

Joint Comment on the Reporting Requirements on Responsible Investment in Burma

October 4, 2012

Summary

The undersigned United States and international nongovernmental organizations (NGOs) are pleased to submit a public comment regarding the “Reporting Requirements on Responsible Investment in Burma.” Many of our organizations have expressed concerns about the scope and timing of the US government decision to permit new investment in Burma and argued for stronger requirements to be imposed on American companies in view of serious, ongoing human rights and corruption concerns. We nevertheless support the reporting requirements as a valuable—if incomplete and imperfect—means to help advance human rights and political reform, consistent with the US government’s longstanding foreign policy priorities in Burma.

We are firmly of the view that the information to be collected is crucial to support US government efforts to promote respect for human rights in Burma—one of the key issues that underpin the current national emergency with respect to Burma.¹ The US government has long prioritized the promotion of human rights and democratic reform as the centerpiece of its foreign policy in Burma. For example, the administration recently stated that its foreign policy aim is “to support political reform in Burma toward the establishment of a peaceful, prosperous, and democratic state that respects human rights and the rule of law.”² Yet there is a serious risk that US investment could undermine rather than support that worthy aim. Transparency about US investment, including regarding particular detailed issues, is needed to help the Department of State weigh whether US investment aligns with US interests and to enable it to promote responsible business conduct. The information disclosures also help enable independent efforts by civil society actors that are in keeping with US foreign policy interests.

We also find that the requirements are not unduly burdensome and in many cases will usefully serve to forestall or reduce separate, time-consuming inquiries from multiple parties.

¹ The president has declared that “the actions and policies of the Government of Burma continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States.” White House Office of the Press Secretary, “Notice – Continuation of the National Emergency with Respect to Burma,” May 17, 2012, <http://www.whitehouse.gov/the-press-office/2012/05/17/notice-continuation-national-emergency-respect-burma> (accessed October 3, 2012).

² “60-Day Notice of Proposed Information Collection: Reporting Requirements for Responsible Investment in Burma,” *Federal Register* Vol. 77, No. 151, August 6, 2012, <http://www.gpo.gov/fdsys/pkg/FR-2012-08-06/pdf/2012-19283.pdf> (accessed October 3, 2012), p. 46788.

Our submission is structured around three of the issues raised in the Federal Register notice soliciting public comments, namely:

- The necessity of the information for proper performance of State Department functions
- The degree to which the proposed information collection might impose a burden on companies
- Suggestions regarding how to improve the quality, utility, and clarity of the information to be collected.³

It identifies a number of examples of areas in which clarifications or other improvements are needed. We highlight the following concerns as requiring attention, in the order of their highest priority, and provide our specific recommendations:

- The unwarranted and counterproductive designation of some information as confidential;
- The inappropriate designation of threshold amounts for reporting;
- The focus on disclosure of policies and procedures without clear attention to actual practice;
- Insufficient attention to the proper inclusion of subsidiaries, contractors and business partners;
- Inconsistent treatment of trade relationships, such as through supply chains;
- The inclusion of language that may permit companies to bypass reporting on issues;
- Incomplete references to international standards;
- Inadequate frequency and timeliness of the information;
- The need to spell out the consequences for failure to report or to do so fully and accurately.

Finally, we wish to emphasize the need for the timely release of the final reporting requirements so that the information collected can be used to advance human rights and political reform in Burma, consistent with vital US foreign policy goals.

A. The Necessity of the Information for Proper Performance of Department of State Functions

The Burma investment reporting requirements are an essential tool for the Department of State to properly carry out its role to advance US foreign policy interests. As the department outlined in the Federal Register notice, the aim of the reporting requirements is three-fold: first, to support its efforts to assess if new investments advance human rights and political reform in Burma, consistent with US foreign policy goals; second, to enable it to promote responsible practices by US businesses in Burma; and third, to facilitate efforts by civil society in Burma and elsewhere to act independently to the same end.

We consider each of these three elements in turn below, indicating how the information to be collected will add value. We have no illusions that the information collected on its own will be sufficient to ensure

³ Ibid.

progress on human rights and democratic reform in Burma. At the same time, however, we recognize that success in discouraging irresponsible investment and mitigating the harm that such investment may cause depends in part on the increased transparency and engagement made possible by these reporting requirements.

1. Assessing the Impact of New Investment on US Foreign Policy Goals to Promote Human Rights and Political Reform in Burma

We find compelling the Department of State's explanation that it needs the information collected under this reporting requirement in order to be able to determine whether new US investment in Burma is consistent with US foreign policy initiatives to manage the national emergency in Burma by promoting respect for human rights. Speaking from the perspective of NGOs with considerable experience working on Burma matters, often in very close collaboration with partners inside the country and in the border areas, we cannot stress enough that the decision to permit new US investment in Burma is fraught with risk. President Barack Obama acknowledged as much when first announcing on May 17, 2012, that US companies would be allowed to invest in Burma, subject to certain limitations and conditions. At the time, he emphasized that the US government would work to establish a "framework for responsible investment from the United States that encourages transparency and oversight, and helps ensure that those who abuse human rights, engage in corruption, interfere with the peace process, or obstruct the reform process do not benefit from increased engagement with the United States."⁴ The administration subsequently emphasized that, despite easing the investment ban, it "remains concerned about the protection of human rights, corruption, and the role of the military in the Burmese economy."⁵

The information to be collected is an essential starting point for the Department of State to carry out its responsibility, on behalf of the administration, to assess whether new US investment supports or instead undermines the US government's foreign policy goals to advance human rights and political reform in Burma. In its Federal Register notice, the Department of State accurately identifies some of the ways in which foreign investment in Burma has been linked to human rights abuses and ethnic conflict, both in the past and in connection with ongoing business activities. It also correctly notes that the lack of transparency around foreign investment activities in Burma has helped fuel corruption and the misuse of public funds, which in turn has contributed to social unrest and led to further human rights abuses by the government and military.

