

October 4, 2012

U.S. Department of State, DRL/EAP  
Suite 7817  
Burma Human Rights Officer  
2201 C Street, N.W.  
Washington, DC 20520

**Re: *Title of Information Collection: Reporting Requirements on Responsible Investment in Burma***

Dear Burma Human Rights Officer:

Conflict Risk Network and the 21 undersigned institutional investors, asset owners and asset managers with a combined total of more than \$407 billion in assets under management are pleased to submit to the State Department the following comment on the "[Reporting Requirements on Responsible Investment in Burma](#)" (reporting requirements). We welcome these requirements as a vital mechanism to ensure transparency related to new United States (U.S.) business operations in Burma, and we appreciate the opportunity to offer specific comments and recommendations.

Conflict Risk Network includes nearly 100 institutional investors, financial service providers and related stakeholders calling upon corporations to fulfill their responsibility to respect human rights and to take steps that support peace and stability in areas affected by genocide and mass atrocities. To this end, we leverage established principles and standards, and work with leading business, human rights and country experts, companies, and organizations on the ground to develop specific corporate recommendations in areas of concern.

Conflict Risk Network investor members and stakeholders in the responsible investor community (institutional investors) use disciplined approaches—some use screens while others do not—but all members work to encourage corporate practices that promote human rights, environmental stewardship, diversity, good corporate governance and consumer protection. Our approach is founded on the premise that corporations have a responsibility to respect human rights, which includes acting with due diligence to avoid infringing on the rights of others, and addressing any adverse impacts that might occur. In addition, we call upon corporations to take steps that, while beyond their basic responsibility to respect human rights, can contribute to a peaceful and stable environment that poses fewer risks to civilians and the companies themselves.

Many of us have expressed concerns about the risks posed by the U.S. Government decision to permit new investment in Burma.<sup>1</sup> We nevertheless support the reporting requirements as a valuable—if limited and currently imperfect—means to help advance human rights and political reform, consistent with the U.S. Government's longstanding foreign policy priorities in Burma.

This submission provides our responses to the questions the State Department is considering with regard to the reporting requirements, according to the [Federal Register notice](#):

- The necessity of the information for proper agency function;
- The degree to which collecting this information might impose a burden on investors; and
- How to improve the quality, utility and clarity of the information to be collected.

In summary, we wish to emphasize the following points:

- 1. The reporting requirements are not overly burdensome to companies making new investments in Burma.** On the contrary, full and pointed disclosures could help minimize risks in the short term and long term. The information called for is essential for us to carry out due diligence under our mandates as responsible institutional investors. To ensure that we are not contributing to or complicit in human rights violations, worker rights violations or environmental abuses or corruption, institutional investors will rely heavily upon public disclosures by corporations newly investing in Burma.
- 2. The consequences for failing to report or for not reporting fully and accurately should be specified.** Explicit references in the reporting requirements to penalties under applicable laws would create significant incentives for submitters to make full and accurate disclosures.
- 3. Information about financial, operational, legal, regulatory and reputational risks contained in the reports should be accessible to institutional investors and the general public.** We are extremely concerned that corporations newly investing in Burma have too much discretion to designate disclosures under Items 1-8 as privileged and confidential—thereby excluding such disclosures from the public domain. Furthermore, access to the information slated to be reported privately to the U.S. Government under Item 11 (Risk Mitigation) is essential to conducting our business responsibly. Knowing the specific processes and concrete steps a corporation undertakes to mitigate or address risks and impacts—and the results of these actions—is central to exercising our roles as owners of public companies investing in Burma. Disclosures regarding new business dealings with Burma’s state-owned Myanma Oil and Gas Enterprise (MOGE) should also be made public, due to the risk of exposure to poor labor, environmental and safety standards, corruption, forced labor and other human rights violations.
- 4. The reporting requirements should provide specific guidance for their practical implementation, including references to international standards most relevant to Burma.** We applaud the references to the United Nations (UN) Guiding Principles on Business and Human Rights and the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises. We urge the inclusion of additional sector- and industry-specific guidelines—including the International Labor Organization (ILO) Core Labor Standards, the UN Declaration on the Rights of Indigenous Peoples and the Voluntary Principles on Security and Human Rights—and recommend that submitters be encouraged to report according to the most specific standards relevant to their business in Burma.
- 5. Reporting should address not only policies and procedures but also how they are implemented and progress being made.** The effective implementation of policies and procedures related to human rights, worker rights, anti-corruption and environmental

protection is essential to institutional investors' assessment of financial, operational, reputational, regulatory and legal risks associated with any investment in Burma.

- 6. Reporting should include subsidiaries and business partners.** Policies and procedures may prove to be less effective without the assurance of their adequate implementation throughout the company's operations in Burma and across the lifespan of any projects. Corporations should be required to disclose the degree to which human rights, worker rights, anti-corruption and environmental policies and procedures apply to their subsidiaries, joint venture partners and subcontractors and extend throughout their supply chains.

Finally, we call for the timely release of the final reporting requirements so that corporations newly investing in Burma can submit their required reports without delay. To fulfill our responsibility to respect human rights, to avoid complicity in human rights abuses, and to protect the long-term value of our investment portfolios, we as institutional investors need comprehensive and current information about the impact of new U.S. investments and business activity in Burma.

Following are more detailed responses to the questions under consideration by the State Department, as well as supplemental information on the business-military nexus in Burma.

Thank you for your consideration of these comments. Please do not hesitate to contact us if you have questions or would like additional information.

Sincerely,



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Director  
Conflict Risk Network



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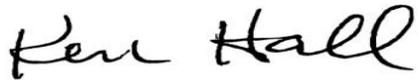
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## **I. THE NECESSITY OF THE INFORMATION FOR PROPER AGENCY FUNCTION**

Institutional investors have identified numerous ways in which disclosures under the reporting requirements can enable the U.S. Government to advance its foreign policy goals of improving human rights protection and facilitating political reform in Burma. At the same time, we are concerned that without recommended improvements to the quality, utility and clarity of the information to be collected, the requirements will fall short of their potential to support U.S. foreign policy priorities. We are confident that strengthened reporting requirements will better facilitate the attainment of U.S. foreign policy goals toward Burma.

### **A. How the proposed requirements serve U.S. foreign policy goals**

The U.S. Government should also use disclosures under the reporting requirements to deter future human rights violations, support risk mitigation efforts and to promote transparency in the U.S. and abroad.

#### **1. Improve human rights protection in Burma**

There are opportunities for corporations to make positive contributions to peace and stability in Burma. Companies that invest in Burma have the opportunity to engage with Burmese decision makers over the steps the government must take to fulfill its responsibility to protect human rights. Corporations also have the potential to create job opportunities, generate revenues that advance economic growth, promote transparency, invest in local communities and foster respect for human rights and environmental protection. Corporations implementing and reporting on the International Labor Organization (ILO) core labor standards – including with respect to equality of opportunity and treatment – can promote worker rights, greater equality and peace.<sup>2</sup>

Public corporate disclosures as a result of robust due diligence will enable the U.S. Government to make progress toward improving human rights protections in Burma. The U.S. Government can also use information disclosed through due diligence to conduct informed consultation with U.S. businesses to address any potential violations and impacts resulting from their investment and operations in Burma, and to prevent potential future violations.

