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*Dear DICA*

## **CONSULTATION ON TRANSPARENCY OF COMPANY REGISTRATION INFORMATION**

MCRB congratulates DICA on the achievement of the MyCo database, as well as for meeting the deadline to disclose information on beneficial ownership as part of the EITI process.

We welcome the opportunity to respond to DICA's online request for suggestions on disclosure of company ownership information (deadline 31 January). As our 2019 Pwint Thit Sa (Transparency in Myanmar Enterprises) report highlighted, we believe that the Myanmar government's commitment in this area is consistent with the objectives of the Myanmar Sustainable Development Plan points 1.4.5 on anti-corruption and 3.3.4 on enhancing corporate governance and disclosure. It is also necessary to meet the recommendations of the Financial Action Task Force (FATF), which in turn will facilitate investment and trade.

MCRB notes that there are a number of interconnecting questions related to disclosure of company ownership information. Furthermore, in addition to MyCO and the recent MEITI disclosure, several other developments are concerning beneficial ownership and disclosure of company information have taken place recently, including:

- publication of Directive 17/2019 by DICA which refers to both s69(c) of the 2014 Anti-Money-Laundering (AML) Law and Presidential Declaration 104/2019;
- publication on 15 November of a [Notification 18/2019 by the Central Bank of Myanmar](#) on customer due diligence related to AML and CFT which references s69c of the Anti-Money-Laundering Law and s40 of the Central Bank Law.

The table in Annex 2 seeks to compare these actions by the Government of Myanmar. Some of these steps have led to uncertainty in the business and legal community about how to comply with Directive 17/2019.

Our suggestions in Annex 1 are based on our study of these issues in Myanmar since 2014, as well as discussions with companies based in Myanmar, including corporate lawyers, as well as international and local NGOs working on the subject.

We also recommend that DICA refers to the FATF publication published in late October 2019 on '[Best Practices on Beneficial Ownership for Legal Persons](#)'.

Our comments and recommendations cover the following areas:

### **Cross-Government Approach**

#### **Legal Basis**

Clarifying the legal basis for DICA's action under the Anti-Money Laundering Law (2014)

Clarifying and strengthening the legal obligations on companies to comply

#### **Beneficial Ownership**

Definition of beneficial ownership

Thresholds for determining 'beneficial ownership'

Submission of data on BO

Verification of BO data by DICA

#### **Politically Exposed Persons (PEPs)**

Definition and Identification of PEPs

#### **Data Protection and Privacy**

#### **Process for Revising the Directive**

#### **Further improvements to MyCo**

Enhanced Search Facilities and Links

Company Disclosure of 'Principal Activities' in AR-97

Ensuring MyCo functionality complies with the Companies Law

We hope that the recommendations in Annex 1 will be useful to DICA.

*Yours sincerely,*

*Vicky Bowman*

Director

# Annex 1: Suggestions from MCRB to DICA on Disclosure of Company Information

## Cross-Government Approach

MCRB has, including through recommendations in its annual Pwint Thit Sa (Transparency in Myanmar Enterprises) reports, encouraged a **consistent cross-government approach to the issue of beneficial ownership** and the related issue of **politically exposed persons (PEPs)**. This requires coordination inter alia between:

- Ministry of Planning and Finance, including in its role as Chair of the Myanmar Extractives Industries Transparency Initiative (MEITI) Leading Committee, and the Internal Revenue Department
- DICA, as Companies Registry
- the Financial Intelligence Unit of MoHA
- the Central Bank
- the Anti-Corruption Commission (whose asset disclosure rules under Section 13 and Rule 37 of the Anti-Corruption Law/Rules have yet to be implemented).

The establishment of the Beneficial Ownership Task Force by MoPF order 60/2018 MEITI was a positive step involving other Ministries. However, since the Task Force was established only to deliver on the MEITI requirements, it appears to have been less effective in achieving a coordinated cross-government strategy to enable Myanmar to meet its wider international obligations, including FATF recommendations.

