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US AND UK JOIN CANADA IN DESIGNATING MYANMAR'S MILITARY CONGLOMERATES, WITH EU CONSIDERING FURTHER ACTION

To Our Clients and Friends:

On March 25, 2021, the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") imposed additional sanctions in response to the ongoing crisis in Myanmar (also called Burma) by designating the country's two largest military conglomerates: (1) Myanmar Economic Holdings Public Company Limited ("MEHL") and (2) Myanmar Economic Corporation Limited ("MEC").

Because Myanmar's military controls significant segments of the country's economy, including trading, natural resources, and consumer goods, through these two companies, these designations are the most consequential sanctions measures that the Biden Administration has taken to-date in response to the situation. By operation of OFAC's "Fifty Percent Rule," the sanctioned status of MEHL and MEC automatically flows to the dozens of their majority-owned subsidiaries that play critical roles throughout the country's economy, implicating the Myanmar-based operations of numerous foreign companies that have touchpoints with the United States (over which the U.S. Government has enforcement jurisdiction). Recognizing the far-reaching impact, OFAC has concurrently issued four general licenses (regulatory exemptions) that provide blanket authorization to engage in certain categories of activities that would otherwise be prohibited—including the wind down of any existing transactions involving MEHL, MEC, or their majority-owned subsidiaries.

Below we summarize the U.S. response thus far to the Myanmar situation, before discussing the significance of these new OFAC designations and general licenses. We then survey briefly the latest developments in the sanctions regimes of the United Kingdom, Canada, and the European Union, which broadly align with the U.S. model. In coordination with the United States, also on March 25, 2021, the United Kingdom designated MEHL, but did not designate MEC until April 1, 2021. Canada, for its part, designated MEHL and MEC in 2007, and never lifted those designations. Meanwhile, the European Union has yet to take direct action against either military conglomerate, although there are signs it might choose to do so in the near term.

An Incremental, Whole-of-Government Approach As Violence Escalates in Myanmar

On February 1, 2021, Myanmar's military (the "Tatmadaw") nullified the election of November 2020 that resulted in Aung San Suu Kyi's National League for Democracy strengthening its standing in the Burmese government in comparison with the military-affiliated Union Solidarity and Development Party. The Tatmadaw responded by seizing control of the government, detaining civilian leaders

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(including Aung San Suu Kyi), setting up the State Administration Council with military officers, and declaring a one-year state of emergency after which, supposedly, a new election will be held.

Ten days later, on February 11, 2021, President Biden issued Executive Order 14014—his first sanctions Executive Order—authorizing the designation of individuals and entities who, among others, directly or indirectly engaged in the situation in Myanmar or are leaders or officials of the Tatmadaw or the State Administration Council. The initial set of designations by OFAC included six officers who played a direct role in the coup, four officers who were appointed to the State Administration Council, and three business entities owned or controlled by the military that are in Myanmar’s gem industry. On the same day, the U.S. Commerce Department’s Bureau of Industry and Security (“BIS”) announced a license review policy of “presumption of denial” for exports or reexports to Myanmar’s Ministry of Defense, Ministry of Home Affairs, armed forces, and security services. BIS also suspended certain previously issued licenses and license exceptions related to Myanmar. Moreover, the Federal Reserve Bank of New York blocked the Tatmadaw from accessing more than \$1 billion in Myanmar Government funds held in the United States. This initial, multi-agency response by the U.S. Government was analyzed in detail in our February 16, 2021 client alert.

For two months, the military-controlled Myanmar Government has maintained tight control over the country, violently cracking down on civilian protests. As of April 2, 2021, more than 500 protestors have been killed, and more than 2,900 have been arrested or charged—numbers that kept rising during the drafting of this update. The Myanmar military has declared a series of martial law orders and has created a military court system for prosecuting these protestors. To tamp down these protest movements, the military has also intermittently blocked certain social media platforms and imposed nightly Internet shutdowns. As the situation in Myanmar continues, so have the calls for targeted sanctions on the military—both from activists outside Myanmar and from Myanmar’s own ambassador to the United Nations (“UN”).

