

Overseas Private Investment Corporation

Office of Accountability

**Operational Guidelines Handbook for Problem-Solving and
Compliance Review Services**

DRAFT FOR PUBLIC COMMENT

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1. Introduction

1.1. Purpose

This handbook describes the operational guidelines that the Office of Accountability (OA) applies in response to externally generated requests for its services.

1.2. Guiding Principles

Consistent with its governing documents, the OA seeks to provide its services in a manner that is:

- fair in the treatment of its parties;
- objective by avoiding pre-conceptions and applying a rule of reason;
- accessible and responsive to its parties;
- transparent and predictable in interactions, while respecting confidentiality;
- independent of OPIC's operations; and
- cost effective and efficient.

1.3. Authorities

Problem-solving authority is the authority to review and attempt to resolve conflicts between affected parties and OPIC clients relating to environmental or social aspects of OPIC-supported projects. This authority does not include taking a position on the accuracy of any allegations made by a party to the conflict, nor does it include proposing or imposing a solution. Rather, it seeks to create conditions such that parties will arrive at a mutually acceptable resolution to the conflict.

Compliance review authority is authority to investigate and report on complaints or concerns regarding OPIC's compliance with its governing statutes, rules, policies and procedures related to environmental, social, worker rights and human rights effects of an OPIC-supported project. This authority does not extend to investigation of any party other than OPIC, such as clients and public authorities. Nor does the authority extend to allocating responsibility for any adverse project effects among OPIC, the client, or other parties.

The exercise of either of these authorities has no direct effect on OPIC's financing or its clients' implementation of subject projects.

1.4. Definitions

An affected party is an individual(s), community authority(ies), company employee(s), or any other party that is or is likely to be materially, directly, and adversely affected by an OPIC-supported project.

An OPIC client is an organization that has executed a financing or insurance agreement with OPIC. An OPIC client may also be a fund manager or local partner in an Investment Funds project.

An OPIC project is a direct finance, insurance, or investment fund transaction that is approved by OPIC's Board (or by OPIC's Management for smaller projects that do not require Board approval) and where the client has an outstanding financial obligation to OPIC, or where there is an active insurance agreement.

The Office of Accountability (OA) consists of the Director of the Office of Accountability who is responsible for exercising its problem-solving and compliance review authorities, OA staff, and external consultants.

1.5. Form of Requests

The OA will consider requests for service that are submitted as follows:

- 1.5.1. A request for service may specify problem-solving, compliance review, both, or neither explicitly.
- 1.5.2. Problem-solving requests may be submitted by affected parties or by OPIC clients.
- 1.5.3. Compliance review requests may be submitted by affected parties, OPIC's Board, or OPIC's CEO.
- 1.5.4. 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. For example, workers at a project might be represented by their local labor union.
- 1.5.5. Requests from affected parties may be submitted confidentially, but anonymous requests will not be accepted.
- 1.5.6. Requests may be written in English or in the language of the requestor. Requests may be submitted via email, fax, mail, or hand delivery.

2. Initial Assessment

2.1. Eligibility determination

When the OA receives a request for service, it makes a preliminary determination regarding the eligibility of the request. Criteria for making this determination include the following:

- 2.1.1. The requestor is eligible. Requests may be submitted by an affected party, an OPIC client, or a party that is documented to be their authorized representative.
- 2.1.2. The requestors' individual identities are clear, even when the OA is requested to keep their identities confidential.
- 2.1.3. The request pertains to an identified OPIC project.
- 2.1.4. The request relates to a project for which OPIC has demonstrated its interest in financing. Such interest would commence when a commitment letter or insurance contract is issued. Requests that are submitted about a project prior to this point may be considered eligible in unusual circumstances; for example, if a project Environmental Impact Assessment has been posted and project construction is proceeding. In no case will the OA consider a request to be eligible if OPIC has not received a retainer fee from the client. OPIC's support ends for eligibility purposes with the termination of OPIC's contractual relationship with the project or, in the case of financial intermediaries, when the financial intermediary is no longer contractually engaged with the project.
- 2.1.5. The OA may, however, consider a request for compliance review to remain 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.
- 2.1.6. Requests submitted by affected parties contain allegations of material, direct and adverse impacts or risks from the OPIC-supported project. (It is not necessary for affected parties requesting problem-solving or compliance review to specify OPIC policies or host country laws they believe have not been followed.)
- 2.1.7. Requests submitted by OPIC clients describe either an ongoing or emerging dispute or the potential for a dispute to emerge between affected parties and the client concerning some environmental or social aspect of the project.