Policies and procedures related to land acquisitions and corporate operations in Burma highlight the urgency of due diligence. A Conflict Risk Network research trip to Burma and the Thai-Burma border revealed that tracts of land are being unjustly confiscated for resale to companies beginning to operate in the country. Reporting requirements help to ensure that corporations have the policies and procedures in place to conduct due diligence prior to their investment in Burma. Information uncovered through due diligence enables them to avoid contributing to or being complicit in human rights violations that occurred before their actual investment, with which they may otherwise be indirectly associated. Additionally, through a robust due diligence process that begins prior to investment in Burma, corporations are in a highly informed position to publicly call for the Burmese government to develop laws and practical enforcement mechanisms to address a wide range of abuses and impacts such as unjust land confiscation.

## **2. Advance U.S. corporations' human rights, worker rights, anti-corruption and environmental policies and procedures in line with internationally recognized standards**

Institutional investors believe that the U.S. Government can use disclosures under the reporting requirements to advance American corporations' human rights, worker rights, anti-corruption and environmental policies and procedures in line with internationally recognized standards. However, a significant deficiency in the reporting requirements is the lack of reference or specificity with respect to international standards most relevant to Burma.

## **3. Promote transparency in the U.S. and abroad**

Although economic reforms in Burma are ongoing, responsible fiscal and monetary management by all government actors cannot realistically be expected overnight, particularly considering ingrained interests against change in parts of the Burmese parliament and business community.<sup>3</sup> Burma also lacks effective anti-corruption legislation and operates under a culture where corruption is the norm. According to consultations with Conflict Risk Network's partner organizations, it is becoming increasingly common for organizations with close links to the Burmese government to require bribes thinly veiled as charitable donations.

In all instances corporations have a responsibility to be transparent in their own payments to the Burmese government and to publicly call on the Burmese regime to adopt laws and policies requiring revenue transparency. The U.S. Government should engage Burmese authorities, U.S. corporations and civil society to promote the value of transparently managing revenues, particularly from extractive industries (*see Appendix on the business-military nexus related to natural resources*). The U.S. Government should encourage these actors as well as U.S. corporations to move toward the adoption of the [Extractive Industries Transparency Initiative](#) (EITI).

Payments to the Burmese government including but not limited to taxes, fees, royalties, bonuses, profit sharing, profits, social benefits and charitable donations (both cash and in-kind) should be publicly disclosed in compliance with the revenue transparency requirements of Section 1504 of the [Dodd-Frank Wall Street Reform and Consumer Protection Act](#) (Dodd-Frank Act) and EITI. Disclosures of payments by all U.S. corporations newly investing in Burma will usefully supplement the pending Section 1504 disclosures, and should be disaggregated at least to the level of categorization required by Section 1504.

Disclosures will significantly aid the enforcement of this legislation. Moreover, institutional investors also call upon the U.S. Government to use disclosures under the reporting requirements to hold U.S. corporations accountable under the Foreign Corrupt Practices Act.

## **4. Foster a stable investment climate and a culture of accountability, and ensure compliance with applicable laws, norms and standards**

According to the United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles), reporting provides a measure of accountability to groups or individuals who may be impacted and to other relevant stakeholders, including institutional investors.<sup>4</sup> Disclosures

inform the development of accountability mechanisms and help them to function properly and effectively. It is especially important that the U.S. Government has accountability mechanisms in place, given Burma's out-of-date or inadequate national laws, lack of legal enforcement and non-existent rule of law.

Institutional investors expect corporations to implement mitigating efforts that directly address the risks and impacts uncovered through due diligence, regardless of the location of their operations. Mitigation includes efforts to uncover and to stop practices that may violate U.S. national laws, Burmese national laws or applicable international law and norms. Mitigation also creates a more stable climate for future investment.

Forced labor by Burmese authorities and the military related to development is a historic issue and remains pervasive.<sup>5</sup> In 1998, the ILO rejected the Burmese government's justification of forced labor as customary or cultural.<sup>6</sup> Yet, a March 2012 Burmese civil society report finds that "the military is using the government administration to exact forced labor" in an attempt to draw less attention to the practice.<sup>7</sup>

The U.S. has domestic legislation aimed toward keeping U.S. corporations from associating with forced labor.<sup>8</sup> Disclosures under the reporting requirements will better equip the U.S. Government to hold U.S. corporations accountable for complicity in or contributing to forced labor. In the absence of disclosures the U.S. Government will also be less able to deter U.S. companies from becoming implicated in labor rights violations.

## **B. How improved reporting requirements could better serve U.S. foreign policy goals**

### **1. Reporting should address not only policies and procedures but also their implementation and progress being made**

Institutional investors are concerned that corporations will not have thorough due diligence policies and procedures in place and primed for implementation prior to investment in Burma. The effective implementation of policies and procedures related to human rights, worker rights, anti-corruption and environmental protection is essential to institutional investors' assessment of financial, operational, reputational, regulatory and legal risks associated with any investment in Burma. Independent monitoring and verification can encourage more thorough and accurate reporting, and bolster the credibility of the reporting system.

### **2. Reporting should include subsidiaries and business partners**

Policies and procedures may prove to be less effective without the assurance of their adequate implementation throughout the company's operations in Burma and across the lifespan of any projects. Corporations should be required to disclose the degree to which human rights, worker rights, anti-corruption and environmental policies and procedures apply to their subsidiaries, joint venture partners and subcontractors and extend throughout their supply chains.

Institutional investors are concerned that some of the very same persons the U.S. was calling to be investigated under a commission of inquiry<sup>9</sup> are now those with whom the government is

encouraging American corporations to do business. By requiring reporting to extend to entities over which U.S. companies exercise control or significant influence, the government will be better prepared to encourage and assist businesses to develop robust policies and procedures to address adverse impacts resulting from their operations in Burma.

**3. In general, human rights, worker rights, anti-corruption and environmental policies and procedures and risk mitigation should be considered necessary and applicable in Burma**

Institutional investors would be very interested to learn the unique circumstances under which a corporation would report that it does not find human rights, worker rights, anti-corruption and environmental policies and procedures applicable in Burma. Allowing corporations to report “none” or “not applicable” on such important disclosure requirements seems to enable them to evade their responsibility, thwarting the aims of this policy.

We strongly encourage the removal of the “not applicable” category for Items 5 and 11. Alternatively, we would recommend that the State Department detail specific examples where a “not applicable” response would be appropriate. If a company has no policy, it should disclose this fact. It is our assumption, however, that all significant investments in Burma carry human rights and environmental risks. If a company answers “none” or “not applicable,” it should be asked to explain why it does not have the appropriate policies or procedures.

Companies generally accept the notion of “comply or explain.” If a company does not have such policies and procedures prior to entering Burma, then steps should be taken well before operations begin in the country. Should it be appropriate for a corporation to develop and phase in a specific policy and its implementation as it enters the country, disclosures should be made on every step of its progress with specific examples.

This information would be vital to institutional investors in assessing our exposure to risks and would greatly aid our corporate engagement efforts. This information should be available and equally scrutinized by the U.S. Government and civil society organizations (CSOs) in Burma and abroad.

