Comment of EarthRights International on the Reporting Requirements for Responsible Investment in Burma

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EarthRights International (ERI) respectfully submits this comment to the Office of Management and Budget (OMB) as part of the review process for the U.S. Reporting Requirements for Responsible Investment in Burma (the "Reporting Requirements"). We welcome the opportunity to further comment and reiterate the importance of renewing the Reporting Requirements to ensure new U.S. investment activity in Burma is conducted responsibly and transparently and promotes, rather than undermines, the democratic reform process.

We are deeply concerned by, and strongly oppose, the State Department's proposal to significantly increase the monetary threshold triggering the requirement for new U.S. investors to report. Increasing the threshold from $500,000 to $5 million would substantially weaken the Reporting Requirements and gut the State Department's ability to effectively monitor and assess new U.S. investment to ensure it contributes positively to the democratic reform process. There is no evidence in the public comment record that this change is necessary.

In fact, the increase in the threshold was not requested by any commenter and is utterly at odds with the overwhelming majority of public comments the State Department received emphasizing the importance of continuing – and strengthening – the Reporting Requirements. We are aware that the American Chamber of Commerce Myanmar (AMCHAM) distributed a survey that covered this subject and asked for responses to be sent to a State Department official, but those responses have not been made public and should not be relied upon as part of the review process. This lack of transparency is deeply troubling, as is the fact that the U.S. Embassy in Rangoon has already listed the $5 million threshold on its website as though the proposed change has received final approval.[1] And the change appears to be in direct conflict with the comment submitted by the National League for Democracy (NLD), Burma's governing party.

This is a critical moment in Burma's historic transition away from a military dictatorship. Weakening the Reporting Requirements now risks weakening the NLD and civil society's push for transparency and efforts to combat corruption when it is most vital. The U.S. Government

[1] "Reporting Requirements," Embassy of the United States, Rangoon, Burma, http://burma.usembassy.gov/reporting-requirements.html.

must reaffirm its commitment to promoting responsible foreign investment and renew the Reporting Requirements without increasing the reporting threshold.

I. Increasing the threshold is wholly unwarranted

The State Department has provided no explanation for increasing the investment threshold, and neither the State Department, nor any commenter, provided any data or analysis to justify the need for such a significant modification. Nor did the State Department, or any commenter, provide any data or analysis on the number of businesses that might be affected by this change – for example, how many companies currently covered by the $500,000 threshold have investments over $5 million, and will still have to report; how many would no longer have to report; or how many U.S. businesses are expected to invest under the $5 million threshold in the near future.

The State Department estimates in the May 17 notice that the number of companies reporting will increase to 150, but it is completely unclear how it could have reached that figure. Only about 30 companies currently report under the $500,000 threshold, and the January 2016 comment from AMCHAM states that "approximately sixty" U.S. companies are invested in Burma.[2] It is not in any way obvious why the State Department believes the number of U.S. companies reporting will rapidly increase fivefold when it is simultaneously proposing a change that will immediately *reduce* the number of reporting companies.

Indeed, the proposed increase is particularly surprising given the overwhelming support by commenters for maintaining, and strengthening, the Reporting Requirements. Sixty-one out of the sixty-three comments submitted during the first comment period, including comments from the NLD, The Coca Cola Company, and Gap, Inc, stressed the importance of the Reporting Requirements.[3] The NLD urged a cautious approach before making *any* changes to the Reporting Requirements: "Thorough review and analysis should be done to be inline with real and existing situation in investment environment before careful adjustments for concrete and long lasting development of reform."

Only two short comments, submitted by the U.S. Chamber of Commerce ("the Chamber") and AMCHAM respectively, criticized the Reporting Requirements. Both speak in vague generalities, suggesting the Reporting Requirements are costly and deter investment without any

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[2] Comment submitted by American Chamber of Commerce in Myanmar (AMCHAM) (Jan. 2016) at 1, *available at* https://www.regulations.gov/#!documentDetail;D=DOS-2015-0070-0009 ("AMCHAM comment").
[3] *See* Comment submitted by NLD representative (Jan. 2016), *available at* https://www.regulations.gov/#!documentDetail;D=DOS-2015-0070-0002; Comment submitted by Gap Inc. (Jan. 2016), *available at* https://www.regulations.gov/#!documentDetail;D=DOS-2015-0070-0042 ("Gap Comment"); Comment submitted by The Coca Cola Company (Jan. 2016), a*vailable at* https://www.regulations.gov/#!documentDetail;D=DOS-2015-0070-0001 ("Coca Cola Comment").

evidence or examples to support those claims, and neither proposed a $5 million investment threshold for reporting.[4] The proposed change simply has no basis in the public comments. [5]

II. There is no evidence that the Reporting Requirements impose an undue burden on businesses

The proposed change cannot be justified on the basis that the Reporting Requirements impose an undue burden on companies or deter new investment. Neither AMCHAM nor the Chamber provided any evidence or examples to support the contention that the Reporting Requirements are unduly burdensome, nor to show would be investors have been deterred by the obligation to report on its human rights, environmental, labor or corruption policies.