The Biden administration has issued sanctions on an incremental basis in response to events taking place on the ground. Over time, OFAC announced three additional sets of designations under Executive Order 14014 (on February 22, March 10, and March 22), which included:

- Two members of the State Administration Council;
- Two leaders of the police, military, or security forces;
- Two family members of Commander-in-Chief Min Aung Hlaing, as well as six business entities that they own or control; and
- Two Light Infantry Divisions of the military.

The Biden administration has also tightened the export-control restrictions regarding Myanmar. On March 4, 2021, BIS removed Myanmar from Country Group B and placed it in Country Group D:1, which effectively created a more restrictive review process for exports or reexports of items subject to the Export Administration Regulations (“EAR”) to end-users in Myanmar. That same day, BIS added MEHL, MEC, Myanmar’s Ministry of Defense, and Myanmar’s Ministry of Home Affairs to its “Entity

List,” which is comprised of entities determined to pose a significant risk of involvement in activities contrary to U.S. security or foreign policy interests. Notably, with these listings, BIS chose to impose its broadest restriction—export or reexport of *any* item subject to the EAR to any of the four aforementioned entities requires a BIS license, and requests for such licenses are subject to a presumption of denial.

Imposing Sanctions on MEHL and MEC

On March 25, 2021, in response to the most brutal crackdown yet, OFAC designated MEHL and MEC pursuant to Executive Order 14014. Both MEHL and MEC were established during the old Myanmar military regime, respectively in 1990 and 1997. They were created with the express purpose of fulfilling the needs of the military and its desire to play a central role in Myanmar’s economy—MEHL focused on light industry, while MEC focused on heavy industry and supplied strategically important natural resources for the military. Although the two entities are not state-owned, they are supervised by senior leaders of the Tatmadaw, some of whom have been designated by OFAC.

As was previewed in President Biden’s speech that accompanied the initial February sanctions, the administration is interested in targeting the “business interests” of Myanmar military. The latest designations were made based on the connection between the two entities and the Tatmadaw’s source of revenue. OFAC Director Andrea Gacki stated that the designation of the two conglomerates is designed to “target[] the Burmese military’s control of significant segments of the Burmese economy, which is a vital financial lifeline for the military junta.” Myanmar’s military and its members rely heavily on the profits earned by these holding companies.

The latest designations should have a more potent effect on Myanmar’s economy than the earlier measures. The UN Human Rights Council reported in 2019 that there are 106 businesses owned by MEHL and MEC across diverse sectors of the Burmese economy “from construction and gem extraction to manufacturing, insurance, tourism and banking.” By operation of OFAC’s Fifty Percent Rule, those businesses that are owned, directly or indirectly, 50 percent or more by MEHL or MEC are also automatically blocked by U.S. sanctions. U.S. persons—and non-U.S. persons engaging in a transaction with a U.S. touchpoint—are generally prohibited from engaging in transactions involving the blocked entities, as well as their properties and interests in properties that come into U.S. jurisdiction.

A considerable number of foreign companies have commercial relationships with the newly designated entities. When the United States and other countries eased sanctions on Myanmar beginning in 2012, companies—including many from Japan, Korea, and Singapore—took advantage of business opportunities in the Myanmar market. According to the 2019 UN Human Rights Council report, there are 14 companies that have entered into formal joint ventures with MEHL, MEC, or their subsidiaries, and 44 additional companies with meaningful contractual or other commercial ties. Dozens of other companies from around the world also have more removed relationships with MEHL, MEC, and/or their subsidiaries. The degree to which the activities of any of these companies will be affected by the designations will depend on the extent to which they rely, directly or indirectly, on U.S. persons, companies, and/or financial institutions.