**4. Disclosures should be timely**

Corporate disclosures under the reporting requirements have the potential to be ten months out of date if a company has a July 1 to June 30 fiscal year. Under these circumstances, institutional investors find it unlikely that corporations would submit fresh information on the April deadline. Furthermore, requiring only one annual report is insufficient to enable a timely response from CSOs operating both in Burma and abroad.

Payment disclosures under the reporting requirements of Section 1504 of Dodd-Frank Act must be made no later than 150 days or roughly five months after the end of the corporation’s most recent fiscal year.<sup>10</sup> In order for disclosures to have the greatest effect on U.S. policy goals of protecting human rights and facilitating political reform in Burma, company reports should be submitted within 180 days of the start of a new investment and thereafter on a twice-yearly basis, on April 1 and October 1.

**5. Corporations should pre-notify the U.S. Government of intent to sign an agreement with Burma's state-owned Myanma Oil and Gas Enterprise (MOGE), and disclosures of new business dealings with MOGE should be made public in a timely manner**

Institutional investors find that the reporting requirements in their current state do not go far enough to ensure that the full nexus of business-military transactions is revealed.

Institutional investors are extremely concerned that U.S. corporations are allowed to engage in business dealings with a company directly linked to the Burmese military, egregious human rights abuses and large-scale corruption. Despite attempted reforms in Burma to create strong safeguards which would prevent MOGE from continuing its business as usual, massive new revenues to the company risk fueling corruption and could reinforce the dichotomy between the military and Burma's vulnerable civilian government (*see Appendix on the business-military nexus related to natural resources*).

Access to this information is essential to institutional investors who lack the resources to thoroughly investigate corporate agreements with MOGE. The information is equally important to CSOs in Burma and abroad, who may be in a position to fact-check and/or challenge key disclosures. Corporations should be required to pre-notify the State Department of the intent to sign a contract with MOGE. This information should be made public at the earliest possible opportunity. Public disclosures related to U.S. corporations' business dealings with MOGE will further enable the U.S. Government to monitor incentives for military authorities within the government to retain power and impede democratic and economic reform in Burma.

It is not clear how the State Department and the U.S. Government intend to use these 60-day disclosures regarding new business dealings with MOGE. Specifically, it is unclear how this information will be used to ensure corporations are not contributing to or complicit in human rights abuses associated with or alleged against MOGE. The U.S. Government should clarify how it intends to use this information to promote the protection of human rights in Burma and its political reform.

**6. More extensive disclosures regarding business dealings with MOGE are essential to the U.S. Government's achievement of its foreign policy goals in Burma**

Currently, Burma requires that foreign companies conducting oil and gas exploration be partnered with at least one domestic energy firm, which is usually MOGE.<sup>11</sup> It has been common practice for Burma's contracts with foreign companies to stipulate that MOGE play a key role in security arrangements (*see Appendix on the business-military nexus related to natural resources*).

Corporations that do business with MOGE are exposed to a spectrum of risks, including poor labor, environmental and safety standards, corruption, forced labor and other human rights violations.<sup>12</sup> Institutional investors find these risks extremely alarming, and therefore recommend that the U.S. mandate additional public reporting regarding MOGE.

Especially in the instance of business dealings with MOGE, corporations should be required to disclose whether they are members of the [Voluntary Principles on Security and Human Rights](#) (Voluntary Principles). If they are not, disclosures should be made on whether any policies, procedures and guidance tools under the Voluntary Principles have been implemented and the extent to which they are independently monitored. Institutional investors also expect a public report on the findings of the independent monitor.

Furthermore, corporations should be required to publicly indicate any contractual agreements with security providers—including through any subcontractors, subsidiaries and/or partners. This disclosure should take account of any requirements that address the corporation’s policies and expectations that the providers should adhere to the Voluntary Principles, along with any penalties for non-compliance. Additional information should include the extent to which the [International Code of Conduct for Private Security Providers](#) has been adopted and implemented by the corporation, its subcontractors, subsidiaries and/or partners.

Without this information the U.S. Government will not be able to track investment that involves MOGE or identify persons or entities with whom it should engage on anti-corruption and human rights policies. More extensive reporting on U.S. corporations’ business dealings with MOGE is necessary for the U.S. Government to assess how such investments are promoting or interfering with political reform and the protection of human rights in Burma.

## **II. THE DEGREE TO WHICH COLLECTING THIS INFORMATION MIGHT IMPOSE A BURDEN ON INVESTORS**

The reporting requirements are not overly burdensome to new investors in Burma. On the contrary, full and pointed disclosures could help minimize risks in the short term and long term. The information called for is essential for us to carry out due diligence under our mandates as responsible institutional investors. To ensure that we are not contributing to or complicit in human rights, worker rights, or environmental abuses or corruption, institutional investors will rely heavily upon public disclosures by corporations newly investing in Burma.

### **A. It is overly burdensome to institutional investors and corporations newly invested in Burma *not* to make disclosures under strong reporting requirements**

Institutional investors emphasize that we will incur significant burdens if information outlined for collection under strong reporting requirements is not collected. There are similar burdens to companies with new investments in Burma. The information called for is minimal, and of the type that we will ask corporations newly investing in Burma to report anyway. The information is essential for us to carry out due diligence under our mandates as responsible institutional investors. Importantly, the information will allow us to conduct the type of due diligence that must be done in order to avoid contributing to or being complicit in human rights abuses through our investment decisions. Fair and equal reporting standards on due diligence that is implemented and enforced will also help keep companies operating in Burma on a level playing field.

## **1. Difficulties of obtaining factual information from Burma affect stakeholder interests**

There is not a free flow of information in Burma's business environment.<sup>13</sup> Yet through stringent due diligence, corporations are in a strong position to gather information enabling them to avoid association with human rights, worker rights and environmental abuses and corruption. U.S. corporations have been collecting and will continue to collect the information mandated under the reporting requirements. The information is generally gathered systematically as part of feasibility studies, market research and in order to fulfill existing reporting requirements to stakeholders.

Institutional investors are sensitive to factors such as financial, operational, regulatory, legal and reputational risks which could have great impact on our holdings. We must have great confidence that corporations in which we are invested have the policies and procedures in place and complete robust due diligence before entering Burma and throughout the lifespan of their investments.

## **2. Full and pointed disclosures minimize risks in the short term and long term**

In well-known legal cases, Burmese villagers filed separate lawsuits against Total and UNOCAL, now Chevron, for alleged complicity in killings, torture, rape, forced labor and forced relocation by the Burmese military.<sup>14</sup> These abuses were allegedly carried out while the military cleared land and provided security for the construction of a natural gas pipeline partly owned by the companies. The UNOCAL case was settled for undisclosed compensation believed to be in the tens of millions of U.S. dollars. A settlement was also reached in the Total case for a similarly large sum.

Disclosures most valued by institutional investors are full and robust, but more importantly pointed toward uncovering material risks unique to Burma that ultimately affect institutional investors and their clients' interests. Risks and impacts derived from UNOCAL's and Total's operations in Burma, which are still ongoing today, could have been minimized, mitigated and/or prevented had there been public access to full and pointed disclosures on the companies' due diligence policies, procedures, practices and subsequent findings. Without this information, institutional investor confidence in corporations operating in Burma is significantly decreased, and in-depth engagement is required to hold corporations accountable for past grievances and to mitigate potential future liabilities.