- 2.1.8. For problem-solving requests only, good faith efforts to resolve the issue have been made (such as through the project's grievance mechanism) but have not been satisfactory to the requestor. This criterion does not apply in situations when the requestor has asked that the OA keeps his or her identity confidential.
- 2.1.9. The OA will not consider the following issues to be eligible for its services:
- matters previously considered by the OA unless new information has come to light;
 - malicious or trivial matters, or to gain competitive advantage;
 - procurement, contractual, or other purely commercial issues;
 - allegations of criminal activities;
 - adequacy of current OPIC policies to prevent harm; or
 - personnel matters other than labor rights issues¹.

Upon reviewing a request against eligibility criteria, the OA will declare it to be eligible or ineligible, or if information is not sufficient to make this determination, the OA will request further information to make it complete. Upon making an eligibility determination, the OA will notify the requestors, OPIC, and the OPIC client in writing. If the request is deemed eligible, the OA will inform the parties of next steps. The OA will also notify parties to the conflict that an eligibility determination is purely administrative and does not imply any judgment by the OA regarding allegations made. If the request is deemed ineligible, the OA will provide the reasons and may offer alternative means for the requestors to have their concerns addressed.

2.2. Assessment

Once a request is deemed eligible, the OA will assess the situation to determine which service to provide and in which order.

2.2.1. Site visit

The OA's assessment may include a site visit. If a site visit is conducted, the OA will meet with affected parties, project sponsors, and any designated representatives of the parties. The OA may also meet with host government representatives and other stakeholders.

¹ Labor rights issues include but are not limited to freedom of association, prohibitions on child labor, unsafe working conditions, bonded labor.

During the site visit, the OA may:

- Undertake a stakeholder mapping exercise;
- Evaluate the extent to which further efforts to address the conflict bilaterally with local third parties would be productive,² and;
- Ensure that there is adequate understanding among the parties of the OA's two services, including their potential benefits and limitations and the implications of the order in which services are provided.

2.2.2. Report

Based on information gleaned during the site visit, the OA will typically prepare an assessment report that informs the parties about the services to be provided. In cases where the OA Director determines that further efforts to resolve the conflict bilaterally might be fruitful, the Director will so inform OPIC and the parties, and identify any local problem-solving resources. For problem-solving requests, the Director may also provide a time-bound opportunity for relevant OPIC officials to work with the client to address the issues before initiating the OA's own services, unless there is imminent risk of harm to lives or livelihoods.

If, in the course of conducting an assessment where the incoming request has been for problem-solving only, the OA determines that a review of OPIC's application of relevant policies would also be useful for institutional learning, the OA Director will send a memo to OPIC's President recommending that OPIC request a compliance review.

2.3. Timing

Timing guidelines for eligibility determination and assessment phase are as follows.

- 2.3.1. The OA will acknowledge receiving the Request within five business days.
- 2.3.2. The OA will refer the Request to relevant OPIC managers for information and comment. Management is expected to respond within 10 business days.
- 2.3.3. The OA will notify requestors, OPIC's client and OPIC management of its determination of the Request's eligibility for service within 20 business days of acknowledging the request unless additional information is needed.

² The OA will not require good faith efforts to resolve the dispute prior to its involvement in cases where the requestor prefers confidentiality. The OA will notify such requestors 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.

2.3.4. The OA will conduct an assessment within 30 business days of notifying the parties to the request of its eligibility.

2.3.5. The OA will transmit an assessment report to the parties and to OPIC within 40 business days of the eligibility determination.