Parallel Issuance of New General Licenses and FAQs

Recognizing the potential collateral impact that the designations of MEHL and MEC could pose, OFAC concurrently issued four general licenses and related Frequently Asked Questions (“FAQs”):

- **General License 1, “Official Business of the United States Government”** authorizes all transactions and activities that are for the conduct of the official business of the U.S. Government by their employees, grantees, or contractors.
- **General License 2, “Official Activities of Certain International Organizations and Other International Entities”** authorizes all transactions and activities that are for the conduct of the official business of 10 enumerated entities, which include the UN and the International Committee of the Red Cross, by their employees, grantees, or contractors. OFAC simultaneously issued FAQ 882 to confirm that all UN-related bodies in the UN System Chart are eligible for General License 2.
- **General License 3, “Certain Transactions in Support of Nongovernmental Organizations’ Activities”** authorizes all transactions and activities that are “ordinarily incident and necessary to” certain enumerated activities by nongovernmental organizations, including humanitarian projects, democracy-building initiatives, education programs, non-commercial development projects, and environmental or natural resource protection programs. This sort of license is particularly welcome, given the violence, prosecutions, and imprisonments occurring in Myanmar.
- **General License 4, “Authorizing the Wind Down of Transactions Involving Myanmar Economic Corporation Limited and Myanmar Economic Holdings Public Company Limited”** authorizes all transactions and activities that are “ordinarily incident and necessary to the wind down of transactions involving” MEHL and MEC (or any of their majority-owned subsidiaries)— until 12:01 a.m. EDT on June 22, 2021. In the accompanying FAQ 883, OFAC confirmed that: (1) General License 4 allows for the involvement of the U.S. financial system and U.S. persons in processing related transactions; and (2) non-U.S. persons may engage in transactions and activities authorized by General License 4, without threat of designation pursuant to Executive Order 14014.

General License 4, in particular, will be a critical authority for companies that intend to exit commercial relationships with MEHL, MEC, or their subsidiaries. Where a designated company has significant economic importance, OFAC’s practice has been to promulgate a wind-down license to minimize the immediate disruption to non-targeted businesses and persons, and to allow parties the opportunity to disengage from the designated entity while hopefully limiting the negative impact on innocent parties. Companies affected by the new prohibitions can now take time to carefully consider options for terminating engagements with the newly-designated entities, and how each might affect the security and safety of their employees on the ground.

In comparing General License 4 to others of its kind, we have two observations. *First*, General License 4 covers the “wind down” of transactions, which is a flexible and broad concept. However, unlike some

wind-down licenses that OFAC has issued in other sanctions programs, this general license does not also cover the “maintenance” of “operations, contracts, and other agreements.” *Second*, General License 4 does not impose any administrative conditions on parties taking advantage of the license. This is in contrast to other wind-down licenses under different sanctions programs that require, for example, that U.S. persons file a report with OFAC detailing the transactions undertaken pursuant to the license or that require any payments made in covered transaction to be deposited into a blocked account. The absence of such conditions—which can be onerous—could encourage more parties to take advantage of the license.

Notably, all four general licenses expressly limit their authorizations to transactions and activities that are prohibited by Executive Order 14014. In relying on these licenses, parties should be careful not to engage in transactions and activities that are prohibited under another authority. As such, the general licenses do not authorize transactions with persons or entities designated pursuant to other sanctions programs, such as Commander-in-Chief Min Aung Hlaing—who was sanctioned pursuant to Executive Order 13818 (Global Magnitsky Sanctions) for his role in the serious human rights abuses committed against the Rohingya in 2017. As made clear in OFAC’s FAQ 400, without a general or specific license, U.S. persons are prohibited from transacting with sanctioned individuals like Min Aung Hlaing, such as by entering into contracts with them, even if they are acting on behalf of a non-blocked entity.

UK, Canada, and EU Sanctions Regimes Targeting Myanmar

When we last discussed Myanmar in our February 16, 2021 client alert, the United States was the only major state to have imposed sanctions on the military regime despite President Biden’s call for multilateralism. That has changed. Since February 16, 2021, the United Kingdom, Canada, and the European Union have all designated Myanmar-related actors and otherwise strengthened their respective sanctions targeting Myanmar—in ways that are complementary to the actions of the United States.