There is legal liability in the U.S. for withholding the full disclosure of material information from stakeholders.<sup>15</sup> Given Burma's risky business operating environment, it is in the best interest of corporations to make full, pointed and independently verified disclosures so as to avoid exposure to causes of action such as securities fraud, breach of fiduciary duty and/or unjust enrichment in the long term. In the short term, disclosures will ease institutional investor skepticism and boost our confidence that the corporation has the necessary tools in place to protect itself from such liability and associated risks which greatly affect it and its clients.

**B. Institutional investors as “submitters” do not find disclosures overly burdensome or onerous but rather highly valuable to conducting due diligence and protecting investments from undue risks**

Through their own investments in Burma, certain institutional investors may fit the definition of a “submitter” under the reporting requirements and therefore, will follow these requirements in making their own disclosures. In doing so, they will implement the necessary company-wide policies and procedures to meet their due diligence commitments.

Institutional investors must also ensure that we are not contributing to or complicit in human rights violations, worker rights violations, environmental abuses or corruption. To fulfill this responsibility, we rely heavily upon public corporate disclosures to uncover any impacts from our funds invested in Burma or in corporations operating in Burma. Such impacts would include legal exposure and any related financial, reputational, regulatory and operational risks.

In addition to reviewing public corporate disclosures to meet our own fiduciary obligations, institutional investors monitor the corporations within our universe for undue risk that may negatively affect our financial products and services. Institutional investors’ screens go well beyond numerical financial disclosures. This level of analysis is not unique to one company or country, but rather is common practice for institutional investors in reviewing an entire universe for potential investment.<sup>16</sup>

**C. Institutional investors will use the information disclosed to promote the greatest respect for human rights by corporations in Burma**

Institutional investors, particularly but not exclusively in the socially responsible investment community, will use public disclosures related to social, labor, governance and environmental issues to promote and encourage the highest standard for responsible corporate investment in Burma. These disclosures will help to identify instances where corporate conduct does not meet a high standard of responsible investment. We use this information to engage with corporations on their responsibility to respect human rights by expressing concerns, providing expertise and proposing recommendations for improvement.<sup>17</sup>

Institutional investors use shareholder resolutions in conjunction with engagement efforts to promote corporate social, labor, governance and environmental due diligence and subsequent public disclosures on related policies and procedures in addition to their results. Greater public disclosures by companies invested in Burma will provide relevant information to institutional investors, potentially reducing the need for overt campaigning.

At the most basic level, contact details for the related entities (subsidiaries, contractors, or joint venture partners) over which U.S. corporations exercise control or significant influence are critical to facilitating institutional investors’ due diligence and engagement efforts with corporations. Details should include the companies’ addresses and contact information for the employee(s) responsible for handling institutional investor related questions and concerns—specifically on human rights, labor rights, environmental and corruption issues.

**D. Information collection can foster relationships among institutional investors, CSOs in Burma and on the Burmese border and local communities to ensure responsible U.S. investment**

It is not uncommon for institutional investors to make site visits to conduct field research in countries with challenging operating environments where companies within their investment universe do business. Some institutional investors have close ties to local CSOs in Burma and on the Thai-Burma border. Others rely on the field research of organizations such as Conflict Risk Network to make informed investment decisions.

Institutional investors are well positioned to facilitate engagement efforts by local communities and CSOs with corporations that are affecting or have the potential to affect their quality of life either positively or negatively. With robust corporate disclosures, institutional investors can assist local communities affected by new investment to identify corporations that are responsible and have the power to act upon grievances.

Thorough disclosures confirmed by local groups with the assistance of institutional investors may also aid the U.S. Government's effort to block investments involving those who threaten the peace, security and stability in Burma.<sup>18</sup> Institutional investors can assist local communities and CSOs in bringing any inconsistencies between public disclosures and the realities on the ground to the attention of corporate, Burmese and U.S. officials. These disclosures and information-sharing can also surface examples of positive conduct by U.S. corporations, and demonstrate how it is possible to fulfill and exceed the responsibility to respect human rights in a challenging operating environment.

**E. Public disclosure of information about financial, operational, legal, regulatory and reputational risks contained in the reports would reduce the burden on investors**

**1. Privately disclosed privileged and confidential information under Items 1-8**

We are extremely concerned that corporations newly investing in Burma have too much discretion to designate disclosures under Items 1-8 as privileged and confidential—thereby excluding such disclosures from the public domain.

There is a high likelihood that information may be wrongly characterized as privileged and confidential, perhaps even deliberately. Institutional investors are especially troubled that the reporting requirements fail to reference mechanisms that the U.S. Government has to compel the disclosure of information that has no legitimate business reason to be kept secret. We believe this omission is a significant disincentive for full and accurate corporate reporting.

To the extent that a submitter wishes to designate certain information as confidential and not for public release, it can seek authorization in advance to withhold that information on a case-by-case basis, based on a detailed explanation of why it feels such information constitutes a trade secret or privileged or confidential commercial or financial information. That designation should then be made by the State Department, not the submitter.

While private information may be accessed through a request under the Freedom of Information Act (FOIA), such requests would pose an immense resource burden to institutional investors, civil society, the U.S. Government and U.S. corporations. Losses that may result to these stakeholders from protracted litigation related to a FOIA request include valuable time, monetary resources and productivity.

## **2. Privately disclosed information under Items 10 and 11**

### **a. Private disclosures under Item 10. *Military Communications***

Institutional investors strongly dispute the assumption that this information should be reserved for a separate, confidential report to the U.S. Government. CSOs in Burma and the Burmese border regions believe there is important value in public release of information on military communications. Rumors and misinformation about communications and meetings can unnecessarily create risks, including by inflaming community and ethnic tensions with the Burmese government or American companies, which might in turn escalate into protests or other incidents that can be associated with an abusive response. Transparency can dispel and prevent distrust amongst the different parties.

Reporting on military communications is intended to help the U.S. Government identify and monitor possible U.S. company ties to a category of notorious human rights abusers. Because of the close links between the Burmese military and others implicated in human rights abuses and corruption, these disclosures may also reveal submitters' contact with other sanctioned persons and entities, short of a formal business relationship that would violate U.S. sanctions.

Due to the prohibition on investment with the military and armed groups, corporations newly investing in Burma should apply a similar level of vigilance to interactions with these entities as they do to interactions with those on the Specially Designated Nationals (SDN) list. The claim that reporting on military communications could be burdensome is troubling to institutional investors. If the volume of communications is high enough to make reporting onerous, the likelihood that the corporation is illegally associated with sanctioned persons or entities increases—making this information even more necessary to institutional investors assessing risks.

### **b. Private disclosures under Item 11. *Risk Mitigation***

The information slated to be reported privately to the U.S. Government under Item 11 (Risk Mitigation) is essential to conducting our business responsibly. Knowing the specific processes and concrete steps a corporation undertakes to mitigate or address risks and impacts—and the results of these actions—is central to exercising our roles as owners of public companies investing in Burma. Private disclosure of information under Item 11 undermines institutional investors' efforts to conduct business properly and successfully. In addition, institutional investors see no reason why due diligence and risk mitigation related to corruption is omitted from reporting.

