

May 20, 2019

Via Electronic Mail

Ms. Catherine F. I. Andrade
Agency Submitting Officer
Overseas Private Investment Corporation
1100 New York Avenue NW
Washington, D.C. 20527

Re: Comments on DFC's Investment Funds Application (DFC-004)

Dear Ms. Andrade,

Thank you for the opportunity to comment on the United States International Development Finance Corporation's (DFC) Investment Funds Application (DFC-004). As civil society organizations and practitioners who advocate for accountability in development finance and support those who have been harmed by development projects, we have a deep interest in ensuring that DFC's projects adequately address risks to communities affected by these projects, which can undermine the sustainability of DFC's investments.

DFC, the new development finance institution created by the Better Utilization of Investments Leading to Development (BUILD) Act,¹ will subsume the Overseas Private Investment Corporation (OPIC) as well as the United States Agency for International Development's (USAID) Development Credit Authority. With a projected opening date of October 1, 2019, it is crucial that DFC is established with strong policies and practices. DFC-004 will be used to determine an investor's and project's eligibility for investment funds support.² Although investing in investment funds and other financial intermediaries (FIs) can help mobilize funds and attract private capital for economic development, this type of lending also comes with significant risks, particularly around clients' adherence to environmental and social safeguards.³

¹ The BUILD Act was passed as a part of the FAA Reauthorization Act. FAA Reauthorization Act of 2018, Pub. L. No. 115-254, §§1401-1470, <https://www.congress.gov/115/bills/hr302/BILLS-115hr302enr.pdf> [hereinafter "BUILD Act"].

² United States International Development Finance Corporation [DFC] & Overseas Private Investment Corporation [OPIC], Agency Information Collection Activities: Comment Request, 88 FR 10843 (Mar. 22, 2019), <https://www.federalregister.gov/documents/2019/03/22/2019-05436/submission-for-omb-review-comments-request>.

³ See the "Outsourcing Development" investigative series by Inclusive Development International, in collaboration with Bank Information Center, Urgewald, 11.11.11, Ulu Foundation, and Accountability Counsel. INCLUSIVE DEVELOPMENT INTERNATIONAL, OUTSOURCING DEVELOPMENT: LIFTING THE VEIL ON THE WORLD BANK GROUP'S LENDING THROUGH FINANCIAL INTERMEDIARIES, <https://www.inclusivedevelopment.net/wp-content/uploads/2016/09/Outsourcing-Development-Introduction.pdf>; see also COMPLIANCE ADVISOR OMBUDSMAN, CAO AUDIT OF A SAMPLE OF IFC INVESTMENTS IN THIRD-PARTY FINANCIAL INTERMEDIARIES (Oct. 10, 2012), http://www.cao-ombudsman.org/newsroom/documents/Audit_Report_C-I-R9-Y10-135.pdf; COMPLIANCE ADVISOR OMBUDSMAN, THIRD MONITORING REPORT OF IFC'S RESPONSE TO: CAO AUDIT OF A SAMPLE OF IFC INVESTMENTS IN THIRD-PARTY FINANCIAL INTERMEDIARIES (Mar. 6, 2017), http://www.cao-ombudsman.org/newsroom/documents/documents/CAOMonitoringReport_FIAudit_March2017.pdf.

It is therefore crucial that DFC's FI clients have robust environmental and social practices, including human rights, environmental, and social due diligence and monitoring of sub-projects as well as accountability and access to remedy for project-affected communities. DFC must properly screen and identify potential clients that lack these practices. Although this form will presumably be just one part of DFC's assessment of potential clients and projects, it is important that the form be robust enough to properly identify, at an early stage, projects that could result in potential negative impacts to communities affected by DFC projects. We accordingly provide the following recommendations for strengthening both DFC-004 and DFC's assessment of the information provided by the form:

Investment Policy & ESG

Several of the signatories to this submission made recommendations for the strengthening of OPIC's Investment Funds Department Questionnaire (OPIC-256) on February 8, 2018.⁴ As with OPIC-256,⁵ DFC-004 currently contains questions on the applicant's environmental, social, and governance (ESG) practices. Concerning developmental impact, DFC-004 requires each applicant to describe the developmental impact that the fund will have in the host country/countries. We recommend that DFC's assessment of this information provided on developmental impacts include screening and assessment of the risk that the fund's sub-projects will not achieve the promised developmental impacts. DFC should additionally commit sufficient resources for enhanced monitoring and site visits throughout the project cycle to ensure that all sub-projects, and particularly high-risk sub-projects, actually fulfill their projected developmental impacts.⁶

Unfortunately, DFC-004 has removed several questions from OPIC-256 on ESG practices. In response to our 2018 recommendations, OPIC modified⁷ a question asking about the fund's requirements for portfolio companies or borrowers to adhere to minimum standards regarding

⁴ ACCOUNTABILITY COUNSEL ET AL., COMMENTS ON OPIC'S INVESTMENT FUNDS DEPARTMENT QUESTIONNAIRE (OPIC-256) (Feb. 8, 2018), <https://www.accountabilitycounsel.org/wp-content/uploads/2019/04/2-8-18-submission-on-form-256.pdf>.

