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NEW U.S. SANCTIONS AND EXPORT CONTROLS TARGET MILITARY BEHIND COUP IN MYANMAR

To Our Clients and Friends:

On February 11, 2021, in one of its inaugural foreign policy actions since taking office, the Biden Administration authorized new sanctions and export-control restrictions on Myanmar (also called Burma) in response to the Myanmar military's recent coup against the country's elected civilian government. These actions imposed an initial round of limited, targeted measures ten days after the Myanmar military overthrew the country's democratically-elected government, arrested civilian leaders including State Counselor Aung San Suu Kyi and President Win Myint, and imposed an intermittent nationwide shutdown on the internet and access to social media. Some of the Myanmar military leaders targeted by the new measures were already subject to U.S. sanctions due to the serious human rights abuses against the Rohingya, an ethnic minority population in Myanmar.

The Myanmar military's extra-judicial actions are an unfortunate echo of Burma's recent past—Suu Kyi had been detained by the military for much of the 1990s and into the early 2000s and the international community, led by the United States, had previously responded with sanctions. Indeed, U.S. sanctions against Myanmar were only formally removed in 2016, after the Myanmar military allowed certain democratic reforms, culminating in the election of State Counsellor Suu Kyi.

In a press conference on February 9, 2021, President Biden previewed his administration's response to the coup, calling for a series of actions including imposing sanctions against a first round of targets, promulgating strong export controls, and restricting the ability of Myanmar's military leaders to access the substantial funds the government of Myanmar has on deposit in the United States. European and other leaders were also quick to condemn the military coup, and are contemplating their own measures.

These new sanctions are among the first hints of how the new administration will wield the United States' tools of economic coercion after four years of record-breaking usage under President Trump. These new sanctions were imposed in the midst of a broader review by the administration regarding all sanctions programs administered and enforced by the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC"). We assess that the measured approach undertaken here – with a conscious effort to focus on identifying targets to limit collateral consequences, to seek multilateral buy-in, and to ensure flexibility to calibrate pressure as the situation develops on the ground – will be the model for future actions in Myanmar and other areas in which sanctions and similar tools will play a role.

The Sanctions Imposed

Designations of Ten Individuals and Three Companies Under a New Executive Order

Calling the undermining of Myanmar's democracy and rule of law a threat to U.S. national security and foreign policy, President Biden on February 11 issued an Executive Order on Blocking Property with Respect to the Situation in Burma (the "Executive Order") which establishes a new sanctions program focused on Myanmar. Under this authority, OFAC may designate as Specially Designated Nationals ("SDNs") those individuals and entities directly or indirectly causing, maintaining, or exacerbating the situation in Myanmar, and/or leading Myanmar's military or current government, or operating in its defense sector. Under the Executive Order, OFAC may also designate the adult relatives of a designee, the entities owned or controlled by a designee, or those providing material support to a designee. The breadth of the Executive Order's designation criteria affords the administration considerable flexibility in selecting targets for designation, and is in many respects broadly parallel with the earlier Burmese Sanctions Regulations imposed, strengthened, and then relieved by former Presidents Clinton, Bush, and Obama.

Pursuant to the Executive Order, OFAC designated six officers of Myanmar's military who played a direct role in the coup: (1) Commander-in-Chief Min Aung Hlaing; (2) Deputy Commander-in-Chief Soe Win; (3) First Vice President and retired Lieutenant General Myint Swe; (4) Lieutenant General Sein Win; (5) Lieutenant General Soe Htut; and (6) Lieutenant General Ye Aung. Notably, both Min Aung Hlaing and Soe Win had already been designated on December 10, 2019 pursuant to Executive Order 13818 (the Global Magnitsky sanctions program) for their roles in the atrocities committed against the Rohingya.

OFAC also designated four military officials who were appointed to positions in Myanmar's State Administration Council ("SAC") government following the coup: (1) General Mya Tun Oo, appointed Minister of Defense; (2) Admiral Tin Aung San, appointed Minister for Transport and Communications; (3) Lieutenant General Ye Win Oo, appointed Joint Secretary of the SAC; and (4) Lieutenant General Aung Lin Dwe, appointed Secretary of the SAC.

Finally, OFAC designated three entities operating in Myanmar's gem industry that are owned or controlled by Myanmar's military: (1) Myanmar Ruby Enterprise; (2) Myanmar Imperial Jade Co. LTD; and (3) Cancri (Gems and Jewellery) Co., LTD.

U.S. persons (as well as non-U.S. persons when engaging in a transaction with a U.S. touchpoint) are, except as authorized by OFAC, generally prohibited from engaging in transactions involving the recently-sanctioned ten individuals and three entities, and their property and interests in property (which must also be blocked to the extent they come into U.S. jurisdiction).

