

October 18, 2013

Via Electronic Mail

Dr. Keith Kozloff
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Re: Comments on the OPIC Office of Accountability Draft Operational Guidelines

Dear Dr. Kozloff:

We, the undersigned, are writing in response to your solicitation of public comments on the August 2013 Draft Operational Guidelines Handbook for Problem-Solving and Compliance Review Services (“Draft Guidelines”). We represent organizations from around the world that work with people and communities impacted by Overseas Private Investment Corporation (“OPIC”)-supported projects. We commend the OPIC Office of Accountability (“OA”), for providing this opportunity for the public to comment on the Draft Guidelines, and we submit these comments with the expectation that they will be taken into account by the Director and the Board as the Office of Accountability continues to revise its Guidelines.

We support the OA and its mandate to provide its problem-solving and compliance review services in a manner that is fair, objective, accessible, responsive, transparent, predictable, efficient, and independent. The OA is a critically important resource for people harmed by OPIC-supported projects, who often have nowhere else to turn for problem solving and access to remedy. OA compliance reviews provide opportunities for complainants to have a transparent accounting of harm due to OPIC policy violations and for OPIC to learn from its past projects and address issues that increase its institutional investment risk.

While the Draft Guidelines are an important step forward in achieving accountability in OPIC’s lending and operations, there are significant concerns raised in the comments that follow. These following comments are based on best practice for accountability mechanisms and our collective experience in working with communities using accountability mechanisms. We hope these comments will be taken into account as a useful tool for the OA as it works to fulfill its mandate and realize its guiding principles.

I. Section I: Introduction

1.2. Guiding Principles

We commend the Office of Accountability for reaffirming its commitment to provide services in a manner that is (1) fair in the treatment of its parties; (2) objective by avoiding pre-conceptions and applying a rule of reason; (3) accessible and responsive to its parties; (4) transparent and predictable in interactions, while respecting confidentiality; (5) independent of OPIC's operations; and (6) cost effective and efficient. However, we believe that the Office of Accountability should also seek to provide its services in a manner that is rights-based in approach. OPIC as an institution recognizes and prioritizes compliance with human and labor rights, and the Board Resolution clearly mandates that the OA evaluate compliance with environmental, social, labor, and human rights standards, so there is a rational basis for adopting this approach.

Adopting a rights-based approach would also reflect the US Government's commitment to implementing the UN Guiding Principles on Business and Human Rights, with the OA being one of the few points for communities affected by U.S. corporations or financing to access remedy for harm.

1.3 Authorities

We recommend replacing the statement that the exercise of OA authorities has no direct effect on OPIC's financing or its clients' implementation of projects, with a provision allowing for the OA to recommend that financing or implementation of subject projects be halted pending problem-solving or compliance review, especially in cases where credible allegations of serious and imminent harm have been made.

1.5. Form of Requests

1.5.4. Requests submitted through a designated representative

The Draft Guidelines confirm that requests from affected parties may be submitted through a designated representative when the "affected party on whose behalf the request is submitted is clearly identified" and evidence is provided of the authority to represent the party. We appreciate the OPIC OA's openness to work with designated representatives. However, designated representatives should be able to request that the OA keep the identity of any clearly-identified affected party confidential where Requesters are concerned about negative impacts of filing a complaint.

1.5.5. Requester Confidentiality

We commend the OA for reiterating its commitment to respecting confidentiality in its guiding principles and allowing requests from affected parties to be submitted confidentially. Maintaining the option of confidential filing is critical to the OA's accessibility and to protection of the most vulnerable requesters from reprisal. The OA's

continuing commitment to requester confidentiality reflects best practices and the spirit of the Board Resolution.

1.5.6. Language of Request

We strongly support the OA’s policy of processing requests received in languages other than English. The Draft Guidelines, however, do not address what language the OA will use in communicating with requesters. As this can have a substantive impact on whether the OA is accessible, transparent, and fair to requesters, we recommend that the Draft Guidelines be revised to clarify that all communications and draft reports related to the OA’s problem-solving or compliance review services will be translated into the language(s) of the requesters.

Moreover, translation should not cause delays in the OA’s provision of services. Therefore, Section 2.3 (Timing) should include a provision that ensures that translation is done efficiently and promptly.

II. Section 2: Initial Assessment

Section 2.1. Eligibility Determination

Generally, we are pleased that OPIC has made some changes to its eligibility requirements that will contribute to making the OPIC OA more accessible and responsive to affected communities. However, because the eligibility requirements are numerous and require more subjective judgment calls than the threshold criteria of the OA’s peer mechanisms, the OA’s eligibility criteria should be interpreted liberally and in favor of the requester so as not to create a barrier to access.¹ Our comments on specific eligibility criteria follow below.