Past patterns and ongoing situations involving foreign investment projects give ample reason for caution. A key concern, as several NGOs previously have stated in letters to the administration, is that the US

⁴ White House Office of the Press Secretary, "Statement by the President on Burma," May 17, 2012, <http://www.whitehouse.gov/the-press-office/2012/05/17/statement-president-burma> (accessed October 3, 2012).

⁵ US Department of State and US Department of Treasury, "Administration Eases Financial and Investment Sanctions on Burma," July 11, 2012, <http://www.humanrights.gov/2012/07/11/burmaresponsibleinvestment> (accessed October 3, 2012).

foreign policy goal of promoting positive democratic reforms in Burma will be jeopardized if new US investments or other business activities benefit individuals and entities responsible for human rights abuses, who contribute to corruption, or who otherwise act to obstruct democratic reform. These risks are heightened by the fact that Burmese authorities, despite some welcome recent changes, have yet to establish a legal or political framework to guard against the danger that business activity could reinforce corrupt patronage networks, environmental degradation, forced labor, and other human rights abuses, particularly in rural and ethnic areas untouched by reform where conflict rages on. In numerous cases, militarization of areas slated for investment has been associated with human rights abuses.

By virtue of what it learns from the reports filed by companies under the disclosure requirements for Burma, the Department of State will be able to analyze some of the key information it needs to arrive at a judgment about whether US investments have supported or undermined US efforts to mitigate the human rights abuses and repression that underpin the national emergency in Burma. For example, it will be able to evaluate the extent to which new investment is concentrated in industries or geographic areas associated with human rights abuses and other problems identified as a threat to US foreign policy interests. It will also learn whether the companies in question have robust due diligence processes to address potential adverse consequences. Further, it will gain important—although unduly limited—knowledge as to whether mitigation and remediation efforts have been undertaken as appropriate.

Indeed, these and other facts the department needs are not generally available, nor have companies or the Burmese government historically been inclined to disclose them. For example, information on payments to the government is notoriously hard to obtain; companies have previously justified their refusal to disclose such payments with reference to the preferences of the Burmese government. Even information on human rights, environmental, and social due diligence policies and procedures—where they exist—can be inaccessible.⁶ The difficulty of obtaining such information, even for US embassies with very active human rights portfolios, and its usefulness justify the need for a reporting requirement for Burma investment.

2. Engaging with Businesses to Promote Responsible Conduct

⁶ For example, a 2007 report by Prof. John Ruggie, then the UN expert on business and human rights, found that while most *large* companies have explicit human rights policies, there is a wide variation in the rights recognized in those policies, and that relatively few conduct human rights due diligence. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Human Rights Policies and Management Practices: Results from questionnaire surveys of Governments and Fortune Global 500 firms*, U.N. Doc. A/HRC/4/35/Add.3, at 3-4 (Feb. 28, 2007).

The promotion of responsible business practices by US companies overseas is an important function of the Department of State.⁷ This dimension of the department's mandate is in keeping with the US government's human rights obligations and its numerous pledges to encourage responsible business conduct, which include a binding commitment to implement the Organization for Economic Cooperation and Development's (OECD) Guidelines for Multinational Enterprises, as updated in 2011.

The information to be collected under the Burma investment reporting requirements will usefully contribute to the department's ability to carry out this function. As it noted in the Federal Register Notice, the department intends to draw on the information collected as "a basis to conduct informed consultations with US businesses to encourage and assist such businesses to develop robust policies and procedures to address any potential adverse human rights, worker rights, anti-corruption, environmental, or other impacts resulting from their investments and operations in Burma." In order to do so, it needs accurate, timely, and reasonably comprehensive information on which companies have business activities in Burma, what policies or procedures they have in place to assess and address potential risks, what steps if any they have taken to mitigate those risks, and the results of their efforts.

Absent a mandatory disclosure requirement, the department would not have the ability or resources to gather this information. It would be exceedingly difficult for it to identify which businesses it should seek to engage or on what issues. It would also be extremely challenging for it to properly prioritize its efforts to best advance US foreign policy goals in Burma. For example, the reports provided by companies investing in Burma will serve as notice of business activity that may be of concern, including with regard to controversial investments in Burma's oil and gas sector, significant land acquisitions, potentially sensitive security arrangements or frequent interactions with the Burmese military, and allow the department to focus outreach efforts accordingly.⁸ We also note that the requirement to report on various issues, including corporate policies regarding labor rights, the environment, and land acquisition, can be expected to motivate some companies to develop or strengthen such policies prior to investing in Burma, which would also support the department's aim to encourage responsible investment by US companies.

The failure of US companies to act transparently and responsibly in Burma would harm US foreign policy interests in several respects, not least by increasing the risk of human rights abuses or corruption or of inflaming community or ethnic tensions. In addition, although the US government is regarded favorably by many in Burma for its long pro-democracy stance, any irresponsible behavior by US companies might make it harder for the US to press for human rights reform in the country.

⁷ See, e.g. State Department unit devoted to "the promotion of responsible and ethical business practices...that complement U.S. foreign policy." US Dept. of State, *Corporate Social Responsibility*, undated, <http://www.state.gov/e/eb/eppd/csr/index.htm> (accessed October 3, 2012).

