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Director-General
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Dear U Aung Naing Oo

Submission for the Consultation on the draft *Myanmar Companies (Electronic Registry System and Miscellaneous Matters) Regulations 2018 ('Companies Regulations 2018')*

The Myanmar Centre for Responsible Business (MCRB) welcomes the opportunity to respond to DICA's consultation on the **Draft Companies Regulations** and submits the following comments.

MCRB would like to thank DICA for offering this possibility for stakeholders to provide input into the draft Regulations. We welcome DICA's continued practice of open consultation with stakeholders on draft laws and regulations. Such an approach greatly contributes to improving the 'ease of doing business' in Myanmar through improving the quality of law-making. We encourage other ministries and government agencies to adopt a similar open approach to seeking and incorporating stakeholder comments.

As you know, MCRB has been actively involved in DICA's previous consultations on the Myanmar Company Law as well as the Myanmar Investment Law and Rules, in line with our mission to promote responsible business in Myanmar. We believe that a core part of that mission is to support more effective laws and regulations governing the establishment and conduct of companies. We also seek to provide comments which 'join up' draft laws with other existing Myanmar laws, and Myanmar and international initiatives, based on our extensive research of the legal framework and context for business in Myanmar, and international standards.

With this in mind, we would like to propose the following set of changes to the Draft Companies Regulations 2018 which concern defining and acquiring information about **Beneficial Ownership** and **Politically Exposed Persons** through the company registration process.

Our proposed changes (see annex) focus on the definition of "**ownership interest**" under the **Myanmar Companies Law S1 (xxii)**, how this should be implemented in the Companies Regulations 2018 and this will also support implementation of **Myanmar's Anti-Money Laundering Law (2014)** and implementation of the Myanmar **Extractive Industries Transparency Initiative**.

The attached comments, if accepted for inclusion in the Regulations, **will need also to be reflected in the re-registration and registration forms** accompanying the Companies Regulations, as the information required will need to be sought from companies when they register.

We believe that the drafting of the Companies Regulations is a unique opportunity to simultaneously address several Myanmar government objectives:

Effective implementation of the 2017 Companies Law and the 2014 Anti-Money Laundering Law

- Greater clarity is needed to give effect to the definition of ‘ownership interest’ under the **Companies Law S1 (xxii)**, which is not further defined in the Law itself, or the current draft of the Companies Regulations.
- The **2014 Anti-Money Laundering Law** (see attached) includes mention of ‘beneficial owner’ (BO) and ‘politically exposed person’ (PEP). However to implement this, further information is required from companies. This could most effectively be addressed through requiring disclosure of this information by companies when they register with DICA.

Meeting the 2020 deadline for implementation of beneficial ownership requirements under Myanmar’s commitment to the Extractives Industries Transparency Initiative

- Myanmar’s EITI commitments require beneficial ownership reporting by 2020 for the extractives industries. Options for achieving this are currently under consideration by government following definitions reached by the EITI Multi-stakeholder group in 2017 (see Annex).
- MCRB believes that systematically incorporating the requirements for BO/PEP disclosure into the Companies Regulations is the most efficient and transparent way to meet EITI requirements as well those for the Money-Laundering Law which are wider. Other options such as taking a sectoral (i.e. oil and gas, mining) approach to beneficial ownership, implemented by sectoral ministries, would result in confusion. It would duplicate information about companies by establishing a collection system in line ministries who are not well placed to manage it. This information is better collected and stored in the Companies Registry, as in other countries.
- There is little time left to implement the EITI requirement by 2020. If the Myanmar government decides in coming months to take an approach to BO based on the Companies Registry, a major opportunity will have been lost by not incorporating these requirements into this August 2018 re-registration process. A later decision means further information will need to be sought from companies who have already re-registered. We therefore recommend that this requirement is introduced now by DICA.
- Furthermore, reforms introduced into the 2017 Companies Law mean that companies now no longer have to list the sectors and activities in which they will operate at the time of company registration. Some companies may initially not be involved in extractives sector, but may subsequently become involved in, or bid for extractives licences. It would be more efficient to take a consistent, unified approach to beneficial ownership, and apply it to all companies from Day 1 of their registration in Myanmar.

Supporting the government’s commitment to combat corruption

- Myanmar continues to rank poorly in Transparency International’s Corruption Perceptions Index¹. The Myanmar government, under the leadership of President U Win Myint, has prioritised the fight against corruption, and combatting corruption with the intent of increased transparency, predictability and accountability of government processes features in several action points of the first draft of Myanmar’s Sustainable Development Plan, in support of Sustainable Development Goal 16.5 (“substantially reduce corruption and bribery in all its forms”) and SDG 16.6 (Accountability).
- Actions planned by the government in the draft Plan include strengthening and enforcing assets disclosure procedures and requirements. Requiring PEP and BO disclosure in an online Companies Registry will support this government objective, as well as improving corruption perceptions of Myanmar internationally.

