

Small and Medium Finance Loans Frequently Asked Questions

Q: How long does it take to process my loan?

A: Your loan will be processed as quickly as you and OPIC, working together, are able to complete the necessary documentation and procedures to complete the loan. This time period varies depending on a number of factors (much of which is in the control of the borrower), including the complexity of the transaction, the length of the negotiation, the nature of the security documentation, the responsiveness of outside counsel, and how quickly you provide all relevant documentation to us. The general stages of the loan process are as follows:

- (1) Applicant submits a short, two-page summary of the project concept for OPIC's review (please contact OPIC's Information Officer at (202) 336-8799 or email info@opic.gov with any questions and to request a suggested outline for the summary),
- (2) If requested by OPIC, complete OPIC Application Form 115, including detailed business plan, sponsor disclosure reports (OPIC Form 129), financial statements, and financial projections model,
- (3) When the Application package is complete, OPIC formally "screens" it for major credit and policy issues, and if it clears screening, OPIC will issue a retainer letter and request payment of retainer fee to begin work on the loan request,
- (5) Borrower delivers all required project documents (see the attached Schedule 1 for a general listing of such documents), and OPIC undertakes credit due diligence, including a visit to Project site and applicant's headquarters, as appropriate,
- (6) Issuance of OPIC policy clearances¹,
- (7) Preliminary terms proposed by OPIC and agreed, followed by formal credit approval²,
- (8) OPIC and the Borrower execute a Commitment Letter including detailed term sheet,
- (9) Drafting of loan and security documents by OPIC and OPIC legal due diligence,
- (10) Borrower and counsel review of finance documents,
- (11) Agreement and execution of finance documents,
- (12) Borrower satisfaction of all conditions precedent to the first disbursement, and OPIC review of documents evidencing that all conditions precedent are met to its satisfaction,
- (14) OPIC processing of disbursement request and actual disbursement,
- (15) OPIC transfers loan to its Project Management Group for loan monitoring.

Q: What fees will I be charged during the loan process?

A: The following provides a description of the basic OPIC fees:

¹ OPIC's Office of Investment Policy performs an in depth analysis of: (i) Human Rights situation in the project country; (ii) Developmental Effects of the project for the project country; (iii) U.S. Economic Effects (a project may not have a detrimental impact on the U.S. economy); (iv) Worker Rights; and (v) environmental issues and appropriate mitigation plans (significant impact projects may necessitate a formal Environmental Impact Assessment and 60 day public notification).

² Approval Process: (i) for OPIC loans up to \$10 MM - Credit Policy and Director/Vice President approval; (ii) for OPIC loans over \$10 MM and up to \$30 MM - Credit Committee and Investment Committee approvals; (iii) for OPIC loans over \$30 MM - Credit Committee, Investment Committee, and Board of Directors approvals (meets four times per year).

- (1) Retainer Fee: varies depending on the complexity of the project, and used to offset OPIC's cost for due diligence, travel, etc. This is a non-refundable fee after loan approval by OPIC, but the unused portion may be applied to offset the Facility Fee.
- (2) Facility Fee: a percentage of the loan, payable at loan agreement signing or first disbursement to OPIC for originating, documenting and disbursing the loan.
- (3) Commitment Fee: a percentage of the undisbursed principal amount of the loan to cover the cost to OPIC of holding the funds available for the borrower (the agreed interest rate will be charged on the disbursed and outstanding amount of the loan).
- (4) Maintenance Fee: an annual fixed fee, payable to OPIC for monitoring and administering the loan.
- (5) Modification/Waiver/Commitment Extension Fee: post-closing fees are charged for negotiating and executing amendments (including extension of the Commitment Period) and waivers.
- (6) Prepayment Fee: If the borrower prepays the loan early, OPIC charges a prepayment fee.
- (7) Cancellation Fee: If the borrower cancels part of the loan commitment, OPIC charges a cancellation fee.
- (8) Outside Consultants: borrower pays the cost of OPIC's outside consultants (including, if applicable, outside counsel, local counsel, insurance consultants, an independent engineer, credit packager, and model auditor) in accordance with customary commercial practice. Costs of outside counsel are addressed in a separate question below.
- (9) Loan and Security Registration: borrower is responsible for the costs of registering the loan, any security documentation, etc., which differ according to project, country, and the nature of the registration.

Q: Why is there an open-ended requirement that I pay any out-of-pocket expenses of OPIC for the negotiation, execution, implementation and delivery of the transaction documents? What about the same requirement for OPIC enforcing its rights? How can I control these costs?

