

The Foreign Account Tax Compliance Act (FATCA) and its Impact on Institutions Regulated and Supervised by the Bangko Sentral ng Pilipinas

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Common experience has abundantly demonstrated that the prosperity of the country is very largely influenced by public confidence in its banking institutions. Anything which tends to shake that confidence and causes depositors in banks to withdraw their deposits, produces contraction in business, which may result, and at times has resulted, in panics which have brought ruin and disaster to thousands, and seriously affected the welfare and happiness of the public generally for greater or less periods of time.

— Chief Justice Frank Herbert Norcross¹

I. BANKING INDUSTRY: LIFEBLOOD OF A HEALTHY ECONOMY

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1. *Ex Parte Pittman*, 31 Nev. 700, 701 (1909) (U.S.).

The indispensability of the banking industry is well-entrenched in the international legal landscape. Banks are universally recognized as quasi-public corporations.² The Supreme Court of Florida declared in a case —

Banks have become indispensable agencies through which industry, trade, and commerce are carried on, and while they exist mainly for private profit, it cannot be denied that they are pre-eminently of a public nature and therefore universally recognized as a corporation of a quasi-public nature and subject to statutory regulation for the protection of the public.³

A well-organized banking system has an essential role in economic progress, channeling as it does the resources and credit needed to create and sustain a robust and financial and active business climate.⁴

In the Philippines, time honored is the doctrine on the extraordinary degree of diligence required of banks whose business is impressed with public interest.⁵ On numerous occasions, the Supreme Court ruled that the highest degree of diligence — more than that of a Roman *pater familias* or a good father of a family — is expected of banks.⁶ Failure of a bank to discharge its duty of exercising extraordinary diligence and reasonable business prudence, such as disregard of its own banking policy, amounts to gross negligence, which the law defines as “negligence characterized by the want of even slight care, acting or omitting to act in a situation where there is duty to act, not inadvertently but wilfully and intentionally with a conscious indifference to consequences in so far as other persons may be affected.”⁷ Acts that could lead to the erosion of the confidence of the public in the banking system are deemed to contravene public interest and may constitute economic sabotage.⁸

Accordingly, legal reforms in the financial sector are anchored on the premise that any danger to the banking industry will also threaten the

2. *McConville v. Ft. Pierce Bank & Trust Co.*, 101 Fla. 727, 734 (1931) (U.S.).

3. *Therell v. Smith*, 124 Fla. 197, 210 (1936) (U.S.).

4. See generally Melencio S. Sta. Maria, *Banking Laws for the Philippines: A Time for Reflection*, 35 ATENEO L.J. 97 (1990).

5. See *Philippine Savings Bank v. Chowking Food Corporation*, 557 SCRA 318, 330 (2008) (citing *Bank of the Philippine Islands v. Court of Appeals*, 326 SCRA 641 (2000); *Philippine Bank of Commerce v. Court of Appeals*, 269 SCRA 695 (1997); & *Philippine Commercial International Bank v. Court of Appeals*, 350 SCRA 446 (2001)).

6. See *Philippine National Bank v. Cheah Chee Chong*, 671 SCRA 49, 62 (2012) (citing *Philippine Savings Bank*, 557 SCRA at 330).

7. *Philippine National Bank*, 671 SCRA at 63.

8. *Galvez v. Court of Appeals*, 671 SCRA 222, 239 (2012) (citing *Increasing the Penalty for Certain Forms of Swindling and Estafa*, Presidential Decree No. 1689, pmbl. (1980)).

stability of the nation. Thus, in crafting the charter of the country's central monetary authority, the Congress took into account that "banks are the main arteries in the bloodstream of the economy. Indeed, a sound and stable banking system is unquestionably a vital ingredient for economic development."⁹

II. REGULATION AND SUPERVISION OF BANKS

A. BSP: the Overseer

In the early case of *Govt. of the Phil. v. Hongkong & Shanghai Banking Corp., etc.*,¹⁰ "it was already recognized that [the] banking business permeated all aspects of the national economy and therefore its regulation and supervision were legally justified under the police power of the state."¹¹

Thus, the 1987 Constitution mandated the creation of the Bangko Sentral ng Pilipinas (BSP) as a new and independent central monetary authority with fiscal and administrative autonomy.¹² The legislative intent was to set a clear direction in the areas of money, banking, and credit.¹³

The BSP "shall have supervision over the operations of banks and exercise such regulatory powers as may be provided by law over the operations of finance companies and other institutions performing similar functions."¹⁴ The autonomy granted to the new central monetary authority was deliberately intended "to avoid a repeat of the past and shield the [BSP] from excessive entanglement with the fiscal operations of the government."¹⁵

"Supervision" shall include, among others, the "conduct of examination to determine compliance with laws and regulations if the circumstances so

9. CONG. REC. Vol. V, at 165-69, 9th Cong., 1st Reg. Sess. (Mar. 1, 1993).

10. *Govt. of the Phil. v. Hongkong & Shanghai Banking Corp., etc.*, 66 Phil. 483 (1938).

11. Armando L. Suratos & Jesus P. Sale, Jr., *Mobilizing Savings and Affirming Individual Privacy Rights: Dualism in the Law on Secrecy of Bank Deposits*, 2 BANGKO SENTRAL REV., Nov. 11, at 18 (1994). See also *Govt. of the Phil.*, 66 Phil. at 489.

