



Memorandum

April 22, 2002

TO: Senate Finance Committee
Attention: Dean Zerbe

FROM: Elizabeth B. Bazan
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SUBJECT: Potential civil and criminal consequences of a corporation providing false or misleading information to OPIC or the Export-Import Bank of the United States to obtain loans from them

This memorandum is in response to the request from Senator Grassley, Ranking Member of the Senate Committee on Finance, asking for an examination of potential civil and criminal liability of a corporation providing false, misleading or incorrect information to the Overseas Private Investment Corporation (OPIC) or to the Export-Import Bank of the United States (Ex-Im Bank) in order to obtain loans from such organizations. The Senator has asked for information with respect to both organizational and personal liability of those providing such false, misleading, or incorrect information. Our examination is limited, of necessity, by time constraints.

The examination of these issues will be separated into the following sections. First, we will briefly touch upon the statutory underpinnings of OPIC and the Export-Import Bank of the United States relevant to the basis of criminal and civil penalties or remedies which may be applicable. Second, we will note a number of criminal law provisions that may be of interest in connection with the issues you have raised. Third, we will note possible civil penalties or civil remedies that may be available as a result of such conduct in some circumstances.

**Brief Summary of Pertinent Statutory Underpinnings of
OPIC and the Export-Import Bank of the United States**

Both OPIC and the Export-Import Bank of the United States are wholly-owned government corporations.¹ Under 12 U.S.C. § 635(a)(1), the Ex-Im Bank is created and denominated "an agency of the United States of America."

¹ 31 U.S.C. §§ (3)(C) (Export-Import Bank of the United States) and (3)(H) (Overseas Private Investment Corporation).

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The objects and purpose of the [Export-Import Bank of the United States are] to aid in financing and to facilitate export of goods and services and imports and the exchange of commodities and services between the United States or any of its territories or insular possessions and any foreign country or the agencies or nationals thereof. In connection with and in furtherance of its objects and purposes, the bank is authorized and empowered to do a general banking business except that of circulation; to receive deposits; to purchase, discount, rediscount, sell, and negotiate, with or without its endorsement or guarantee, and to guarantee notes, drafts, checks, bills of exchange, acceptances, including bankers' acceptances, cable transfers, and other evidences of indebtedness; to guarantee, insure, coinsure, and reinsure against political and credit risks of loss; to purchase, sell, and guarantee securities but not to purchase with its funds any stock in any other corporation except that it may acquire any such stock through the enforcement of any lien or pledge or otherwise to satisfy a previously contracted indebtedness to it; to accept bills and drafts drawn upon it; to issue letters of credit; to purchase and sell coin, bullion, and exchange; to borrow and to lend money; to perform any act herein authorized in participation with any other person, including any individual, partnership, corporation, or association; to adopt, alter, and use a corporate seal, which shall be judicially noticed; to sue and to be sued, to complain and to defend in any court of competent jurisdiction; to represent itself or to contract for representation in all legal and arbitral proceedings outside the United States; and the enumeration of the foregoing powers shall not be deemed to exclude other powers necessary to the achievement of the objects and purposes of the bank. . . .²

Under 22 U.S.C. § 2191, OPIC is created as “an agency of the United States under the policy guidance of the Secretary of State.” OPIC’s purpose is 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.”³ In so doing, OPIC may provide insurance, guarantee, financing, or reinsurance for a project consistent with specified criteria.⁴

² 12 U.S.C. § 635(a)(1).

³ 22 U.S.C. § 2191.

⁴ 22 U.S.C. § 2191 indicates that the Corporation, in making such determinations, must especially:

- (1) be guided by the economic and social development impact and benefits of such a project and the ways in which such a project complements, or is compatible with, other development assistance programs or projects of the United States or other donors;
- (2) give preferential consideration to investment projects in less developed countries that have per capita incomes of \$984 or less in 1986 United States dollars, and restrict its activities with respect to investment projects in less developed countries that have per capita incomes of \$4,269 or more in 1986 United States dollars (other than countries designated as beneficiary countries under section 212 of the Caribbean Basin Economic Recovery Act (19 U.S.C. 2702), Ireland, and Northern Ireland); and
- (3) ensure that the project is consistent with the provisions of section 117 (as so redesignated by the Special Foreign Assistance Act of 1986), section 118, and section 119 of this Act [22 U.S.C. §§ 2151p, 2151p-1, and 2151q] 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 117 (as

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⁴ (...continued)

so redesignated by the Special Foreign Assistance Act of 1986), section 118, and section 119 of this Act [22 U.S.C. §§ 2151p, 2151p-1, and 2151q].