¹ Myanmar ranks 130 out of 182 countries. <https://www.transparency.org/country/MMR>

Improving the international attractiveness of Myanmar as an investment destination

- There has been agreement at the global level through the G20 and the Financial Action Taskforce (FATF), that greater transparency around the issue of beneficial ownership of companies is needed to combat money laundering, corruption² and more recently, tax evasion. By incorporating these BO/PEP requirements into the Companies Regulations, Myanmar will be aligned with, and well placed to interact with, international standards.
- Alignment with international standards will facilitate Myanmar's integration with the global economy and the market for international finance. It signals to the global community that the country is committed to good corporate governance and routing out corruption and money-laundering.
- Furthermore, MCRB has found that due diligence on partners is often a major concern to potential international investors with whom it engages. Therefore for investors in Myanmar, establishing consistent BO/PEP disclosure requirements in the Companies Registry will facilitate due diligence and the ease of doing business.

Facilitating responsible investment

- Companies which conduct their business responsibly should have no reason not to divulge their shareholding and ownership structures. Some Myanmar companies already do so. MCRB's 2018 Pwint Thit Sa/Transparency in Myanmar Enterprises report found that of the Myanmar companies assessed, 15 already disclose beneficial ownership data. Requiring all companies to do so means that those Myanmar companies committed to transparency and already disclosing beneficial ownership data are able to compete on a more level playing field.
- The Myanmar Investment Commission and DICA has a legal obligation under the Myanmar Investment Rule 64 to screen companies for *'whether the Investor is of good character and business reputation the Commission may consider (without limitation) whether the Investor or any Associate with an involvement or interest in the Investment has committed an offence or other contravention of the law of the Union or another jurisdiction, including any environmental, labour, tax, anti-bribery and corruption or human rights law.*
- Requiring disclosure of BO and PEP information at the time of Registration will assist DICA in screening companies.

We believe that these suggestions for the Companies Regulations will be another step towards more fully implementing Myanmar's policy that all companies operating in Myanmar are expected to act responsibly. We therefore very much hope that the Myanmar government will take up the suggested proposals in Annex.

Finally, the positive impacts of the online Companies Registry and these disclosure requirements will be more fully achieved if the data is both online and freely available, as with the UK's Companies House register (beta.companieshouse.gov.uk), rather than behind a paywall. We hope that DICA will be able to follow this approach.

Yours sincerely,

Vicky Bowman

Director

² See report of the Law Library of Congress, "[Disclosure of Beneficial Ownership in Selected Countries](#) (July 2017). This notes that most of the countries in the survey have recently amended their legislation (e.g., Argentina, Brazil, Costa Rica, France, Germany, Italy, Jamaica, Jordan, Pakistan, Singapore, South Africa, Sweden, United Kingdom) or are currently working on amending their laws (Afghanistan, India, Netherlands).

ANNEX

PROPOSED CHANGES TO THE DRAFT COMPANIES REGULATIONS FROM MYANMAR CENTRE FOR RESPONSIBLE BUSINESS (MCRB)

1. Definitions relevant to our proposals

This section sets out relevant texts in other Myanmar laws and initiatives, to ensure consistency.

(i) The **2017 Myanmar Companies Law** S1.c (xxii)³ sets out the following definition:

“ownership interest” means a legal, equitable or prescribed interest in a company which may arise though means including:

- (A) a direct shareholding in the company;
- (B) a direct or indirect shareholding in another company which itself holds a direct shareholding, or an indirect shareholding, in the first company; or
- (C) *through an agreement which provides the holder with a direct or indirect right to exercise control over the voting rights which may be cast on any resolution of the company;*” (emphasis added)

The reference to ‘ownership interest’ is mentioned in the important definition of **“foreign company”** (S1.c (xiv) which *‘means a company incorporated in the Union in which an overseas corporation or other foreign person (or combination of them) owns or controls, directly or indirectly, an ownership interest of more than thirty-five per cent’*. It is also referenced in 83.c.2 concerning transfer requirements.