⁸ With regard to security matters and contacts with the military, the reports will assist the State Department in its commitment to promote the Voluntary Principles on Security and Human Rights and assist US companies in implementing them.

3. Facilitating Independent Civil Society Efforts to Engage with US Businesses and the Burmese Government

While the reporting requirements are primarily intended to support the department's own efforts, as described above, they also have been designed in part to help enable civil society, particularly in Burma, to engage with US businesses and the Burmese government. As reflected in the Federal Register notice, independent action by civil society that encourages responsible business conduct and improved transparency and accountability over the Burmese government's use of resulting revenues "ultimately promotes US foreign policy goals."

As organizations that actively work in this arena, often in conjunction with civil society actors in Burma and surrounding areas, we will make use of the disclosures mandated under the reporting rules to advance the shared goal of advancing human rights protection and necessary democratic reforms in Burma. Our organizations and others work through a variety of means, all of which would be supported by having access to essential information about new US investment in Burma.

To offer one example, disclosures about payments made to the government of Burma will help enable monitoring of the Burmese government's use of the revenue by relevant groups inside and outside the country. Transparency regarding payments will help address well-founded concerns that government revenues resulting from investment in Burma may not be used for public benefit. In particular, the information will add value and help advance wider efforts to overcome the legacy of Burma's opaque budgeting processes, rampant corruption in public expenditures and procurement, and the diversion of government revenues by the military. Such disclosures can also serve to enable communities and the groups working with them to press Burma's government to ensure that revenues are allocated fairly and in keeping with the government's obligations to uphold economic and social rights, an issue that is particularly salient in resource-rich ethnic areas marked by a recent history of armed conflict.

It is important to stress the unavailability of information about Burma's income from foreign investment absent these reports, as at the moment the only required disclosures concern oil, gas and mining companies listed on US stock exchanges, which in light of the recently approved rules by the Security and Exchange Commission (SEC) are subject to reporting payments to foreign governments on a per-project-basis under Section 1504 of the Dodd-Frank Act.⁹ The Burma reporting requirements apply to US companies in all sectors of the economy and thus will usefully supplement the pending Section 1504 disclosures, in so far as these relate to Burma.

⁹ SEC Final Rule, "Disclosure of Payments by Resource Extraction Issuers" August 22, 2012, <http://www.sec.gov/rules/final/2012/34-67717.pdf> (accessed October 3, 2012). Reporting under these requirements is due to begin in March 2014, at the earliest.

Additionally, publicly available information about which US businesses invest in Burma will enable civil society groups working to stop corporate abuses, as well as promote transparency and corporate accountability, to share pertinent information, expertise and recommendations, including regarding international and sector or issue-specific standards for responsible business practices, with these companies. Such efforts in some cases might spur constructive dialogue and action to forestall human rights abuses and reputational damage for the companies.

We fully anticipate that civil society groups will draw on the disclosures to embark on targeted outreach to companies whose investments may raise particular risks. In such cases, the information available from the public reporting will help ensure that the groups engaged in such outreach are aware of and can take into account the company's own policies and practices regarding such risks, thus allowing for a more productive exchange with greater potential to achieve positive results.

For example, the information disclosures will allow for the identification of companies that act more transparently than their peers and with greater regard for human rights risks, as well as those that respond to concerns more openly and work more diligently to remedy problems. The comparison and contrast of the approaches taken by different companies can help serve to raise the overall level of performance and encourage more responsible behavior.

In some cases, the information collected will also serve to identify other actors—not only US companies—with whom civil society groups will wish to engage. Information made available that identifies foreign business partners could spur outreach to non-US companies to help ensure that they too meet their human rights responsibilities. Likewise, some US investments may receive financial or other support from international financial institutions, private lenders, insurers or other actors that themselves have human rights safeguard policies that NGOs could invoke to promote responsible conduct, in keeping with these actors' own responsibilities.

The information disclosures about certain specific issues—such as security arrangements or business partners—may lead to useful exchanges of information. Dialogue around such issues is highly unlikely to occur absent the reporting requirements and could include, for example, civil society groups sharing information about past or ongoing human rights controversies implicating an investing company's business associates. This could be of mutual benefit, considering that the US government decision to permit new investment takes effect before the Treasury Department has updated its Specially Designated Nationals list in keeping with the president's determination that targeted sanctions should apply to "individuals or entities that threaten the peace, security, or stability of Burma, including those who undermine or obstruct the political reform process or the peace process with ethnic minorities [and] those who are responsible for or complicit in the commission of human rights abuses in Burma" and that US

companies are forbidden from engaging in new investment with entities owned by the Burmese Ministry of Defense, the Burmese military, or any non-state armed groups.¹⁰

In cases where human rights abuses or other adverse consequences are alleged to have occurred in connection with investment activities, civil society groups working with affected individuals and communities will better be able to identify which companies may be implicated, whether directly or indirectly, which will serve to facilitate contact with relevant companies. For example, NGOs that actively monitor human rights conditions inside Burma frequently receive information about forced evictions and land confiscations that allows them to identify the victims and the location of the land, and often the Burmese individual or company implicated in the human rights abuse. However, they are not always able to identify any foreign partners. Accurate and timely public reporting by US companies would thus help address important human rights concerns by providing, at the most basic level, an opportunity for interested parties to contact relevant companies to make them aware of the alleged abuses to which they may be linked.

