence that such person has committed a corrupt act.

The most pertinent anti-corruption update since the enactment of the Anti-Corruption Law 2013 was the issuance of the President's Office Guidelines on Accepting Gifts, which was published just one working day after the NLD government assumed power in 2016. The guidelines, aimed at stamping out 'tea money' incentives among government officials, 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 club membership fees. While not prohibiting civil servants from accepting gifts altogether, the value of each permissible individual gift must not exceed 25,000 kyat, and the total value of gifts received from an individual or organisation is limited to no more than 100,000 kyat in a single year. The guidelines prescribe a few exceptions, namely where gifts are given during recognised 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 no more than 400,000 kyat, as well as money for travel, medical expenses, or for scholarships – although such provisions have been criticised as presenting a loophole in its enforcement. The government's commitment to enforcing the guidelines has been encouraging thus far. For example, shortly

after the issuance of the guidelines, an unnamed media company was said to have violated them by gifting 5 million kyat in cash to an assistant of an official in conjunction with the Myanmar new year celebrations in 2016. The funds were later redirected to social projects.

Uncertainty in the anti-corruption framework and ongoing legal reforms

These important amendments and political commitments portend a continued strengthening of the anti-corruption legal framework and culture in Myanmar. 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.

As mentioned above, the President's Office Guidelines on Accepting Gifts contain loopholes. In addition to that, the low threshold of 25,000 kyat per gift, combined with broadly worded provisions present certain practical challenges in reality. The guidelines do not explicitly address situations such as privately organised events or corporate sponsorships. For example, it remains unclear whether a company is allowed to invite government officials to officiate an annual appreciation dinner or product launch, or if one is allowed to sponsor or invite government teachers or health officials to attend in-house or international workshops and seminars as part of its corporate social responsibility initiatives. The blurred position persists when dining in a group comprising public servants, as it is not a cultural norm for participants to split the bill.

Despite the above, it is encouraging to note that the present government is continuously demonstrating its interest in combating graft within the public service sector. In July 2017, State Counsellor Aung San Suu Kyi launched the four-year Civil Service Reform Strategic Action Plan, which envisages extensive reforms within public service. In her officiating speech, the State Counsellor explained that the Strategic Action Plan sets out, among other things, initiatives to strengthen the code of conduct in civil service, improving training on ethics and anti-corruption, making grievance and whistle-blowing mechanisms more effective, enforcing asset disclosure requirements for senior positions, and introducing new technologies into administrative processes to minimise opportunities for bribes.

Anti-corruption provisions have also been included in some newly enacted statutes. For example, the Myanmar Investment Law 2016 explicitly states that in performing their duties under the act, members and officers of the Myanmar Investment Commission 'shall carry out such duties in accordance with the Anti-Corruption Law'. The Myanmar Investment Rules 2017, issued by the Ministry of Planning and Finance in March 2017, further states that when assessing an investment proposal, the Myanmar Investment Commission can take into consideration whether the investor or its associates have committed an offence or acted in contravention of the law in Myanmar or in other jurisdictions, 'including any environmental, labour, tax, anti-bribery and corruption or human rights law'.

The new Myanmar Companies Law 2017, which is set to enter into force on 1 August 2018, also seeks to introduce and modernise company transparency requirements. For example, the new law contains provisions mandating non-financial reporting requirements for companies, such as the submission of an annual director's report, which must consist of a fair review of the company's business, including a description of the company's primary business, an analysis of the company's performance during the year, a description of risks and uncertainties facing the company, and any other

matters that may be prescribed. Such a step is expected to improve transparency in the private sector, which in turn impacts private and public bribery.

Impact of overseas anti-corruption laws

Companies doing business in Myanmar should not only comply with domestic legislation but also be fully aware of the far-reaching extraterritorial effect of some overseas anti-corruption laws, such as the United States' Foreign Corrupt Practices Act (FCPA) and the United Kingdom's Bribery Act 2010.

The 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 who issue securities on a US exchange or otherwise engage in activities in furtherance of a bribe in US territory. Importantly, the US Department of Justice has adopted an expansive definition of what constitutes 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 that, 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.

On the other hand, the Bribery Act 2010 of the United Kingdom 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. It is therefore important for foreign investors to be aware of any overseas anti-corruption laws that may apply to them, such as the FCPA and the Bribery Act.

Compliance measures

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

Although the current legal framework in Myanmar does not mandate the establishment of a compliance programme, the formulation of comprehensive compliance training programmes is critical for good governance, and to ensure that company executives and employees are aware of the domestic and international legal obligations that they and the company have. This is particularly important in Myanmar where the anti-corruption regime is only in its early stages, where enforcement and interpretation is inconsistent, and where there may be cultural acceptance of some forms of impermissible behaviour. At the grassroots level, anti-corruption compliance policies should be made available in both Myanmar and English languages for ease of access. Companies are also encouraged to undertake annual assessments to identify the material risks faced, as well as host regular training programmes for internal stakeholders and employees. Important steps adopted at the preventive stages to prepare and implement compliance programmes may lessen the likelihood of future investigations, liabilities and expenditures. Similarly, stakeholders ought to understand the intrinsic relationship between corruption and money laundering and also seek to ensure a holistic application of the existing anti-money laundering provisions under the Anti-Money Laundering Law 2014 when playing their respective roles in combating corruption in Myanmar.

Conclusion

Myanmar is a dynamic and evolving foreign investment destination. With its valuable natural resources, large and youthful 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 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, and should work to develop programmes to minimise such risk through education, evaluation and compliance. As a nation that has topped the Charities Aid Foundation's World Giving Index for three consecutive years, the culture of giving and gifting is deep-rooted within local values. Often, the simple act of giving is not tainted by implied motives, but ignorance of the law is not a defence and a lack of awareness of allowable legal limitations may nevertheless land one in trouble. Hence, 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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Sher Hann Chua is a consultant in Tilleke & Gibbins' Yangon and Bangkok offices. 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 beverages, pharmaceuticals, real estate, media and entertainment, information technology and automotives. She has regularly appeared before registrars and government bodies on behalf of clients in negotiations, enforcement actions and regulatory affairs. She has also advised various multinational companies on anti-corruption compliance and regularly contributes to thought leadership publications.

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For almost a decade, Nwe Oo 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 memoranda of understanding and agreements, company formation and business matching, franchise agreements and management, consultancy and project management, and investment negotiations. With Tilleke & Gibbins, Nwe Oo is active in advising clients on intellectual property and commercial matters, including customs and tax, project development, corporate formation, joint ventures, distribution and franchising, anti-corruption and employment law.

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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:

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- 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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ISBN 978-1-78915-108-4