

An hourglass-shaped graphic with a globe in the top bulb and another globe in the bottom bulb. The hourglass is light blue and has a dark blue top and bottom. The globe in the top bulb is dark blue, and the globe in the bottom bulb is light blue. The text is centered within the hourglass.

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*Overseas Private Investment Corporation: Financing
Requirements and Restrictions*

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Overseas Private Investment Corporation: Financing Requirements and Restrictions

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Summary

Congress established the Overseas Private Investment Corporation (OPIC) in 1969 to promote and assist U.S. business investment in developing nations. As part of its responsibilities, Congress has appropriated OPIC's budget and determined its overall lending levels annually and has reauthorized the corporation on a periodic basis. OPIC was last reauthorized in 1999 (P.L. 106-158; H.R. 3381) through September 30, 2003. The Corporation is a U.S. government agency that provides project financing, investment insurance, and other services for U.S. businesses in 150 emerging markets and developing economies. OPIC is directed to "mobilize and facilitate the participation of United States private capital and skills in the economic and social development of less developed countries and areas, and countries in transition from nonmarket to market economies."¹ Since Congress established OPIC it has amended the corporation's legislation to restrict OPIC's ability to approve transactions with firms involved in certain specified activities. It is difficult to estimate how these restrictions have affected demand for OPIC's services. This report will be updated as warranted by events.

Overview

OPIC's programs are intended to promote U.S. private investment in less developed countries by reducing risks, especially political risks (including currency inconvertibility, expropriation, and political violence), for U.S. firms associated with overseas investment. To accomplish these goals, OPIC is authorized to finance U.S. investment through loans and guarantees, insure against political risk, and provide various investor services. OPIC's authority to guarantee and insure U.S. investments abroad is backed by the full faith and credit of the U.S. government and OPIC's own substantial financial resources. Although OPIC offers U.S. firms an array of services, its activities can be grouped into three categories: finance, including direct loans; insurance, primarily insurance against

¹ 22 U.S.C. Section 2191.

currency inconvertibility, expropriation, and political violence; and investment development, or pre-investment services to aid U.S. investors.

Congressional Restrictions

In establishing OPIC, Congress directed the Corporation to assist U.S. firms and small businesses' foreign operations and focus on projects that have "positive trade benefits for the United States." Congress also directed OPIC to decline its services under certain circumstances by utilizing "broad criteria," without reference to any specific industries, projects, or economic sectors within the U.S. economy. Specifically, Congress directed OPIC to decline its services for projects it determines could reduce production or employment in the United States, either because a U.S. firm shifts part of its production abroad, or because output from an overseas investment will be shipped to the United States and "reduce substantially the positive trade benefits" of the investment.² Through successive amendments, Congress also barred OPIC from participating in projects that pose an "unreasonable or major environmental health, or safety, hazard," or participating in countries that do not "extend internationally recognized workers rights," or that impose domestic content requirements.

U.S. Production.

In 22 USC Section 2191(3), Congress placed a number of restrictions on OPIC's activities. These restrictions, added in 1974 (P.L. 93-390) and 1978 (P.L. 95-268), were the first restrictions Congress placed on OPIC's activities. In subsection (k)(1), OPIC is restricted from providing its services if it determines that a potential investment may have a negative impact on U.S. production:

[OPIC is] to decline to issue any contract of insurance or reinsurance, or any guaranty, or to enter into any agreement to provide financing for an eligible investor's proposed investment if the Corporation determines that such investment is likely to cause such investor (or the sponsor of an investment project in which such investor is involved) significantly to reduce the number of his employees in the United States production [sic] he is replacing his United States production with production from such investment which involves substantially the same product for substantially the same market as his United States production; and (2) to monitor conformance with the representations of the investor on which the Corporation relied in making the determination required by clause (1);

U.S. Employment.