**We therefore recommend that, to address questions of disclosure of ownership of all companies registered in Myanmar, and the government's approach to the question of Politically Exposed Persons (PEPs), a Committee should be established under the AML that brings together the above authorities, and ensures a consistent approach, anchored in international standards and obligations.**

The higher risk nature of the extractives sector may argue for an enhanced approach e.g. thresholds for EITI reporting, or PEPs. Therefore, for advice on EITI requirements and disclosure by those companies, it should take recommendations from the relevant MEITI body.

## Legal Basis

### **Clarifying the legal basis for DICA's action under the Anti-Money Laundering Law (2014)**

We understand from our contacts with the legal community that it is not clear that a legal instrument has been issued by the Central Board (chaired by MoHA) under Article 3(f) of the 2014 Anti-Money Laundering Law to appoint DICA as a competent authority to collect beneficial ownership information and maintaining the relevant registry.

The empowerment of DICA as 'beneficial ownership task force focal agency' pursuant to the President's Office Notification No. 104/2019 is limited to extractive sectors (see paragraph 4 thereof); and the powers

granted DICA pursuant to the Myanmar Companies Law 2017 are not sufficiently broad to cover beneficial ownership disclosure. **We therefore recommend that such an authorising Directive should be issued under the AML, by the Central Body/Board and that it should also explicitly provide DICA with the necessary powers, and identify sanctions on companies which do not comply.**

## Clarifying and strengthening the legal obligations on companies to comply

**We recommend either the Directive issued by the AML Central Body, or a revised DICA Directive, should make clear the Company's duty to obtain information and specify what the company is required to do in order to seek to obtain the beneficial ownership information, so that the scope of the company's duties is clear.** This is particularly important where the beneficial owner of a company is another company registered in another jurisdiction, either as a company listed on a recognised stock exchange, or privately owned. There is no single approach to this in international practice, and it should be a matter of consultation with experts.

## Beneficial Ownership

### Definition of beneficial ownership

The definition in DICA 17/2019 copies that in CBM 15/2019 although the latter is written to describe bank customers, not companies. The MEITI definition of BO is much more detailed and describes various types of ownership (See Annex 2).

**We recommend a revised DICA Definition uses the MEITI Definition (but with a 25% rather than 5% threshold).** It might also or instead make reference to the definition in the Companies Law s1.(xxii) of “**ownership interest**” which 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”.

### Thresholds for determining ‘beneficial ownership’

We recommend a consistent and simplified approach for the majority of companies in Myanmar. The international approach is to use 25% direct or indirect control (or ownership interest – see above). This is also the figure in the 2015 AML Rules (see Annex 2). **We therefore recommend:**

- **25% should be the threshold for the majority of companies in Myanmar**
- **the Central Bank Notification 18/2019 should be brought in line with this (currently 20%).**

However, **we recommend maintaining lower thresholds for high risk activities such as the 5% recommended for the extractives industries by MEITI.**

## Submission of data on BO

The Annual Return would provide the opportunity to collect this data and the AR form could be amended. However, to allow for up to date information, **we recommend introducing an appropriate Form, similar to, or an amendment to C3, to allow companies to inform DICA of any change in beneficial owner within a prescribed timeframe.**

## Verification of BO data by DICA

We recognise that verification of BO data is a major challenge for Companies Registries around the world. However it is made more complex in other jurisdictions by the use of ‘shell companies’ and trusts. We have not observed much use (yet) by Myanmar companies of overseas shell companies or complex legal arrangements. Indeed, the distinction between the opportunities afforded to Myanmar and foreign company discourages use of overseas shell companies by Myanmar businesses and individuals.

Furthermore, very few Myanmar companies own other companies and most shareholdings seem to be held by ‘natural’ rather than ‘legal’ persons. The BO disclosures by most Myanmar companies are therefore likely to show a close correlation between direct shareholding by natural persons, and beneficial owners, making this aspect of verification easy for DICA.

However, it is clear from our review of the database and our knowledge of businesses in Myanmar that shareholding information will not always reveal companies in which another individual ‘exercises significant influence’. For example, our study of MyCo shows that some family businesses have divided shareholdings between individual children and that these will fall below a 25% threshold, and in some cases either a small minority or no shares are held by the founder/Chairman/father, even though it is clear that this individual ‘exercises significant influence’ over his children. There will also be cases in which an ownership interest is held by an unrelated individual wishing to remain anonymous who is not mentioned as a shareholder or Director but who nonetheless ‘exercises significant influence’.

