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United States sanctions against Myanmar's military conglomerates

BY JUDITH ALISON LEE, AUDI SYARIEF AND CLAIRE YI

On 25 March 2021, the US Treasury Department's Office of Foreign Assets Control (OFAC) imposed additional sanctions in response to the ongoing crisis in Myanmar by designating the country's two largest military conglomerates: Myanmar Economic Holdings Public Company Limited (MEHL) and 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 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 US, and over which the US government has enforcement jurisdiction. Recognising the far-reaching impact, OFAC has concurrently issued four general licences or regulatory exemptions that provide blanket authorisation to engage in certain categories of activities that would otherwise be prohibited, including the winding down of any existing transactions involving MEHL, MEC or their majority-owned subsidiaries.

An incremental approach as violence escalates in Myanmar

On 1 February 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, 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.

On 11 February 2021, president Biden issued Executive Order 14014 authorising the designation of individuals and entities who, among others, are 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 in Myanmar's gem industry that are owned or controlled by the military. On the same day, the US Commerce Department's Bureau of Industry and Security (BIS) announced a licence review policy of 'presumption of denial' for exports or re-exports to Myanmar's Ministry of Defence, Ministry of Home Affairs, armed forces and security services. BIS also suspended certain previously issued licences and licence exceptions related to Myanmar. Moreover, the Federal Reserve Bank of New York blocked the Tatmadaw from accessing more than \$1bn in Myanmar government funds held in the US.

For two months, the military-controlled Myanmar government has maintained tight control over the country, violently cracking down on civilian protests. The Myanmar military declared a series of martial law orders and 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.

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.

The Biden administration has also tightened the export-control restrictions regarding Myanmar. On 4 March 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 re-exports 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 Defence, 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 US security or foreign policy interests. Notably, with these listings, BIS chose to impose its broadest restriction: export or re-export of any item subject to the EAR to any of the four aforementioned entities requires a BIS licence, and requests for such licences are subject to a presumption of denial.

Imposing sanctions on MEHL and MEC

On 25 March 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.

The latest designations should have a more potent effect on Myanmar's economy than the earlier measures. In 2019, the UN Human Rights Council reported 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 50 Percent Rule, those businesses that are owned, directly or indirectly, 50 percent or more by MEHL or MEC are also automatically blocked by US sanctions. US persons and non-US persons engaging in a transaction with a US touchpoint are generally prohibited from engaging in transactions involving the blocked entities, as well as their properties and interests in properties that come into US jurisdiction.

A considerable number of foreign companies have commercial relationships with the newly designated entities. When the US 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 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 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 US persons, companies and financial institutions.

Parallel issuance of new general licences and FAQs

Recognising the potential collateral impact that the designations of MEHL and MEC could pose, OFAC concurrently issued four general licences and related frequently asked questions (FAQs).

General License 1, 'Official Business of the United States Government', authorises all transactions and activities that are for the conduct of the official business of the US government by their employees, grantees or contractors.

General License 2, 'Official Activities of Certain International Organisations and Other International Entities', authorises 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', authorises all transactions and activities that are "ordinarily incident and necessary to" certain enumerated activities by nongovernmental organisations, including humanitarian projects, democracy-building initiatives, education programmes, non-commercial development projects, and environmental or natural resource protection programmes. This sort of licence

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', authorises 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 12:01am EDT on 22 June 2021. In the accompanying FAQ 883, OFAC confirmed that General License 4 allows for the involvement of the US financial system and US persons in processing related transactions, and non-US persons may engage in transactions and activities authorised by General License 4, without threat of designation, pursuant to Executive Order 14014.

General License 4 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 licence to minimise 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.

Notably, all four general licences expressly limit their authorisations to transactions and activities that are prohibited by Executive Order 14014. In relying on these licences, parties should be careful not to engage in transactions and activities that are prohibited under another authority. As such, the general licences do not authorise transactions with persons or entities

designated pursuant to other sanctions programmes, 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 licence, US 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. ■

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