Through the Public Laws adopted in 1974 and 1978, Congress requires OPIC in 22 USC Section 2191(3)(l) to decline its services if it determines that a foreign investment may result in a "significant reduction" in U.S. employment:

(OPIC is) to decline to issue any contract of insurance or reinsurance, or any guaranty, or to enter into any agreement to provide financing for an eligible investor's proposed investment if the Corporation determines that such investment is likely to cause a significant reduction in the number of employees in the United States;

² 22 U.S.C. Section 2191, 3(k)(1).

Foreign Performance Requirements.

In 1981, Congress amended OPIC's statutes through P.L. 97-65 to require it in 22 USC Section 2191(3)(m) to decline its services if a foreign investment involves foreign content requirements that reduce the positive trade benefits for the U.S. economy:

(OPIC is) to refuse to insure, reinsure, or finance any investment subject to performance requirements which would reduce substantially the positive trade benefits likely to accrue to the United States from the investment;

Environment, Health, Safety.

OPIC is also required in 22 USC Section 2191(3)(n), amended in 1985 through P.L. 99-204, to decline its services if it determines that the foreign investment will have a negative effect on the environment, health, or pose a safety issue:

(OPIC is) to refuse to insure, reinsure, guarantee, or finance any investment in connection with a project which the Corporation determines will pose an unreasonable or major environmental, health, or safety hazard, or will result in the significant degradation of national parks or similar protected areas.

Workers' Rights.

In 22 USC Section 2191a(1), also amended in 1985 through P.L. 99-204, OPIC is required to decline its services if it determines that the country where the investment is located is not recognizing certain basic worker rights:

The Corporation may insure, reinsure, guarantee, or finance a project only if the country in which the project is to be undertaken is taking steps to adopt and implement laws that extend internationally recognized worker rights, as defined in section 2467(4) of title 19, to workers in that country (including any designated zone in that country).

OPIC may gain a waiver from the above requirement upon the determination of the President that the investment is in the "national economic interests" of the United States, as indicated in 22 USC Section 2191a(a)(3):

Paragraph (1) shall not prohibit the Corporation from providing any insurance, reinsurance, guaranty, or financing with respect to a country if the President determines that such activities by the Corporation would be in the national economic interests of the United States. Any such determination shall be reported in writing to the Congress, together with the reasons for the determination.

Environmental Impact.

Congress has adopted various measures that require OPIC, and other government agencies whose operations have an effect beyond U.S. borders, to take into account the impact their programs may have on the environment of developing countries. These measures include:

Provisions of a measure enacted in 1972, through P.L. 92-226, codified in 22 USC 2199(g) and amended extensively in 1985 through P.L. 99-204, requiring OPIC to conduct environmental impact assessments:

The requirements of section 2151p(c) of this title relating to environmental impact statements and environmental assessments shall apply to any investment which the Corporation insures, reinsures, guarantees, or finances under this subpart in connection with a project in a country.

(h) Preparation, maintenance, and contents of development impact profile for investment projects; development of criteria for evaluating projects. In order to carry out the policy set forth in paragraph (1) of the second undesignated paragraph of section 2191 of this title, the Corporation shall prepare and maintain for each investment project it insures, finances, or reinsures, a development impact profile consisting of data appropriate to measure the projected and actual effects of such project on development. Criteria for evaluating projects shall be developed in consultation with the Agency for International Development.

In 1985, through P.L. 99-204, Congress amended 22 USC Section 2191 to require: The Corporation, in determining whether to provide insurance, financing, or reinsurance for a project, shall especially -

(3) ensure that the project is consistent with the provisions of section 2151p of this title, section 2151p-1 of this title, and section 2151q of this title [originally designated as sections 117, 118, and 119; redesignated by the Special Foreign Assistance Act of 1986] relating to the environment and natural resources of, and tropical forests and endangered species in, developing countries, and consistent with the intent of regulations issued pursuant to section 2151p of this title, section 2151p-1 of this title, and section 2151q of this title.

Other Environmental Restrictions.