It will be challenging for DICA to verify information, including where there are gaps in filed information about those who ‘exercise significant influence’. **We recommend that DICA considers establishing a confidential channel of information** whereby a member of the public who believes the information on the register to be inaccurate can provide information. Informants should be protected. (According to the Anti-Corruption Commission, a draft Whistleblower Protection Law is under consideration by Government).

## Politically Exposed Persons (PEPs)

### Definition and Identification of PEPs

The definition in DICA Directive 17/2019 uses the standard FATF definition of a PEP and does not take into account the valuable work of the MEITI to put the definition of ‘Domestic PEP’ into the Myanmar context and identify what ‘prominent public function’ and ‘senior’ means, as well as making mention of Ethnic Armed Organisations. **We recommend that companies in Myanmar are required to provide information in accordance with the definition developed by MEITI.**

In the EITI BO exercise, individuals were invited to identify themselves as PEPs. Very few did so. It is possible that they failed to see that this relates to first degree relatives of someone who “are or were entrusted with prominent public functions”. An example of this is Kyaing San Shwe of Kyaing International who did not self-identify as a PEP despite being the son of Senior-General Than Shwe, former Head of State.

This raises the question of whether it is meaningful to ask people to self-declare as a PEP. **Instead, we recommend that DICA should require companies to provide specific information about their beneficial owners including their family members and close associates** (a similar approach is taken by some countries to those applying for visas).

The information requested should include the categories identified by MEITI. It should be made clear, including in training of companies, that beneficial owners should provide information about themselves or family members or close associates who were formerly senior officials, military or other categories of PEPs, in addition to current connections.

With this information, DICA would then be able to determine whether the individual should be considered as a PEP. We recommend that DICA should make their PEP determination publicly available for all companies (rather than only those in the extractives sector covered by MEITI), and provide basic information on why the subject is considered a PEP e.g. **Family member of former senior official**. This will be very useful for investors and financial intermediaries in conducting due diligence in Myanmar, as much information about Myanmar PEPs currently available is unreliable, not least due to confusion over spelling and similarity of Myanmar names.

## Data Protection and Privacy

At the moment, neither DICA (nor the CBM) does not appear (based on a search of the website) to have a data privacy policy, and furthermore, there is no Myanmar Data Protection legislation, even though Article 357 of the Constitution says that “*The Union shall protect the privacy and security of home, property, correspondence and other communications of citizens under the law, subject to the provisions of this Constitution*”.

We note that the MEITI BO pilot report<sup>1</sup> by Adam Smith International and Open Oil noted that “*The approach taken by the pilot did broadly hold up to EITI requirements, but could benefit from refinements on the applied BO and PEP definitions, disclosure form and data protection and validation procedures.*” It noted that “*A third gap in the applied BO definition regards the issue of confidentiality. While BO disclosure is globally welcomed as a means to fight tax evasion, money laundering and terrorist financing, commentators have repeatedly raised that any BO implementation will have to find the right balance between transparency and the right to privacy.*”<sup>2</sup> For Myanmar, the practical implication is that it should be clearly defined what data will only be available to government agencies and parties with statutory obligations (such as banks and civil-law notaries), and what will be publicly disclosed. This particularly concerns any additional information provided on the identities of the beneficial owners, such identity

<sup>1</sup> <https://eiti.org/document/myanmar-eiti-beneficial-ownership-pilot-project-report>

<sup>2</sup> <https://www.pwc.nl/en/assets/documents/pwc-considering-privacy-on-the-brink-of-full-transparency.pdf>

*number or residential address. The need to respect privacy laws should therefore be considered going forward". It recommended capacity building for regulators on data protection concepts.*

**MCRB recommends that, in the absence of a (much needed) Myanmar data protection law, the government authorities, including DICA and the CBM, should establish and publish their own data protection policies and practices.**

These should ensure that systems for collecting and holding data – including that for BO and PEP data - embed the concept of **'privacy by design'**. This means that only the necessary data collected, protected and held only for the necessary period of time, and used only for the purposes for which its collected, with consent sought for other uses which are not part of the statutory disclosure or data sharing requirements.

