25 March 2013

Office of Management and Budget
Office of Information and Regulatory Affairs
U.S. General Services Administration
Executive Office of the President
United States of America

To whom it may concern

**Reporting requirements for Responsible Investment in Burma (Myanmar)**

The Institute for Human Rights and Business (IHRB) welcomes the opportunity to offer comments on the revised draft of the Reporting Requirements for Responsible Investment in Burma (the “Reporting Requirements”), pursuant to Public Notice 8191 (Billing Code 4710-18) and in relation to General License 17 of the Department of the Treasury’s Office of Foreign Assets Control (OFAC).

The Institute made a detailed submission on the first round of the draft Reporting Requirements, which we have added as an appendix to this submission for ease of reference.

IHRB strongly supports the finding in the Federal Register notice and accompanying Supporting Statement for Paperwork Act Reduction that the reporting covered by the Reporting Requirements will further U.S. foreign policy goals of improving human rights in Burma.

The Reporting Requirements are necessary and important because of the country’s unique context. While the Burmese government has undertaken important steps to gain international confidence in its economic and political reforms process, major challenges remain. With the Burmese government and the Opposition parties stressing the importance of responsible investment, and other governments easing sanctions while also making responsible investment a priority, it is critical that businesses demonstrate how they are responsibly operating in the country.

The Reporting Requirements are also important because they offer an early and important opportunity to demonstrate the application and outcomes of enhanced due diligence under the UN Guiding Principles on Business and Human Rights necessary for companies investing in high-risk zones such as Myanmar. The US Government has been a strong supporter of the UN Guiding Principles, so demonstrating how they work in
practice in a particular context also serves an important US foreign policy goal. It is therefore vital for the Reporting Requirements to set high standards.

As per IHRB’s first submission on the original draft Reporting Requirements, we strongly welcome the Reporting Requirements reference to the UN Guiding Principles on Business and Human Rights. Application of the UN Guiding Principles in the context of the US Reporting Requirements offers a crucial early opportunity to demonstrate the application and outcomes of enhanced due diligence under the UN Guiding Principles on necessary for companies investing in high-risk zones such as Burma.

IHRB strongly supported the first draft of the Reporting Requirements because of the clarity they provided about how international standards and social expectations applied to companies operating in high risk areas. IHRB is therefore pleased to note that the current draft remains largely aligned with the past draft. In addition, we have noted several improvements to the revised Reporting Requirements, which we outline in Section A below. IHRB would also like to offer some suggestions for final revisions to the draft Reporting Requirements, which we outline in Section B below.

A. Support for Maintaining the Current Text

We strongly encourage the Office of Management and Budget to retain the proposed changes made to the current draft:

• **Further clarity on relevant international standards as benchmarks.** IHRB welcomes the addition of references to relevant international standards and guidance in the text (such as the reference to the Voluntary Principles on Security and Human Rights in the section on security providers), in footnotes and your Appendix on “International Principles, Guidelines, Tools, and Global Initiatives Related to Business and Human Rights”. These will provide important guidance to companies and benchmarks for Burmese civil society and others in reviewing public reports.

IHRB would like to add that it is establishing a **Myanmar Center for Responsible Business** in Yangon, in partnership with the Danish Institute for Human Rights, with the financial support of a number of governments. Many of the Center’s activities will be of direct relevance to US companies and their understanding of international standards in context of Burma (to be available in English and Burmese). IHRB also has a range of materials relevant to business in Burma which can be found on its website.¹

Whilst your Appendix is helpful, it might also overwhelm companies with its reference to nearly 50 principles, guidelines, tools and initiatives (there are perhaps another 50 not listed that might be equally relevant to doing business in Burma). IHRB recommends that the centrality of the UN Guiding Principles on Business and Human Rights is communicated, as well as other international agreements directly relevant to US companies (e.g. ILO or OECD standards). Your Appendix might make a good basis for an online directory of tools that can be updated at regular intervals (and include more Burma-specific versions as they become available) and can be more clearly signposted.

