

BURMA: Letter to President Obama on Reporting Requirements

August 12, 2013

The Honorable Mr. Barack Obama
President of the United States of America
The White House
1600 Pennsylvania Ave, NW
Washington, DC 20500

Dear President Obama,

We are writing to express our concerns regarding the first public reports from U.S. companies under the Burma Responsible Investment Reporting Requirements (“Reporting Requirements”). We commend the companies that have complied with the July deadline for timely reporting but are concerned that the reports exhibit serious informational gaps. We call on your Administration to correct these oversights and avoid setting a precedent allowing companies to avoid forthright disclosures in future reports.

The Reporting Requirements were intended to help the U.S. Government and U.S. businesses manage the impacts of investment and safeguard human rights in Burma, as well as to provide the transparency that civil society groups need in order to promote responsible investment. However, the reports cannot assist in these efforts if companies interpret the drafting language to avoid making full disclosures. In order to ensure that the Reporting Requirements fulfill their intended purposes, we advise your Administration to make clear that companies are expected to:

- Assume responsibility for due diligence on the impacts of their investments, regardless of whether they manage those investments in a manner that is “passive” or hands-on;
- Disclose their Burmese partners; and
- Fully comply with the Reporting Requirements by submitting summaries or copies of their policies and procedures under Question 5 on Human Rights, Worker Rights, Anti-Corruption, and Environmental Policies and Procedures, Question 6 on Arrangements with Security Service Providers, and Question 7 on Property Acquisitions.

Application of due diligence responsibilities to passive investments

The U.S. investment sanctions – of which the Reporting Requirements are an integral part – are predicated on the understanding that investments in Burma may exacerbate human rights abuses, conflict, and corruption and could frustrate U.S. foreign policy interests. They make no distinction between the character of investments; rather, they apply equally to hands-off (“passive”) investors and those actively engaged in managing their investments. Yet in three separate reports, two related investment funds, Capital Bank and Trust Company and Capital International Inc. (collectively, “Capital”) declined to report on their human rights, worker rights, anti-corruption, and environmental policies and procedures, arrangements with security service providers, property acquisition practices, payments to the Burmese government, or even the general nature of their investments in Burma. In fact, Capital provided no detail about the extent and nature of these investments, and justified its failure to report on the grounds that its investments in Yoma Strategic Holdings, Ltd. (“Yoma”) are merely “passive.”

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The fact that Capital believes it has no responsibility to manage the impacts of its investments is especially disturbing because Yoma has operations in plantation agriculture and real estate, sectors that are notorious for land confiscation, labor abuse, and environmental destruction. If all investment funds with a “passive” relationship to their Burmese investment targets were to take the same position, U.S. capital could flood high-risk sectors – such as extractives, plantation agriculture, and infrastructure development – without providing the transparency needed to ensure that these investments are not in fact harming U.S. foreign policy interests.

Your Administration should clarify that *all* investors in Burma are expected to report thoroughly on their activities, even self-declared “passive” investors. “Passive” investors – just like hands-on investors – should explain in detail the nature and scope of their investment and the due diligence, if any, they have conducted. International standards concerning responsible corporate investment, including the OECD Guidelines for Multinational Enterprises, which the U.S. has endorsed, demand human rights due diligence from all companies that operate internationally, and apply equally to active and passive investors.

Several national governments and the UN High Commissioner for Human Rights have concluded that all investors – even minority investors – should use their leverage with business partners to prevent and address human rights abuses uncovered as a result of thorough due diligence. The Administration must not allow the first public reports to establish the precedent that companies may skirt detailed reporting by declaring their investments “passive,” thus negating the very purpose of the Reporting Requirements.