Privacy by design does **not** mean that all BO/PEP data collected should not be in the public domain, or that access should be restricted only to government authorities. The European Union's 5<sup>th</sup> Anti-Money Laundering Directive requires beneficial ownership registers to be public, and **we recommend that Myanmar follows this practice.** Access to BO/PEP data is important for financial institutions and designated non-financial businesses and professionals, for purposes of complying with their obligations as 'reporting organisations' under the AML Law and the Anti-Money Laundering Rules 2015 and the CBM Directive. It is also essential for NGOs and media working to improve transparency and fight corruption, in support of the Myanmar Sustainable Development Plan.

## Process for Revising the Directive

**We recommend that the draft of a revised DICA directive should be shared either publicly or at least with practitioners i.e. lawyers, transparency NGOs, before being finalised to enable them to make suggestions based on their practical experience.**

Other than for the extractives BO/PEP data, which should be made available to meet MEITI deadlines, **we recommend that DICA, when revising its Directive, should provide for a reasonable deadline for companies to comply with new requirements.** This would allow for an effective in person, email, SMS and media-based communication campaign by DICA to all companies. It would also allow DICA to obtain the necessary staff resources, prepare the necessary forms and database enhancements and conduct training of companies and DICA and other government staff.

The EITI BO data demonstrated that many extractives companies misunderstood the concept of BO and Politically Exposed Persons, or failed to correctly fill in the form. Furthermore, some companies who have contacted DICA to correct the information, have so far been unable to do so. **We recommend training for DICA staff and companies** on how to complete beneficial ownership data, including the concept of 'exercising significant influence'.

An example demonstrating the need for further training is the BO declaration for the DICA/EITI database submitted by Myanma Economic Holdings. This identified three senior military/retired military officials as having 33% voting rights each in the company. Since according to its Company extract, MEHL is a public company with over 240 million shares of 1,000 kyats each, believed to be held by hundreds of thousands of individuals this seems unlikely (see also below – Functionality of MyCo).

## Further improvements to MyCo

In addition to BO and PEP, MCRB takes this opportunity to highlight further areas in which we hope to see MyCo develop.

### Enhanced Search Facilities and Links

To facilitate customer and company due diligence, including by the authorities, banks and other financial institutions, in line with Customer Due Diligence requirements of the Central Bank of Myanmar, **we recommend that the MyCo company public interface permits a search on individual Directors/Officers.**

**We also recommend that all information about the appointments held by an individual is available through hyperlinks.** This should be easy to achieve in DICA's internal database through linking by NRC number of the individual.

The UK and New Zealand and many other Company Registries provide this facility in front of their paywalls.

### Company Disclosure of 'Principal Activities' in AR-97

To enable DICA to identify companies in the high risk sectors, **we recommend that companies should be required to identify the Principal Activities in which their business is engaged** when they complete the Annual Return (AR-97). This should not prevent the company from undertaking other activities. Many companies currently do not do this at all, and some do not do this accurately.

### Ensuring MyCo functionality complies with the Companies Law

MyCo's online database has been a quantum leap forward for transparency and corporate governance in Myanmar. However, after more than a year, there is still some information which is not yet available online in accordance with S421f of the Myanmar Companies Law, even if behind the paywall.

Specifically, what is missing includes documents filed by public companies with the Registrar, including Financial Statements, Statutory Report, and Share Capital and Register of Members, including (as required in filings on Form C3) the top 50 members (or such other number of members if the company has less than 50 members) holding the largest number of shares in the company and their respective names, addresses and nationalities and shareholdings.