When requests are submitted in languages other than English, the above timing guidelines may be adjusted to allow for translation. The timing of the above steps may also be adjusted to accommodate OA resources and the engagement of OPIC management with the client.

3. Problem-solving

3.1. Process

The problem solving function focuses on finding ways to address the issues raised rather than on identifying or allocating responsibility. The OA takes no position on the validity of the allegations made. It seeks to build the parties' trust in the process and with each other in order to create conditions conducive to resolving the issues raised.

3.1.1. Communication

In order to identify the underlying interests of requestors, an essential element of the problem-solving process is for the OA to establish and maintain a direct channel of communication and relationships with the requestors, regardless of whether they secure representation or advisory services from other organizations.

3.1.2. Timing

A problem-solving process can take different paths, and the OA will seek to be flexible and responsive to the parties' preferences as long as there is progress towards a resolution. Accordingly, it is difficult at the outset to predict how many meetings will be required and how much time the problem-solving process will take.

3.1.3. Tools

The OA has the ability to mobilize different tools for problem-solving, including the following:

- convene a mediated dialogue table or multi-stakeholder roundtable led by an independent mediation specialist;
- facilitate direct negotiation between the parties to generate a solution;
- promote joint fact-finding or commission technical studies; and
- engage the host country government.

There are no out-of-pocket charges for any of these services.

3.1.4. Ground-rules

The OA will seek the parties' pre-agreement to ground rules prior to initiating any of these tools. If mediated dialogue is to be used, for example, OA will generally seek pre-agreement among the parties on the rules of engagement, how each party will be represented at the table, meeting venue and other logistical matters, the substantive scope of the dialogue, and non-disclosure of sensitive information. The OA will seek to maintain adherence to pre-agreed ground-rules for the dialogue, while remaining flexible to the constraints of the parties and respectful of local cultural norms as long as the integrity of the dialogue process is protected.

3.1.5. Training

If the parties agree to either mediated or direct dialogue, OA may offer training to strengthen their capacity to effectively participate in the dialogue process.

3.1.6. Agreements

The OA will ask that the parties to put in writing and sign any agreements reached during the problem-solving process. The OA will post the agreements on its website unless a party objects. The OA will monitor compliance by the parties with these agreements within its resources.

3.1.7. Termination of problem-solving

The OA will terminate the problem-solving process if any party withdraws from the process at any time for any reason. In addition, The OA reserves the right to 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.

3.1.8. Monitoring

The OA will monitor the implementation of any agreements reached in response to the problem-solving action, to the extent practicable. Actions involving a change in the project's design or operation may require OPIC's approval, according to OPIC's policies and procedures.

3.1.9. Reporting

The OA Director will report results of the problem-solving action to the P&CEO and to the OPIC Board. When the problem-solving process is completed, with or without agreement, the OA Director will submit a report to OPIC's President, with copies to OIP and the relevant financing department. If the parties have resolved the problem, the report will describe the process followed and attach a copy of any agreements reached. If attempts to resolve the problem have not been successful, the report will so advise OPIC's President and Board. The OA

will prepare a final report on the outcome of the problem-solving process, which will be posted on the OA's webpage.

4. Compliance review

4.1. General

In a compliance review, the OA investigates and reports on OPIC's implementation of policies and procedures with respect to an individual project or a set of projects about which a request for compliance review has been made. The focus of the review is on OPIC's rather than the client's actions. The OA's ultimate goal is to improve the environmental and social sustainability of the OPIC project under review and of future OPIC projects.

4.2. Scope

The potential scope of an OA compliance review includes OPIC's implementation of policies governing environmental and social impacts, human rights, worker rights, transparency, and anti-corruption. Because OPIC's policies evolve over time, the benchmark for review is the set of policies in effect when the OPIC client submits its request for OPIC financing. As of 2013, for example, OPIC's 2010 Environmental Social Policy Statement encompasses much of the potential scope for compliance reviews. (See <http://www.opic.gov/doing-business-us/OPIC-policies> for a list of current OPIC policies.) A compliance review may examine both whether or not the set of policies applied was appropriate to the project and how the applied policies were actually implemented by OPIC.