Importantly, the public disclosures about company practices will provide a useful basis for further dialogue about the issues of concern, by clarifying the procedures that may be available or the steps the company may already have undertaken with respect to the concerns. In some cases, as circumstances warrant, this outreach could serve to address and seek to resolve grievances through appropriate channels, which may range from company grievance mechanisms to the “specific instance” complaints process available through the US National Contact Point for the OECD Guidelines, and thus provide a much-needed outlet for redress for victims of abuses, who do not have access to effective remedy in Burma.

The disclosures will also serve a valuable public interest in cases where, despite having had the opportunity, companies do not take their human rights responsibilities seriously and decline to take steps to prevent and address adverse impacts. In this regard, disclosures related to due diligence—as well as risk mitigation, which should also be made public—will help civil society organizations, the media, and the public at large in the US, Burma and elsewhere to focus attention on companies that merit additional scrutiny. Just as independent efforts by civil society to promote responsible investment serve to reinforce US foreign policy goals in Burma, public attention and pressure on irresponsible corporate actors that are implicated in abuse of human rights also further US interests. Such actions offer a possibility for the victims of abuses to secure a measure of accountability for the harm suffered, which is particularly

¹⁰ US Department of State, “Fact Sheet: Administration Eases Financial and Investment Sanctions on Burma,” July 11, 2012, <http://www.state.gov/r/pa/prs/ps/2012/07/194868.htm> (accessed October 3, 2012); “Blocking Property of Persons Threatening the Peace, Security or Stability of Burma,” *Federal Register*, Vol. 77, No. 135 (regarding Executive Order 13619 of July 11, 2012), July 13, 2012, <http://www.gpo.gov/fdsys/pkg/FR-2012-07-13/pdf/2012-17264.pdf> (accessed October 3, 2012), p. 41243-45.

important considering the continued absence of the rule of law in Burma and dearth of available protections or avenues for remedy.

More broadly, we anticipate that the availability of information about US investment will, alongside other efforts, help spur demands in Burma for greater transparency and accountability of the government to its citizens and improved respect for the rule of law. It could, for example, help to drive domestic initiatives to impose responsible investment requirements that apply to all companies in Burma.

B. The Degree to which the Proposed Information Collection Might Impose a Burden on Companies

The reporting requirements are neither unreasonable nor onerous. Unlike disclosures required by the SEC pursuant to Sarbanes-Oxley, they principally ask companies to disclose information that is readily at their disposal – such as basic information on business activities, as well as corporate policies and procedures.¹¹ With respect to the government payment disclosures, companies must already track government payments in order to comply with the “books and records” provisions of the Foreign Corrupt Practices Act (“FCPA”).¹² Additional information to be collected regarding potential or actual risks is information that companies seeking to invest in Burma should gather in keeping with their human rights responsibilities but also as a matter of general business risk management, as such issues are relevant to feasibility studies and companies’ reporting requirements to stakeholders. Moreover, given that most companies providing information will be entering Burma for the first time, the reporting requirements give them the opportunity to develop systems and procedures for capturing information that will also assist them to reduce the risk that their operations will contribute to corruption and abuse, which can only be of benefit to them.

Moreover, it is possible that the public dissemination of information may ultimately save the time and effort of numerous US companies that might otherwise receive separate queries from a large number of groups interested in the companies’ activities in Burma, for example for the purpose of conducting research or seeking to address situations of concern. Making certain information available publicly could forestall some of these queries. At a minimum, it would help ensure that queries are informed by and serve to build on a common base of knowledge about the company’s involvement and approach that is articulated in its public report. Furthermore, distorted and incomplete information circulated through

¹¹ For example, Sarbanes-Oxley Section 404 requires companies to produce an “internal control report” that evaluates the adequacy of financial controls. Companies hire accounting firms to test and document their financial controls, a costly endeavor that costs companies almost \$3 million dollars annually, on average. See Paul P. Arnold, “Give Smaller Companies a Choice: Solving Sarbanes-Oxley Section 404 Inefficiency,” 42 *U. Mich. J.L. Reform* 931 (2009).

¹² Under the FCPA, companies are required to maintain books, records, and accounts that accurately reflect their transactions and allow for the preparation of accurate financial statements. 15 U.S.C. § 78m (b)(2)(B), as a means of preventing foreign bribery (among other illegal acts). Necessarily, this must include a tracking system for government payments.

rumor mills can unnecessarily create risks, including by inflaming community and ethnic tensions with the Burmese government or American companies.

Finally, when weighing the relative burden against the benefit, it must be recalled that the president and secretary of state developed these reporting rules as a central plank of a “responsible business framework” intended to serve an important public interest—the promotion of human rights and political reform in Burma as key US foreign policy priorities.

C. How to Improve the Quality, Utility, and Clarity of the Information to be Collected

In view of the important goals to be served by the Burma reporting requirements, it is essential that the information provided be sufficient to enable the US government and the public at large, in both the US and in Burma, to analyze the actual and potential impact of investments on human rights, the rule of law and political reform in Burma, and to engage companies to encourage robust policies and procedures to address the risk of adverse impacts. Those providing and utilizing the information must have a common understanding of what is covered. A number of items would benefit from improvements to address the quality, utility and clarity of the information provided. Our input below generally follows the order and structure of the “Reporting Requirements on Responsible Investment in Burma,” rather than the order of priority identified in the summary to this submission.

1. Spell Out the Consequences of Failure to Report or to Do So Fully and Accurately

We are aware that, as affirmed in the Federal Register notice about the reporting requirements, the information collection is authorized under section 203(a)(2) of the International Emergency Economic Powers Act and the obligation to respond is mandatory for companies investing in Burma. We understand that violations of the reporting requirements are subject to enforcement by the US Treasury Department’s Office of Foreign Assets Control.¹³ We are concerned, however, that this is not clearly stated in the reporting requirements—which provide no information on what penalties will apply if companies fail to report as required, or if they provide incomplete or inaccurate information. We also are troubled that the drafting of the requirements seems to allow the possibility that respondents could simply respond “none” or “not applicable” in relation to essential information, potentially as a means to sidestep scrutiny as discussed further below, which further highlights the need to make clear that inadequate responses are subject to specific consequences.