In carrying out its purpose, the Corporation, utilizing broad criteria, shall undertake--

- (a) to conduct financing, insurance, and reinsurance operations on a self-sustaining basis, taking into account in its financing operations the economic and financial soundness of projects;
- (b) to utilize private credit and investment institutions and the Corporation's guaranty authority as the principal means of mobilizing capital investment funds;
- (c) to broaden private participation and revolve its funds through selling its direct investments to private investors whenever it can appropriately do so on satisfactory terms;
- (d) to conduct its insurance operations with due regard to principles of risk management including efforts to share its insurance and reinsurance risks;
- (e) to the maximum degree possible consistent with its purposes--
 - (1) to give preferential consideration in its investment insurance, reinsurance, and guaranty activities to investment projects sponsored by or involving United States small business; and
 - (2) to increase the proportion of projects sponsored by or significantly involving United States small business to at least 30 percent of all projects insured, reinsured, or guaranteed by the Corporation;
- (f) to consider in the conduct of its operations the extent to which less developed country governments are receptive to private enterprise, domestic and foreign, and their willingness and ability to maintain conditions which enable private enterprise to make its full contribution to the development process;
- (g) to foster private initiative and competition and discourage monopolistic practices;
- (h) to further to the greatest degree possible, in a manner consistent with its goals, the balance-of-payments and employment objectives of the United States;
- (i) to conduct its activities in consonance with the activities of the agency primarily responsible for administering part I and the international trade, investment, and financial policies of the United States Government, and to seek to support those developmental projects having positive trade benefits for the United States;
- (j) to advise and assist, within its field of competence, interested agencies of the United States and other organizations, both public and private, national and international, with respect to projects and programs relating to the development of private enterprise in less developed countries and areas;
- (k) (1) 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 because 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);
- (l) 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;

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Possible Criminal Provisions Which May Be Implicated

Whether particular circumstances give rise to criminal or civil liability turns upon the specific facts of a given case. The following list of criminal law provisions may be of interest in considering whether, in a given situation, criminal liability may flow from the provision of false, misleading, or incorrect information by a corporation to OPIC or to the Ex-Im Bank in order to obtain a loan from such organizations. Depending upon how the facts in a given situation may develop, some of those provisions listed below might not apply, while other provisions not listed below might become pertinent.

- 18 U.S.C. § 641 (theft of public money, property, or records)—Among other things, this covers embezzling, stealing, purloining, or knowingly converting to one's own use or the use of another, or, without authority, selling, conveying, or disposing of any record, voucher, money, or thing of value of the United States or of any department or agency thereof. It also covers whoever receives, conceals, or retains such record, voucher, money, or thing of value of the United States or of any federal department or agency with intent to convert it to his, her, or their own use or gain, knowing it to have been embezzled, stolen, purloined, or converted. Conviction under this section may result in imprisonment for up to 10 years, a fine under Title 18, U.S.C., or both.⁵
- 18 U.S.C. § 1001 (false statements)—Among other things, this covers, in any matter within the jurisdiction of the federal Executive, Legislative or Judicial Branches, knowingly and willfully falsifying, concealing, or covering up by any trick, scheme, or device a material fact; making any materially false, fictitious, or fraudulent statement or representation; or making or using any false writing or document, knowing that it contains a materially false, fictitious, or fraudulent statement or entry. Maximum

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(m) 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; and

(n) 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.

See also, 22 U.S.C. §§ 2191a, 2194, 2194a, and 2197 for other authorities and requirements.

⁵ Under 18 U.S.C. § 3571, individuals convicted of a felony may be fined the greater of either the amount set forth in the offense statute or an amount not more than \$250,000, while the maximum fine for an organization convicted of a felony would be the greater of the amount set forth in the offense statute or an amount of not more than \$500,000. This section also provides for an alternative fine based on pecuniary gain or loss. If anyone has derived pecuniary gain from the offense or if the offense results in pecuniary loss to any person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless the imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

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penalties include imprisonment of not more than 5 years, a fine under Title 18, U.S.C.,⁶ or both.