4.3. Appraisal

The OA first performs an appraisal in order to determine if a full investigation is the most appropriate response to a request for compliance review. The OA reviews available project-related documentation, and discusses allegations of non-compliance with Management. As part of the appraisal, the OA will refer the compliance review request to the relevant OPIC departments with a request for comments and information. The appraisal may also involve commissioning an external study, and/or a site visit to better understand the concerns raised in the request. The appraisal process will identify OPIC policies that are relevant to the incoming request for compliance review, but does not determine OPIC's compliance with relevant policies.

4.3.1. Appraisal Considerations

Several risk-based considerations help guide the OA in determining whether or not the potential benefits to the requestors, OPIC, and the client merit the time and resources involved in conducting a full investigation:

- 1) To what extent is there evidence of direct and material harm or risk of future harm caused by the OPIC-financed project?

For assessing evidence of direct and material harm, the OA will compare the prevailing conditions with the project with conditions that would have occurred without the project, within the availability of relevant information. Non-accomplishments and unfulfilled expectations will not be considered evidence of direct and material harm.

- 2) To what extent is there evidence of a causal relationship between the manner in which OPIC implemented its operational policies and procedures and the alleged harm or risk of future harm?

In appraising the situation, the OA will seek evidence that this causal relationship exists. Finding such evidence supports conducting a full investigation.

- 3) To what extent has OPIC identified the underlying sources of risk to the requestors and has taken steps to address them?

If OPIC is apparently unaware of the risks posed in the request, this suggests the value of conducting an investigation. On the other hand, if OPIC has already taken steps to address the causes of these risks, the value of conducting an investigation is reduced.

- 4) How likely is it that an investigation would yield additional information useful for eliminating the sources of harm, by changing how OPIC applies its policies to the subject project going forward or to future projects?

The output of an investigation is information that can be used to make decisions. A finding that such information would be valuable in terms of the subject project or future projects supports the value of conducting an investigation. An investigation would also be warranted if the OA was not able to obtain adequate information during the appraisal process to make the above (1-3) determinations.

4.3.2. Appraisal Report

The OA will prepare an appraisal report that includes its decision whether or not to conduct a full compliance investigation, the reasons for that decision, and any observations and suggestions that it deems appropriate. These may relate to the subject project or to future projects. If the OA determines that an investigation is warranted, the appraisal report will contain its Terms of Reference.

The OA Director submits the appraisal report to OPIC's President. The Director's decision whether or not to proceed with an investigation will be taken in consultation with OPIC's President; however, the Director has the authority to make the final decision. The OA will notify the Requestor, the sponsor, and relevant OPIC staff in writing of this decision. The decision is not subject to appeal.

The OA will request that OPIC management prepare a response to any observations or suggestions contained in the appraisal report. If an investigation is not warranted, the OA will close the compliance review component of the case, after posting management's response to the appraisal report on the OA's website.

4.4. Full compliance investigation

In general, a compliance investigation is intended to provide observations and analysis regarding the application and implementation of relevant OPIC policies and procedures in effect at the time of the consent application. The OA will examine OPIC's implementation of relevant policies in the course of its due diligence, client engagement, approvals, and monitoring of the OPIC-supported project. Policies that could potentially be covered under a compliance investigation include (but are not necessarily limited to) the following:

- Environmental and Social Policy Statement, October 15, 2010.
- International Finance Corporation's Performance Standards on Social and Environmental Sustainability (*subsequent revisions to those standards, see Environmental and Social Policy Statement*)
- International Finance Corporation's Industry Sector Guidelines (*subsequent revisions to those standards, see Environmental and Social Policy Statement*)
- Labor Rights, which includes Internationally Recognized Worker Rights (as specified Trade Act of 1974), *see Environmental and Social Policy Statement.*
- For projects involving the construction and operation of dams, considers the core values and strategic priorities as identified in the November 2000 Report of the World Commission on Dams.
- Transparency standards (e.g. public disclosure of information, coordination of project development with affected communities, due diligence screening, and compliance with Extractive Industries Transparency Initiative and Anti-Corruption initiative).
- Host Country environmental, health, safety, and social requirements.