In addition, the requirements should specify that the US government will carry out spot checks or otherwise act to audit companies for compliance.

¹³ See Office of Foreign Assets Control, US Dept. of the Treasury, General License No. 17 – Authorizing New Investment in Burma (e) (July 11, 2012).

2. Supplement References to “Investment” to also Address Trade Relationships

Our understanding is that the term “investment,” for the purpose of the reporting requirements, is defined in a manner that does not adequately cover business activity in the context of trade relationships and in particular supply chains. We note that the reporting requirements, under question #5, refer to a company’s “operations and supply chains.” Similar additions are needed throughout the reporting requirements to ensure that such ties are subject to reporting in support of the US government’s policy goals. Moreover, the experience of the US government and others in implementing the OECD Guidelines for Multinational Enterprises shows the problems that can arise if rules designed to cover investment do not clearly and at the outset take into account the strong nexus with trade. The OECD eventually expanded the scope of the Guidelines to expressly address supply chain relationships.¹⁴

3. Remove the Threshold Investment Amount for Reporting

The application of a \$500,000 investment threshold to trigger the reporting requirement is inappropriate, considering Burma’s economy and low costs in many sectors that may present risks to human rights and the other important policy goals identified by the US government. The US government should revise the reporting requirements to apply to all new investment. Eliminating this threshold also would simplify the requirements, as it would offer clarity on which companies must report.

4. Provide Earlier and Public Notifications of Oil and Gas Investment

The US reporting requirements also include a notification requirement for companies that partner with the Myanma Oil and Gas Enterprise (MOGE), who are obliged to report to the US State Department within 60 days of any contracts signed with that entity. The department should be pre-notified of the intent to sign such a contract, in order to enable it to engage with companies regarding such matters as ensuring the contracts are in keeping with US requirements. Moreover, consistent with the US government’s goals, notifications of such investment should be made public. We propose that the rules be clarified to indicate that notifications of new investments involving partnership with MOGE should be issued publicly at the earliest possible opportunity. Timely public notifications of partnerships with MOGE would complement, and under no circumstances should replace, required public reporting by those companies in regards to human rights, corruption, and other issues.

5. Remove the Option for a Confidential Report to the US Government

There should be only one report submitted to the Department of State—rather than two separate reports—and this single report should cover the full range of issues addressed in the reporting requirements. It is deeply problematic that, as currently drafted, companies are free to remove any information from the public report and move it to the confidential government report, if they consider that it contains business

¹⁴ OECD, “General Principles & Supply Chain,” undated, <http://www.oecdguidelines.nl/guidelines/general-principles/> (accessed October 3, 2012).

secrets. This is fundamentally at odds with the overarching goals of the reporting requirements to promote US foreign policy interests through transparency about US investment.

The current option to allow companies to self-designate information as confidential, if left in place, will have the effect of removing a powerful incentive that otherwise would have existed for companies to provide full and accurate disclosures, as civil society will not be able to challenge or fact-check key information in their reports, and the government will have no mechanism to compel them to reveal inappropriately designated confidential information.

The Department of State should withhold select information from public release only on a limited basis, where it determines that such information is exempt from public disclosure under US law because it constitutes a trade secret or privileged or confidential commercial or financial information. In no circumstance should that designation be left to the discretion of the submitter.

Additionally, we note that individuals and organizations with an interest in Burma regularly use the Freedom of Information Act (FOIA) to seek information in the government's possession on Burma. Keeping the disclosure reports confidential would likely lead to extensive FOIA litigation, which would occupy the time and resources of the requestors, the government, and the companies. Such an outcome would create a burden for all interested parties.

6. Consistently Apply the Requirements to Subsidiaries, Business Partners, and Contractors

As drafted, the requirements to report (including on policies and procedures, security arrangements, government payments, and deals with MOGE) do not clearly apply to subsidiaries, contractors or other companies with which a submitter has a business relationship. This is a major lapse and could make it possible for US companies investing in Burma to fail to report on significant risks and impacts related to their operations and supply chains. While the requirements to report on property acquisitions extend to subsidiaries, they do not clearly cover business partners and contractors.

The requirements should clearly require the companies to report on related entities—e.g. subsidiaries, contractors, or joint venture partners—over which they exercise control or significant influence.¹⁵ The Global Reporting Initiative's guidelines are a useful reference point.¹⁶ We note that definitions based on

¹⁵ We understand "control" to be a fact-based definition that refers to "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." See 17 CFR 240.12b-2. Additionally, given the nature of the reporting guidelines and the risks presented by other business relationships, it is important that companies be required to report on entities over which they exercise significant influence, even if they do not fall under their control. Both equity and non-equity partners should be clearly covered.

¹⁶ The GRI's "Boundary Protocol" offers a framework for defining whom companies should include in their sustainability reporting based on the intersection of "impact" and "control/influence." See <https://www.globalreporting.org/resourcelibrary/GRI-Boundary-Protocol.pdf>.

majority ownership are problematic because businesses can be organized in so many different ways that percentage ownership may not accurately reflect the degree of control that one company exercises over another company or joint venture operation. A definition based on percentage ownership may encourage companies to create or use a different corporate vehicle to bypass reporting.¹⁷ We also note that, even under the law on foreign investment that is to be reconsidered by Burma's parliament, many industries associated with human rights risks, including agriculture and the oil and gas industry, require local partnerships in order for foreign companies to do business in the country.

