



U.S. CHAMBER OF COMMERCE



## COMMENTS ON MYNMAR INVESTMENT RULES

January 23, 2017

The U.S. Chamber of Commerce and AMCHAM Myanmar chapter appreciate the opportunity to provide Comments concerning the first draft of the Myanmar Investment Rules, as supplied by DICA, which are designed to implement the new Myanmar Investment Law No. 40/2016. We continue to believe that foreign investment can play an important role in promoting economic growth and development in Myanmar, as it has in many of Myanmar's neighbors. A secure, stable, transparent and predictable environment is essential to attracting such investment.

These Comments are offered in the hope that they will contribute to the improvement of the first draft in helping implement the "rule of law" in Myanmar, as well as assist in the reestablishment of common law principles as the basis for legislative implementation and interpretation. They are based on the U.S. Chamber of Commerce recommendations made in June, 2016 to the Myanmar Government in a report titled: "US-Myanmar Commercial Relations: The Next Phase." The report can be found at: <https://www.uschamber.com/event/us-myanmar-commercial-relations-the-next-phase>.

We will address the various proposed Rules in the first draft by Rule number, followed by comments explaining the proposed changes.

### **Rule 22**

We suggest the following change in language:

"Except if an Investment application is barred by any other law, an Investment activity which is not subject to a notification referred to in Rule 21 will not be considered to be a Prohibited Investment under the Law."

COMMENT to Rule 22

We believe that this revised language clarifies the intent of Rule 22, as currently drafted.

### **Rule 25**

We suggest adding, at the end of this proposed Rule, the following language:

..., or as specifically approved by the Commission.

COMMENT to Rule 25

As it will be shown below, we are suggesting several modifications which will provide to the Commission the authority to approve projects under circumstances which otherwise will make them ineligible.

## **Rule 26**

We suggest the insertion, as a new subparagraph (c), the following language:

(c) after reviewing the information submitted by Investor, under the provisions of Section 44 of the Law, and with the approval of the Government, the Commission may approve an investment proposal despite any objections or lack of Endorsement from a relevant Ministry or Authority.

### COMMENT to Rule 26

As it will be the shown in other paragraphs below, it our suggestion to empower the Commission to act as a “One-Stop Investment Center” for all inbound investment, in that it should have the authority to approve projects in a timely manner even when a Ministry, or other government organization, either refuses to provide an Endorsement or simply denies a worthy application without just cause. These changes will allow an investor to have a quantifiable procedure for its investment, from inquiry, to filing, approval process, registration and implementation of the project, with firm deadlines and a predictable path, free from unreasonable delays or potential requests for bribes. Furthermore, in many cases, requirements in various laws provide for a necessity to secure multiple similar and overlapping permits or licenses from different Ministries. Under these circumstances, empowering the Commission to issue one Permit or Endorsement replacing multiples of such documents will reduce the cost of administration to the government, as well as provide for a transparent, predictable set of rules and procedures to the business community, foreign or domestic.

## **Rule 27**

This Rule has left unlisted which are the Restricted Investments. We urge the inclusion of definitions of such Investments in this Rule, similar to the ones listed in Rule 11 for the purpose of section 36(a) of the Law.

## **Rule 29**

We suggest the following change in language:

“Except if an Investment application is barred by any other law, an Investment activity which is not subject to a notification referred to in Rule 21 will not be considered to be a Restricted Investment under the Law”

### COMMENT to Rule 29

We believe that this revised language clarifies the original intent of the proposed Rule 29. It is also consistent with the modified language in Rule 22.

## **Rule 34a**

We are suggesting the creation of a new subparagraph, inserting the following language from the revised Rule 26(c):

After reviewing the information submitted by the Investor, under the provisions of Section 44 of the Law and with the approval of the Government, the Commission may approve an

investment proposal despite any objections or lack of Endorsement from a relevant Ministry or Authority.

COMMENT to Rule 34a

The same considerations outlined in the COMMENT to Rule 26 apply here.