Item 11 currently calls for private disclosure of any risks and/or impacts identified and any steps taken to mitigate them “[i]f the submitter conducted due diligence.”<sup>19</sup> The implication that conducting due diligence is optional or not entirely necessary—particularly in Burma’s unique operating context—should be corrected to require due diligence, as well as the public disclosure of risks and/or impacts and the steps that have been, will be and will continue to be taken to mitigate them.

An essential element of risk mitigation is the disclosure of the *results and progress* of mitigating efforts. Mitigating efforts should address root causes and not create worse unintended consequences. Adverse impacts from mitigating efforts can be avoided through due diligence and project assessments by both the corporation and civil society throughout the lifespan of a project. Without public disclosure and clear information on the results of mitigating efforts, institutional investors will be unable to maximize the full utility of reporting. The U.S. Government will also lack adequate information to assess whether companies are evaluating the extent to which their mitigating efforts actually address impacts and risks as opposed to creating negative, unintended consequences.

Institutional investors will not be in a position to challenge or fact-check private reporting of corporate due diligence policies, procedures, implementation efforts and their results. Without this information, they cannot meet their due diligence commitment to ensure that they are not invested in corporations responsible for or associated with human rights abuses and corruption in Burma.

By publicly disclosing information under Item 11, corporations as well as relevant stakeholders assume a responsibility to prevent or mitigate adverse impacts and risks associated with violation of human rights and worker rights, environmental degradation and corruption. It is in the interest of corporations to work with all stakeholders—including affected communities, CSOs, customers, employees and investors—to take advantage of their unique expertise and experiences to lessen their exposure to financial, operational, reputational, regulatory and legal risks.

### **c. Inconsistencies with internationally recognized standards in Item 11. *Risk Mitigation***

The failure to require the disclosure of environmental or human rights risks to affected communities directly contravenes the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, which require corporations to report environmental risks publicly.<sup>20</sup>

The UN Guiding Principles outline the responsibility to respect human rights and include policies and procedures for corporations to know and *show* that they respect human rights in practice. “Showing” involves communicating measures of transparency and accountability to those impacted by corporate conduct and other relevant stakeholders, including institutional investors.<sup>21</sup> This communication according to the UN Guiding Principles can take a variety of forms including formal public reporting. Formal reporting “is expected where risks of severe human rights impacts exist . . . [and] should cover topics and indicators concerning how enterprises *identify and address* adverse impacts on human

rights.”<sup>22</sup> Due diligence under the UN Guiding Principles is meant to involve communication or a dialogue with stakeholders through a transparent process. The private nature of disclosures under Item 11 of the reporting requirements therefore contradicts the UN Guiding Principles’ established purpose and process of due diligence.

**F. To reduce possible burdens on corporations newly investing in Burma, the U.S. Government should provide comprehensive and current information about those responsible for human rights abuses and corruption in Burma, including an up-to-date and complete Specially Designated Nationals list**

Institutional investors are concerned that U.S. companies are exposed to significant liability under the Foreign Corrupt Practices Act and sanctions, as well as additional related exposure given the high level of corruption in Burma. According to Transparency International, Burma was among the most corrupt nations in the world in 2011, trailing only North Korea, Somalia and Afghanistan. Burma ranked in the third percentile of countries for effective rule of law and in the zero percentile for control of corruption in 2010.<sup>23</sup>

The overlap between Burma’s political and business actors remains complex, making it extremely difficult for U.S. companies seeking to invest responsibly in Burma to decipher which persons or entities are free of ties to human rights abuses and corruption and therefore, appropriate business partners. The SDN list and related list of persons who threaten the peace, security and stability in Burma should be key tools to help U.S. corporations newly investing in Burma make these decisions.

The Burmese government is attempting to ensure that the economic elite, generally those with close ties to the military and powerful politicians, will not continue to be the sole beneficiaries of its economy. However, corruption clearly remains a significant problem. Because personal connections with Burma’s elite are essential to achieving successful and timely deals, U.S. corporations face the prospect of compromising their compliance with standards for responsible business in order to operate in the country.<sup>24</sup> These risks are heightened for operators in industries that require local partnership, such as the oil and gas industry, which has notoriously been tied to corruption.

**G. Disclosures regarding subsidiaries, partners and sub-contracts would help the U.S. Government to keep up-to-date records on those associated with human rights abuses and corruption, providing a valuable resource for investors**

Reporting related to a submitter’s subsidiaries, equity and non-equity business partners, or subcontractors is not clearly required. Institutional investors stress how important this information is to maximizing their intended uses of corporate disclosures. These uses include meeting their due diligence commitment to ensure that they are not investing in corporations responsible for or associated with human rights and environmental abuses and corruption in Burma. U.S. corporations newly investing in Burma should be required to report on all equity and non-equity partnerships including contracts, distribution agreements, licenses and production sharing agreements with MOGE. Disclosure language should further include contracts between partners that are relevant to due diligence policies, procedures, compliance and repercussions for non-compliance. The vetting process that U.S. corporations use to contract with partners and subcontractors should also be disclosed.

Investors are particularly concerned that the reporting requirements on land acquisitions (beyond subsidiaries), security arrangements, government payments, and deals with MOGE do not clearly apply to other entities with which the submitter has a business relationship. This could make it possible for the submitter to elude responsibility and fail to report on significant risks and impacts related to its operations or supply chain.

### **III. HOW TO IMPROVE THE QUALITY, UTILITY AND CLARITY OF THE INFORMATION TO BE COLLECTED**

Several provisions and terms in the reporting requirements should be clarified to improve the quality, utility and clarity of information disclosed to the U.S. Government and public by companies newly invested in Burma. It is also essential for the U.S. Government to provide specific guidance for practical implementation of the reporting requirements, including references to international standards most relevant to Burma.

#### **A. Refine particular requirements to improve the quality and clarity of the reports submitted by U.S. companies newly invested in Burma and the information disclosed to the U.S. Government and the public**

##### **1. Specify consequences for failing to report or for not reporting fully and accurately**

Although these reporting requirements are not intended to give rise to any liability beyond that which exists under U.S. law, explicit references in the reporting requirements to penalties under applicable laws would create significant incentives for submitters to make full and accurate disclosures.

##### **2. Eliminate the \$500,000 threshold at which reporting requirements apply**

The aggregate \$500,000 threshold for reporting is a significant investment considering Burma's economy and the low entrance costs in many sectors. This threshold should be eliminated to avoid unduly complicating the requirements, which would be in the interest of all stakeholders. Removing the threshold would also keep corporations from developing internal structures designed to enable them to evade reporting.

##### **3. Further define the terms "investment" and "operations"**

The term "investment" throughout the reporting requirements should be clarified to ensure that all relevant U.S. business activity is subject to reporting, including business activities in the context of trade relationships and, in particular, supply chains. The OECD, for example, has expanded the scope of the Guidelines to address supply chain relationships in appreciation of the importance of a broad interpretation of "new investment" to include its strong nexus with trade.

The term "operations" should be clarified to ensure that a corporation's investment in Burma is covered, even if its activities in Burma are not yet fully operational. Such disclosures could facilitate early engagement by the U.S. Government and stakeholders in cases where

investments pose high risks of human rights abuses, worker rights abuses, environmental degradation or corruption.