**We recommend making this information filed by public companies available online immediately to further support those undertaking customer and company due diligence.**



Annex 2	Central Bank Notification 18/2019	DICA Directive 17/2019	MEITI
<b>Scope</b>	Customer Due Diligence (CDD) by Banks, as defined by Section 2(c) of the Financial Institutions Law.  CDD is described in Article 9 to 39 of this Directive.	All companies ('all legal persons or legal arrangements incorporated in Myanmar')	Extractives companies (currently those mentioned in MEITI)
<b>Legal Base</b>	Based on CDD as defined in section 3(u) of the 2014 Anti-Money Laundering Law  Replaces earlier Directive 21/2015 (which required banks to determine the BO of their customers, and specifically mentioned those with >20% control of the company/customer)	Unclear. References both s69(c) of the 2014 Anti-Money-Laundering (AML) Law and Presidential Declaration 104/2019, but it is unclear that DICA has been provided under the AML Law with a status as a 'competent authority'. There is no Company Law legal basis.  Section 97b(xvi) only requires the <u>inclusion in the Annual Return</u> of 'such items as may be prescribed from time to time'	Myanmar's commitment to EITI, and President's Office Notification No. 104/2019)
<b>Came into force</b>	Immediate: replaces earlier Directive 21/2015	1.1.2020	Pilot for 2016/7 report  Ongoing collection for 2017/2018 report?
<b>BO definition</b>	"Beneficial Owner" refers to the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement	Identical to the CBM 18/2019  This definition, in referring to customers and transactions, is designed for banking, not company ownership.	1.The individual holds, directly or indirectly, 5% and above of the shares in the public or private company or corporate entity.  2. The individual holds, directly or indirectly, 5% and above of the voting rights in the public or private company or corporate entity.  3. The individual holds the right, directly or indirectly, to appoint or remove a majority of the board of

			<p>directors of the public or private company or corporate entity.</p> <p>4. The individual has the right to exercise, or actually exercises, significant influence or control over the public or private company or corporate entity.</p> <p>5. For shareholding entities:</p> <p>i. which are state-owned enterprises or their subsidiaries, disclose the parent ministry and country</p> <p>ii. which are publicly listed, disclose the name of the stock exchange and a web link to stock exchange filings.</p> <p>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.</p>
<p><b>Threshold (global standard is 25%)</b></p>	<p>Need to establish who has &gt;20% control (s.26-32) for CDD</p> <p>(It should be noted that in separate CBM directives concerning ownership the ‘acquisition of substantial interest’ in a bank (CBM Directive 12/2019) substantial is defined as 10%.</p>	<p>5%</p> <p>There is no threshold in the AML Law to which the DICA Directive refers.</p> <p>However the 2015 AML Rules says</p> <p>42. The reporting organizations shall take adequate action in order to understand the ownership and control structure of the following customer who</p>	<p>5%</p> <p>Chosen by MEITI Multistakeholder Group</p>

		are entitled to manage transfer of money and properties on behalf of other company, organization or other legal person: (a) with respect to legal entities, in identifying on each of the following natural person that: (i) owns or controls directly or indirectly more than 25 percent of the ownership of the legal entity; (ii) is responsible for the management of the company;	
<b>BO data timeliness</b>	Not applicable	Required to be 'up to date'	Annual basis to coincide with report?
<b>Definition of PEPs</b>	Definition in s.3(l)/(m) of the AML for 'PEPs or customers linked to a PEP', including family members or close associates of such persons.	Definition in s.3(l)/(m) of the AML	Uses a much more detailed definition for Myanmar context (e.g Ethnic Armed Organisation, PEP down to Lt-Colonel, Director) Family members
<b>Obligation on company/Provision of data</b>	Banks (s.21-23 CBM 18/2019) should 'establish appropriate risk management systems to determine whether a customer of beneficial owner is a PEP [or linked to one] and apply additional customer due diligence'. S.22 on 'Measures for determining who is a PEP, whether a customer or a beneficial owner) which requires the banks to: <ul style="list-style-type: none"> <li>• Seek relevant information from the customer</li> <li>• Refer to information about the customer</li> <li>• Refer to commercial electronic databases of PEPs</li> <li>• Take reasonable measures to determine whether the</li> </ul>	No process provided for submitting information is yet in place.	Some collected data for individuals e.g. phone/email is not necessary to establish identity. If collected, it should not be disclosed except for functioning contact details for the company as a whole

	beneficiary(ies) of a life insurance policy and/or the beneficial owner of the beneficiary are PEPs.		
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