¹ Other mechanisms have fewer eligibility criteria and have recognized that eligibility criteria should be construed in a manner that is forgiving to requesters with limited resources and minimizes barriers to mechanism access. For example, the Compliance Advisor/Ombudsperson (“CAO”) requires only that the complaint meet three eligibility criteria to qualify for an assessment: (1) that the complaint relate to an International Finance Corporation (“IFC”) or Multilateral Investment Guarantee Agency (“MIGA”) project; (2) that the complaint be about a social and/or environmental issue related to that project; and (3) that the complainants believe they are or may be affected by the issue(s) raised. *CAO Operational Guidelines*, §2.21, CAO (2013), available at: http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013_ENGLISH.pdf. Additionally, the current ICIM policy permits requesters to “complete or correct a Request” prior to a determination of ineligibility. *Policy Establishing the Independent Consultation and Investigation Mechanism* at ¶¶ 41, 57, Inter-Am. Dev. Bank (Feb. 17, 2010).

2.1.4. Eligibility Window

A. Commencement

The requirement for eligibility related to when OPIC's involvement begins is complicated and would be nearly impossible for requesters to investigate without in depth, inside knowledge of OPIC. At a minimum, Requesters should be encouraged to obtain the OA's assistance in verifying the status of an OPIC project any time prior to a decision on eligibility. Without such assistance, this eligibility criterion presents a problematic barrier to access to the OA.

B. Cut-off Date for Filing a Request and Exception

The termination of OPIC's interest is more restrictively construed than the cut-off date for other mechanisms.² Extending the window for eligibility will allow OPIC to address the practical reality that some of its projects may create long-term adverse impacts, such as health or environmental issues, that only become apparent many years after a project is completed. The delayed onset of harm should not foreclose a request for OPIC's services.

Additionally, it may take time, or even outside assistance, for affected people to obtain information that OPIC is involved in a project that is harming them and that they can file a complaint with the OA. To bring OPIC OA's eligibility criteria in line with best practice, the OA should consider extending or permanently removing this criterion.

2.1.5. New Exception for Compliance Review after Final Disbursement

Under Section 2.1.5 of the Draft Guidelines, the OA may consider a request for compliance review eligible for a limited period after OPIC's financial relationship with the project has ended, "if the Director determines that there is potential for institutional learning to improve OPIC's support for future projects."³ We commend the OA for proposing an extended cut-off period for compliance review. A similar extension should be permitted for problem-solving services if the onset of harm is delayed and the OPIC client and affected parties wish to engage in dispute resolution.

2.1.6. Contents of Allegations

Under the Draft Guidelines, requests submitted by affected parties must allege material, direct, and adverse impacts or risks from the OPIC-supported project. The

² Some mechanisms do not have set cut-off dates. For instance, the CAO will accept complaints about any project the IFC or MIGA is participating in or actively considering, without defining any set cut-off date. See *CAO Operational Guidelines* at § 2.2.1. Other mechanisms have extended cut-off periods, for example the Asian Development Bank, which allows for complaints up to two years after the loan or grant closing date for the project

³ Draft Guidelines at § 2.1.5.

Draft Guidelines define “affected party” with similarly restrictive language.⁴ This requirement goes beyond the basic requirements of the Board Resolution, which provides standing to all “impacted communities in the host country.”⁵ By adopting a more restrictive standing requirement, the OA reduces the accessibility, responsiveness, and fairness of the mechanism and places a heavy burden on project-affected parties to prove harm. Therefore, we urge the OA to strike all language in the draft requiring allegations of “material, direct, and adverse impacts.”

2.1.8. Proof of Good Faith Efforts for Problem Solving Requests

Under the Draft Guidelines, for problem-solving requests only, good faith efforts to resolve the issue must be made before requesters may access the services of the OA. We commend the OA for recognizing an exception to this requirement in situations when the requester has asked that the OA keep his or her identity confidential. To further promote fairness and preserve accessibility for the most vulnerable requesters, the OA should make an additional exception to the good faith effort requirement in cases where a requester’s efforts to contact Management, the OPIC client, or project-level grievance mechanisms could lead to harm or reprisal.⁶ Requesters who are at serious risk of reprisal should not be forced to decide between their safety and the potential remedy filing a request may offer.

2.1.9. Ineligible Issues

While we generally agree with the exclusion of requests concerning “matters previously considered by the OA unless new information has come to light,” we suggest extending the exception for new information to include situations in which new parties become involved in the dispute after it is originally considered by the OA.