#### **4. Tighten the reporting obligations in Item 10. *Military Communications***

The option for a new corporate investor in Burma to avoid reporting on military communications it does not consider “material to” its investment should be removed. No submitter should be permitted to fail to report on meetings or other communications with Burmese armed forces and/or other armed groups held by the corporation or on its behalf.

The reference in this clause to “any individual from or representing the submitter” should clarify that this includes any representative of the submitter in either a formal or informal sense and should reflect commonly accepted principles of agency under international and U.S. law.

A corporation should be well aware of any significant conversations between it and/or its representatives and the military or other armed groups, so the phrase “to the best of your knowledge” should be deleted. A corporation should be required to report that it either had military communications or it did not, and to provide details on the communications as outlined.

#### **5. Clarify and specify scope of Item 8: *Transparency***

Required reporting on payments to the government can serve a valuable purpose, but we are concerned that these requirements must extend to subsidiaries or other companies with which a submitter has a business relationship. Otherwise a company could possibly arrange to make payments through an agent, for example, and not report them under these rules.

We consider the reporting threshold of \$10,000 for aggregate payments to any government entity appropriate in the Burmese context. Unlike the recently released rules implementing Section 1504 of the Dodd-Frank Act, which provide for a significantly higher payment threshold for extractive industry payment disclosures worldwide, the Burma reporting rules implicate all sectors of the economy and relate specifically Burma, whose relative poverty, isolation, and endemic corruption make much smaller sums relevant to human rights and corruption risks.

#### **6. Clarify information that must be reported regarding property acquisitions**

A central component of due diligence concerning land acquisitions must be respect for the free, prior and informed consent to operations on the land on which members of the community derive their livelihoods. Due diligence that is thorough enough to identify the true users of acquired land and to ensure that the true users are sufficiently informed decision makers is key to obtaining consent.

Corporations should be required to publicly report their policies and procedures for obtaining free, prior and informed consent and the extent to which they incorporate the [United Nations Declaration on the Rights of Indigenous Peoples](#). Corporations should also be required to report publicly on the results of the implementation of policies and procedures that address consent and grievance mechanisms related to land acquisitions.

**a. Remove the defense of ignorance under Item 7. *Property Acquisition***

Without exception, corporations should be required to report on any compensation made to previous users/residents of real property and any involuntary resettlement or dislocation of people that occurred on real property it purchased or leased. Thorough due diligence should help a corporation to identify risks of involuntary resettlement or dislocation related to its land acquisitions. Therefore, the phrase “of which the submitter is aware” in sections (d) and (e) should be deleted.

**b. Clarify that “dislocation or resettlement” in Item 7. *Property Acquisition* includes displacement prior to the corporation’s acquisition of land and instances of land abandonment**

While reporting covers forced displacements for any large-scale purchases or lease of land, it is not clear whether submitters must report on displacement that took place *before* they made their investment. Further clarification will guide due diligence to uncover the very common instances where forced displacement is happening *now* for *future* investment projects, so that U.S. corporations newly investing in Burma can ensure that they are not contributing to or complicit in rampant human rights violations associated with land.

The reporting requirements must also clarify the term “resettlement” to prevent evasive corporate disclosures. It should be defined in accordance with international human rights standards, including with regard to indigenous peoples’ rights and the generally applicable right to adequate housing. Citations should reference not only relevant international standards but also best practice in relation to land-related human rights concerns.

**c. Include “land abandonment” in Item 7. *Property Acquisitions*, Sections (a), (c), and (e)**

Sections (a), (e) and (c) should be expanded to address land abandonment concerns, particularly considering the recent flight of 90,000 in Kachin and Northern Shan States as a result of armed conflict<sup>25</sup> and 90,000 in Arakan State as a result of the inter-communal violence,<sup>26</sup> and the pre-existing 500,000 internally displaced persons in Eastern Burma.<sup>27</sup> A flexible interpretation of “land abandonment” should be included in the reporting requirements to prevent evasive corporate disclosures.

**d. Eliminate thresholds for reporting under Item 7. *Property Acquisition***

The 30-acre or \$500,000 threshold for the application of the reporting requirements to land or real property acquisitions should be eliminated. Land rights have been a flashpoint for disputes, which have become more common in Burma as investments increase. Moreover, Conflict Risk Network’s field research both in Burma and on the Thai-Burma border confirmed that small tracts of land are extremely important to people and communities. It is customary for families to practice subsistence farming, and many depend on the land for their livelihoods.<sup>28</sup>

The U.S. Government should establish a clear timeframe for reviewing and updating the reporting requirements. Benchmarks linked to dollar amounts may need to be adjusted to retain their relevance and to reflect changes in the market. These changes could include but are not limited to lessons learned from the implementation of these reporting requirements, volatile currency valuations, inflation, unstable domestic monetary and fiscal policies, as well as unpredictable law reform and enforcement.<sup>29</sup>

**e. Clarify disclosures regarding compensation in Item 7. *Property Acquisition*, Section (d)**

Disclosures related to any financial and/or material arrangements made to compensate previous users and/or residents of real property acquired by the submitter should be expanded to prevent evasive corporate reporting. The requirements must further clarify that each party to the negotiation for compensation must be reported, as well as whether the arrangements were fully implemented or the extent to which they have been implemented, and the entity or entities responsible for delivering compensation.

**B. Provide specific guidance for the practical implementation of these requirements**

We applaud the references to the [UN Guiding Principles](#) and the [OECD Guidelines for Multinational Enterprises](#) in the reporting requirements. The UN Guiding Principles and OECD Guidelines for Multinational Enterprises must be implemented throughout company-wide investments and operations regardless of location. However, the placement of Footnote 1 implies an unduly narrow scope for the UN Guiding Principles. In-depth due diligence throughout all phases of a project lifespan and the implementation of human rights, worker rights, anti-corruption and environmental policies and procedures are essential to protecting the rights of those in Burma and the business interests of U.S. corporations and institutional investors.

We urge the inclusion of additional sector- and industry-specific guidelines, and recommend that submitters be encouraged to report according to the most specific standards relevant to their business in Burma. Such reporting will allow for more comparable disclosures and facilitate evaluation of reports by the U.S. Government, institutional investors and civil society.

Given the hyper-sensitive context for new investment in Burma, reporting requirements must thoroughly integrate established standards and principles:

- [Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act](#) and [Extractive Industries Transparency Initiative](#);
- [Global Network Initiative](#);
- [Voluntary Principles on Security and Human Rights](#); and
- [1998 International Labor Organization Declaration on Fundamental Principles and Rights at Work](#), including ILO Core Labor Standards:
  - [Elimination of all forms of forced or compulsory labor](#)
  - [Effective abolition of child labor](#)
  - [Equality of opportunity and treatment](#)
  - [Freedom of association](#)
  - [Right to collective bargaining](#)

Broad tools and guidance are applicable to conflict settings provide valuable guidance for the development and implementation of due diligence by corporations newly investing in Burma. The reporting requirements should therefore also reference the following instruments and tools:

- [Global Compact Business Guide for Conflict Impact Assessment and Risk Management](#);
- [Guidance on Responsible Business in Conflict-Affected and High Risk Areas: A resource for companies and investors](#); and
- [Organization for Economic Cooperation and Development Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones](#).

