



**Comments on CAO's Draft Revised Operational
Guidelines (November 3, 2006 draft)**

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We welcome the opportunity to provide comments on the Compliance Advisor/Ombudsman's (CAO) revised operational guidelines. Many of the draft revisions helpfully clarify the existing guidelines and make them easier for stakeholders to understand. Furthermore, by streamlining its procedures the CAO has strengthened incentives of parties to seek resolution of disagreements.

Following are a number of points we would like to share with the CAO on the substance of the draft operational guidelines. However, we would also like to request clarification around the revision process – in particular on whether or how our comments will be incorporated into the new guidelines. Best practice at the World Bank Group and other multilateral development banks regarding policy or guideline reviews include the following minimum process guarantees: (i) disclosure of all comments received in full on the institution's website; and (ii) provision of a summary of how comments have or have not been incorporated into the final document.

We look forward to your response to the above process related issues and to the substantive comments below.

General Comments

Post-divestment jurisdiction

- We believe that the CAO's mandate to enhance the social and environmental outcomes of IFC and MIGA operations should more explicitly extend to projects post-IFC or MIGA divestment, repayment of IFC loans, or termination of a MIGA guarantee, as all impacts and outcomes of a project may not manifest during the timeframe of IFC or MIGA's involvement. Allowing complaints for a defined period of time after the IFC or MIGA closes its books on an investment would be an important acknowledgement that IFC/MIGA's commitment to sustainable outcomes is not limited to the duration of the institution's financial involvement in a project. The Asian Development Bank's (ADB) Accountability Mechanism has taken steps towards applying this principle to ADB financed-operations. The CAO should examine how it would apply a similar principle to IFC/MIGA operations.

Fast-track procedures

- The CAO may need to adapt procedures to particular situations requiring rapid response. For example, if stakeholders lodge a complaint due to a lack of access to material project information, the CAO should be able to respond more quickly than foreseen in the proposed

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Ombudsman assessment period (120 days). This is particularly important for complaints concerning projects under active consideration by IFC/MIGA.

Focus on outcomes

- We find it crucially important that CAO guidelines reflect the shift in IFC (and MIGA) policies towards good social and environmental outcomes. While a review of procedural obligations continues to be important, the ongoing processes and results related to IFC/MIGA investments should also be a key focus of CAO Ombudsman, Compliance and Advisory roles. We strongly encourage the CAO to implement its operational guidelines in such a way as to ensure that it examines not only the *letter* but also the *spirit* of IFC policies, performance standards, procedures and guidelines.

Comments on Specific Sections

Independence and impartiality (section 1.3)

- In order to strengthen CAO's independence and impartiality, the guidelines should include a clause that CAO staff cannot work for the IFC or MIGA for at least two years following employment with the CAO. The "revolving door" dynamic has long been shown to have the potential to undermine impartiality in institutional settings.

Information disclosure and confidentiality (section 1.5)

- Regarding disclosure of information the guidelines should reference Section III(B)(10) of IFC's disclosure policy. Under this clause, "IFC reserves the right to disclose information that it would ordinarily not release to third parties" if, "IFC's senior management determines that the disclosure of certain non-public information would be likely to avert imminent and serious harm to public health or safety, and/or imminent and significant adverse impacts on the environment." A similar clause should apply to MIGA's disclosure practices. In the course of an Ombudsman or Audit process, the CAO may uncover such information and should be clear about what actions it will undertake to ensure (or to appeal for) its disclosure.

Relationship with IFC and MIGA Boards (section 1.7)

- To strengthen CAO's accountability and improve stakeholder communication, the CAO's annual report to the Board Committee on Development Effectiveness should be publicly disclosed, with redaction of any truly confidential information (that is, only information that may cause commercial or personal harm if disclosed).