Also, the OA should better define the limits of its exclusion of requests involving allegations of criminal activities. Often human rights violations are also crimes under the laws of the host country or the United States. The Board Resolution indicates that this exclusion relates to claims of corruption or fraud (like FCPA claims).⁷ The OA should clarify that this exclusion is only related to crimes of corruption and fraud, and not to other types of crimes like sexual offences and crimes against the person.

⁴ See Draft Guidelines at §1.4.

⁵ Board Resolution § 4(b).

⁶ Other institutions make similar exceptions. For example, the Project Compliance Mechanism of the European Bank for Reconstruction and Development requires complainants to “describe the good faith efforts the Complainant has taken to address the issues in the Complaint, including with the Bank and/or the Client, and a description of the result of those efforts, *or an explanation of why such efforts were not possible.*” Project Complaint Mechanism: Rules of Procedure at ¶18(d) (May 2009), available at: http://www.ebrd.com/downloads/integrity/pcm_rules.pdf (emphasis added).

⁷ See Board Resolution at ¶ 4(d) (excluding claims that “appear to raise criminal wrongdoing, for example under the Foreign Corrupt Practices Act”).

2.2. Assessment

We would edit the current statement on assessment to state that determination of “which service to provide and in which order” should be based on requester preference. Having this conversation with the requesters, at a minimum, could elicit information important to the decision on sequencing.

2.2.1 Site Visit

We are concerned by the statement regarding the evaluation of the “extent to which further efforts to address the conflict bilaterally with local third parties would be productive[.]” When requesters file a complaint with the OA, they expect the OA to provide oversight over a neutral problem solving process.⁸ Handing the process to a “local third party” is neither requested by the complainants or permitted by the Board Resolution, and may serve to worsen problems based on local dynamics that may be difficult or impossible for the OA to understand during a site visit. We recommend deleting this section of 2.2.1. If it is kept, we suggest that it at least state “local third party neutrals approved by the requesters” to avoid overriding the decision the requesters made to file a complaint with the OA and not a local third party.

Footnote 2 in this section (which may be more appropriate in section 1.5.5) states that the “OA will notify [] requestors [who request confidentiality] that maintaining confidentiality may limit the methods that can be used by OA to resolve the problem, given that face to face mediation is not feasible.” This statement leaves the impression that “face to face mediation” is the only or even primary tool at the disposal of the OA, which belies the more apt description of the tools described in section 3.1.3. Moreover, even if face-to-face mediation between requesters and the project sponsor is not feasible, the OA can meet individually with requesters and requesters could send representatives to mediate on their behalf. Representatives can serve as important facilitators under these circumstances. Such an OA notification may also have the unintended impact of discouraging requesters from entering into a process confidentially. Requesters’ who require confidentiality should not face actual or threatened limits on the methods that can be used by the OA to resolve the dispute. We recommend deleting this footnote.

2.2.2. Report

We oppose the inclusion of the “time-bound opportunity” for relevant OPIC officials to work with the OPIC client to address the issues before initiating the OA’s own problem-solving services. OPIC has this opportunity through the “good faith effort” requirement. This proposed additional “opportunity,” compromises the effectiveness, fairness, and accessibility of the OA by undermining the dispute resolution function that the OPIC Board Resolution requires. Moreover, this “time-bound opportunity” significantly reduces transparency and predictability of the OA’s services, which erodes requesters’ trust in the OA. Inviting OPIC and its client to negotiate without input from

⁸ See Board Resolution at ¶ 4(a)2 and ¶ 4(b).

the affected parties or facilitation by the OA is an unacceptable intrusion on the OA's independence and requesters' ability to access the OA's services.

Additionally, the language of 2.2.2 does not define the limits of this "time-bound opportunity," which risks the indefinite suspension of the eligibility assessment. Any unnecessary delays in the problem-solving process caused by the new provisions of 2.2.2 will allow harm to continue on the ground and tensions to escalate. Finally, the exception in cases where there is "imminent risk of harm to lives or livelihoods" is poorly defined. Without indication of who would decide whether there is an "imminent risk of harm to lives or livelihoods" and on what basis that decision would be made, this provision is vague and subject to abuse. Requesters' position about harm to their own lives or livelihoods should not be second-guessed by others without investigation or transparency in decision-making.

We support the OA's provision in paragraph 2 of section 2.2.2, which states that the OA can recommend that OPIC request a compliance review, even where requesters have only requested problem solving.