---

¹ http://www.ihrb.org/about/programmes/multi-year-project-in-myanmar.html
by thematic issue and business sector.

- **Public Report and Disclosures:** IHRB welcomes the implicit underlying assumption of the Reporting Requirements that companies should disclose their activities. In particular, IHRB welcomes the clearer language in the new draft on two aspects of disclosure:
  
  (i) A requirement that companies indicate *whether* they have redacted information and explain *why* they have withheld information from the public draft. IHRB acknowledges that companies may have valid reasons not to disclose certain information – for competitive reasons, trade secrets, and safety and security of operations, staff or other stakeholders. But those valid reasons should not become an excuse to stall progress towards making business-government relationships less opaque. IHRB feels the new draft sets the right balance.
  
  (ii) A requirement to explain *why* a provision is not deemed applicable. As we noted in our first submission, this would demonstrate that companies have investigated the need for a policy, reflected on the relevance to their business and have made a specific decision that the policy is not relevant to their business. That reflection process enables companies to provide a credible explanation for why a provision is not applicable to their business. IHRB therefore welcomes the enhanced language in the revised Reporting Requirements beyond merely stating *whether* a provision is not applicable to their business, but also requiring an explanation as to *why* that is the case.

- **Land:** IHRB commends the broadening of the definition of land acquisition, including:
  
  (i) The decision to include “lease and use” of land and to “rights related thereto” in para (7)- “For any purchase, use, or lease of land or other real property, or rights related thereto”;
  
  (ii) The recognition of different land values in rural and urban areas, through the requirement that the stipulation concerning land applies to any transaction valued at $500,000 or more, or covering land area larger than 30 acres. This will ensure its application to most major transactions in urban areas, as well as significant transactions in rural areas, even if the value of such a transaction does not exceed $500,000.

- **Transparency:** IHRB is encouraged to note that the threshold limit for payments to each government entity, set at $10,000, has remained in place. While noting that S. 1504 of the Wall Street Reform and Consumer Protection Act uses a higher threshold, we feel it is necessary to stress that the local context of Burma is unique, where concerns over corruption have been expressed at all levels of public life, and additional vigilance and caution are necessary. A higher threshold would pose the risk of some transactions escaping scrutiny.

- **Investment limit:** IHRB commends the retaining of $500,000 as the investment threshold for application of the Reporting Requirements.
B. Suggested Changes to the Final Text:

- **Military Communications:** The Reporting Requirements have retained the provision on businesses communicating with the Burmese military. Businesses may indeed have legitimate reasons to communicate with the Burmese military, including seeking permissions while operating in zones of conflict, or liaising with the military to provide relief during a natural disaster. However, given the dominant position of the Burmese military in the country’s politics and its human rights record, and considering that military-linked companies are active in business, the current Reporting Requirements regarding business-military communications would not sufficiently capture the nature of these relationships. As Burma becomes more democratic, it is to be hoped that the role of the military in public life will diminish. At such a juncture, it is important for businesses in contact with the military to be more transparent about the nature of their relationship with the military. The current Reporting Requirements ask companies to report the date of the meeting or communication, names and ranks of officials involved, and a short description of the nature of and reason for the meeting or communication. While necessary, these criteria are not sufficient to capture the nuance of the nature of the relationship and its potential impact on the country and its governance. Companies should also report on the kind of assistance they provide the military; the kind of services the military provides the company; human rights issues raised in their discussions, and outcomes of those discussions, provided this is done without jeopardizing the safety and security of the individuals involved.

- **Other business relationships:** It would be useful if future iterations of the Reporting Requirements take into account the complex nature of business relationships, and include reporting activities of not only subsidiaries, but also the first tier of supply chain in the country. Similarly, there needs to be greater clarity regarding reporting requirements involving business entities in which the reporting company is a minority stakeholder, or a strategic partner.