⁵ OPIC, INVESTMENT FUNDS DEPARTMENT QUESTIONNAIRE (n.d.), https://www3.opic.gov/OPICForms/Documents/OPIC_256_for_Reference_Purposes.pdf.

⁶ A February 1, 2019 USAID Office of Inspector General report highlighted shortcomings with OPIC's approach to assessing and monitoring development impacts, and issued several recommendations to improve OPIC's current practice and inform the practice of the future DFC. USAID OFFICE OF INSPECTOR GENERAL, OPIC INVESTMENTS INCREASED CHILE'S ENERGY CAPACITY, BUT WEAK PROCESSES AND INTERNAL CONTROLS DIMINISH OPIC'S ABILITY TO GAUGE PROJECT EFFECTS AND RISKS 17, 23-25, 28 (Report No. 9-OPC-19-002-P, Feb. 1, 2019), <https://oig.usaid.gov/index.php/node/1892>. See also ACCOUNTABILITY COUNSEL ET AL., JOINT COMMENTS ON OPIC'S DRAFT REVISED ENVIRONMENTAL AND SOCIAL POLICY STATEMENT (Nov. 23, 2016), <https://www.accountabilitycounsel.org/wp-content/uploads/2017/08/11.23.16-OPIC-ESPS-Joint-Submission-1.pdf>; U.S. GOVERNMENT ACCOUNTABILITY OFFICE, OVERSEAS PRIVATE INVESTMENT CORPORATION, ADDITIONAL ACTIONS COULD IMPROVE MONITORING PROCESSES (GAO-16-64, December 2015), <http://www.gao.gov/assets/680/674142.pdf>; USAID OFFICE OF INSPECTOR GENERAL, ASSESSMENT OF THE OVERSEAS PRIVATE INVESTMENT CORPORATION'S DEVELOPMENT OUTCOME AND COMPLIANCE RISKS (Report No. 8-OPC-15-002-S, May 15, 2015), <https://oig.usaid.gov/sites/default/files/2018-06/8-opc-15-002-s.pdf>.

⁷ OPIC, RESPONSE TO COMMENTS TO OPIC NOTICE ON FORM OPIC-256 82 FEDERAL REGISTER 58456 (DECEMBER 12, 2017) (Feb. 26, 2018), <https://www.accountabilitycounsel.org/wp-content/uploads/2019/05/response-to-comments-on-form-256.pdf>.

labor, human rights, and social and environmental risks. OPIC also modified a question on the fund's ESG practices and procedures with the addition of a question on the supervision of the implementation of ESG policies and procedures by portfolio companies, and a question about accountability and access to remedy and for negative sub-project impacts.

We are disappointed to see that these modified questions have been removed from DFC-004. DFC should deny funding to any applicant that does not require adherence to standards regarding labor, human rights, and social and environmental risks. Similarly, DFC should deny funding to any applicant that does not have robust ESG policies and procedures. Additionally, applicants should provide accountability and access to remedy, including through DFC's independent accountability mechanism (IAM),⁸ for project-affected communities in case of negative impacts from sub-projects. We accordingly recommend the re-addition of the appropriate OPIC-256 question with slight modifications (in bold):

(i) Does the Fund require portfolio companies or borrowers to adhere to minimum standards regarding labor, human rights, and social and environmental risks? (ii) Does the Fund have established ESG policies and procedures? If so, please describe the Fund's supervision of the implementation of these standards by its portfolio companies and/or borrowers. You may also refer to appropriate sections in the PPM or marketing presentation. Please also include references to the Fund's practices concerning provision of ~~access to~~ **access to** accountability and **access to** remedy for negative sub-project impacts on individuals and communities.

In this same ESG section, OPIC-256 asks applicants about their policies and procedures to screen investors and investees for "Know Your Customer" and reputational and integrity risks, and the application thereof to investments in the fund and investments by the fund in portfolio companies. Unfortunately, this question has also been removed from DFC-004 and should be re-added:

Has the Fund adopted policies and procedures to screen investors and investees for "Know Your Customer" and Reputational/Integrity Risk? (ii) If applicable, please describe how you apply these policies and procedures to investments in the fund and investments by the fund in portfolio companies.

Moreover, DFC should deny funding to any applicant that does not currently have robust policies and procedures.

Other – Miscellaneous

The Other – Miscellaneous section of DFC-004 includes a question on litigation, dispute resolution, and regulatory actions brought against the applying fund's manager, principals, or any portfolio companies. We appreciate that DFC-004 includes some of the modifications to OPIC-256 in response to our recommendations. However, we recommend further changes to

⁸ Section 1415 of the BUILD Act mandates the creation of an independent accountability mechanism for DFC. BUILD Act, *supra* note 1, §1415.

ensure that the questions comprehensively capture the necessary information on an applicant's involvement in grievance processes.