- 18 U.S.C. § 1341 (mail fraud)—Among other things, Section 1341 applies to use of the mail for the purpose of executing, or attempting to execute, a scheme or artifice to defraud⁷ or for obtaining money or property by false or fraudulent pretenses, representations, or promises. The maximum penalties include a fine under Title 18, U.S.C.,⁸ or imprisonment of not more than 5 years, or both.⁹
- 18 U.S.C. § 1343 (wire fraud)—Section 1343 covers use of wire, radio, or television communication in interstate or foreign commerce to transmit or to cause to be transmitted any writings, signs, signals, pictures, or sounds, for the purpose of executing a scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises. Maximum penalties include a fine under Title 18, U.S.C.,¹⁰ imprisonment of up to 5 years, or both.¹¹

⁶ *Id.*

⁷ For purposes of 18 U.S.C. §§ 1341-1347, the term “scheme or artifice to defraud” includes “a scheme or artifice to deprive another of the intangible right of honest services.” 18 U.S.C. § 1346.

⁸ See discussion of fine options under 18 U.S.C. § 3571 in fn. 5, *supra*.

⁹ If the violation affects a financial institution, the defendant, if convicted, may be fined not more than \$1 million or imprisoned for not more than 30 years, or both. Under 18 U.S.C. § 20, a “financial institution” is defined to include:

- (1) an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act);
- (2) a credit union with accounts insured by the National Credit Union Share Insurance Fund;
- (3) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system;
- (4) a System institution of the Farm Credit System, as defined in section 5.35(3) of the Farm Credit Act of 1971;
- (5) a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662);
- (6) a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act[]) [the closing parentheses is missing from this subsection as published in the 2000 edition of the United States Code];
- (7) a Federal Reserve bank or a member bank of the Federal Reserve System;
- (8) an organization operating under section 25 or section 25(a) of the Federal Reserve Act;
- or
- (9) a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) or section 1(b) of the International Banking Act of 1978).

This term, so defined, does not appear to cover OPIC or the Export-Import Bank of the United States.

¹⁰ For the possible criminal fines provided under Title 18, U.S.C., for a felony conviction, see the discussion at fn. 5, *supra*.

¹¹ If the offense affects a financial institution, conviction exposes a perpetrator to a fine of up to \$1
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- 18 U.S.C. § 1956(a)(3)(A) (money laundering)—Among other things, this provision covers those who, with intent to promote the carrying on of specified unlawful activity (as defined in 18 U.S.C. § 1956(c)(7)), conduct or attempt to conduct a financial transaction involving property used to conduct or facilitate specified unlawful activity. It carries a maximum penalty of 20 years imprisonment and a fine under Title 18, U.S.C.¹² The term “specified unlawful activity” means, among other things, any act or activity constituting an offense listed in 18 U.S.C. § 1961(1) except an act indictable under 31 U.S.C., ch. 52, subchapter II. Both mail fraud under Section 1341 and wire fraud under Section 1343 are among the offenses listed in Section 1961(1).
- 18 U.S.C. § 1962 (racketeering)—Among other things, this section makes it unlawful for any person who had received income derived, directly or indirectly, from a pattern of racketeering activity to use or invest, directly or indirectly, any part of that income, or the proceeds of such income, in acquisition of any interest in, or establishment or operation of, any enterprise engaged in interstate or foreign commerce or in activities affecting interstate or foreign commerce. “Racketeering activity” is defined under 18 U.S.C. § 1961 to mean, among other things, any act indictable as mail fraud under 18 U.S.C. § 1341 or wire fraud under 18 U.S.C. § 1343. Section 1962 also prohibits any person, through a pattern of racketeering activity, to acquire or maintain, directly or indirectly, any interest or control of any enterprise engaged in interstate or foreign commerce, or whose activities affect interstate or foreign commerce. In addition, this section prohibits any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate in the conduct of that enterprise’s affairs through a pattern of racketeering activity. Finally, Section 1962 makes it unlawful to conspire to engage in any of the activities prohibited in the section. Under 18 U.S.C. § 1963, a person convicted of an offense under Section 1962 faces maximum criminal penalties including imprisonment of not more than 20 years, a fine under Title 18, U.S.C.,¹³ or both, plus forfeiture to the United States of (1) any interest acquired or maintained in violation of Section

¹¹ (...continued)

million, imprisonment of up to 30 years, or both. See discussion of definition of “financial institution” in fn. 9, *supra*.

¹² *Id.* In addition, 18 U.S.C. § 1956(b) provides for a civil penalty of the greater of the value of the property, funds, or monetary instruments involved in the transaction or \$10,000, for those who conduct or attempt to conduct such a transaction.