(ii) Myanmar’s **2014 Anti-Money Laundering Law** sets out the following relevant definitions:⁴

- Article 3(j) defines: **“Beneficial owner”** as *“a person who principally owns or controls a customer or delegates to conduct transaction with other person on his behalf. In this expression, a person who exercises effective control over any company or arrangement;”*
- Article 3(l) defines: **“Domestic and foreign politically exposed person”** as *“a person who is prominent or has been entrusted with public functions within the country or in any foreign country and family members or close associates of such persons.”*
- Article 3(m) defines **“international politically exposed person”** as *“a director, a deputy director, a member of the board of directors and a senior member of an international organization, a member who has the similar position or a person who has been entrusted with such function and family members or close associates of such persons.”*

³ https://www.dica.gov.mm/sites/dica.gov.mm/files/document-files/final_mcl_english_version_6_dec_president_signed_version_cl_0.pdf

⁴ <http://www.myanmar-law-library.org/law-library/laws-and-regulations/laws/myanmar-laws-1988-until-now/union-solidarity-and-development-party-laws-2012-2016/myanmar-laws-2014/pyidaungsu-hluttaw-law-no-11-2014-money-laundering-eradication-law-burmese.html>

(iii) Myanmar Extractive Industries Transparency Initiative (MEITI)

Myanmar has committed to implementing the Extractive Industries Transparency Initiative (EITI).⁵ By 1 January 2020, EITI implementing countries have to ensure that all oil, gas and mining companies that apply for, or hold a participating interest in an exploration or production oil, gas or mining license or contract in the country disclose the identity(ies) of their beneficial owner(s) (BO), the level of ownership and details about how ownership or control is exerted. In addition, any politically exposed persons (PEP) holding ownership rights must be identified. This information must be publicly available (published in EITI Reports and/or public registries) and updated regularly. BO and PEP disclosure is required of all companies in the sector, including companies that are not currently required to participate in the EITI Report. Myanmar is currently one of the pilot countries on beneficial ownership and is committed to making transparent beneficial ownership in the sector.⁶

The EITI Standard (2.5f) defines a “**beneficial owner in respect of a company**” as “*the natural person(s) who directly or indirectly ultimately owns or controls the corporate entity*”⁷ but leaves it to national multistakeholder group (MSG) to agree an appropriate definition of the term beneficial owner aligned with this which takes international norms and relevant national laws into account,⁸ and should include ownership threshold(s).

The Myanmar MSG has adopted a definition for Beneficial Owner (Box 1) and for Politically Exposed Person (PEP) (Box 2). This has been included in the MEITI reports recently approved by the Myanmar government for submission for validation by the EITI:⁹

Box 1: MEITI MSG Definition of Beneficial Owner

Myanmar MSG has defined a beneficial owner as “a natural person(s) who, directly or indirectly, ultimately owns or controls a public or private company or corporate entity. A person is automatically considered to be a beneficial owner if they own or control 5% or more of the public or private company or corporate entity.

THE DEFINITION STATES THAT:

- The individual holds, directly or indirectly, 5% and above of the shares within reporting period in the public or private company or corporate entity.
- The individual holds, directly or indirectly, 5% and above of the voting rights in the public or private company or corporate entity. Voting rights held by the public or private company or corporate entity, itself are disregarded for this purpose.
- The individual holds, directly or indirectly, the voting rights in the public or private company or corporate entity. Voting rights held by the public or private company or corporate entity, itself are disregarded for this purpose.
- The individual holds the right, directly or indirectly, to appoint or remove a majority of the board of directors of the public or private company or corporate entity.
- The individual has the right to exercise, or actually exercises, significant influence or control over the public or private company or corporate entity.”

Reference to “ultimately owns or controls” refer to situations in which ownership/ control is exercised through a chain of ownership or by means of control other than direct control. This definition should also apply to a beneficiary under a life or other investment.’

⁵ <http://myanmareiti.org/my>

⁶ [Myanmar Beneficial Ownership Roadmap](#), March 2017

⁷ https://eiti.org/sites/default/files/documents/the_eiti_standard_2016_-_english.pdf or https://eiti.org/sites/default/files/documents/the_eiti_standard_2016_-_burmese.pdf

⁸ In this case, the 2017 Companies Law and the 2014 Anti-Money Laundering Law

⁹ https://eiti.org/sites/default/files/documents/meiti_report_2015-2016.pdf

Box 2: MEITI Definition of Politically Exposed Persons

PEPs are defined as individuals belong to one of the following categories:

- Domestic PEPs: individuals who are or have been entrusted domestically with prominent public functions, for example, Cabinet Members at Union level & State and regional level, Members of Parliament both Union level and state and regional level, senior government (Deputy Ministers, Permanent secretaries, DGs, DDGs, Directors, Auditor General, Central Bank, etc.), judicial or military officials including Ethnic Armed Organizations' senior leaders and officials, senior executives of state owned corporations, important political party central committee members and key influencers.
- Foreign PEPs: individuals who are or have been entrusted with prominent public functions by a foreign country, for example Heads of State or of government, senior politicians, senior government Officials, judicial or military officials, senior executives of state owned corporations, important political party officials and diplomats.
- International organization PEPs: persons who are or have been entrusted with a prominent function by an international organization, refers to members of senior management or individuals who have been entrusted with equivalent functions, i.e. directors, deputy directors and members of the board or equivalent functions, International Financial institution's leaders and senior staffs. PEPs shall also be defined to include:
 - Family members who are related to a PEP in one of the categories above either directly (consanguinity) or through marriage or similar (civil) forms of partnership, to the second degree of relation.
 - Close associates who are closely connected to a PEP in one of the categories above, either socially or professionally.