Identification of Burmese partners

For the Reporting Requirements to incentivize positive, responsible investment behavior, companies must disclose the names of their local partners, subsidiaries, and subcontractors. This information, if reported publicly, can empower your Administration and civil society groups to have more productive exchanges with companies, thereby assisting U.S. investors to mitigate the adverse impacts of their investments. However, companies are interpreting the Reporting Requirements as if they did not contemplate this outcome. Hercules Offshore, a company involved in offshore oil and gas activities that submitted the most detailed of the initial five reports, explained that its due diligence procedures included its local suppliers and subcontractors. However, and despite the fact that the Reporting Requirements ask companies to disclose the names of all companies covered by their reports, Hercules declined to identify its local supplier.

Your Administration should insist that companies publicly identify their Burmese partners in order to support civil society monitoring of U.S. investments. Due diligence necessarily covers suppliers, purchasers, and contractors, particularly in Burma, where corruption and human rights risks remain high. Neither civil society organizations nor the U.S. Government can monitor such risks unless investors disclose the identities of these related entities.

Publication of policies and procedures

In order to allow civil society organizations and the U.S. Government to trouble-shoot U.S. companies’ investment relationships and manage problems before they occur, investors have

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been required to provide concise summaries or copies of their policies and procedures related to human rights, the environment, labor, land acquisition, and corruption. If companies' procedures are vague or inadequate, they may run an unreasonably high risk of contributing to human rights and other abuses in Burma. Moreover, without adequate information about these policies and procedures, constructive engagement with individual investors becomes much more difficult.

The report submitted by Crowley Marine Services does not fulfill this requirement. Rather, Crowley states only that the company "maintains" policies, without explaining, describing, or attaching them to the report. Your Administration should require Crowley to submit summaries or copies of relevant policies and procedures. Otherwise, Crowley's report may set a negative precedent that the Reporting Requirements can be ignored without consequence.

Tracking reporting obligations

Finally, our organizations are interested in the extent to which the Administration is tracking U.S. companies' investments in Burma in order to ensure reporting when they reach the \$500,000 threshold. Has the State Department received all the reports it expected to receive to date, and how will it proceed if it suspects that a report has been unlawfully withheld? We believe the U.S. Government should have an established mechanism to monitor the overall level of U.S. investment in Burma and to require investors to submit reports. Investors should not be able to conceal their investments.

Thank you for your consideration of these recommendations. Our organizations are pleased that the Reporting Requirements have gone into effect, and we hope that your Administration will take the necessary steps to establish a precedent of thorough and high-quality reporting by U.S. companies. As always, we are grateful for the continued engagement by senior leadership in your Administration on these critical issues.

Signed by:

Access
Actions Birmanie – Belgium
AFL-CIO
Altsean-Burma
Burma Campaign UK
Burma Environmental Working Group
Burma Partnership
EarthRights International
Fortify Rights
Freedom House
Global Witness
Human Rights Foundation of Monland
Human Rights Watch
Institute for Asian Democracy
International Labor Rights Forum
International Trade Union Confederation
Investors Against Genocide

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Jubilee USA Network
Karen Human Rights Group
Karen Environmental and Social Action Network
Karenni Civil Society Network
Land Core Group of the Food Security Working Group
Orion Strategies
Physicians for Human Rights
Responsible Sourcing Network, a project of As You Sow
United to End Genocide
US Campaign for Burma

CC:

John Kerry, U.S. Secretary of State
Jacob Lew, U.S. Secretary of Treasury
Susan Rice, National Security Advisor
Ben Rhodes, Deputy National Security Adviser for Strategic Communications
Uzra Zeya, Acting Assistant Secretary of State, Bureau of Democracy,
Human Rights and Labor, Department of State
Daniel Russel, Assistant Secretary of State, Bureau of East Asia and the
Pacific, Department of State
Cheryl Hesse, Capital Guardian Emerging Markets DC Master Fund, Emerging
Markets Growth Fund, Inc., and Capital Guardian Emerging Markets Restricted
Equity Fund for Tax-Exempt Trusts
Charles Lestage, Hercules Offshore, Inc.
Mark Miller, Crowley Marine Services, Inc.