A: The costs that are referred to in the Loan Agreement are: (i) the fees and expenses of outside legal counsel and business consultants, and (ii) the costs of communications, preparation of any documents, the authentication, registration, and recordation of any of the Transaction Documents, the preparation of bound volumes of the Transaction Documents for OPIC's use, and the termination of the Liens created pursuant to the Security Documents. These costs can be estimated, and in some cases can be subject to caps based on certain assumptions, but in general the exact amounts are not known. It is customary banking practice for all lenders' costs to be covered by the borrower. These costs can be controlled, and often can be completely transparent, by getting good estimates upfront based on realistic assumptions that can be met.

As to the cost of enforcing OPIC's rights, these would only come into play if there is a default, such as for example non-payment of the loan, and OPIC engages in enforcement proceedings to collect. The fees for such efforts are not known at the time of signing, nor can they be foreseen. For this reason no qualifiers can be put on such amounts.

Q: Is there any flexibility in OPIC's US eligibility requirements? Do I always need 25% US equity in the project?

A: OPIC's eligibility requirements with respect to direct loans are statutory. OPIC's statute requires "significant US involvement" of a U.S. small business, and, as a policy matter, OPIC has taken this to mean that 25% equity or shareholder subordinated debt in a project owned

by a US small business should fulfill this requirement. However, in exceptional cases, OPIC may accept less than 25% equity or debt, if there is other significant involvement of a U.S. small business.

Q: What type of equity is acceptable? Can I get equity credit for the time and effort I put in to develop the project? What about my development expenses?

A: In general, equity is to be contributed as cash, but OPIC may consider in-kind contributions to the project. Certain documented, out-of-pocket development costs can also be considered as a form of equity. However, compensation for a sponsor's time contributed to a project, as well as undocumented development costs, do not fall into this category and will not be considered as equity.

Q: What kind of proof/documentation do I need as evidence of contributed in-kind equity?

A: This will vary from project to project, depending on the type of "in-kind" equity contributed. For example, if the in-kind equity is land, evidence of the land value, such as an independent appraisal or property tax assessment, will be required. For more details, ask your project officer.

Q: When do I get the money?

A: Once OPIC has signed a loan agreement, a borrower may submit a request for disbursement 20 business days before the requested disbursement. The conditions to disbursement must be satisfied in full before the funds will be disbursed. Most of these conditions are under the borrower's control, i.e. providing certificates, documentation, etc., but in some cases additional security documentation must be drafted by OPIC or outside counsel. OPIC will work diligently to see that these documents get promptly executed but a high level of cooperation is needed from the borrower to see that this process goes smoothly.

Q: How often do I need to make interest and principal payments on the loan?

A: Generally, OPIC requires quarterly repayment of debt service. It may permit an appropriate grace period on the repayment of principal (although interest must be paid quarterly during such a grace period).

Q: Can I get a mortgage-style repayment on my loan?

A: OPIC generally requires straight-line amortization, but variations on this can be discussed where the cash flows of the project indicate an alternative might work better.

Q: What will the legal expenses be? Why do I have to pay for OPIC's lawyers when I can't control how much they bill?

A: It is very difficult to predict what the legal expenses for any given transaction will be. Consistent with commercial banking practice, OPIC requires a borrower to cover both its own legal expenses as well as those of the lender. A borrower can help keep the costs down by accepting OPIC's standard form loan documents as adapted for the deal.

OPIC has spent a considerable amount of time with various law firms working out fee discounts, incentives, etc to keep the legal costs of our transactions down. Except in very

limited circumstances, we do not generally work with firm fee caps (although we do expect estimates from our counsel) because of the fear that if a cap is reached, the law firm will discontinue or will do inadequate work thereafter. However, we do our best to ensure that legal fees are as low as possible and that all of the work is justified with respect to the relevant transaction.

Q: How much legal work will my lawyer be required to undertake in connection with the documentation and closing items?

A: Again, you can largely control your own lawyer's legal costs by agreeing to stick to OPIC's standard forms. Commercial points can be negotiated with the finance officer and can be reflected in documents drafted by OPIC's lawyers and confirmed by your counsel. Negotiation of boilerplate may be expensive and unproductive. However, we should note that OPIC does require legal opinions from Borrower's counsel, on the transaction. Our form opinions are fairly standard, but lawyers often add many assumptions and qualifications, which require additional negotiations.

Q: What about outside counsel in the project country ("local counsel")? Can OPIC just rely on my local counsel instead of hiring their own?

A: In general, OPIC prefers to rely on its own local counsel for advice. However, in some limited circumstances, such as where only one international law firm operates in a country, or where OPIC has used the borrower's local counsel on previous transactions, OPIC may agree to rely on the borrower's local counsel advice. If this is to be done, then OPIC must be given unrestricted access to the borrower's local counsel; OPIC should have knowledge of the fee arrangements and scope of work agreed to with local counsel; and OPIC must be able to ascertain whether the local counsel is capable of performing the tasks/analysis required. If a determination is made that OPIC can rely on the borrower's counsel, the borrower must agree that (1) if for any reason OPIC determines that it can no longer rely on such counsel, the borrower will be responsible for the fees of additional counsel; (2) if the local counsel becomes unavailable or is not paid on a timely basis, OPIC has the right to hire additional counsel or stop work on the transaction; and (3) if additional tasks/analysis is required of local counsel that were not originally anticipated, the borrower must pay for any additional fees resulting.