Neither AMCHAM nor the Chamber ever actually claim the Reporting Requirements have deterred investment; they only imply it might have by saying they "appear to" or saying companies have pulled out of Burma "in part due to these factors."[6] It is no doubt true that some companies have been deterred from entering Burma due to the reputational risks and high compliance costs. But that hardly means the Reporting Requirements are the reason. AMCHAM acknowledges there are many other serious issues that may deter companies from entering Burma, citing the Specially Designated Nationals list and the "refusal of U.S. financial institutions to conduct financial transactions with Myanmar banks."[7] AMCHAM also notes the "lack of a robust legal and regulatory framework," in Burma, the "inadequate physical infrastructure, absence of adequate banking facilities, and a lack of trained local human resources," among other reasons it is difficult and risky to do business in Burma.[8] All of these present greater obstacles to investing in Burma than reporting on a company's human rights, environmental and corruption policies. And more importantly, those obstacles highlight the very real risks of investing in Burma that motivated the creation of the Reporting Requirements in the first place, and continue to justify their necessity today.

Indeed, the Reporting Requirements simply require companies to focus on, and be transparent about, information they should already be collecting if their investment is to have a constructive impact. The State Department should be quite concerned that an investor who is otherwise willing to invest hundreds of thousands or millions of dollars in Burma, but would be deterred by answering a few questions, is not likely to be reinforcing U.S. values and priorities in Burma.

Although the Chamber suggested that the time necessary for compliance is greater than the 21 hours the State Department originally estimated, this cannot be the reason for increasing the threshold, because the State Department did not credit the Chamber's argument about response

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[4] AMCHAM Comment; Comment submitted by the U.S. Chamber of Commerce (Jan. 2016), *available at* https://www.regulations.gov/#!documentDetail;D=DOS-2015-0070-0010 ("Chamber Comment").

[5] Indeed, as far as we are aware, the only comment that even mentioned the possibility of an increase was the January 2016 comment from the Myanmar Centre for Responsible Business (MCRB), which suggested that an increase to "$1 million, calculated over a period of two years" could be considered if necessary. Comment submitted by MCRB (Jan. 2016) at 6, *available at* https://www.regulations.gov/#!documentDetail;D=DOS-2015-0070-0005. No commenter specifically requested or urged an increase in the reporting threshold.

[6] AMCHAM Comment at 2.

[7] *Id.*

[8] *Id.*

time. The State Department still estimates that it will take an average of 21 hours to complete the responses. So the State Department has apparently come to the conclusion that, for a business willing to put in at least half a million dollars into new investment in Burma, requiring one employee to spend two and a half days on the Reporting Requirements would be an insurmountable burden.

Indeed, although the Chamber states that companies are putting more time in to reporting than the State Department estimated, it also says that reporting has not changed companies' practice. That makes no sense. The reports themselves require only some short-form answers to a handful of questions. To the extent investors expend significant time complying with the Reporting Requirements, it must be because they are using the opportunity to conduct the due diligence that the Reporting Requirements are intended to promote. In this context, it is surely a good thing when investors find that the Reporting Requirements encouraged them to take the time for a proper consideration of the risks of investing in Burma. In that case it is not actual compliance with the Reporting Requirements themselves, but improvements in company behavior because they know they will need to be transparent, that take additional time.

Coca Cola and Gap submitted comments in support of the Reporting Requirements and noted their beneficial role for the companies themselves, including by improving those companies' reputations.[9] For example, Coca Cola noted the following: "The Responsible Investment Reporting Requirements process has helped to guide our due diligence efforts from the outset and have since remained an important vehicle for us to transparently communicate our efforts to support a responsible, safe and vibrant local business that respects human rights."[10]

The Reporting Requirements reflect the considered judgment of the U.S. Government that the experience of reviewing internal policies and procedures, conducting proper due diligence on human rights, labor rights, environmental responsibility, land rights, and corruption risk in order to prepare a company's initial report provides benefits both to the company and to the foreign policy goals of the United States that are well worth the effort required. Moreover, the burden of providing subsequent updates after filing an initial report should be limited; therefore, investors who are filing second or third reports will need significantly less time than was necessary for their first report. The Reporting Requirements strike an appropriate balance, allowing the U.S. Government to ensure new U.S. investment activity does not undermine U.S. foreign policy goals without overburdening U.S. investors.

III. The notice and public comment process on the proposed change was non-transparent

The process by which the State Department proposed the threshold change has deprived the public of the opportunity to fully understand and weigh in on the proposal, and strongly suggests the State Department has inappropriately worked with business interests outside the formal comment process and away from public view.

[9] *See* Gap Comment; Coca Cola Comment.
[10] Coca Cola Comment.