OPIC is also subject to three provisions of the Foreign Assistance Act, the first of which is contained in 22 USC Section 2151p. This provision was adopted in 1979 through P.L. 96-53 in accordance with Ex. Ord. No. 12163, Sept. 29, 1979, 44 F.R. 56673, as amended. The section provides for protecting the environment and natural resources of developing countries. It authorizes the President to furnish assistance to developing countries to assist them in protecting and managing their environment and natural resources.

The next provision, 22 USC Section 2151p-1, adopted by Congress through P.L. 87-195 Dec 30, 1969, as amended, provides for protection of tropical forests, by placing a high priority on “conservation and sustainable management of tropical forests” and to “the fullest extent feasible” support programs and other efforts that carry out this objective.

The final section, 22 USC Section 2151q, was adopted through P.L. 98-164 as the “International Environment Protection Act of 1983,” and concerns preserving and protecting endangered species as another consideration in U.S. programs abroad.

In addition to the provisions of the Foreign Assistance Act, Congress added 22 USC Section 2191(3)(n) to OPIC’s charter in 1985 through P.L. 99-204. The provision states that:

[the Corporation, utilizing broad criteria, shall undertake] - to refuse to insure, reinsure, guarantee, or finance any investment in connection with a project which the Corporation determines will pose an unreasonable or major environmental, health, or safety hazard, or will result in the significant degradation of national parks or similar protected areas.

In 1985, through P.L. 99-204, Congress also added 22 USC Sec. 2197(m)(1) to OPIC's environmental requirements.

Before providing insurance, reinsurance, guarantees, or financing under this subpart for any environmentally sensitive investment in connection with a project in a country, the Corporation shall notify appropriate government officials of that country of -

(A) all guidelines and other standards adopted by the International Bank for Reconstruction and Development and any other international organization relating to the public health or safety or the environment which are applicable to the project; and (B) to the maximum extent practicable, any restriction under any law of the United States relating to public health or safety or the environment that would apply to the project if the project were undertaken in the United States. The notification under the preceding sentence shall include a summary of the guidelines, standards, and restrictions referred to in subparagraphs (A) and (B), and may include any environmental impact statement, assessment, review, or study prepared with respect to the investment pursuant to section 2199(g) of this title.

In 1999, Congress also directed OPIC through P.L. 106-158, in 22 USC Section 2191a(b), to decline its services if it determines that an activity will have an adverse environmental impact that is "sensitive, diverse, or unprecedented":

The Board of Directors of the Corporation shall not vote in favor of any action proposed to be taken by the Corporation that is likely to have significant adverse environmental impacts that are sensitive, diverse, or unprecedented, unless for at least 60 days before the date of the vote - (1) an environmental impact assessment or initial environmental audit, analyzing the environmental impacts of the proposed action and of alternatives to the proposed action has been completed by the project applicant and made available to the Board of Directors; and (2) such assessment or audit has been made available to the public of the United States, locally affected groups in the host country, and host country nongovernmental organizations.

OPIC is also subject to Executive Order No. 12144 (44FR 1957) entitled "Environmental Effects Abroad of Major Federal Actions." The Executive Order requires federal agencies that take actions that are subject to the Order to implement procedures that are consistent with the Order. On September 4, 1979, OPIC adopted a series of procedures to comply with the Executive Order. These procedures are contained in OPIC's *Environmental Handbook*, which is available over the World Wide Web.³

Implications for Congress

Congress has amended OPIC's statutes at times to meet various objectives, domestic and foreign. Often these amendments have restricted OPIC's activities relative to a

³ OPIC's web address is: [<http://www.opic.gov/>].

particular type of economic activity or have acted to advance other U.S. goals and objectives, such as improving workers' rights or protecting U.S. jobs. It is difficult to estimate what impact such restrictions and requirements have had on OPIC's activities. The nature of OPIC's activities means that it responds to, rather than generates, requests for its services from U.S. firms that have invested abroad. Ostensibly, such firms likely are aware of Congressional actions regarding OPIC and, therefore, likely would not apply for OPIC's services with projects that clearly violate a Congressionally-mandated restriction. Generally, OPIC receives more requests each year than it can accept due to Congressional limitations on the overall level of financing OPIC is allowed to obligate.