2.3. Timing

We generally approve of the timing set forth in the Draft Guidelines. However, we suggest the following changes:

- 2.3.3: The exception for circumstances in which additional information is needed does not clearly specify a deadline. Failure to provide a new timeline under these circumstances allows for abuse of the OA process and continuing, unabated harm to requesters.
- The provision which allows "the timing of the above steps [to] also be adjusted to accommodate...the engagement of OPIC management with the client" invites unpredictable and unacceptable delay in OA services and should be removed from section 2.3.

III. Section 3: Problem-Solving

3.1 Process

3.1.1 Communication

Section 3.1.1 of the Draft Guidelines states that an essential element of the problem-solving process is for the OA to establish and maintain a "direct channel of communication" between OA and requesters "regardless of whether they secure representation or advisory services from other organizations." We agree that there should be open lines of communication between OA and requesters, but the language of 3.1.1 should not be construed to limit requesters' right to have representatives or advisors present and included in all communications with the OA, if they so desire.

3.1.5 Training

We support the OA's offer of training to build requesters' capacity to effectively participate in the dialogue process. Only negotiation and dispute resolution professionals with experience working with vulnerable groups should conduct such training.

3.1.6 Agreements

We are pleased that the Draft Guidelines default to transparency of agreements reached as a result of problem-solving activities. This will increase public understanding of OA services and will promote effective monitoring of agreements by the parties, the OA, and the public. Obtaining sufficient budget for monitoring should be the duty of OPIC's Board and President, not the OA, and budget should not be a reason to suspend OA rules. OA guidelines that provide for exceptions to implementation where there is insufficient budget invite underfunding where there is lack of political will to uphold the rules and/or if the particular policy provision is not a priority of the Director. We recommend deleting "within its resources" so as not to de-prioritize this welcome advance in the OA's policy.

3.1.7 Termination of Problem-Solving

We object to the provision giving the OA discretion to unilaterally "suspend or terminate problem-solving, if continuing it is unlikely to produce positive results because for example, sufficient trust cannot be established or the integrity of the process has been irreparably damaged." Permitting the OA to suspend or terminate problem solving at any point in the process without consulting or adequately warning the parties is problematic and goes beyond the scope of the Board Resolution. If both parties to the dispute want to continue the problem-solving process despite common setbacks, the OA should make a firm commitment to do as much as possible to establish trust and mitigate any damage to the process before making the decision to terminate problem solving. There may often be periods in lengthy, ultimately successful, dispute-resolution processes where positive results may appear unlikely at a particular point in time. We suggest removing this provision from Section 3.1.7. However, should the OA decide to retain this provision, it should, at the minimum, warn all parties that the process will be terminated and give the parties a 60-day grace period to build trust and repair the process before termination.

3.1.8 Monitoring of Problem-Solving

We are pleased that the OA proposed to monitor implementation and compliance with agreements reached through problem solving, but recommend deleting the reference to practicability. Although budget and resources are relevant concerns, the reference to practicability de-prioritizes this provision and may invite underfunding.

Monitoring should include potential site visits, if necessary. Additionally, we recommend that the OA publish reports on its monitoring biannually until the Director concludes that all implementation issues are resolved.⁹

3.1.9. Reporting

We commend the OA for publishing the full report on the outcome of the problem-solving process on its webpage. This contributes to the transparency of the process, which will in turn foster trust between the OA and affected communities. The OA should include a requirement that the full report be “promptly” posted on the OA’s webpage.

IV. Section 4: Compliance Review

4.3. Appraisal

We object to the introduction of an appraisal stage of compliance review and recommend that the OA send cases of compliance directly to a full investigation after eligibility is confirmed. The OPIC OA Board Resolution mandates investigations of eligible complaints but *does not authorize* this extra barrier of an “Appraisal” step.

The introduction of the appraisal stage permits the OA to close a case without conducting a comprehensive investigation of the facts and encourages OA decision-making based on incomplete and one-sided information. Although the OA states that it will consider potential benefits to requesters when determining whether to conduct a full investigation, none of the existing criteria give requesters a role in the appraisal process. Based on the experiences of other accountability mechanisms, we are concerned that too few cases will receive a full investigation, despite evidence of eligibility and policy violations leading to substantial harm on the ground. In addition, eschewing full investigation of OPIC’s compliance with social and environmental policies reduces opportunities for and quality of OPIC’s institutional learning.

If the OA chooses, despite these serious issues, to officially adopt the appraisal stage, we have the following comments:

- We have concerns that criterion three will limit the OA’s independence from OPIC Management, and reduce transparency and fairness for requesters. If the OA discusses allegations of non-compliance with Management and the steps OPIC has already taken to address the causes of these risks before determining whether to conduct a full investigation, Management has the opportunity to

⁹ Our proposal reflects best practices for IAMs. For example, the EBRD’s PCM monitors the implementation of any agreement reached during a Problem-Solving Initiative. Moreover the PCM issues a Problem-Solving Initiative Monitoring Report at least biannually or until the PCM determines that all implementation issues are concluded. *European Bank for Reconstruction and Development’s Project Complaint Mechanism, Rules of Procedure*, section 34.

characterize the facts and unfairly influence the OA’s decision to fully investigate the matter.

