

# ClientAlert

## Regulatory Developments in Myanmar

6 March 2013

### Myanmar Issues Foreign Investment Law Implementing Regulations

#### Summary

On January 31, 2013, the Ministry of National Planning and Economic Development released the new Implementing Regulations for the Myanmar Foreign Investment Law No. 21 (FIL No. 21). President U Thein Sein signed FIL No. 21, which repeals the previous 1988 Law on Foreign Investment, on November 2, 2012. FIL No. 21 introduces certain improvements compared to the 1988 Law on Foreign Investment. For instance, the Myanmar Investment Commission (MIC) can approve land leases for up to 50 years, with potential two 10-year long extensions. Foreign investors may be granted up to five years of tax holiday with possible extension for a reasonable period. Other forms of tax relief on machinery, tools, equipment and goods manufactured for export are also available. FIL No. 21 also assures that the MIC will not terminate a permit without due cause and establishes a clearer dispute resolution mechanism. However, FIL No. 21 did not provide details as to which sectors of the Myanmar economy would be open to foreign investment.

The Implementing Regulations serve to clarify the restricted investment activities and provide additional information and detail for foreign investors. They are divided into two parts: Notification 1/2013 and Notification 11/2013. Notification 1/2013 lists out the business activities allowed for foreigners and is divided into four schedules. Notification 11/2013, on the other hand, provides more specifics on the other aspects and procedures of FIL No. 21 as well as lists the economic activities that are only open to Myanmar nationals.

#### Analysis

We provide below some of the key highlights of the Implementing Regulations – Notification 1/2013 and Notification 11/2013. While the Myanmar Government has just issued an official English translation of Notification 1/2013, we understand that it is yet to do so for Notification 11/2013, so we have therefore relied on unofficial English translations of Notification 11/2013 in preparing this Alert.



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## Notification 1/2013

Notification 1/2013 provides a detailed list of the business activities in which foreigners will be allowed to engage. It is separated into the following four schedules: (i) restricted activities for foreigners; (ii) activities only allowed in the form of a joint venture with Myanmar nationals; (iii) activities allowed under certain prescribed circumstances and conditions; and (iv) activities allowed only following an Environmental Impact Assessment.

The first schedule lists activities that foreigners are not permitted to invest in. Some of these areas include:

- Small and medium size mining projects<sup>1</sup>;
- Import of waste products from abroad for manufacturing use in Myanmar; and
- Printing and broadcasting activities.

The second schedule lists a number of activities only open to foreigners through a joint venture with Myanmar nationals. Notification 1/2013 provides that foreigners will be allowed to own up to 80 percent of the equity in such joint ventures<sup>2</sup>. These joint ventures will require the prior approval of the Myanmar Investment Commission (MIC). Such joint venture activities include the following:

- Production and distribution of a range of consumer products within the food and beverages segment; production and distribution of materials, chemicals, pharmaceuticals and equipment; and production of plastic and rubber;
- Large size mining projects;
- Development and construction of infrastructure projects; and construction of buildings, iron frames and manufacturing of concrete;
- Development, sale and rental of residential apartments, office and commercial buildings and residential apartments in industrial zones; and development of international standard golf courses and recreational parks;
- Development of new towns;
- Transport of goods and passengers by ship;
- Construction and maintenance of ships at shipyard;
- Construction of trains;

- Private hospitals and clinics; and
- Operation of domestic and international airlines and travel business.

The third schedule lists activities permissible under certain circumstances, which often times may require approval from pertinent government ministries. Some of these activities include:

- Forestry and timber-related activities: foreign ownership restricted to between 25 percent and 45 percent;
- Paint and certain chemical production and distribution activities: foreign ownership restricted to 70 percent;
- Large scale mining projects: duration of permit is limited to 15 years with possible renewal for 4x5 years;
- Jewelry production and sales; production and distribution of explosive chemicals, specified substances and vaccines; marine training, representing foreign shipping companies, operation of shipyards, domestic water transport and specified construction work related to transportation: such activities must be in the form of a joint venture with the government;
- Build-Operate-Transfer arrangements: this process is required for construction of power plants and electricity production as well as construction and rental of office and commercial buildings when based on 100 percent foreign investment;
- Large scale supermarkets, department stores and shopping centers: foreigners are allowed to operate such activities; however, they are not allowed to carry out small scale retail businesses<sup>3</sup>. This schedule contains restrictions on location of business and level of imported goods. Under a joint venture scenario, Myanmar nationals must hold at least 40 percent of the investment;
- Retail trading businesses: foreigners will be permitted in the sector after 2015 with a minimum investment of US\$3 million. Such business activities will not qualify for tax exemption; and
- Warehouses: foreigners are allowed to operate warehouses in joint ventures with the Myanmar nationals who hold at least 40 percent of the equity.

The fourth schedule lists activities subject to an Environmental Impact Assessment. Some of these activities include large construction and infrastructure projects, certain manufacturing activities, mineral and metals extraction, and certain types of oil and gas exploration.

<sup>1</sup> The Implementing Regulations do not provide guidelines on what constitutes "small," "medium" and "large" size mining projects. This requires further clarification, and MIC policy / precedents in this regard will have an important bearing in determining the size category to which a particular mining project belongs.

<sup>2</sup> There is still some uncertainty on the maximum foreign shareholding permitted in the sectors listed in the second schedule. The Myanmar National Assembly has been discussing a possible reduction in foreign investment in certain restricted sectors from 80% to 49%.

<sup>3</sup> Large scale stores (supermarkets, department stores and shopping centers) must comply with certain minimum size requirements: (a) 12,000 – 15,000 sq ft for supermarkets, and (b) 50,000 sq ft and above for department stores and shopping centers. The Implementing Regulation do not prescribe any guidelines on as to what constitutes 'small scale retail'. Based on the text of the Implementing Regulations, a possible interpretation could be that retail stores which do not meet the minimum size requirements of large scale stores would be considered as 'small scale retail'.

#### Notification 11/2013

Notification 11/2013 outlines a number of key aspects of foreign investment as well as details the relevant procedures applicable under the FIL No. 21. These include:

- Setting out the legal grounds for the transfer of shares between foreigners and Myanmar nationals. The MIC's approval will be required for such transfer of shares.
- The application and review process for investment proposals that require the MIC's prior approval. As part of this approval process, foreign investors will need to provide MIC with a draft of its joint venture agreement.
- The issuance of an investment permit by the MIC and the continuing obligations of foreign investors.
- Timeframes for completing projects approved by the MIC.

Notification 11/2013 also allows parties to choose their preferred dispute resolution forum (although questions remain on enforceability of foreign arbitral awards in Myanmar) and details additional economic activities that are only open to Myanmar nationals. Some of these activities include forest conservation and production, exploration and production of oil up to 1,000 feet, electricity production under 10 megawatts, and a wide range of fishery and agricultural activities.

#### Outlook

Foreign investors have welcomed the timely issuance of the Implementing Regulations. While FIL No. 21 introduces important amendments to the regulatory regime and the Implementing Regulations help to clarify some of the activities open to foreign investment, they have no effect on the extant State-Owned Economic Enterprises Law dated March 1989, which restricts private investment in most key sectors of the economy, including exploration and production of oil and gas, associated products and metals, certain electricity generating services, telecommunication services, and banking and insurance services.

The above being said, given the nascent stage of the Implementing Regulations and several grey areas surrounding their interpretation, foreign investors evaluating investments in Myanmar should consult their advisors to fully understand these changes and their possible application to particular situations.

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