- **Risk Prevention and Mitigation:** IHRB strongly welcomes the inclusion of the provision on reporting on risk mitigation and prevention, as this is the core reason for carrying out the due diligence processes covered in the Reporting Requirements. One of the stated objectives of the Reporting Requirements is to promote responsible business through undertaking the due diligence steps outlined, and in turn “providing civil society this type of information to both ensure the transparency of U.S. investment in Burma and to encourage civil society to partner with their government and U.S. companies towards building responsible investment, which ultimately promotes U.S. foreign policy goals.” The draft Reporting Requirements already require a summary of risks and impacts identified. IHRB recognizes that requiring more detailed reporting of the risks and impacts identified might be viewed as too burdensome and so have not put this suggestion forward as it would be counterproductive. However we are making two suggestions with respect to this provision:

  (i) As the Reporting Requirements are requesting a summary, IHRB suggests that this summary be included in the public report as well, subject to any redaction for FOIA considerations. This will be the key information of interest to Burmese civil society and others, as it is about outcomes on human rights (at a generalized
level) rather than only ongoing processes aimed at systematizing respect for human rights in day-to-day business. As such, transparency around key prevention and mitigation efforts will be important in encouraging and assisting Burmese civil society to understand the efforts companies are making with the aim of enabling the type of partnership approach suggested in the Federal Register notice and improve companies’ efforts to operate responsibly throughout their project or operation lifecycle.

(ii) The Reporting Requirements currently refer to summarizing “any” risks or impacts and “any” steps taken. This may impose a fairly significant burden for companies because it requires a summary of any and all risks and steps. At the same time, such a broad approach may encourage lumping all information on risks – significant or insignificant – into the same report, making it harder for the Department of State (and potentially the public), to distinguish the most relevant issues in the report if this becomes a “data dump”.

In order to promote reporting on key issues (rather than a broad reporting on all issues), IHRB suggests that the section focus on reporting on “significant incidents” and the way it has prioritised its risks and impacts - and associated prevention and mitigation measures - based on their human rights severity and likelihood. The scale, scope and irremediable nature of severity would be relative for each company, rather than absolute (e.g. some companies may not have any impacts that would be considered “severe” human rights impacts in human rights terms, but they are nonetheless the most severe potential and actual impacts that their business poses. In line with other provisions in the draft Reporting Requirements, the company would be required to explain how it made the choice of which impact or prevention to report on and which to exclude. This kind of scaled reporting would be more in line with the underlying UN Guiding Principles provisions on communicating and as such, another reason for making such information public.

IHRB believes the Reporting Requirements will establish an important benchmark for basic expectations of what companies should report regarding their operations and conduct in Burma. With some modification, it can and should become the template to establish similar, nuanced, and improved Requirements for other operations elsewhere. The Reporting Requirements thus form the basis for future work: developing methodology to ensure corporate accountability in Myanmar, with important lessons that will undoubtedly prove invaluable to other contexts around the world.

Respectfully submitted,

John Morrison

Executive Director
Institute for Human Rights and Business
Appendix

Original IHRB Submission to the US State Department on US Reporting Requirements on Responsible Investment in Burma (Myanmar) made on 4 October 2012

The Institute for Human Rights and Business (IHRB) makes this submission pursuant to A Notice by the State Department on 6 August 2012 as recorded in the Federal Register, regarding Reporting Requirements on Responsible Investment in Burma (77 FR 46786, DOS-2012-0046).

The Institute for Human Rights and Business (IHRB) is a global centre of excellence and expertise on the relationship between business and internationally proclaimed human rights standards. We seek to shape policy, advance practice and strengthen accountability, with a view to ensuring that the activities of companies do not contribute to human rights abuses, and in fact lead to positive outcomes.

IHRB warmly welcomes the US Government’s Reporting Requirements on Responsible Investment in Burma and takes this opportunity to respond to the questions posed in the Federal Register Notice and to provide some limited recommendations on changes to the suggested text of the Reporting Requirements themselves. As a preliminary matter, we note that this unprecedented initiative by the State Department serves as a model for other governments and intergovernmental groupings to seriously consider similarly requiring companies in their jurisdictions to report on their investment activities in Burma.