In Coordination with the United States, the United Kingdom Designates MEHL and then MEC

The United Kingdom’s own sanctions regulations regarding Myanmar went into effect on December 31, 2020, following Brexit, and in response to the Rohingya crisis. Under the regulations, the Secretary of State may designate to the UK Sanctions List persons involved with the violation of various human rights in Myanmar, including right to life, right to liberty and security, right to a fair trial, and right to freedom of expression and peaceful assembly. Designation results in the freezing of assets, including funds and economic resources, that are owned, held, or controlled, either directly or indirectly, by the designated person.

In response to the coup in Myanmar, the UK Foreign Commonwealth & Development Office (the “FCO”) designated three leaders of the police, military, and security forces on February 18, 2021, and five members of the State Administration Council on February 25, 2021. On March 25, 2021, the United Kingdom joined the United States in adding MEHL to the UK Sanctions List, calling out the entity’s “involvement in serious human rights violations against the Rohingya” in 2017, as well as “its association with senior military figures.”

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On April 1, 2021, the FCO added MEC to this list, noting that this designation was “in response to credible evidence that [MEC] has contributed funds to support . . . the Tatmadaw.” The FCO cited MEC’s association with senior military officers within the Tatmadaw, with MEC’s Board of Directors comprising mainly serving or retired personnel, as an additional reason for this designation.

In making the recent designations, the FCO noted that the United Kingdom “has been at the forefront of a strong, co-ordinated international response to situation in Myanmar.” U.S. Secretary of State Blinken has also described the United Kingdom as “a close partner in our response to the coup.”

Canada’s Historical Designation of MEHL and MEC

Canada, for its part, has had targeted sanctions in place against MEHL and MEC for more than a decade. Canada’s Myanmar-related sanctions regulations were first enacted on December 13, 2007. As Myanmar progressed towards democratic reforms, Canada lifted its comprehensive sanctions on April 24, 2012. While most Myanmar-related restrictions were effectively suspended, any trade in arms and related materials, as well as any technical and financial assistance related to military activities, remain prohibited. Canada also continued to maintain sanctions against certain listed individuals and entities, including MEHL, MEC, and a number of their subsidiaries.

In response to recent events in Myanmar, on February 18, 2021, Canada designated nine senior officers of the military, the National Defence and Security Council, and the State Administration Council. The designations brought the total number of Myanmar-related listed persons to fifty four. Moreover, as further evidence of multilateralism, these new Canadian sanctions were announced on the same day as those imposed by the United Kingdom, reportedly as part of the two countries’ strategy of joint actions on international security issues. In announcing the measures, Global Affairs Canada, the country’s foreign affairs department, noted that Canada’s sanctions “are part of a united response,” made “following recent measures by the United States and in coordination with the United Kingdom.”

European Union Contemplates Further Designation of Military Businesses

Prior to the coup in Myanmar, the European Union had in place a number of restrictions targeting Myanmar, including:

- A ban on the export of equipment that can be used for political repression in Myanmar;
- An export ban of dual-use goods for use by the Myanmar military and/or the border guard police;
- Export restrictions on equipment for monitoring communications that could be used for political repression in Myanmar;
- A prohibition on military cooperation with the Tatmadaw, including respective training; and
- An arms embargo relating to Myanmar.

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In addition, the European Union deploys financial sanctions that have been and remain in place against individuals and entities in Myanmar that are deemed responsible for atrocities committed against the Rohingya population. Those designated parties are added to a consolidated list comparable to OFAC's Specially-Designated Nationals List.

On March 22, 2021, the European Union imposed additional financial sanctions on 11 individuals considered responsible for the military coup in Myanmar and the crackdown on peaceful demonstrators that followed. Currently, there are 25 individuals or entities designated by the European Union.

While the European Union has not designated MEHL or MEC, there are signs that it may be prepared to do so in the near term. The European Union has stated that it is continuing to "review all of its policy options, including additional restrictive measures against economic entities owned or controlled by the military in Myanmar/Burma." Notably, the European Parliament, as early as February 8, 2021, urged the EU Council "to amend the current scheme of restrictive measures to include the possibility of listing companies and extending targeted sanctions to the vast economic holdings of Myanmar's military and its members, which provide the military with its revenue." If the situation in Myanmar continues to deteriorate, we would not be surprised if the European Union follows its allied governments in the United States, the United Kingdom, and Canada in designating MEHL and/or MEC.