Q: Why does OPIC not agree to give indemnities in contexts where a commercial bank would, such as in agent or trustee agreements?

A: OPIC, like all US government agencies, is limited by the Anti-Deficiency Act from undertaking to pay any amounts which are not specifically obligated. For this reason, OPIC cannot provide open-ended indemnities or agreements to reimburse third party costs to any person. OPIC must always therefore be excluded as an indemnifying party.

Q: What about restrictions on share transfer? Why can't I sell my shares after the loan is disbursed?

A: Due to ordinary credit concerns as well as its special status as a US government agency, certain restrictions on share transfer are imposed by OPIC. These include:

(1) to the extent sponsor support is required/guaranteed for a project, no share transfers are permitted during the loan period, unless the transferee has equal or better credit than the

original sponsor, and that the original sponsors retain a majority interest and management control.

(2) share transfers to “unacceptable persons”, even the transfer of one share is unacceptable. OPIC insists on using its sole discretion to determine whether a person is unacceptable, although its discretion is largely used to determine whether the transfer to such person conflicts with regulatory requirements or U.S. government policies.

(3) share transfers where the ownership of the company will become either (1) less than 25% owned by US persons or (2) more than majority owned or controlled by a government entity, since OPIC is meant to foster private sector development.

Q: If I am the shareholder of the project company pledging my shares to OPIC, what are my costs and liabilities?

A: You (or the project company) will be responsible for all expenses associated with the execution, delivery and registration of the share pledge; all documentary, stamp and other taxes or fees associated with it; and all costs incurred by OPIC for enforcement of the share pledge. These costs are required by OPIC because OPIC must ensure that it has a perfected lien on the pledged shares; OPIC cannot take the risk of third party claimants or unexpected collection and enforcement costs. As shareholder, your liabilities are limited to your ownership interest in the project company itself; upon enforcement of a share pledge, OPIC becomes the shareholder so that it can “step in” as necessary to manage or restructure the company.

Q: Why do I have to appoint a process agent for the life of the loan?

A: Entities that are not US companies must submit to service of process in the United States, unless OPIC receives an opinion from local counsel that service of process may be made through another means. If a U.S. party is chosen to act as an agent, and local counsel advises that specific formalities for such appointment are necessary, the completion of these formalities will be a condition to disbursement. For US entities and individuals, no separate agent is required.

Q: Why do I have to consent to jurisdiction in US courts if OPIC does not?

A: Because of its status as a US government agency, OPIC may not consent to jurisdiction under the Tucker Act. For this reason, only the Borrower, and not OPIC, consents to jurisdiction in the loan agreement. Note that this is not an uncommon practice in multilateral/bilateral institutional lending.

Q: What types of consents or approvals are required?

A: This will vary depending on the location and type of project. Creating a list of consents and assistance with obtaining them is typically a local counsel task; examples of consents are construction permits, land consents, and registration of the loan with the Central Bank.

Q: Who is an acceptable independent auditor?

A: OPIC will review the qualifications of any proposed auditor who does not have a conflict of interest. In some cases, both a US auditor and a local auditor may need to be obtained. In any

case, the auditor should be approved by OPIC well in advance of disbursement. OPIC will require that the borrower instruct the auditor to communicate directly with OPIC.

Q: What type of insurance is required?

A: The standard form loan agreement requires the project be insured against such risks and hazards as are usually carried by companies of similar size in the same industry and in the same geographic area where it is located. The actual insurance regime is project-specific and will vary by project and by country.

Q: Why do I have to make representations and covenants regarding worker rights provisions? Why does this extend to contractors and subcontractors?

A: OPIC is statutorily mandated with ensuring compliance with worker rights provisions in every project we support, and at every level. This compliance extends to contractors and subcontractors, and may be accomplished through a number of ways, including amending existing documentation, side letters, or representations and covenants. If a contractor or subcontractor violates these provisions, the project company is required to use all reasonable efforts to cure these violations, or else must terminate the relevant contract.

Q: What are the environmental standards with which my project must comply?

A: Generally, OPIC requires compliance with the more restrictive of local law or applicable World Bank Group Guidelines. Each project is subject to an environmental review which will contain project-specific requirements to be included in the loan agreement. Any requested changes must be agreed upon by OPIC's Office of Investment Policy.

Q: Why am I asked to give ERISA representations?