In addition to inquiring about litigation, dispute resolution, and regulatory actions, DFC-004 should require applicants to disclose if they are currently listed on any debarment lists at an international financial institution (IFI). Several IFIs have these lists, including the World Bank Group, African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, and Inter-American Development Bank. This requirement would help DFC identify applicants that have engaged in sanctionable conduct at these and other IFIs. This section should add the following:

Is the Fund or any portfolio companies currently listed on any publicly available debarment lists at an international financial institution, including the World Bank Group, African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, and Inter-American Development Bank? If so, please provide additional information.

In addition to debarment lists, several IFIs, including OPIC and DFC, have IAMs that receive complaints concerning IFI-financed activities and offer to convene the complainants (often members of project-affected communities), the IFI's client, and other relevant parties to resolve the conflict, conduct an investigation to determine if the IFI's environmental and social policies have been violated, or both. Similarly, governments adhering to the Organisation for Economic Co-operation and Development's (OECD) Declaration on International Investment and Multinational Enterprises,⁹ including the United States, are required to establish a National Contact Point (NCP) to receive complaints (known as "specific instances") against companies that are operating in or from their respective countries and that have allegedly violated the standards in the OECD Guidelines for Multinational Enterprises.¹⁰ NCPs are able to offer "good offices," which can include conciliation or problem solving to the complainants and the company to facilitate resolution of the dispute.¹¹

In order to minimize risks to DFC and its investments, DFC should require applicants to disclose prior, current, or pending involvement in or association with an IAM, NCP, or other community-related complaint. Since most IAMs have the ability to conduct a compliance review investigation and are not limited to facilitating dispute resolution, asking only about dispute resolution processes would not be sufficient. This can provide useful information on both applicants' practices, including environmental and social practices, and their willingness to rectify problems that may occur. Accordingly, the following should be added to this section:

⁹ Organisation for Economic Co-operation and Development [OECD], *OECD Declaration on International Investment and Multinational Enterprises* (2011), <http://www.oecd.org/daf/inv/investment-policy/oecddeclarationoninternationalinvestmentandmultinationalenterprises.htm>.

¹⁰ The OECD Guidelines for Multinational Enterprises are a component of the OECD Declaration on International Investment and Multinational Enterprises. OECD, *OECD Guidelines for Multinational Enterprises* (2011), <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

¹¹ OECD, *Specific Instances Mechanism of the OECD Guidelines for Multinational Enterprises*, <http://mneguidelines.oecd.org/specificinstances.htm> (last visited Apr. 1, 2019).

Is the Fund and/or its portfolio companies currently or previously involved in or associated with a complaint at an Independent Accountability Mechanism of an International Financial Institution, including, but not limited to, the World Bank Group, African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, and Inter-American Development Bank? If so, please provide additional information on the nature and status of the complaint(s).

Is the Fund and/or its portfolio companies currently or previously involved in or associated with an OECD National Contact Point complaint? If so, provide additional information on the nature and status of the complaint(s).

Thank you for considering our recommendations. We look forward to continued engagement with DFC to ensure that the agency is a leader in environmental, social, and human rights accountability so that projects will result in benefits to the American people and communities around the world.

Sincerely,

Abibiman Foundation – Ghana
Accountability Counsel – United States
Actions Paysages contre la Faim – Democratic Republic of the Congo
African Coalition for Corporate Accountability (ACCA) – South Africa
Buliisa Initiative for Rural Development Organisation (BIRUDO) – Uganda
Center for Biological Diversity – United States
Center for International Environmental Law (CIEL) – United States
Centre for Human Rights and Development – Mongolia
COMPPART – Nigeria
Conseil Régional des Organisations Non Gouvernementales de Développement – Democratic Republic of the Congo
Friends of the Earth U.S. – United States
Fundación Ambiente y Recursos Naturales – Argentina
Gender Action – United States
Greenpeace U.S. – United States
International Accountability Project (IAP) – United States
Lumière Synergie pour le Développement – Senegal
Nash Vek Public Foundation – Kyrgyzstan
Observatoire d'Etudes et d'Appui à la Responsabilité Sociale et Environnementale (OEARSE) – Democratic Republic of the Congo
Oyu Tolgoi Watch – Mongolia
Rivers without Boundaries Coalition – Mongolia
Youth For Environment Education And Development Foundation (YFEED Foundation) – Nepal
Youth Group on Protection of Environment – Tajikistan

cc: The Honorable David Bohigian, Acting President and Chief Executive Officer, OPIC

Mr. Ryan Brennan, Chief Operating Officer, OPIC

Ms. Anne Lesser, Acting Deputy Vice President, Office of Investment Policy, OPIC