## APPENDIX: SUPPLEMENTAL INFORMATION ON THE BUSINESS-MILITARY NEXUS IN BURMA

### A. The Business-Military Nexus Related to Natural Resources

Burmese natural resources have historically been used by the military-backed government and armed groups as key strategic tools for political, economic and territorial control. The country's most attractive areas for natural resource investment are precisely the areas in which rights violations are ongoing.<sup>30</sup> Projects in the energy, hydropower and mining and gems industries have the strongest links to conflict affected areas and serve as drivers of conflict.

Foreign companies operating in these industries are generally required to operate in partnership with a state-owned Burmese firm.<sup>31</sup> This requirement enables the concealment of revenues and impedes transparent disclosures of taxes, fees, royalties, bonuses, profit sharing, profits, social benefits and charitable donations (both cash and in-kind), creating a deeply corrupt environment among government and corporations.

The potential for foreign investment to fund conflict and corruption has increased as foreign investment has increased in Burma, predominantly in the oil, gas, power and mining industries.<sup>32</sup> The Burmese oil and gas sector alone has accounted for 70% of the country's foreign exchange reserves, foreign currency deposits and bonds held by the central bank.<sup>33</sup> As the military regime's largest source of revenue, the oil and gas industry has significantly funded the defense ministry and armed forces—in 2012, 15% of the country's total budget was proposed to fund defense.<sup>34</sup> According to an economist who specializes on Burma, the budget allocation for the military ultimately increased by one-third for 2012-2013.<sup>35</sup>

In addition to their role in funding conflict and corruption, the oil, gas, power and mining industries have the potential to be directly tied to conflict and mass atrocities. For example, access roads necessary to construct, expand and operate in these industries are highly militarized and have been acquired through massive land concessions where locals received inadequate compensation. The roads used for these projects provide access for the military to remote and contested areas, heightening the conflicts that have displaced thousands.<sup>36</sup>

The area where the Shwe Gas Pipelines are being constructed and maintained are occupied and patrolled by security operations. The pipelines are slated to cut directly through conflict-affected areas in Arakan, Kachin and Shan States.<sup>37</sup> Military atrocities common around dam, mining and pipeline development and construction sites in these areas include the shelling of civilian targets, gang-rapes, and the displacement of thousands of civilians.

Additionally, research conducted in August 2012 in Karen State found a correlation between development projects and human rights violations, particularly those related to land and displacement.<sup>38</sup> One of the most dangerous areas in Karen State is the area around the Dawei deep sea port and special economic zone – an area completely controlled by the Burmese government.<sup>39</sup> The project, which is under construction, will include oil and gas, steel mills, fertilizer and petrochemical industries. The research revealed that civilians living near the project experienced forced labor, blocked access to their land and restrictions on their movement at a rate two to eight times higher than in other areas surveyed.<sup>40</sup> In addition to forced labor and land confiscation, the Burmese army guarding project construction sites has allegedly engaged in attacks on civilians.<sup>41</sup>

Controversy and conflict over the construction of numerous mega-dam projects in Burma, many of which are located in northeast Burma, has been ongoing. Power is bound for neighboring countries, while the revenues are going to the military through the Burmese government, which has complete control over the industry. Locals are also upset that there is no process for their participation in project development, for information disclosure concerning the dams, or for the implementation of proper standards for dam building.<sup>42</sup> Dam projects can cause direct displacement at project sites, alter river flows, and damage downstream ecosystems, wetlands and farmlands, all of which can heighten tensions surrounding access to and use of land.

Natural resources such as jade, rubies, copper, gold, iron ore, coal and timber are especially plentiful in the conflict-affected Kachin State and northern Shan State. Smuggling, bribery and illicit trade in the “informal” sectors of mining, gems and timber are rampant and are primarily controlled by and fund the Burmese army and ethnic armed groups. Private mining investment related to most natural resources is done through production or profit-sharing contracts that give the Myanmar Ministry of Mines and its subsidiaries thirty to seventy percent of profits plus royalties and taxes.<sup>43</sup>

Major U.S. jewelry retailers have been sensitive to these issues and institutional investor engagement on the dangerous conditions at the mines, and their connections to the spread of HIV/AIDS and drug trafficking. Retailers such as Walmart, Costco and Tiffany & Co. have made some commitments to ban Burmese gems from their supply chains.

## **B. The Business-Military Nexus Related to Information and Communication Technologies**

The information and communication technologies (ICT) sector is also one of high risk for institutional investors, as its potential to play a negative role is heightened in conflict-affected areas. ICT products and services can support free expression and association but can also be used to infringe upon private citizens’ access to information and their right to freedom of association and expression, which creates an environment conducive to government sponsored repression, at times through force and violence.

The military-backed Burmese government has been well-known for its repressive tactics of internet control and surveillance.<sup>44</sup> During a brutal crackdown on protests in 2007, Burma became one of the first countries to temporarily shut off its internet.<sup>45</sup> At this time about 200 mobile phones belonging to politicians, journalists and students were also blocked without explanation.<sup>46</sup>

A recent report identified Burma as one of 12 states that are “enemies of the Internet” due to internet censorship activities that combine strict access restrictions for citizens with systems that monitor and track usage.<sup>47</sup> A research institute investigating the use of commercial filtering products in countries ruled by repressive regimes discovered a number of devices manufactured by the U.S.-based company Blue Coat Systems that are actively being used by the Burmese government to censor and monitor citizens.

In early 2011, the Burmese intelligence agency was reportedly preparing to intercept more than 3,000 cell phones belonging to business persons, politicians, social activists, artists and media personnel. Although there were doubts whether the plan—which was to be implemented with the technical

assistance of state-run Myanmar Posts and Telecommunications—would be fully executed, it was notably similar to the program of the former junta’s military intelligence chief.<sup>48</sup>

The ICT sector exposes citizens to serious human rights abuses. Violent regimes use products and services provided by companies doing business in the sector to intercept citizens’ e-mails and text-messages, monitor Internet activity and locate political targets through cell phone technology. Officials routinely use this information to track, arrest and torture dissidents. A number of telecommunications companies that have expressed interest in investing in Burma have been implicated in assisting authorities in several countries to access their networks to keep tabs on anti-government activists. One such company has been under heavy criticism spurring it to make a greater effort to focus more on human rights.<sup>49</sup> Without proper due diligence, companies doing business in the sector, and particularly in Burma, are at great risk of violating sanctions as well as being complicit in or contributing to severe human rights abuses.<sup>50</sup>

## ENDNOTES

All URLs cited were last visited in October 2012.

<sup>1</sup> Joint Investor Letter to President Obama, May 11, 2012, at <http://blog.endgenocide.org/wp-content/uploads/2012/05/Investor-Letter-Burma-5.11.2012.pdf>.

<sup>2</sup> "Responsible Investment in Myanmar: The Human Rights Dimension," Institute for Business and Human Rights, pg. 15, September 2012, at <http://www.ihrb.org/pdf/Occasional-Paper-1-Burma-Myanmar-FINAL.pdf>.

<sup>3</sup> "Political Excitement Trumps Economic Realities," *Bangkok Post*, September 3, 2012, at <http://www.bangkokpost.com/business/economics/310563/political-excitement-trumps-economic-realities>.