Targeted Ramifications for Those Operating in Myanmar

According to a 2019 United Nations Human Rights Council report, many of the designated individuals and the three designated entities are linked to Myanmar Economic Holdings Limited ("MEHL"), one of the two military-controlled conglomerates that play foundational roles throughout Myanmar's economy.

Min Aung Hlaing, Soe Win, Mya Tun Oo, and Tin Aung San are purported members of the "Patron Group," which plays a supervisory role for MEHL. Myint Swe and Aung Lin Dwe apparently serve on MEHL's board of directors. All three designated companies—Myanmar Ruby Enterprise, Myanmar Imperial Jade Co. LTD, and Cancri (Gems and Jewellery) Co., LTD—are alleged subsidiaries of MEHL. There do not appear to be any direct ties between the new designees and the second military-controlled conglomerate, the Myanmar Economic Corporation ("MEC").

While some of the recently-sanctioned individuals exercise considerable influence over the public and private spheres in Myanmar, that does not mean that the new sanctions apply wholesale to the country at large. Quite the opposite: the sanctions imposed thus far are limited in their reach and scope. We assess that this outcome is purposeful. Indeed, the absence of any General Licenses issued alongside the designations (to allow companies to wind down activities, for example) may suggest that the Biden Administration does not believe that there are any systemically critical, ongoing transactions that need to be addressed before shutting off all dealings. As such, the administration may be viewing this first tranche of targets more as a warning to the Myanmar military than as means for imposing substantial economic harm.

By operation of OFAC's "Fifty Percent Rule," U.S. sanctions automatically apply those restrictions to entities that are majority owned by one or more sanctioned persons – even if those entities are not explicitly identified by OFAC. A wholly-owned subsidiary of Myanmar Ruby Enterprise, for example, is now restricted by operation of law to the same extent as its parent company. However, as OFAC has made clear, U.S. sanctions do not automatically extend to entities over which a sanctioned person merely has decision-making authority or otherwise exercises control, nor does it extend to the parents or corporate siblings of designated entities. As a result, in the absence of majority ownership by designated parties, the fact that a sanctioned individual is the head of a Myanmar government agency or on a Myanmar company's board of directors does not result in the automatic imposition of OFAC restrictions on that agency or company. Moreover, that a designated entity is part of a broader conglomerate does not mean that the designation extends to its parents or corporate siblings.

While OFAC has yet to release parallel guidance, we assess that the interpretations the agency developed in connection with its recent designation of 11 senior Hong Kong and mainland Chinese government officials will likely be applicable in this case. In the Hong Kong guidance, and as reported in our 2020 Year-End Sanctions and Export Controls Update, OFAC clarified that U.S. sanctions do not extend to the non-sanctioned government agencies led by those 11 sanctioned officials, and that routine dealings with those agencies were not necessarily prohibited. At the same time, OFAC cautioned that, in interacting with such agencies, persons under U.S. jurisdiction were still prohibited from transacting or dealing with the sanctioned officials and could not, for example, enter into contracts signed by, or negotiate with, these individuals. The initial Myanmar sanctions program was the first OFAC program to make clear that contracting with designated persons (even in their official capacities as leaders of non-designated entities) was prohibited – we expect the same to be true here and hence those operating in Myanmar should take similar precautions when dealing with any government agencies, or companies, affiliated with newly designated parties.

The Export Controls Imposed

Alongside the new U.S. sanctions, the U.S. Commerce Department's Bureau of Industry and Security ("BIS") announced that it would apply a "presumption of denial," effective immediately, for items requiring a license for export and reexport to Myanmar's Ministry of Defense, the Ministry of Home Affairs, armed forces, and security services. In addition, BIS announced a suspension of certain previously-issued licenses to these Myanmar government departments and agencies, and a revocation of certain license exemptions that had been available to Myanmar as a result of its Country Group status under the Export Administration Regulations ("EAR")—such as Shipments to Country Group B countries (GBS) and Technology and Software under restriction (TSR). In the coming days, we expect more detail from BIS as to the scope of these suspensions.

Notably, BIS also indicated in its announcement that it is assessing further specific actions, including adding Myanmar entities to the Entity List (which would impose licensing obligations on almost any export from the United States to a listed party). In this regard, we see a continuation of the Trump Administration's use of the Entity List – unlike any administration in the past, the Trump BIS was eager to leverage the surgical impact of an Entity Listing (as compared with the more draconian impact of a sanctions listing) when dealing with certain targets where a more limited economic impact was sought. As discussed in detail in our 2020 Year-End Sanctions and Export Controls Update and 2020 Mid-Year Sanctions and Export Controls Update, the Entity List was the tool of choice in dealing with many Chinese actors.