A: The Employee Retirement Income Security Act of 1974, or "ERISA", is applicable to all companies which have or may have operations or employees in the US, and includes foreign companies if their affiliates have US benefit arrangements. For this reason, OPIC requires all US borrowers and foreign borrowers which are at least 80% US-owned to comply with ERISA during the term of the loan. If there is no ERISA plan, then all that is needed is a representation so stating. If there are applicable plans, however, then OPIC has form language needed with respect to all such plans to ensure compliance with ERISA.

Q: Why am I asked to give representations with respect to corrupt practices laws?

A: OPIC is statutorily prohibited from doing business with people who violate corrupt practices laws, including in particular the Foreign Corrupt Practices Act. We take this prohibition very seriously and require all of our borrowers and sponsors to give representations and abide by covenants ensuring compliance with these requirements.

Q: Why are there so many covenants and defaults? It seems like it would be so easy for OPIC to declare a technical default and hold me liable. Why should I agree to this?

A: OPIC's standard form loan agreement provides for typical commercial covenants and some agency-specific ones. They are meant to protect OPIC in the event of serious problems with the project or breach of the loan agreement. They are NOT meant to help OPIC find a reason to find a borrower in default. Although the defaults may seem wide-reaching, they do not,

except for limited policy or governmental issues, deviate from standard commercial bank practice. OPIC has a long history of working with projects and acts in a considered and appropriate manner when deciding whether to exercise its remedies; it does not do so capriciously. Most defaults also contain appropriate cure periods for the borrower to cure non-compliance. A payment default does not have a cure period, so borrowers should make appropriate arrangements with their banks to assure that payments due under OPIC loans are made on their scheduled payment dates.

Q: Why do I have to make outright representations in OPIC documentation, rather than “to the best of my knowledge”?

A: If a representation requires a factual determination, the person making the representation is the best party to know whether such determination is correct, and this knowledge cannot be conditioned. If the representation involves a legal determination, you may certainly seek and obtain the advice of legal counsel to such determination to give you the comfort necessary to make such representation. You could also ask for a legal opinion in this respect from your counsel, but OPIC will require your unqualified representation as to the matters covered in your counsel’s opinion.

Q: Why doesn’t OPIC use standards of “reasonably” or “in any material respect” with respect to representations, covenants and defaults?

A: OPIC generally avoids these legal “softeners” in its loan agreements for the following reasons:

(1) New York law (which governs our loan agreements) has an implied covenant of good faith and fair dealing, thus all actions must be “reasonable”;

(2) carving out issues that are not “material” inappropriately shifts the risk of showing materiality onto OPIC; without it, all issues are brought up and OPIC can waive the “non-material” ones; and

(3) OPIC has provided for appropriate cure periods and restraints on enforcement within the defaults section of the loan agreement.

Q: Why am I required to submit officer’s certificates regarding my corporate documentation and the project documents at signing and at each disbursement, especially when I already submitted them as part of the due diligence process?

A: In order to ensure the disclosure of all potential material changes to the documentation, OPIC requires these certificates at each disbursement. The certificates also serve an evidentiary function if there were a misrepresentation. If there is no change to any document, the certificate can refer back to an earlier certificate and merely affirm or “bring down” the earlier certificate that it continues to be accurate and complete. After the first disbursement, however, these certificates are few in number and should become fairly routine.

Q: Why do the shareholders of the project company, even minority shareholders, need to fill out a Sponsor Disclosure Report?

A: OPIC requires all shareholders beneficially holding (whether directly or indirectly) 5% or more of the shares of a project company, or parties providing credit or other significant

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support to a project, to complete a Sponsor Disclosure Report. OPIC not only relies on the representations made in the Sponsor Disclosure Report, but uses it as a basis for its review and approval of each sponsor (similar to commercial banks' "Know Your Customer" policies). The Sponsor Disclosure Report also provides an authorization to OPIC to perform credit and background checks on the sponsor. The Sponsor Disclosure Report is an integral part of any OPIC application for financing.

Schedule 1

Legal documents/information to be submitted at the time of execution of the Retainer Letter³

1. Corporate organization chart (for each entity, please indicate type of organization and the jurisdiction of formation)
 - a. Who are the U.S. citizens?
 - b. What is their involvement with the project?
2. Copies of charter documents
3. Copies of permits/licenses
 - a. What permits/licenses are required?
 - b. Which entity issues these permits/licenses?
 - c. Status - have permits/licenses been applied for or obtained? If not, when will they be required/obtained?
4. Copies of major project documents (such as construction contract, concession agreement, off take agreement, etc.)
5. Describe litigation, arbitration or investigations, if any
6. Land and building - will the borrower own or lease premises for operations (if leased, who is the owner of the property)?
7. Names of local (project country) counsel and U.S. counsel.

³ Documents that were submitted as part of the complete application package need not be re-submitted.