Ombudsman role

Grounds for Complaint (section 2.2)

- We strongly welcome the streamlining of procedures for referring complaints to CAO Compliance for appraisal contained in the draft, revised procedures (Sec 2.2, 3.3, 4.4). By establishing a straightforward transfer procedure from Ombudsman to compliance appraisal (after examination of all alternatives and determination that resolution is unlikely), the guidelines provide an additional incentive to the parties to reach an agreement. This is an innovative strengthening and leveraging of the CAO mechanism.

Timelines for complaint handling (section 2.7)

- The “120 working days” foreseen for the Ombudsman assessment phase is too long and not aligned with the potential immediacy of a complainant’s concerns. It should be noted that 120 working days could actually translate into 24 weeks (based on 5 day work-weeks)—more than 5 months! We suggest that the guidelines strike the term “working days” (as the term may have little relevance to complainants not familiar with CAO’s work schedule) and state that the CAO will strive to complete the assessment within 60 days but will take no longer than 90 days.
- We feel that the guidelines should provide for expedited handling of complaints, depending on the nature and severity of the issues involved, as well as the status of project implementation. As noted in our general comments, if the complaint relates to access to information, timeliness is especially important. For issues with direct bearing on health, safety, potential conflict, etc., expedited assessment may be required. Similarly, for issues concerning potential impacts of a project under preparation, which could be avoided were actions taken before project implementation, it is essential that a complaint be handled in a timely fashion.
- We note that if **both** parties are in agreement up front that a complaint cannot be resolved through the Ombudsman function, then the assessment should proceed more quickly and the complaint be transferred much earlier for appraisal by the Compliance function.

Receiving and assessing complaints (section 3.1)

- While revisions to the criteria listed under “Eligibility screening” (section 3.1) for the Ombudsman process are very welcome, some language remains confusing and should be clarified. Specifically, the meaning of the following criterion is not clear: “The complainant (or those whom the complainant has authority to represent) would be affected if the social and/or environmental impacts raised in the complaint occurred.”

As phrased—“*would* be affected ... *if* the social and/or environmental impacts ... occurred” [emphasis added]—could be interpreted to mean that eligibility is based on whether *future* impacts may affect the complainant. While we understand that the Ombudsman process is meant to be forward-looking in order to limit overlap with the Compliance function, and that the Ombudsman should not reach judgments during complaint screening, eligibility for the Ombudsman process should not be limited to possible future impacts. Such an approach would be inconsistent with realities on the ground as complainants are likely to raise issues concerning past or current impacts. The Ombudsman should be involved in trying to remedy past or current issues, as well as prevent future harm.

Confidentiality and Disclosure (section 4.3)

- The stipulations regarding the non-transferability of confidential information obtained in an ombudsman process to the Compliance function are unnecessarily strict. When such information is materially relevant to a review of compliance, staff of the CAO office Compliance function should have access to that information, as they did under the Ombudsman process, with clear guarantees that legitimately confidential information (see above) will not be disclosed to the public. Protecting information provided by parties during the Ombudsman process is important to ensure frank participation. However, in the event of

a compliance audit such protections should not allow for withholding information that could reveal non-compliance.

Monitoring and follow-up (section 4.5)

- We strongly support the clarification that the CAO will publicly disclose whether agreements or recommendations have been implemented. This will provide additional incentives for parties to carry through on their commitments. However, we recommend that the phrase “to the extent that this is practicable,” be struck from the operational guidelines in order to avoid any interpretation that public disclosure of monitoring reports is not required in all cases. Public disclosure is vital to ensure the accuracy of progress reports on actions undertaken in response to agreements or recommendations stemming from an Ombudsman process.
- Additionally, language should be inserted to clarify that the CAO will ensure any and all monitoring reports are shared directly with complainants on a regular basis.