Given Burma’s past human rights record, the long period of sanctions, and the opportunity offered by political and economic reforms now underway in the country, Burma represents an important opportunity to test whether the newly endorsed UN Guiding Principles on Business and Human Rights have purchase on the way states and companies behave. We congratulate the US Government on this policy innovation to put the UN Guiding Principles on Business and Human Rights into practice and hope other governments and organisations will feel encouraged to follow suit. This would provide consistent expectations and a more level playing field for businesses investing in Burma, remind other governments’ and organisations’ of their human rights responsibilities, reinforce their stated commitments to responsible investment in Burma and provide more consistent assurance for the people of Burma that the opening of their country to outside investment brings the hoped for improvement in their daily lives.

I. Responding to Key Questions in the Federal Register Notice

• Evaluate whether the proposed information collection is necessary for the proper performance of our [US State Department] functions

Promoting responsible investment in Burma is a major priority consistent with US foreign policy goals and with the stated commitment of the Burmese government, opposition, its people and the aspirations of Burmese and international civil society. Given the human rights history of Burma, the Reporting Requirements create critical and necessary steps to ensure that companies engaged in the country demonstrate transparently to the US Government but equally as importantly, to stakeholders and shareholders, that they are acting in accordance with international human rights standards.

That a public version of each company’s annual mandatory report to the State Department will be made available is noteworthy, and will be a valuable source of information for
governments, other companies, stakeholders and the general public to ensure they are operating to necessary standards of responsible business conduct. This public version is particularly important for the Burmese government, businesses, and civil society, though efforts to publicize such reports in local languages within Burma will be crucial to ensure that people there are aware of such reports and able to access them easily.

- **Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.**

IHRB very much welcomes the *Reporting Requirements*’ reference to the UN Guiding Principles on Business and Human Rights. In doing so the Reporting Requirements reaffirm the independent responsibility that every business has to respect human rights under the UN Guiding Principles, which includes conducting human rights due diligence. As such the *Reporting Requirements* asks companies to collect the type of information, which they should be gathering in any case, as part of their responsibility to respect. One of the core values of the UN Guiding Principles is their emphasis on engagement with affected people and other stakeholders as part of the human rights due diligence process, throughout the whole cycle of a company’s operations. In order to account to affected stakeholders and others for how a business has addressed its human rights impacts, it should be prepared to communicate that externally. Communication can take many forms, but in a higher risk context such as Burma, more formal reporting about the company’s impacts and action taken to address its impacts, is expected. Therefore the *Reporting Requirements* are not asking companies to go beyond what they should be doing to meet their responsibility to respect anyway.

- **Enhance the quality, utility, and clarity of the information to be collected.**

The questions which form part of the Reporting Requirements can assist companies in identifying the kind of information they should be considering, and become a useful starting point enabling companies to report information in a succinct manner.

II. **Key Recommendations on the Text of the Reporting Requirements**

(*These recommendations (indicated by a ⊗) are provided in the order and according to the heading in which they appear in the Federal Register notice*)

**Introduction:**

We note that there are two separate reporting requirements:

* **For “any US person undertaking new investment pursuant to an agreement, or pursuant to the exercise of rights under such an agreement, that is entered into with Myanmar Oil and Gas Enterprise (MOGE)”**

  This requirement is critical, given the lack of transparency with regard to revenues received by MOGE in the past and human rights abuses associated with some extractive projects in Burma.

* **For “any U.S. person whose aggregate investment in Burma exceeds $500,000”**.

  ⊗ We recognise that the threshold is set so as not to capture small investments. Nonetheless, even small and medium sized investments in some particularly high risk sectors in Burma can have significant human rights impacts. We suggest that the *Reporting Requirements* should include lower threshold amounts for investments in some industry sectors, which may not require high capital investment but which may have significant adverse
human rights impacts. These may include, but are not limited to trade in commodities that may fuel conflict, mining specific minerals linked to conflict and human rights abuses, support services for larger industries like oil and gas, tourism, infrastructure development, and forestry and agribusiness.