Possible Next Steps

The U.S. sanctions targeting MEHL and MEC represent a significant escalation in the economic pressure campaign against the Tatmadaw in Myanmar, members of whom exercise considerable influence over these conglomerates and profit from their many businesses. The Biden Administration could have continued to gradually sanction the subsidiaries and affiliates of these two military conglomerates, as well as individuals associated with those entities. Instead, it elected to sanction MEHL and MEC, knowing that restrictions would flow down to all of their majority-owned subsidiaries (by operation of OFAC's Fifty Percent Rule). These consequential measures may have been deemed necessary in light of the worsening situation in Myanmar.

To soften the immediate blow to those foreign companies engaged with MEHL, MEC, and/or their subsidiaries, OFAC has issued a wind-down license as it has done in the past with respect to other sanctions designations of this magnitude. Such a license will be critical for those companies seeking to unwind their MEHL- or MEC-linked ventures, and will allow them to utilize the U.S. financial system and the U.S. dollar in doing so. But companies will likely still face challenges in the execution of the wind-down transaction and activities. The license, while inclusive in scope, cannot be invoked for operations that are *not* "ordinarily incident and necessary to" the wind-down of transactions. Moreover, the license does not cover dealings with Commander-in-Chief Min Aung Hlaing and other individuals that are designated pursuant to other sanctions programs (e.g., Global Magnitsky Sanctions). The license also expires on June 22, 2021, which may not be enough time for companies to effectively and safely extricate themselves from their respective arrangements. As companies engage in the wind-down process, we anticipate that OFAC will continue to issue, modify, and renew general licenses and related guidance.

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For those companies that plan to continue to operate in Myanmar, it will be important to understand the scope of U.S. sanctions restrictions, and in particular the risk of enforcement and/or designation. The U.S. Department of Justice and OFAC continue to penalize non-U.S. companies under a theory of non-U.S. parties “causing” U.S. persons to engage in prohibited transactions. U.S. authorities have also continued to use non-U.S. companies’ reliance on the U.S. dollar and U.S. correspondent banking as a hook to secure jurisdiction over these sorts of actions. For that reason, it will be important for any non-U.S. company operating in Myanmar to understand the extent of its U.S. touchpoints.

In the little time that has passed since the MEHL and MEC designations, the Myanmar military has shown no signs of intending to relinquish their power. In fact, civilian deaths have risen dramatically. We would expect further action if this situation persists. The U.S. Government may choose to continue targeting individuals and entities with ties to the Myanmar military pursuant to Executive Order 14014, or it could create new sanctions authorities that impose more comprehensive sanctions—either on the whole Myanmar government (see, e.g., Venezuela sanctions) or the entire country (see, e.g., Iran and Cuba sanctions). Of course, the U.S. Government also has non-sanctions tools at its disposal. Indeed, on March 29, 2021, U.S. Trade Representative Katherine Tai announced the suspension of U.S. trade pact with Myanmar under the 2013 Trade and Investment Framework Agreement.

Finally, we expect there to be continued coordinated action among the United States, Canada, the United Kingdom, and European Union. The rhetoric used by officials in all four jurisdictions has highlighted the importance of multilateralism in responding to the situation in Myanmar. That said, the sanctions regimes in these jurisdictions are not exact copies—as is evidenced by the fact that not all have sanctioned MEHL and MEC. There will be differences that will be important to pinpoint and navigate, and that we are tracking closely. As the aforementioned sanctions regimes converge for the most part, we do not expect the UN Security Council to do the same given the competing interests on that body. While the UN Security Council has adopted multiple statements condemning the violence in Myanmar, countries such as China and Russia have reportedly steered the body away from even suggesting that it would impose sanctions. We expect this to continue to be the case.



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