Compliance Role

Introduction and purpose of compliance auditing (section 5.1)

- We welcome the clarification that the “focus of compliance audits will be on IFC, MIGA and project sponsors.” The current guidelines are vague (“the role of the sponsor may also be considered”) as to whether the critical actions of the sponsor will be an included focus of a compliance audit. The focus on the project sponsor is especially relevant given the deliberate shift in IFC performance standards to relegate more of the responsibility for fulfillment of environmental, social and disclosure obligations to IFC clients.

Definitions and outline approach (section 5.2)

- While revisions to the audit criteria update language to reflect IFC's new policy framework, they do not encompass the entire suite of criteria and standards that the CAO should be able to review when assessing whether operations have resulted in environmental or social impacts. For instance, in some cases policies and procedures not directly related to environmental and social performance may nevertheless have direct impacts on social conditions, environmental impacts, or livelihood security. This section should make clear that the list of audit criteria presented in the guidelines is not exhaustive and explicitly state that **all** IFC policies, guidelines and procedures (whether specifically related to environmental and social protection or not) are relevant to a CAO audit. Furthermore, section 5.2 should list IFC's and MIGA's Policies on Disclosure of Information among the key audit criteria.

Initiating a compliance audit (section 6.1)

- We are unclear whether the guidelines allow affected parties to directly request a compliance audit. While the statement “Request for a compliance audit should be made to the CAO in writing” seems to allow for direct access to Compliance, the preceding bulleted list only includes requests from senior management or the President, transfers from the Ombudsman, and discretionary recommendations of the CAO's Vice President among the potential initiators of compliance audits. We request that this section be clarified to allow for direct requests from affected parties for a compliance audit.

Report preparation (section 8.1)

- The language that management comments “should” be submitted in writing to the CAO within 15 working days of receipt does not provide assurance of a timely response. We recommend that the term “should” be changed to “will” with allowance for exceptions to be granted by CAO if needed. In such cases, an explanation of the delay should be made public.
- The procedures for the President’s simultaneous clearance of both CAO’s report and Senior Management’s response is cumbersome and runs the risk of causing inordinate delays in informing complainants of CAO’s findings. The procedure as defined cedes far too much control to management over the release of CAO’s report (one cannot rule out deliberate foot-dragging on the part of management as it seeks to put all its “ducks in a row.”) We recall a recent case in which CAO’s final report had not been released in a timely manner due to internal considerations by the President’s office and management. We believe that a maximum time limit should be set after which CAO’s report will automatically be disclosed, whether or not management’s response is final and “cleared” by the President’s office. We would also like to request clarification on what clearance is necessary for the audit report if, according to the CAO’s draft guidelines, “The President will have no editorial input to the content of the report.”

Monitoring and closure of audits (section 8.3)

- We strongly support the CAO’s enhanced monitoring function, especially in regards to the compliance audit. However, we are concerned about the lack of civil society involvement in this process. Monitoring should be a dynamic process and include an assessment of two subjects: (i) IFC, MIGA and/or the project sponsor’s implementation of an action plan to come into compliance according to CAO findings, and (ii) whether or how implementation of the action plan is effectively redressing negative social and environmental impacts on the ground. In regards to this second subject, in particular, the CAO should consult civil society and community actors involved in the project as part of its monitoring activities.
- In order to increase accountability, the CAO should publicly release annual reports on implementation of the IFC or MIGA’s action plan. Clearly the public and especially complainants and communities involved in the relevant project have high interest in understanding how the institution is complying with its policies.

Advisory role

Limits to transparency and the Advisory role (section 11.2)

- This section states that in cases where the CAO is reviewing a number of projects to draw broader lessons for the IFC, individual project names will not be identified in order “to ensure the cooperation of IFC and MIGA’s sponsors, as well as avoiding the potential for CAO advice to be interpreted as being project-specific.” This seems overly secretive. CAO advisory reports should clearly indicate which projects were considered and why. This would strengthen the credibility and receptivity of CAO advisory findings as stakeholders would be able to note the extent of operations that had been considered.

For questions or comments to the above, please contact:

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