**Public Report:**

Under the Reporting Requirements a submitter who “determines in good faith that it considers any information covered in items 1 through 8…to be exempt from disclosure under FOIA Exemption 4.”

- The criteria for deleting certain information from the public report, which is tied to standard FOIA exemptions, is reasonable. Another factor to consider in the Reporting Requirements as a ground for exemption is the safety and security of the company’s employees or the safety and security of communities near the company’s operations.

“(1) It shall … provide a detailed explanation for withholding this information”

This is a welcome requirement because it permits necessary exemptions but balances this with a requirement to justify the application of the exemption.

**Reporting Requirement 4(d): “Approximate maximum number of employees in Burma during the reporting period (broken down by Burmese and non-Burmese employees)”**

IHRB welcomes the requirement as job creation is an essential part of economic reforms in the country. It may also be useful for companies to segregate the data as per management levels and/or rank.

**Reporting Requirement 5: “Human Rights, Worker Rights, Anti-Corruption, and Environmental Policies and Procedures”**

IHRB welcomes the list of policies and procedures in Section 5 as each is extremely relevant for a company to develop its own thinking and guidance on the topics identified, which are appropriate and well-targeted to the operating context in Burma. Without policies and procedures in place, companies will not be prepared to deal properly with the challenges they will face in doing business in a responsible manner in Burma.

- However, IHRB remains concerned that companies are not required to explain why they do not have – or whether they will develop - such policies and procedures for Burma. Given Burma’s poor human rights record, the Reporting Requirements should include a “comply or explain” provision that requires companies to explain why they do not think such policies and procedures are relevant as part of their public report. This would demonstrate that they have investigated and reflected on these issues and their relevance to their business and can provide a credible explanation for their non-applicability to their operating circumstances. In addition, the Reporting Requirements could provide that, where the State Department determined that the explanation is not credible, companies should be required to develop these policies and procedures.

- We would welcome clarification in the final version of the Reporting Requirements that the reference on the application of policies and procedures for supply chains in Burma applies to business relationships generally in Burma and that the reporting equally should cover these relationships in line with the UN Guiding Principles on Business and Human Rights.

- Linked to Section 11 on Risk Mitigation and our recommendations for that section, we strongly suggest that the Reporting Requirements should include reporting on
implementation of the policies and procedures (that could be combined with the Section 11 reporting) as part of the public report.

**Reporting Requirement 6: “Arrangements with Security Service Providers”**

IHRB welcomes the questions about arrangements with security service providers. However it should be noted that in some cases the tatmadaw, or Burmese army, rather than private security companies, has provided security for companies’ installations. The tatmadaw has committed widespread human rights violations against the civilian population in the context of counter-insurgency operations and otherwise in the last 25 years. They carried out these operations in all seven ethnic nationality states, where ethnic minority armed opposition groups fought against the central government.

- Companies will need to investigate if any private security firm with which they sign contracts has military links and they should also scrutinize the human rights records of any private security providers they use, to ascertain if there are credible allegations of past human rights abuse. Companies should ensure that the conduct of private security service providers is not only consistent with the International Code of Conduct for private security providers, but the underlying international legal standards, principles and norms. The Reporting Requirements should include a question on whether the company has investigated if its private sector security providers have military links, recognizing both that this is challenging but necessary and that this would be an additional piece of information that would rarely be appropriate to include in the public report.

- For companies operating in the extractive and energy sectors, the Reporting Requirements should ask companies to report on whether they have applied the Voluntary Principles for Security and Human Rights and if not, why not. We recognize that only a limited number of companies are members of this important initiative but for those who are, this is a relevant framework for operating in Burma and could be reported on; for companies who are not members they nonetheless can apply the Voluntary Principles and their helpful, detailed implementation guidance.

**Reporting Requirement 7: “Property Acquisition”**

IHRB considers the question concerning land to be of critical importance. There are credible reports of forced evictions and land grabs in the context of companies acquiring land, which may have originally belonged to small farmers and vulnerable groups.