2. Suggested Amendments to the draft Myanmar Companies Regulations

Note: The proposed texts are based on the MEITI definition but also covers PEPs as defined under the 2014 Money Laundering Law. The following suggestions are provided in English. However the Myanmar vocabulary should be aligned with the Myanmar relevant laws, as well the Myanmar version of EITI documents.

Add: Article 2(a):

- (v) "ownership interest" as set out in the Companies Law shall include the following two types of ownership interest information:
- (A) Beneficial owners which shall include: a natural person(s) who, directly or indirectly, ultimately owns or controls a public or private company or corporate entity. A person is automatically considered to be a beneficial owner if they own or control 5% or more of the public or private company or corporate entity.
- The individual holds, directly or indirectly, 5% and above of the shares within reporting period in the public or private company or corporate entity.
 - The individual holds, directly or indirectly, 5% and above of the voting rights in the public or private company or corporate entity. Voting rights held by the public or private company or corporate entity, itself are disregarded for this purpose.

- The individual holds, directly or indirectly, the voting rights in the public or private company or corporate entity. Voting rights held by the public or private company or corporate entity, itself are disregarded for this purpose.
- The individual holds the right, directly or indirectly, to appoint or remove a majority of the board of directors of the public or private company or corporate entity.
- The individual has the right to exercise, or actually exercises, significant influence or control over the public or private company or corporate entity
- “Ultimately owns or controls” refers to situations in which ownership/ control is exercised through a chain of ownership or by means of control other than direct control. This definition should also apply to a beneficiary under a life or other investment.
- The individual who principally owns or controls a customer or delegates to conduct transaction with other person on his behalf. In this expression, a person who exercises effective control over any company or arrangement.

(B) Politically exposed persons (PEPs) which are defined as individuals belong to one of the following categories:

- Domestic PEPs: individuals who are or have been entrusted domestically with prominent public functions, for example, Cabinet Members at Union level & State and regional level, Members of Parliament both Union level and state and regional level, senior government (Deputy Ministers, Permanent secretaries, DGs, DDGs, Directors, Auditor General, Central Bank, etc.), judicial or military officials including Ethnic Armed Organizations’ senior leaders and officials, senior executives of state owned corporations, important political party central committee members and key influencers.
- Foreign PEPs: individuals who are or have been entrusted with prominent public functions by a foreign country, for example Heads of State or of government, senior politicians, senior government Officials, judicial or military officials, senior executives of state owned corporations, important political party officials and diplomats.
- International organization PEPs: persons who are or have been entrusted with a prominent function by an international organization, refers to members of senior management or individuals who have been entrusted with equivalent functions, i.e. directors, deputy directors and members of the board or equivalent functions, International Financial institution’s leaders and senior staffs.

PEPs shall also be defined to include:

- Family members who are related to a PEP in one of the categories above either directly (consanguinity) or through marriage or similar (civil) forms of partnership, to the second degree of relation.

Add Article 3 (e):

(iv) Fails to provide the relevant ownership interest information as specified in the Companies Law and in this Regulation.

Add: Article 5(a):

- (v) In the case of an existing company or body corporate:
 - (A) full details of each ownership interest in the company or body corporate, (including the full name, date of birth, nationality, tax identification number and address of the holder and the nature of the ownership interest), in accordance with the prescribed form; and
 - (B) whether the holder of the ownership interest is a politically exposed person, as defined in the prescribed form.

Add: Article 5:

- (e) Each company or body corporate applying for incorporation or registration under s.6 or Division 9 of the Law shall include the particulars listed in regulation 5(a)(v) above within its application, in accordance with the prescribed form.
- (f) Each company or body corporate making an annual return in accordance with s.53 or s.97 of the Law shall include details of any changes to ownership interest which took place within the relevant year (or provide a confirmation statement that no such changes took place), in accordance with the prescribed form.

3. Making Corresponding Changes in the Relevant Company Registration, Re-registration and Annual Reporting Forms

The questions/boxes on the forms should be amended to require companies to provide information which meets the relevant definitions above.

ENDS