Moreover, companies should be required to make clear in their disclosures the extent to which the information they provide (including regarding due diligence policies and procedures) applies to any related entities, to provide detailed information on contracts (including distribution agreements, licenses, production-sharing agreements, etc.), and any language in such contracts relevant to matters (including due diligence policies, procedures and compliance) on which the submitter must report in regard to the US company itself.

It is widely accepted that enterprises can have impacts on local populations both directly and through their business relationships.¹⁸ Mandated disclosures on a company's subsidiaries, affiliates and other related entities with whom they have a relevant contractual relationship will support in important ways the US government's and relevant civil society's efforts to evaluate the effects of a given investment on human rights, corruption, and conflict.

7. Increase the Frequency and Timeliness of Reporting

The current requirement that companies report publicly on an annual basis does not allow enough opportunity for timely response from communities or civil society organizations to engage with companies or others regarding actual or potential negative impacts of investment and local partnerships. Initial reports should be submitted within 180 days of the start of a new investment. Thereafter, the report should be issued on a twice-yearly basis, on April 1 and October 1 (in line with existing SEC 10Q reporting requirement deadlines) to better serve this purpose.

¹⁷ For example, unless the matter is adequately addressed submitters might have a perverse incentive to make land deals or acquisitions through partners that are not required to report, in order to themselves remain below the threshold for reporting if the threshold is maintained (contrary to our recommendation further below).

¹⁸ The 2011 update of the OECD Guidelines for Multinational Enterprises, which the US has endorsed, clearly states the expectation that companies will seek to prevent and mitigate human rights impacts that arise through their business relationships with other entities. On September 21, 2012, the French National Contact Point for the OECD Guidelines issued a statement on the application of the Guidelines to the activities of a French company that sourced cotton from growers in Uzbekistan that were alleged to have used child labor. It emphasized that companies should put in place "reasonable due diligence systems and apply them to their commercial partners in order to prevent or mitigate negative impacts directly related to their activities, products or services by the existence of a commercial relationship." French National Contact Point, *Communiqué – DEVCOT*, Sept. 21, 2012.

Among other reasons, the timeframe for reporting requires clarification to avoid a situation in which those who may face harm learn of companies' involvement in a particular project or activity only after or shortly before the statute of limitations expires on available grievance or complaint mechanisms. To this end, the reporting requirements should require a company to indicate if it has a fixed timeline for victims to pursue potential claims for redress via company-led grievance mechanisms and how it compares to the company's timeline for public reporting.

Reporting on a twice a year basis would help ensure that the information contained in public reports is sufficiently timely to enable effective engagement by the US government or members of the US or Burmese public to address actual or potential risks. As currently drafted, the requirement allows for companies to provide information covering the most recent fiscal year, however the company defines it, and to file annual reports by an April deadline. If a company's fiscal year begins on July 1 and ends on June 30, for example, the information would be 10 months out of date when it is issued publicly. This would considerably diminish the value of the information and its potential to serve, as intended, in support of US foreign policy goals.

8. Clarify the Term “Operations” in the Overview in Reporting Question 4

There is ambiguity regarding the use of the term “operations.” A clarification is needed to ensure that a company's investment in Burma is covered, even if its activities in Burma are not yet fully operational. This is particularly important to provide an opportunity for early engagement in cases where there are heightened concerns about potential risks to human rights, corruption, or other key US goals.

9. Specify in Reporting Question 5 that Disclosure of “Procedures” Relates to Actual Practice

The requirements should specify that policies are different from procedures, and that while “policies” refer to a company's commitments on paper, “procedures” refer to the concrete steps it actually takes (e.g., to perform due diligence) to carry out such policies.

For example, the request for information on due diligence under question 5(a) should specify that companies must report on what they actually do in practice to carry out due diligence, rather than simply reporting their policies and procedures on paper.

It also should be made clear that public reporting on both policies and procedures should address efforts that extend into the company's supply chain and other business relationships, including any contractual requirements the company may set, for example to prevent the purchase by the company—or its suppliers—of goods or services produced using forced labor or child labor.

In addition, in relation to anti-corruption, the reporting requirements are extremely broad and should be refined to add specific mention of efforts to comply with the FCPA and to mandate disclosure of policies and procedures to vet business partners or incorporate relevant requirements into contractual language.

An additional question is needed to ask companies if their activities in Burma are subject to independent monitoring and, if so, by whom and against what standard.

10. Elaborate on International Standards in Reporting Question 5

We urge that all reporting be based on available international and industry standards and best practice guidance, which should be referenced throughout the requirements as appropriate, so that reports can be made more comparable and subject to evaluation by the government and civil society alike. For example:

- Business policies and procedures for due diligence regarding human rights, worker rights, and the environment, as well as anti-corruption measures, should be reported in a manner that is consistent with relevant parts of the OECD Guidelines for Multinational Enterprises.
- Company grievance procedures should be described in terms of the criteria identified in the UN Guiding Principles on Business and Human Rights (UN Guiding Principles).
- Companies should report on whether they are members of the Voluntary Principles on Security and Human Rights, and if not, whether they have implemented the principles, procedures, and guidance tools developed for the Voluntary Principles.
- Payments to the Burmese government should be disaggregated so as to identify at least the categories required by Section 1504 of the Dodd-Frank Act applicable to extractives companies, as specified under the recent SEC rule.