4.4.1. Management of investigation

The OA will manage the investigation and may participate in it directly. If OA contracts with outside consultants to assist, external experts who have provided non-OA services to OPIC in the previous 12 months will not participate in compliance reviews in order to ensure the independence of the process. Access to information

Once an investigation is initiated, the OA will have access to information and assistance from a variety of sources including:

- *OPIC staff and records* -- Any interviews of OPIC staff will be conducted in accordance with applicable law and will be organized through a designated point of contact within OPIC;
- *Technical consultants* -- The Office of Accountability may arrange to have outside expert technical advice provided, in cases where the Office of Accountability does not have all the expertise it considers necessary to make a determination in the specific investigation;
- *The Requestor* -- The Office of Accountability may consult with the Requestor, who may provide any supplemental information that s/he believes is relevant to the audit;
- *The Project Sponsor* -- May be contacted directly or through an OPIC point of contact.
- OPIC's Office of the General Counsel will facilitate the OA's access to legal advice on the relevant laws and regulations of the host country as needed.

4.5. Draft report

The OA Director will set forth findings from the investigation in a draft report to OPIC's President, which will:

- Summarize the information that was taken into account to produce findings and identify the sources of this information;
- Provide observations as to OPIC's compliance with relevant policies and procedures; and
- If appropriate, offer recommendations for improving OPIC's engagement with the subject project and/or systemic recommendations for improving its application of policies to future projects.

The report will provide OPIC's President with a basis for determining OPIC's compliance with relevant policies and deciding whether any preventive or corrective action should be taken. The OA will circulate the draft report to OPIC management and all relevant departments for factual review and comment.

4.6. Final report

The OA Director will transmit the final report to OPIC's President, with copies to all vice presidents. Once the findings have been discussed with senior management, the Director will transmit a summary to the Requestors and post it on the OA's website.

4.7. OPIC Management response

The OA will request that OPIC prepare a written response to each project specific or systemic finding contained in the final compliance report. Management's responses, which will be posted on the OA website, are expected to include any follow up actions that it considers to be appropriate.

4.8. Monitoring and reporting

The OA will monitor implementation of any actions to be taken by OPIC in response to a compliance investigation, report to OPIC's President on an annual basis, and summarize its monitoring in the OA's annual report.

4.9. Timing guidelines

- 4.9.1. The OA will complete the appraisal report within 60 business days from initiating the compliance review phase of the case.
- 4.9.2. The OA will request that OPIC Management respond in writing to the appraisal report within 15 business days.
- 4.9.3. If a full investigation is called for, the OA will seek to complete it within six months.
- 4.9.4. The OA will request OPIC Departments to respond in writing to the draft investigation report within 15 business days.
- 4.9.5. The OA will request that OPIC's President respond in writing to the final report within 15 business days of submitting it.

5. Communication and public disclosure

- 5.1. The OA has established a Registry on OPIC's public website to provide information on the status of cases. Information provided includes:
 - The original request for service (subject to requests for confidentiality)
 - Determination of eligibility
 - Initial assessment report
 - Agreements reached during problem solving process
 - Problem-solving interim and final reports
 - Compliance appraisal report

- Compliance investigation report
 - Management's proposed actions
 - Monitoring reports
 - Notice that case is closed
- 5.2. The OA will not disclose information identified by OPIC's disclosure policy and/or by OPIC, a sponsor, co-financier or relevant government as confidential or sensitive. Identities of OPIC personnel, OPIC personnel records and personnel information shall always remain confidential to the agency. Confidential information provided to the OA in the course of problem-solving and compliance review will remain confidential.
- 5.3. The OA will inform the Board in writing of key milestones in cases as they occur, and will report to the Board at least once a year.
- 5.4. The OA will post an electronic annual report of its activities on its webpage.
- 5.5. The OA will maintain a mailing list of external stakeholders that it will use periodically to transmit information about its activities.