- The appraisal process also appears to require the OA to apply a cost-benefit analysis for determining if a full compliance investigation is appropriate. Such an analysis could sacrifice requesters’ interests in order to avoid the institutional cost of a full compliance investigation. When the Board and Congress created the OA, neither intended that the right of a requester to seek compliance review should be weighed on a discretionary basis against the cost to OPIC and project sponsors. While the Board Resolution does mention that the OA should be “cost effective,” it also calls on the OA “to provide a forum to investigate and report on complaints regarding OPIC’s compliance” and does not limit such investigations to those that pass an initial and highly discretionary appraisal process.¹⁰ The OA should be cost-effective in fulfilling its duties, but the Board Resolution does not permit the OA to fail to fulfill its duties under the guise of being “cost-effective.” With just four cases in its entire history, it is hard to understand how resource concerns could be driving steps at this point to limit access to the OA.
- An eligibility assessment has already happened before the appraisal determination takes place. Duplicating assessment processes creates unnecessary delays and barriers to access while causing institutional inefficiencies. The necessary questions for an appraisal process should be answered during the eligibility assessment and investigations and reports commissioned should be part of the Investigation phase.

While we agree that the focus of a compliance review is on OPIC’s actions, working directly with affected communities during all stages of compliance is important because requesters can provide valuable information relevant to fact gathering about compliance. We therefore recommend that the Guidelines include a provision that allows requesters to meaningfully participate in the appraisal process by commenting on appraisal reports, consulting with the OA on factual issues, and having their input fairly considered during appraisal determinations.

4.3.2. Appraisal Report

Terms of Reference for full compliance investigations should be drafted in consultation with communities. Requesters should also have the opportunity to prepare a response to the appraisal report, especially if the OPIC OA decides that full investigation is not warranted.

4.4. Full compliance investigation

We suggest that the OPIC Procedures Manual be listed under policies that could potentially be covered during a compliance investigation by the OPIC OA.

¹⁰ See Board Resolution at §§ 1-2.

4.4.1. Management of the Investigation

The OA Director's direct participation in both dispute resolution and compliance creates potential for bias. For example, after conducting a problem solving initiative, the Director could reach conclusions about the parties or the issues that cloud the Director's ability to undertake an independent investigation of the separate issues of OPIC policy compliance. The OA should receive sufficient staffing resources to avoid this potential conflict. Furthermore, the OA should not engage consultants with a conflict of interest, regardless of the timing of their last engagement with OPIC.

4.5. Draft report

As currently written, the Draft Guidelines cut the requesters out of the process once the OA Director issues the draft report regarding findings of non-compliance. As mentioned above, requesters are a rich source of information pertaining to OPIC's compliance with policies that were intended to protect them. Requesters should have the same opportunity given to OPIC Management and all relevant departments to review and comment in writing on any draft report. The OPIC OA should be required to consider requesters' comments and amend the draft report accordingly. Maximizing transparency and information disclosure during the compliance review process reinforces the OA's credibility and public confidence in the process.

4.8. Monitoring

We commend the OA for providing an unqualified commitment to monitor implementation of any actions to be taken by OPIC in response to a compliance investigation. However, we recommend that the OA also commit to regularly monitor and publicly document implementation until actions taken by OPIC assure the OA that OPIC is addressing the non-compliance sufficiently. Moreover, to increase transparency and learning, full compliance reports should be published on OPIC's webpage in addition to the summaries available in the OA's annual report.

V. Section 5: Communication and Public Disclosure

We commend the OA's commitment to providing information on the status of cases on its webpage. Providing this information is key to maintaining and strengthening the transparency and credibility of the OA and its processes.

5.2 Disclosure of Sensitive Information

While we understand that confidential information will not be disclosed, the OA should be willing to respond to information requests pertaining to OPIC projects that relate to whether or not complaints are eligible under the OA's rules. While some of this information may be considered "sensitive," the OA must assist requesters in obtaining the

information required to know if they may file a complaint. Failing to do so will create unnecessary barriers to access.

Thank you for your attention to these issues. We appreciate this opportunity to comment on the OA Draft Guidelines, and we look forward to continuing to engage with the OPIC OA. Please do not hesitate to contact us if you have any questions or would like to discuss these comments in further detail.

Sincerely,

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