

CLIENT UPDATE 2016 APRIL

FOREIGN INVESTMENT

Updates to Myanmar's Foreign Investment Regime

Introduction

Changes to the list of restricted economic activities under the Myanmar Foreign Investment Law ("FIL") were recently announced by the Myanmar Investment Commission ("MIC"), in the form of MIC Notification No. 26/2016 dated 21 March 2016 ("**Notification No.26/2016**"). These changes are brought in more than 18 months after the release of the previous notification on foreign ownership restrictions, being Notification No. 49/2014 dated 14 August 2014 ("**Notification No. 49/2014**").

Notification No. 26/2016 retains the framework previously set out in Notification No.49/2014, namely listing three broad categories of business activities:

- (i) business activities that foreign investors are prohibited to undertake;
- (ii) business activities that foreign investors can undertake only through a joint venture with a local Myanmar partner; and
- (iii) business activities that are subject to certain prescribed conditions, such as requiring approval from the relevant ministry.

Key Changes Arising from Notification No. 26/2016

The key changes arising from Notification No.26/2016 are further liberalisation and re-calibration of foreign investment policy towards certain business activities, as well as additional prohibitions and restrictions in respect of certain business activities.

These changes are further elaborated below.

(1) Liberalised Economic Activities

Business activities in respect of the production and distribution of hybrid seeds, production and propagation of high yield seeds and local seeds, manufacturing of rubber and rubber products, and ecotourism can now be wholly undertaken by foreign investors. Under Notification No.49/2014, these activities could only be undertaken through a joint venture with a local Myanmar partner, and in the case of ecotourism, it is subject to an additional recommendation from the then Ministry of Environmental Conservation and Forestry. This dovetails with recent liberalisations permitting foreign investors to undertake wholesale distribution of hybrid seeds and local seeds, which is an exception to the general policy against "trading" by foreign investors. It is also in line with the new Government's focus on the agricultural sector as a key pillar of the country's economy.

(2) Prohibited Activities

An additional prohibited activity was introduced in Notification No.26/2016, which relates to activities which "endangers mangrove forests, sacred religious sites and traditional ritual sites, grazing land, plantation and farmland, and water resources". This reinforces Myanmar's focus on environmentally sustainable developments and investments, together with its commitment to protect its heritage. However, it is unclear how strict the authorities would construe the term "endanger" as it is inevitable that certain investments might have a less than positive impact on for example, farmland or water resources.

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(3) Activities requiring Joint Venture

The production and distribution of vaccines is now an activity which can only be undertaken via a joint venture with the Union Government. Whether this extends to state-owned enterprises, or more importantly enterprises designated by the Union Government, remains an open point within Notification No.26/2016.

In addition, the conditions relating to rail activities such as the construction of a new railway, station and buildings, as well as the operation and maintenance of a railway, have also been refined. In addition to requiring approval of the Union Government and the Ministry of Transportation and Communication, foreign investors can now secure a "Build-Operate-and-Transfer" (BOT) project from the state-owned Myanma Railways. It remains to be seen how this will be implemented in practice given that such activities continue to require a joint venture with a Myanmar citizen, even though a BOT project in Myanmar may not necessarily entail a joint venture per se.

(4) Additional Qualifications

While Notification No.26/2016 provides that business activities not specified within Notification No.26/2016 could be wholly carried out by foreign investors without the need for any local participation, additional qualifications introduced appear to demonstrate that this may not necessarily be the case in practice. In particular, Notification No.26/2016 expressly reserves the MIC's right to review business activities not listed within Notification No.26/2016, with the MIC reserving the discretion to seek permission from the relevant ministries if it believes that such permission is required. Furthermore, "services" type activities which are not "investments" per se, may require approval of the relevant ministry. This may open up an avenue for the Government to restrict certain activities by withholding approval at its discretion.

Concluding Remarks

Whilst Notification No.26/2016 is a welcome improvement to the existing regime by providing clarity to foreign investors keen on entering Myanmar, foreign investors new to the Myanmar market should be aware that sector specific regulations and policies imposed by the various ministries would still be pertinent.

In this regard, foreign investors will need to consider whether there are indeed restrictions imposed by the relevant ministries in practice. In short, Notification No.26/2016, as with Notification No.49/2014 which preceded it, ought to be treated as the first reference point for foreign investment policy outside of the special economic zones. However, it is by no means the omnibus negative list when one is considering foreign ownership restrictions in Myanmar.

In addition, it remains to be seen how the new Government will implement Notification No.26/2016 in practice, and in particular, the interpretation and level of intervention that may be applied by each ministry or governmental agency. In a country which is still on its road to reform, investors will have to appreciate that regulations and practices can remain in a state of flux as the new Government comes to grip with administering the regime to promote foreign investments. It will be interesting to observe whether there might be further relaxation in Myanmar's foreign investment regime in the very near future with the new Government in power.

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ASEAN Economic Community Portal

With the launch of the ASEAN Economic Community (“AEC”) in December 2015, businesses looking to tap the opportunities presented by the integrated markets of the AEC can now get help a click away. Rajah & Tann Asia, United Overseas Bank and RSM Chio Lim Stone Forest, have teamed up to launch “Business in ASEAN”, a portal that provides companies with a single platform that helps businesses navigate the complexities of setting up operations in ASEAN.

By tapping into the professional knowledge and resources of the three organisations through this portal, small- and medium-sized enterprises across the 10-member economic grouping can equip themselves with the tools and know-how to navigate ASEAN’s business landscape. Of particular interest to businesses is the “Ask a Question” feature of the portal which enables companies to pose questions to the three organisations which have an extensive network in the region. The portal can be accessed at <http://www.businessinasean.com/>.

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