The original notice published May 17 in the Federal Register lacked any mention of the proposed change at all – in fact, it *twice* listed the reporting threshold as $500,000.[11] Five days later, in a separate notice, the Agency published a "correction" stating only that the prior notice "contained an incorrect investment amount. This document corrects the investment amount to $5,000,000."[12] Despite the substantial error, the comment window was not extended, leaving less than the statutorily-required 30 days for public comment on the proposed change, and the original notice with the incorrect threshold has remained on the government's website throughout this comment period, without any reference or link to the correction.[13] (Indeed, the correction itself did not even link to the correct previous document.[14]) Consequently, members of the public may be completely unaware that the State Department has proposed any change and miss the opportunity to weigh in.

The State Department also appears to have accepted comments by companies during the notice and comment period that have not been published or otherwise made public. According to AMCHAM's website, it provided a survey to its members and directed companies to complete it and "return to Suzanne Yountchi YountchiSM@state.gov. The U.S. Embassy will be sharing this information with AMCHAM so that we may submit our comments to the State Department[.]"[15] AMCHAM's January comment references the "recent survey" and summarizes the feedback,[16] but neither AMCHAM, the Embassy, nor the State Department have made the surveys publicly available. This gives the appearance that the U.S. Embassy directly facilitated the commenting process for AMCHAM, collected information through a separate process outside the public comment process, and shared it with only AMCHAM. Such an arrangement is highly inappropriate and deprives the public of information and a fair opportunity to comment. It is all the more worrying if these private comments formed the basis for the increase in the reporting threshold.

The impression that the Embassy in Rangoon is not following the public comment process is reinforced by its website, which treats the proposed change as though it has already been approved. The 2016 Reporting Requirements, with the increased investment threshold, are not yet final. But the Embassy's website already states: "Any U.S. person who invests $5,000,000 or more in Burma, or invests in Burma's oil & gas sector, is required to complete the reporting requirements."[17] This has the potential to create substantial confusion, and reinforces the

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[11] Department of State, 30-Day Notice of Proposed Information Collection: Reporting Requirements on Responsible Investment in Burma, 81 Fed. Reg. 20597 (May 17, 2016), ("May 17 Notice").
[12] Department of State, 30-Day Notice of Proposed Information Collection; Reporting Requirements on Responsible Investment in Burma; Correction, 81 Fed. Reg. 32381 (May 23, 2016).
[13] *See* May 17 Notice, *available at* https://federalregister.gov/a/2016-11707.
[14] The correction linked to "FR Doc 2016-3668." The original 30-day notice was FR Doc. 2016-11707.
[15] Email from Judy A. Benn, Executive Director, AMCHAM Myanmar Chapter, to AMCHAM members, (December 15, 2015) *available at* https://www.amchammyanmar.com/accm/asp/edetails.asp?SponsorID=0&MMID=6073&MailListID=5. *See also* Email from Judy A. Benn Executive Director, AMCHAM Myanmar Chapter, to AMCHAM members (Nov. 25, 2015) *available at* https://www.amchammyanmar.com/accm/asp/edetails.asp?SponsorID=0&MMID=6069&MailListID=5/
[16] AMCHAM Comment at 1.
[17] *See* "Reporting Requirements," U.S. Embassy in Rangoon, Burma http://burma.usembassy.gov/reporting-requirements.html.

appearance that the public process is being ignored in favor of a non-transparent process involving collusion with the business community.

IV. The State Department must ensure companies cannot evade the obligation to report

ERI has long advocated for the State Department to expressly clarify that companies cannot use loopholes to evade reporting requirements.[18] We continue to believe that the clarifications outlined in our January 2016 comment are vital. Increasing the threshold, especially without implementing changes to ensure companies cannot improperly dodge their reporting obligation, will greatly exacerbate the risk of evasion. Indeed, AMCHAM's and the Chamber's comments acknowledge this problem, stating that some companies are structuring their investments to stay under the existing $500,000 threshold, or using third parties to dodge the reporting obligations.[19] That companies are trying to evade regulations is not an argument for withdrawing those regulations, it is evidence of why the regulations are vital, and why the Reporting Requirements must be strengthened and clarified to ensure companies cannot avoid the obligation to report.

The only obvious result of the threshold increase is to increase the number of companies investing in Burma who do not report transparently on their operations. Most companies – especially companies in the most problematic economic sectors – will not disclose information about their operations unless legally required. Weakening the Reporting Requirements just as U.S. investment begins to ramp up would eliminate this key tool before it even has a chance to work. Increasing the threshold now is premature.

This is a critical moment in Burma's democratic reform process, and the U.S. must fulfill its promise to support that process by ensuring U.S. investment does not undermine progress. The Reporting Requirements are an important tool through which the U.S. Government can promote transparency and accountability, support political reform, and ensure new U.S. investment activity in Burma furthers U.S. foreign policy goals as intended. We urge the State Department to renew the Reporting Requirements, without an increase in the investment threshold, to ensure they have their full intended effect.

Respectfully submitted,

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[18] *See, e.g.* Comment submitted by ERI (Jan. 2016) *available at* https://www.regulations.gov/#!documentDetail;D=DOS-2015-0070-0001.
[19] *See* AMCHAM Comment at 2; Chamber Comment at 1.