In addition, we urge that the footnotes to this section be revamped considerably to be consistent with and adequately reflect existing international standards or norms. For example, the reference at footnote 1 creates the false impression that only some human rights and workers' rights are "relevant."¹⁹ A clarification is needed to convey that the requirements are intended to apply to all internationally recognized human rights and labor rights, at a minimum those referenced in the United Nations Guiding Principles on Business and Human Rights.²⁰ It may also be useful to refer to the State Department Annual

¹⁹ As has been shown repeatedly, including by the former UN Special Representative to the United Nations on Business and Human Rights, the full range of human rights can be impacted by businesses. This is reflected, for example, in the OECD Guidelines, drawing on the recognition in the UN Framework on Business and Human Rights and the UN Guiding Principles for their implementation that due diligence processes should not at the outset limit the scope of rights considered. See OECD Guidelines for Multinational Enterprises, Commentary on Human Rights ¶ 40 (2011).

²⁰ The UN Guiding Principles suggest that human rights policies must *at a minimum* address the internationally recognized human rights identified in the "International Bill of Human Rights" - which includes the Universal Declaration of Human Rights, the International Convention on Civil and Political Rights, the International Convention on Economic, Social, and Cultural Rights – and the ILO's Declaration on Fundamental Principles and Rights at Work.

Country Report on Human Rights Practices for Burma for illustrative but non-exhaustive examples of the range of rights at issue.

Under due diligence, footnote 2 also needs to be improved to refer to, for example, IFC and OECD-endorsed best practice on due diligence.²¹ Likewise, under question 5(c), it would be valuable to include citations to standards and best practice in regard to stakeholder engagement.²² The same applies regarding grievance processes, addressed at 5(d), with companies expected to describe these mechanisms with references to the criteria set forth in Principle 31 of the UN Guiding Principles. Question 5(e) is missing any reference to the company's policies in relation to security arrangements (e.g., Voluntary Principles on Human Rights and Security), which is needed to help to underpin the responses to question 6.

11. Tighten the Reporting in Question 6 Regarding Security Arrangements

We have similar concerns that the information sought under this question needs refinement to enable it to serve US foreign policy goals. Any company engaging security forces should be required—rather than merely invited—to disclose their policies and practices for engaging such services, as well as their oversight policies and procedures. It also must be clarified that companies should report all forms of cooperation and assistance, including any in-kind assistance, and all security service providers, regardless of whether they are directly contracted by the company or provided by another entity.

In addition, as already noted, companies should be required to report if they adhere to the Voluntary Principles (as well as International Code of Conduct for Private Security Service Providers) or other relevant standards.

In keeping with the recommendation above, regarding collecting information on procedures in a manner that clearly identifies actual practice, they also should be required to publicly clarify if their commitments in relation to security are subject to independent monitoring and to disclose if they include in contracts with their security providers any provisions outlining clear expectations that the providers should adhere to human rights or anti-corruption requirements and detailing penalties for non-compliance.

12. Broaden the Reporting Requirement Under Question 7 Regarding Property Acquisition

The reporting requirements for land acquisition require companies to reveal any information they have about forced displacement for any large-scale purchase or lease of land. A further clarification is needed to ensure that companies reveal information concerning land claims, including in particular any

²¹ See, e.g., International Finance Corporation's Performance Standard 1 and the OECD's Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence.

²² The IFC's Performance Standards and Good Practice Handbook for Companies Doing Business in Emerging Markets provide widely accepted guidance on stakeholder consultation.

dislocation or resettlement and compensation that may have arisen prior to their investment, as people are being displaced now for future investment projects.

The reporting requirements should include a definition for the term “involuntary resettlement or relocation,” and it should be defined in accordance with international human rights standards, including with regard to indigenous people’s rights and the generally applicable right to adequate housing. Citations should reference not only relevant international standards but also best practice in relation to land-related human rights concerns. We also wish to stress the need for the reporting requirements to clearly cover situations in which companies may obtain land that was ostensibly “abandoned,” an issue that is brought into sharp relief by the recent flight of 90,000 people from Kachin and Shan States as a result of armed conflict and 90,000 in Arakan State as a result of the inter-communal violence, not to mention the pre-existing 500,000 internally displaced people in eastern Burma.

In addition, a revision is needed to clarify that even those companies that have no policies or procedures related to land issues must still report on the identified issues if they acquired property. Additionally, as noted above, they should be required to explain why they do not have such policies and procedures. Namely, companies need not report if they have acquired land under the threshold “or” do not have any relevant policies or procedures in place to deal with related human rights issues. This exception, if left uncorrected, may allow companies to avoid reporting entirely—regardless of how much land they use—by simply failing to have any due diligence processes to address potential rights risks. This would seem to reward companies that act irresponsibly by failing to conduct due diligence and permit them to avoid public scrutiny for property acquisitions.

We also urge that the \$500,000 or 30-acre threshold for reporting be eliminated. All investments and property acquisitions should be subject to disclosure. Land rights have been a flashpoint for dispute, which have become more common in Burma as investments increase. Moreover, the \$500,000 or 30-acre threshold is unreasonable given the context, the risks at issue in view of how many people in Burma engage in small-scale subsistence farming, and the heightened risks associated with land acquisition in conflict regions and resource-rich areas, not to mention that some investments—related to tourism, for example—may entail the use of disputed plots of land of fewer than 30 acres.

As mentioned in relation to other topics, it is essential that companies be clearly required to disclose their actual practice regarding land acquisition. For example, in seeking information about arrangements made for compensation under question 7(d), it is important to specify that the report should clearly identify with whom those arrangements were negotiated, if the agreements were fully implemented, when, and who delivered the compensation, as each of these frequently arise as problems in practice.