<sup>4</sup> "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework," pg. 20, March 21, 2011, at <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>.

<sup>5</sup> "Bitter Wounds and Lost Dreams: Human Rights Under Assault in Karen State, Burma," Physicians for Human Rights, pg. 2-3, August 2012, at [https://s3.amazonaws.com/PHR\\_Reports/burma-karen-rpt-ltr-2012.pdf](https://s3.amazonaws.com/PHR_Reports/burma-karen-rpt-ltr-2012.pdf) (Thirty percent of the 665 households in Karen State surveyed by Physicians for Human Rights between January 2011 and 2012 reported a human rights violation. The most common human rights abuse reported was forced labor including being porters for the military, growing crops and sweeping for landmines.)

<sup>6</sup> "Benchmarks for Renewed Engagement with Burma," United Nationalities Federal Council, pg. 7-8, March 2012.

<sup>7</sup> "Benchmarks for Renewed Engagement with Burma," United Nationalities Federal Council, pg. 8, March 2012.

<sup>8</sup> Section 307 of the Trade Act of 1930, 19 U.S.C. § 1307 (1997) states that "All goods . . . produced wholly or in part in any foreign country by forced labor . . . shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited." As per 19 C.F.R. § 12.42 (1997), the U.S. Customs and Border Protection may initiate an investigation and enforcement action under section 307.

According to the legislation, "forced labor and/or indentured labor" include "all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily." Child advocates around the world agree that children, by definition, are incapable of providing legally binding consent to an employment agreement. Virtually all child labor that requires children to work full-time, and at the expense of their health and well-being, is forced.

As of January 1, 2012, the [California Supply Chain Transparency Act](#) requires all retailers and manufacturers doing business in California and grossing over \$100,000 million globally, to report what they are doing to ensure that slavery does not exist in their supply chains.

<sup>9</sup> "Travel Diary: Secretary Clinton Delivers Remarks on U.S. Leadership in the Asia-Pacific Region," DipNote, U.S. Department of State Official Blog, October 28, 2010, at [http://blogs.state.gov/index.php/site/entry/clinton\\_remarks\\_leadership\\_asia\\_pacific](http://blogs.state.gov/index.php/site/entry/clinton_remarks_leadership_asia_pacific) (An excerpt from Secretary of State Hillary Rodham Clinton's policy address on American leadership in the Asia-Pacific region: "...And I would like to underscore the American commitment to seek accountability for the human rights violations that have occurred in Burma by working to establish an international Commission of Inquiry through close consultations with our friends, allies, and other partners at the United Nations. Burma will soon hold a deeply flawed election, and one thing we have learned over the last few years is that democracy is more than elections. And we will make clear to Burma's new leaders, old and new alike, that they must break from the policies of the past.")

<sup>10</sup> Disclosure of Payments by Resource Extraction Issuers, Dodd-Frank Wall Street Reform and Consumer Protection Act, 17 C.F.R. 240 and 249, pg. 16, at <http://sec.gov/rules/final/2012/34-67717.pdf>.

<sup>11</sup> Gwen Robinson, "Myanmar Pushes Reform to Woo Investors," *Financial Times*, March 19, 2012, at <http://www.ft.com/intl/cms/s/0/168baaee-71b6-11e1-b853-00144feab49a.html>.

<sup>12</sup> William Boot, "Western Firms Eye MOGE Deals in Rangoon," *The Irrawaddy*, September 4, 2012, at <http://www.irrawaddy.org/archives/13246>.

<sup>13</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, "Human Rights Policies and Management Practices: Results from questionnaire surveys of Governments and Fortune Global 500 firms," U.N. Doc. A/HRC/4/35/Add.3, at 3-4 (Feb. 28, 2007) (For example, a 2007 report by Prof. John Ruggie, then the UN expert on business and human rights, found that while most *large* companies have explicit human rights policies, there is a wide variation in the rights recognized in those policies, and that relatively few conduct human rights due diligence.)

<sup>14</sup> See *Doe v. UNOCAL*, 248 F.3d 915 (9th Cir. 2001).

<sup>15</sup> For example, to plead securities fraud a plaintiff must prove that, in connection with the purchase or sale of securities, the defendant, acting with scienter, made a false material misrepresentation or omission of material fact and that plaintiff's reliance on defendant's action caused plaintiff injury. Securities fraud cannot be committed by a corporate officer by omitting information unless he/she is under an affirmative duty to disclose the information. This duty may only be invoked as a result of one of the following circumstances: (1) a statute requiring disclosure; (2) an inaccurate, incomplete, or misleading prior disclosure; or (3) insider trading. *Oran v. Stafford*, 226 F.3d 275, 285 (3d Cir. 2000); *ATSI Communications, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 105 (2d Cir.2007); *United States v. Schiff*, 602 F.3d 152, 163 (3d Cir.2010).

<sup>16</sup> Sheila Oviedo, "Avoiding the Land Grab," *Sustainalytics*, July 2011, at [http://www.sustainalytics.com/sites/default/files/avoiding-the-land-grab-responsible-farmland-investing-in-developingnations\\_final.pdf](http://www.sustainalytics.com/sites/default/files/avoiding-the-land-grab-responsible-farmland-investing-in-developingnations_final.pdf).

<sup>17</sup> See e.g. Julie Tanner and Kimberly Gladman, "Outside the Box Guidelines for Retail Store Siting," Christian Brothers Social Investments, Inc. and Domini Social Investments LLC, July 11, 2005, at <http://www.cbisonline.com/file/StoreSitingGuidelines.pdf> (an example of the expertise institutional investors may provide in this case regarding land issues).

<sup>18</sup> "Administration Eases Financial and Investment Sanctions on Burma," Fact Sheet, U.S. Department of State, July 11, 2012, at <http://www.state.gov/r/pa/prs/ps/2012/07/194868.htm>.

<sup>19</sup> "Reporting Requirements on Responsible Investment in Burma," Pending OMB Approval as of July 11, 2012, pg. 4, at <http://www.humanrights.gov/wp-content/uploads/2012/07/Burma-Responsible-Investment-Reporting-Reqs.pdf> (emphasis added).

- <sup>20</sup> “OECD Guidelines for Multinational Enterprises,” pg. 19, at <http://www.oecd.org/investment/guidelinesformultinationalerprises/1922428.pdf>.
- <sup>21</sup> “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework,” pg. 20, March 21, 2011, at <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>.
- <sup>22</sup> “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework,” pg. 20, March 21, 2011, at <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf> (emphasis added).
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- <sup>24</sup> “Myanmar: The Politics of Economic Reform,” International Crisis Group, pg. 6, 9-10, July 27, 2012, at [http://www.crisisgroup.org/~media/Files/asia/south-east-asia/burma-myanmar/231-myanmar-the-politics-of-economic-reform.pdf](http://www.crisisgroup.org/~/media/Files/asia/south-east-asia/burma-myanmar/231-myanmar-the-politics-of-economic-reform.pdf).
- <sup>25</sup> “Kachin War a Battle for Resources,” *Radio Free Asia*, August 31, 2012, at <http://www.rfa.org/english/news/burma/kachin-08312012130540.html>.
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