### **Rule 36a**

We are suggesting the creation of a new subparagraph, inserting the following language from the revised Rule 26(c):

After reviewing the information submitted by the Investor, under the provisions of Section 44 of the Law, and with the approval of the Government, the Commission may approve an investment proposal despite any objections or lack of Endorsement from a relevant Ministry or Authority.

COMMENT to Rule 36a

The same considerations outlined in the COMMENT to Rule 26 apply here.

### **Rule 67**

The delegation of proposals under \$5 million to “State and Regional Committee(s)” is, indeed, a more effective way to bring smaller investments directly to the region which will be affected by them. Yet, by allowing discretion to each local committee, without rigorous and uniform requirements, in order to examine potential similar investments may create a lack of uniformity in the evaluation of these proposals. This flexibility will create the danger that two identical under-5 million dollar proposals for two different parts of the country may end up being evaluated differently, which will create both additional costs, as well as create the potential for unfair and equal treatment of these investments. We would suggest the addition of very specific guidelines and rules to be followed by the State and Regional Committees in evaluating such under 5 million proposals.

### **Rule 71**

We are suggesting the insertion in this Rule, as well in several others below, of the concept of “materiality” when issuing a prohibition against “offences” or other “contravention of the law of the Union or other jurisdiction, as follows:

“... a material offence or other material contravention of the law of the Union or another jurisdiction ...”

COMMENT to Rule 71

As currently drafted, even a minor violation of a law not relevant to the Investment (e.g. a speeding ticket in some jurisdictions can be a criminal offense, albeit a misdemeanor). With a “materiality” qualification, any violation, of any kind, of any law in any country in which the Investor operates may be a bar to investment in Myanmar, irrespective of the fact that such a violation is not material to the investment application being considered by the Commission.

### **Rule 75**

We are suggesting the insertion of the following language at the end of this Rule, as currently drafted:

In the event that an Investment application is incomplete due to the unreasonable or untimely refusal, or unjustified lack of action, of a Ministry in the granting of an Endorsement, recommendation, approval, license, permit and/or similar authorization petitioned by the Investor, then the Commission itself may grant such an authorization based on public policy considerations, subject to the approval of the Government.

COMMENT to Rule 75

The same considerations outlined in the COMMENT to Rule 26 apply here.

### **Rule 77**

We are suggesting the replacement of the word “have” in the last line of this Rule, with the word “with,” in order for the last line to read as follows:

“... with regard to the Endorsement assessment criteria in Rule 89 and the following Rules.”

### **Rule 78**

We are suggesting the insertion of “Subject to Rule 75,” at the beginning of this Rule.

COMMENT to Rule 78

See COMMENT to Rule 75.

### **Rule 80**

We suggest that a maximum deadline of 90 days should be specified in order to provide investors with more transparency regarding their applications.

COMMENT to Rule 80

As currently written, the Rule allows the Commission to extend the time period for the assessment of the MIC Endorsement Application without any specific deadline.

### **Rule 81**

See COMMENT to Rule 80

### **Rule 86**

We are suggesting the insertion of the word “material” between “... to be in ...” and “compliance with law ...”

COMMENT TO Rule 86

See COMMENT to Rule 71 regarding “materiality.”

### **Rule 90**

We believe that the drafters intended to refer to Rule 89, not Rule 88 in this paragraph.

### **Rule 94**

We are suggesting the insertion of the following language at the end of this Rule, as currently drafted:

Such list may be amended by the Investor, subject to the approval of the Commission, as circumstances may require a change due to circumstances unforeseen at the time the custom duty exemption was first applied for.

COMMENT to Rule 94

One of the issues Investors which have received the Commission's approval for a custom duty exemption is that business circumstances change over the long period of Investment approval, from initial filing to actual construction. This new language will allow the Investor to better adjust its import requirements to changed market conditions, as well as provide clarity to the Customs Department as to what the Commission actually approved.

### **Rule 98**

We are suggesting the following text to be inserted at the end of subparagraph 98(j):

"... on a net basis after deduction of the value of imported component parts."