- Given the wide range of arrangements that may be put in place with respect to land and given that local laws may not permit land ownership or lease by foreigners in certain circumstances, the Reporting Requirements should extend to land use as well as land purchase or lease.

- Moreover the requirement to report purchase or lease of land or any rights related to land sets the bar too high, at $500,000 or more than 30 acres of land. This is because many people in Burma occupy small plots of land, whether for farming, other business, or residence. As noted by land activists in Burma, rural land is inexpensive compared with other countries in the region, and land prices in general are unstable with significant regional variations within the country. Context becomes important, and therefore the threshold should be lowered to reflect more accurately the value in the area of routine land transactions in Burma.
The specific questions under section 7a-e are crucial because they cover policies and procedures relating to “dislocation or resettlement” of people, any compensation to such people, and information about “any involuntary resettlement or dislocation”. Question 7a of the Reporting Requirements could be slightly reformulated to lead companies to ensure that they have policies and procedures that include obtaining accurate information about the history of land ownership and acquisition in their areas of operation.

Similar to the recommendation for Section 5, we suggest that the Reporting Requirements include a “comply or explain” provision.

**Reporting Requirement 8: “Transparency”**

IHRB commends the inclusion of Question 8 requiring transparency in total payments to each Burmese government entity.

**Reporting Requirement 10: “Military Communications”**

IHRB also welcomes Question 10 regarding communications with the tatmadaw or any other armed groups and its requirement that submitters state the nature of and reasons for such communications. The fact that the question covers not only the tatmadaw, but also other armed groups, is significant because there are many such groups in Burma, including those who have agreed ceasefires with the government, those who are still fighting against the tatmadaw, most notably the Kachin Independence Organization (KIO), and local militias. Many ethnic minority-based armed groups control territory and populations, and have made business agreements in the past with companies. Bringing transparency in all these relationships is a major step forward in making investment more responsible.

**Reporting Requirement 11: “Risk Mitigation”**

IHRB considers Question 11 to be significant. However, in summarising any risks or impacts identified, the Reporting Requirements should require reporting on any steps taken not just to mitigate the risks or impacts, but crucially to prevent them as prevention should be the key objective.

How companies implement their policies and procedures to prevent and mitigate potential negative human rights impacts on individuals, workers and communities is what will finally make a difference in the lives of the Burmese people – positively or negatively. The outcomes of responsible investment is at the core of the intent behind the Reporting Requirements. The Burmese people, the Burmese government and civil society require access to the reports in a timely manner, preferably in local languages so that they can engage with companies in an informed manner, so that they are well-placed to understand and analyse if companies are living up to the policies and procedures being made public, as well as how they are being implemented. Transparency is an important precursor to accountability. Without transparency it will not be clear whether business remains part of the problem as it has been in the past, or whether indeed a new page has been turned and business is becoming part of an important new solution in bringing Burma into the global economy in a way that respects the human rights of people in the country and leads to a more prosperous and robust economy.

We recognize that in some situations it may be sensitive for the company or raise security concerns for individuals, workers or communities to report on the management of...
human rights issues. That is why we suggest that the Reporting Requirements include reporting on implementation, including prevention and mitigation as the default, with the possibility to report certain sensitive issues only in its report to the US Government.

Similar to the recommendation for Section 5, we suggest that the Reporting Requirements include a “comply or explain” provision. It is important that companies explain why they have not conducted due diligence to prevent or mitigate risks.

*************

In conclusion, IHRB strongly welcomes the mandatory reporting requirements for US companies operating in Burma and again commends the United States Government in setting the standard for ensuring international investment into Burma is undertaken in adherence to international human rights standards. We believe they will serve their intended purpose even more effectively if they are strengthened along the lines suggested above.

Respectfully submitted,

John Morrison,
Executive Director

Institute for Human Rights and Business
34b York Way, London, N1 9AB, United Kingdom
www.ihrb.org
T: +44 203 411 4333