Given the risk of harming Myanmar citizens, as well as international investors, we assess that the Biden Administration could leverage BIS in a similar fashion to respond to the situation in the country, especially if it decides to increase pressure on military companies. Restricting certain exports to the Myanmar military risks less severe collateral consequences to innocent third parties and investors than potentially blacklisting the entire military or their conglomerates (as discussed below). Other actions BIS is apparently considering include adding Myanmar to the list of countries subject to the EAR's new military end-use and end-user (MEU) and military-intelligence end-use and end-user (MIEU) restrictions, and downgrading Myanmar's Country Group status in the EAR (requiring more scrutiny and licenses for exports to the country).

Anticipated Restrictions on Myanmar Government Funds in the United States

In addition to the aforementioned sanctions and export controls measures, the Biden Administration has also announced that it "is taking steps to prevent the generals from improperly accessing more than $1 billion in Burmese government funds held in the United States." Though no further details have been released, the most likely restriction will be on the ability of the military leaders to access government funds kept on deposit with the Federal Reserve Bank of New York. This limitation is in addition to various U.S. grants and foreign aid to Myanmar that are now by law restricted due to the coup.

What Is Next and What Does the Myanmar Case Suggest for Sanctions Under a Biden Administration?

As noted above, under the sanctions regime launched last week, ten individuals and three business entities associated with Myanmar's military have been added to the SDN List. This will certainly have immediate implications for those dealing with the sanctioned parties and entities majority owned by those parties. However, it is worth noting also what the Biden Administration chose *not* to do at this juncture. Not only did the Administration not sanction the entirety of the Myanmar military nor place the country under an embargo, it also avoided targeting the two military-controlled conglomerates MEHL and MEC. If either had been designated, U.S. sanctions prohibitions would have flowed (pursuant to OFAC's Fifty Percent Rule) to the conglomerates' numerous subsidiaries operating throughout Myanmar's economy and to the operations of numerous foreign companies that have entered the country in partnership with a MEHL and/or MEC entity since the easing of sanctions under President Obama.

Harsher sanctions measures are still possible and Treasury Secretary Yellen has promised "additional action" if Myanmar's military does not change course. But at least for now, the Biden Administration seems intent on deploying its tools surgically and deliberately, giving an opportunity for the military to alter course and time for Washington's multilateral partners to join in the effort, and developing ways to calibrate sanctions pressure if the situation merits. The same variables appear true for the new export-controls measures, with a narrow set of restrictions being rolled out while other restrictions are being considered. Similarly, the anticipated restrictions on Myanmar government funds in the United States has been characterized as specifically preventing withdrawals by the military (as opposed to the government writ large).

The international implications of the situation in Myanmar have likely informed the U.S. government's approach. Since February 1, 2021, governments around the world, including Canada, France, Germany, Italy, Japan, the United Kingdom, and the European Union, have strongly condemned the military coup and related actions in Myanmar. The United Nations Human Rights Counsel has unanimously called for the release of Suu Kyi and other imprisoned civilian leaders. In his remarks, President Biden has consistently emphasized the need for a multilateral response. State Department officials have echoed that message, and have reportedly consulted with U.S. allies on the appropriate U.S. response.

However, national economic interests can sometimes check the willingness of even close allies to match U.S. measures. Countries with significant ties to the Myanmar economy, such as Japan, may have swayed the Biden Administration to employ more targeted sanctions and export controls, rather than broad-based restrictions. It is noteworthy that at this time Tokyo has yet to impose its own restrictions on trade with Myanmar. This is another echo of the prior Myanmar sanctions program – Japan has long been one of Myanmar's principal sources of foreign capital and, for years, the scale of Japanese foreign direct investment in the country made it challenging to bring Japan into the fold and compel it to impose its own sanctions on the country. In addition to concerns about the private sector impact of broad-based sanctions, another motivation for a more restrained approach may have been, as others have hypothesized, a concern that severe sanctions on the military would only serve to enhance China's influence in the country while reducing the likelihood of a change in approach.

Assuming that the situation in Myanmar does not improve, we anticipate that the Biden Administration will impose further sanctions and export control measures. In addition, as part of the multilateral response, we expect U.S. allies including the European Union, the United Kingdom, Australia, and Canada to promulgate sanctions and export controls restrictions of their own.

The Biden Administration's approach at play in this case is likely to be the model of its use of economic coercive tools going forward. We assess that the Administration will pursue a whole-of-government effort – with the State Department taking the foreign policy lead and encouraging multilateral uptake, while the Treasury and Commerce Departments implement complementary restrictions – in situations like Myanmar and in other foreign policy challenges including those relating to Iran, Venezuela, Russia, Cuba, and of course China. As with most international trade policy efforts, private sector actors will remain on the front lines in dealing with these tools. But, while we will need to wait and see whether they will be spared some of the uncertainty regarding the scope and trajectory of U.S. measures that have been pervasive over the last four years, the Biden Administration's first sanctions foreign policy move has started out with a clearer policy direction, and better coordination both within the U.S. Government and between Washington and its allies.

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