COMMENT to Rule 98

The suggested change makes the language of this paragraph more favorable to the collection of duties. As currently drafted, the language in Rule 98(j) only provides for the gross value of a product manufactured in Myanmar, without regard to the value of imported components. Thus, it is possible to provide a Tax Incentive to a business which manufactures products in Myanmar from imported components, with very little added value in Myanmar. There actually should be a threshold of net value added here, which would quantify the net value-added which an exporter will have to show in order to qualify for Tax Incentives.

### **Rule 105**

We are suggesting the insertion of "Subject to Rule 94," at the beginning of this paragraph.

COMMENT to Rule 105

See COMMENT to Rule 94.

### **Rule 107**

We are suggesting the addition of the following language at the end of this paragraph:

"... in which case Investor is authorized to use such tax credit in other affiliated Myanmar operations.

COMMENT to Rule 107

As the reimbursement may only be a tax credit provided to the Investor, which may not be able to use it in a timely fashion, the Investor's affiliates in Myanmar may have use for this credit. As normally each investment is in a separate tax entity, Investor should be allowed to use the tax credit in a timely fashion in any Myanmar operation with which it is affiliated.

### **Rule 112**

We are suggesting the deletion of the words: "... the earlier of the year of assessment in which the investor commences commercial operation or ..."

COMMENT to Rule 112

The language of this Rule, as currently drafted, makes little sense from a business standpoint. In order to be assessed, Investor has to have an operating registered company which is engaged in commercial operations. In most cases, investors do not earn an income in the first year of operation. By stating that the triggering of this Tax Incentive will be the commencement of a commercial operation, even if the business does not earn any income, will reduce the incentive for making the investment. Thus, this provision, as currently drafted, has an anti-investment outcome which will create a chilling effect on investment.

### **Rule 113**

We are suggesting the replacement of the last sentence in the second paragraph, which starts with: "No adjustment will be made if ..." with the following language:

"An adjustment will be made if the Investor is found to have received a lesser amount of Tax Incentive than it may have been eligible for based on the re-assessment, which will take the form of a tax credit in the subsequent annual assessments years, until such credit is exhausted."

COMMENT to Rule 113

We are emphasizing the introduction of the "Rule of Law," which applies equally to individuals, corporations and government. In the event that an error is made in the granting of a Tax Incentive in favor of an Investor, this Rule provides a mechanism to the government to recover such unearned Tax Incentive. Under the law, the same should apply if an error is made in favor of the Government, by granting the Investor what it is due.

### **Rule 119**

We are suggesting the deletion of the words: "... the earlier of the year of assessment in which the investor commences commercial operation or ..."

See COMMENT to Rule 112

### **Rule 129**

We are suggesting the insertion of the word "material" between "Subject to ..." and "... compliance", so that the first line of this paragraph will read:

"Subject to material compliance with any other applicable law and any conditions imposed by the Commission, ..."

COMMENT to Rule 129

See COMMENT to Rule 71 regarding materiality.

### **Rule 130**

We are suggesting the insertion of the word “material” between “Subject to ...” and “... compliance”, so that the first line of this paragraph will read:

“Subject to material compliance with any other applicable law and any conditions imposed by the Commission, ...”

COMMENT to Rule 130

See COMMENT to Rule 71 regarding materiality.

### **Rule 137**

We are suggesting the re-drafting of the language in this Rule, to read as follows:

The Commission may revoke an Approval if, in the Commission’s reasonable opinion, the Approval has been obtained through fraud or other materially misleading conduct, or the Investment has not been carried out substantially in accordance with the Application and no approval permitting a variation from the Application has been granted by the Commission.

COMMENT to Rule 137

The suggested changes emphasize the concept of materiality, as well as of a “reasonable” decision-making process by the Commission in revoking an Approval. The other changes are stylistic, designed to clarify the intent of this Rule.

### **Rule 139**

We are suggesting the insertion of the words “materiality” and, respectively, “material,” in paragraphs 139 (a), and 139(c), as follows:

- (a) The information provided by the Investor to the Commission in connection with the Application was materially correct at the time it was provided;
- (b) (omitted);
- (c) the Approval is granted subject to continuing material compliance with all applicable laws.

COMMENT to Rule 139

See COMMENT to Rule 71 regarding materiality.