KELVIN CHIA YANGON

LOCAL KNOW-HOW WITH INTERNATIONAL EXPERTISE

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Kelvin Chia Yangon

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MYANMAR'S ENRICHED LEGAL FRAMEWORK FOR BANKING INDUSTRY SHEDS LIGHT ON FOREIGN PARTICIPATION IN A ONCE-RESTRICTED SECTOR

Foreign entities intending to engage in the once-restricted banking industry in Myanmar can now explore the avenues provided for under the new Financial Institutions Law. Despite the fact that implementing regulations and procedures are still lacking, the law touches on the regulatory approvals required and modes of entry into the sector.

Introduction

Until the recent enactment of the new Financial Institutions Law ("**FIL**") in January 2016, the old Financial Institutions of Myanmar Law from as early as 1990 governed the conduct of banks and other financial institutions in Myanmar. The 1990 law did not provide for an adequate framework for foreign participation in that it only contemplated the opening a branch or a representative office with the permission of the Central Bank of Myanmar ("**CBM**"), which may not be the preferred mode of entry for a foreign bank.

Aware of the fact that Myanmar needs to import foreign capital to finance the colossal projects which will in turn fuel the economic development to its full potential, the government has taken significant steps to reform the regulatory framework, thereby creating the options for foreign participation in the banking industry. Under the new FIL framework, foreign entities may now invest in existing local banks both by way of equity injection and by extending loans. In this article, we discuss the various forms of foreign participation in the banking industry.

Setting up a branch of a foreign bank

In May 2014, the CBM introduced a competitive licensing scheme whereby it invites interested foreign banks, with representative offices in Myanmar or which are in the process of opening their representative offices, to submit proposals to the CBM for a branch license. Under the first round of the call for proposals, nine foreign banks from Singapore, Japan, Malaysia, China, Thailand, and Australia were granted with a license to operate a branch for provision of wholesale banking services to foreign-owned companies operating in Myanmar.

Pleased with the success of the first round of call for proposals, the CBM initiated a second call for proposals in December 2015, one month before the enactment of the new FIL. Participation in the second call for proposals was limited to foreign banks, with representative offices or which are in the process of setting up their representative offices in Myanmar, a restriction which was exercised during the last call as well. Additionally, however, only foreign banks from countries which were not represented in the last round of award winners are invited to participate in the second round. The results from such second call have since been announced in favor of a total of four banks from India, Vietnam, the Republic of China and South Korea. The scope of the license to be granted under the second call is the same as that granted under the first call, i.e. a branch for provision of wholesale banking services.

Notwithstanding the foregoing, the new FIL contemplates setting up a subsidiary bank or a branch by a foreign bank and outlines the documents which are required to be submitted to the CBM as part of the application process for the relevant license to operate. The FIL further sets out that the CBM shall respond to such application within six months from the date of receipt of the application documents. It would nevertheless appear that foreign banks are unlikely to be able to proceed to apply for a subsidiary bank or a branch license in accordance with the new FIL without a need to wait for a call for proposal or new policy directions from the CBM.

> "...foreign banks may be better positioned to enjoy a broader range of permitted activities via equity participation with an existing local bank."

Although a range of commercial banking activities are contemplated under the FIL, such activities may be carried out by foreign banks only to the extent of and in accordance with the terms and conditions of the relevant licenses. Currently, branches of foreign banks are prohibited from providing their services to retail customers and wholly citizen-owned companies. Consequently, foreign banks may be better positioned to enjoy a broader range of permitted activities by participating via equity participation in an existing local bank or by extending loan facilities to an existing citizen-owned bank.

Setting up a representative office of a foreign bank

For foreign banks wishing to explore Myanmar's financial services sector without committing a sizable minimum paid-up capital required for operating a branch, a representative office may also be set up to conduct market research activities. Generally, representative offices are not permitted to conduct any banking activities even if such activities are carried out on behalf of its head office and branches elsewhere.

Equity participation by a foreign entity in an existing Myanmar bank

Clause 42 of the FIL details the discussion on acquiring interests in financial institutions. It requires entities intending to acquire substantial interests in financial institutions established in Myanmar to apply to the CBM first for approval of such acquisition. Substantial interest is defined in the FIL as owning, directly or indirectly, ten percent or more of the required capital as prescribed by the CBM or of the voting rights of a financial institution; or, directly or indirectly being able to exercise control over the management of the financial institution.

The FIL empowers the CBM with the power to require documentation from the applicant to investigate the application and background of the applicant. Clause 42 also outlines the grounds for refusal of approval of a proposed acquisition of interests in a financial institution: (i) the applicant, being an individual, is not a fit and proper person; (ii) the applicant, being a corporate entity, has one or more directors or chief executives who are not fit and proper persons; or, (iii) facts are known to the CBM indicating that the applicant would exercise significant influence on the relevant bank that would threaten the sound and prudent management of the bank.

Notably, Clause 45 stipulates that a person or persons acting in concert shall first seek prior written approval from the CBM before entering into any agreement or even an arrangement to acquire substantial interests in a bank. Therefore, the CBM appears to be contemplating and regulating not only actual acquisitions of substantial interests in banks but also arrangements which will eventually result in or can potentially result in acquisition of substantial interests in banks. This provision may possibly extend to affect loan facilities such as the convertible loan instrument.

It should nonetheless be noted that the discussion under Clause 42 on acquisition of substantial interests in financial institutions does not specifically nor expressly comment on acquisition by foreign non-bank entities. Additionally, it is not yet clear in the law if and how the acquisition of interests in financial institutions that are not substantial will be regulated by the CBM.

Under Clause 48 of the FIL, mergers between banks are also now sanctioned. Foreign banks are permitted to acquire all or part of another bank established in Myanmar as well as sell their own businesses as conducted in Myanmar. Prior written approval from the CBM is necessary for any merger and acquisition of a business undertaking, and the relevant bank is required to apply to the CBM for approval with the proposed agreement and related documents.

On a more general note, the FIL authorizes the CBM to prescribe the maximum number of shares which an individual or an entity may own in a bank. The CBM is able to exercise discretion on the relevant thresholds depending on the type of shareholder acquiring an interest.

Extending loan facilities to Myanmar banks

The FIL does not impose any explicit prohibitions on Myanmar banks to borrow from other banks or non-bank entities. Convertible loan facilities are also possible with the approval of the CBM and conversion could result indirectly in an interest being acquired in a Myanmar bank.

It should also be noted that, regardless of the nature of the borrower, any type of borrowing from offshore requires prior approval from the CBM pursuant to the Foreign Exchange Management Regulations issued by the CBM, failing which remittance of the principal and interest offshore for purposes of repayment, may present an issue.

Conclusion

Whilst some ambiguities still persist, the new FIL is fairly comprehensive, reflects the complexity of the economic reality of nowadays, and sets out modes of entry for foreign investors into Myanmar's banking industry. Implementing regulations and procedures when put in place will certainly reinforce the framework for foreign investment in the banking industry.

Main Practice Areas

Foreign Investments | Incorporation and Company Maintenance | Due Diligence | Mergers and Acquisitions | Joint Ventures and Production Sharing Agreements | Investment Funds | Energy/Oil and Gas | Natural Resources/ Mining | Banking Regulatory | Corporate and Project Financing | Manufacturing | Education | Agriculture | Real Estate | Infrastructure | Construction | Technology, Media and Telecommunications | Compliance/ Regulatory | Licensing and Permits | Labor and Employment | Taxation | Insurance | International Arbitration | Intellectual Property | Special Economic Zones