¹³ Under 18 U.S.C. § 3571, individuals convicted of a felony may be fined the greater of either the amount set forth in the offense statute or an amount not more than \$250,000, while the maximum fine for an organization convicted of a felony would be the greater of the amount set forth in the offense statute or an amount of not more than \$500,000. This section also provides for an alternative fine based on pecuniary gain or loss. If anyone has derived pecuniary gain from the offense or if the offense results in pecuniary loss to any person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless the imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

1962; (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprise which the person has established, operated, controlled, conducted, or participated in, in violation of 18 U.S.C. § 1962; or (3) any proceeds of or derived from racketeering activity in violation of Section 1962.¹⁴

- 22 U.S.C. 2197(n) (penalties for fraud with respect to OPIC)—This provision makes criminal penalties available with respect to anyone who knowingly makes any false statement or report, or willfully overvalues any land, property, or security, for the purpose of influencing in any way the action of OPIC with respect to any insurance, reinsurance, guarantee, loan, equity investment, or other activity of the Corporation under section 2194 of this title or any change or extension of any such insurance, reinsurance, guarantee, loan, equity investment, or activity, by renewal, deferment of action or otherwise, or the acceptance, release or substitution of security therefor. Maximum penalties include a fine of not more than \$1,000,000, imprisonment for not more than 30 years, or both.

Possible Civil Penalties Or Civil Remedies That May Be Available

In some circumstances, civil penalties or remedies may be available where a corporation uses false, misleading, or incorrect information to obtain a loan from OPIC or the Export-Import Bank of the United States. As with the criminal provisions discussed above, the question of whether these provisions apply is a very fact-specific inquiry. Listed below are some provisions which may be of interest in this context, depending upon the facts of a given situation as they develop.

- 18 U.S.C. § 1956(b) (money laundering)—As noted in the discussion of criminal penalties above, 18 U.S.C. § 1956(a)(3)(A) covers those who, with intent to promote the carrying on of specified unlawful activity (as defined in 18 U.S.C. § 1956(c)(7)), conduct or attempt to conduct a financial transaction involving property used to conduct or facilitate specified unlawful activity. The term “specified unlawful activity” means, among other things, any act or activity constituting an offense listed in 18 U.S.C. § 1961(1) except an act indictable under 31 U.S.C., ch. 52, subchapter II. Both mail fraud under Section 1341 and wire fraud under Section 1343 are among the offenses listed in Section 1961(1). In addition to the criminal penalties discussed above, 18 U.S.C. § 1956(b) provides for a civil penalty of the greater of the value of the property, funds, or monetary instruments involved in the transaction or \$10,000, for those who conduct or attempt to conduct such a transaction.
- 18 U.S.C. § 1964 (racketeering—civil remedies)—This section gives the United States district courts jurisdiction to “prevent and restrain violations” of 18 U.S.C. § 1962, discussed above under the criminal provisions section of this memorandum. In so doing, the district court may issue orders

18 U.S.C. § 1964 also provides for civil remedies in specified circumstances.

including, but not limited to “ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.”¹⁵ Such actions may be instituted by the Attorney General. In addition any person injured in his business or property by reason of a Section 1962 violation may sue to recover three times the damages sustained plus the cost of the suit including a reasonable attorney’s fee. To establish a violation of Section 1962 in a private right of action, reliance may not be placed upon any conduct that would have been actionable as fraud in the purchase or sale of securities, except as against a person who has been convicted in a criminal case for such fraud. A criminal conviction has the effect of estopping the person convicted from denying the essential allegations of the criminal offense in a subsequent civil proceeding brought by the United States.

18 U.S.C. § 1345 (injunctions against fraud)—Among other things, if a person is violating or is about to violate the mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343) or false statements (18 U.S.C. § 1001) provisions, the Attorney General may bring a civil action in a federal court to enjoin the violation. The court shall grant a temporary restraining order, temporary injunction, or permanent injunction without bond under these circumstances.

Conclusion

As the provisions noted above suggest, if a corporation or its officers or employees knowingly and intentionally submit false, misleading, or incorrect information to OPIC or the Export-Import Bank to obtain a loan from one of those federal agencies, criminal liability may attach to such actions. Whether a given situation will give rise to potential criminal liability, either for the corporation or for the individuals involved, depends upon the specific factual circumstances involved. It does not appear that provision of incorrect information because of a simple mistake, rather than a knowing and intentional act, would be sufficient to trigger criminal liability. If the underlying facts include money laundering, racketeering, or false statements in any matter within the jurisdiction of the Executive, Legislative, or Judicial Branches of the United States, civil penalties or certain other civil remedies may also apply.

We hope that this memorandum will be of assistance to you

18 U.S.C. § 1964(a).