An important revision is needed under both 7(d) and (e) to ensure that companies are not able to avoid reporting on land-related human rights abuses in which they may be implicated by simply declaring that

they were not “aware” of such matters. The phrase “of which the submitter is aware” in these sections is unnecessary and should be removed to make clear that companies must report on involuntary resettlement or dislocation. Consistent with the US government’s support of the OECD Guidelines and UN Guiding Principles, which call on companies to carry out due diligence to identify such risks, they should be required to report on involuntary resettlement or dislocation or associated compensation arrangements. Moreover, they should be required to disclose what efforts they have undertaken to assess property-related risks.

13. Widen the Scope of Reporting Question 8 Regarding Transparency Over Payments

Required reporting on payments to the government can serve a valuable purpose, as explained above, but we are concerned that these must extend to subsidiaries or other companies with which a submitter has a business relationship, as per our comment above. Moreover, the rules should cover payments made “directly or indirectly,” in order to cover situations in which an investing company arranged to make a payment through a subsidiary, partner, or agent.

We also feel that requirement is written too narrowly, as it covers only payments to government entities that may be said to “possess authority over the submitter’s new investment activities in Burma.” It is not clear that this should cover, for example, any revenue-sharing or other forms of payments to non-state armed groups, either of which potentially raise human rights risks of great relevance to US foreign policy goals.

By the same token, we note that the threshold for reporting, which is set at \$10,000 for each government entity, is appropriate and should be preserved. It should be recognized that unlike the recently released rules implementing Section 1504 of the Dodd-Frank Act, which provide for a significantly higher payment threshold for extractive industry payment disclosures worldwide, the Burma reporting rules implicate all sectors of the economy and concern Burma, whose relative poverty, isolation, and endemic corruption make much smaller sums relevant to human rights and corruption dynamics.

14. Remove the Confidentiality of Reporting Under Question 10 Regarding Military Communications

As discussed above, we strongly dispute the assumptions that this information should be reserved for a separate, confidential report to the US government. Similarly, the option for companies to decline to report on military communications if these are considered not to be “material” to the investment should be removed. Companies should provide all relevant information—including, without exception, whether any military communications occurred.

We note that the issues raised under question 10 are designed to provide the US government with information about possible US company ties to a category of notorious human rights abusers (the Burmese military). This information is important and worthwhile, but the US government should expand the question to require reporting on any US company communications or contact with the categories of

persons and entities that are subject to targeted US sanctions, which by definition have been determined to run afoul of US foreign policy interests. Such reporting would serve to elicit information about contacts US companies may have with such persons or entities short of a formal business relationship in violation of US sanctions.

Furthermore, there is important value in public release of information on military communication. Rumors and misinformation about communications and meetings can unnecessarily create risks, including by inflaming community and ethnic tensions with the Burmese government or American companies, which might in turn escalate into protests or other incidents that can be associated with an abusive response. Transparency can dispel and prevent distrust amongst the different parties.

15. Make Public Information Provided Under Question 11 Regarding Risk Mitigation

We are very troubled that information concerning whether a submitter carried out due diligence regarding human rights, worker rights or environmental risks and if any risks or actual impacts were identified is not designated for public release. We urge in the strongest terms that information provided in response to this question be made public, as it is key to accuracy and quality control—and to the goal of promoting responsible business conduct in Burma.

Indeed, such information is precisely what would most help facilitate informed engagement by civil society actors with companies around their risk profiles, appropriate mitigation strategies, and remediation as appropriate. Importantly, absent a public disclosure requirement for this information, companies will be under no clear obligation to reveal environmental or human rights risks to the communities that will be affected by them. This is inconsistent with the OECD Guidelines on Multinational Enterprises, which for example require companies to publicly report environmental risks. It is also inconsistent with the UN Guiding Principles, which emphasize that communicating to stakeholders what companies have been doing regarding human rights risk is a crucial aspect of due diligence processes.

Moreover, as with other issues covered in the reporting requirements, companies must be clearly mandated to report on concrete outcomes, not only policies or processes. This is necessary to address the fact that a company's description of "mitigation" efforts will not, without further elaboration, necessarily clarify if the problem was successfully mitigated or if perhaps the situation remained unresolved or possibly worsened or generated other negative consequences.

We also note the need for the reporting requirements to be improved to avoid a situation, akin to that described above with regard to property acquisitions, in which a company can in effect "opt out" of mandated disclosures by not conducting due diligence at all. In cases where a company investing in Burma reports that it does not conduct due diligence, it should be required to explain its rationale and basis for feeling that due diligence procedures are not necessary or applicable. Unless such an explanation were required, companies may find it appealing to decline to carry out any due diligence as a

means to bypass reporting on the identified risks or impacts—no matter the scale and severity of the adverse human rights consequences their operations may have. Such a system of perverse incentives would seriously undercut US foreign policy goals and requires correction.

As noted elsewhere, the reporting requirements already provide for the Department of State to withhold select details from public release where such information is exempt from public disclosure under US law. Even if some details are redacted on that basis, the public report should contain as much information as possible—including, without exception, whether risk assessments were conducted.

Submitted on behalf of the following organizations:

Accountability Counsel
AFL-CIO
EarthRights International
Freedom House
Human Rights First
Human Rights Watch
Institute for Asian Democracy
International Labor Rights Fund
Jubilee USA
International Trade Union Confederation
Investors Against Genocide
Open Society Foundations
Orion Strategies
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Responsible Sourcing Network
US Campaign for Burma
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