12. PHIL. CONST. art. XII, § 20.

13. CONG. REC. Vol. V, at 165-69.

14. PHIL. CONST. art. XII, § 20.

15. CONG. REC. Vol. V, at 165-69.

warrant as determined by the Monetary Board”¹⁶ and “[o]verseeing to ascertain that laws and regulations are complied with.”¹⁷

Under the General Banking Law (GBL), banks “shall refer to entities engaged in the lending of funds obtained in the form of deposits.”¹⁸ In Section 3.2 of the GBL, banks shall be classified into:

- (a) Universal banks;
- (b) Commercial banks;
- (c) Thrift banks, composed of: (i) Savings and mortgage banks, (ii) Stock savings and loan associations, and (iii) Private development banks, as defined in the Republic Act No. 7906 (hereafter the ‘Thrift Banks Act’);
- (d) Rural banks, as defined in Republic Act [(R.A.)] No. 7353 (hereafter the ‘Rural Banks Act’);
- (e) Cooperative banks, as defined in [R.A.] No 6938 (hereafter the ‘Cooperative Code’);
- (f) Islamic banks as defined in [R.A.] No. 6848, otherwise known as the ‘Charter of *Al Amanah* Islamic Investment Bank of the Philippines[;]’and
- (g) Other classifications of banks as determined by the Monetary Board of the [BSP].¹⁹

The supervisory and regulatory powers of the BSP extend to the operations of “quasi-banks, trust entities[,] and other financial institutions which under special laws are subject to [BSP] supervision.”²⁰

For the purposes of the GBL, quasi-banks “shall refer to entities engaged in the borrowing of funds through the issuance, endorsement[,] or assignment with recourse or acceptance of deposit substitutes as defined in Section 95 of R.A. No. 7653 [or the New Central Bank Act] for purposes of re-lending or purchasing of receivables and other obligations.”²¹

16. An Act Providing for the Regulation of the Organization and Operations of Banks, Quasi-Banks, Trust Entities and for Other Purposes [The General Banking Law of 2000], Republic Act No. 8791, § 4.2 (2000).

17. *Id.* § 4.3.

18. *Id.* § 3.1.

19. *Id.* § 3.2.

20. *Id.* § 4.

21. *Id.*

In *Bank of Commerce v. Planters Development Bank*,²² the Supreme Court took pains in narrating the historical evolution of the BSP in the context of its supervisory and regulatory functions —

The Philippine Central Bank

On [3 January 1949], Congress created the Central Bank of the Philippines (Central Bank) as a corporate body with the primary objective of (i) maintaining the internal and external monetary stability in the Philippines; and (ii) preserving the international value and the convertibility of the peso. In line with these broad objectives, the Central Bank was empowered to issue rules and regulations ‘necessary for the effective discharge of the responsibilities and exercise of the powers assigned to the Monetary Board and to the Central Bank.’ Specifically, the Central Bank is authorized to organize (other) departments for the efficient conduct of its business and whose powers and duties ‘shall be determined by the Monetary Board, within the authority granted to the Board and the Central Bank’ under its original charter.

With the 1973 Constitution, the then Central Bank was constitutionally made as the country’s central monetary authority until such time that Congress shall have established a central bank. The 1987 Constitution continued to recognize this function of the then Central Bank until Congress, pursuant to the Constitution, created a new central monetary authority which later came to be known as the [BSP].

Under the New Central Bank Act (*R.A. No. 7653*), the BSP is given the responsibility of providing *policy* directions in the areas of money, banking[,] and credit; it is given, too, the primary objective of maintaining price stability, conducive to a balanced and sustainable growth of the economy, and of promoting and maintaining monetary stability and convertibility of the peso.

The Constitution expressly grants the BSP, as the country’s central monetary authority, the power of supervision over the operation of banks, while leaving with Congress the authority to define the BSP’s regulatory powers over the operations of finance companies and other institutions performing similar functions. Under *R.A. No. 7653*, the BSP’s powers and functions include (i) supervision over the operation of banks; (ii) regulation of operations of finance companies and non-bank financial institutions performing quasi banking functions; (iii) sole power and authority to issue currency within the Philippine territory; (iv) engaging in foreign exchange transactions; (v) making rediscounts, discounts, loans[,] and advances to banking and other financial institutions to influence the volume of credit consistent with the objective of achieving price stability; (vi) engaging in

22. *Bank of Commerce v. Planters Development Bank*, 681 SCRA 521 (2012).

open market operations; and (vii) acting as banker and financial advisor of the government.²³

The *Bank of Commerce* case likewise elaborated on the BSP's power of supervision over the operation of banks under the GBL of 2000 —

CHAPTER II

AUTHORITY OF THE BANGKO SENTRAL

SECTION 4. *Supervisory Powers.* — The operations and activities of banks shall be subject to supervision of the Bangko Sentral. 'Supervision' shall include the following:

4.1. The issuance of rules of conduct or the establishment of standards of operation for uniform application to all institutions or functions covered, taking into consideration the distinctive character of the operations of institutions and the substantive similarities of specific functions to which such rules, modes[,] or standards are to be applied;

4.2. The conduct of examination to determine compliance with laws and regulations if the circumstances so warrant as determined by the Monetary Board;

4.3. *Overseeing to ascertain that laws and regulations are complied with;*

4.4. Regular investigation which shall not be oftener than once a year from the last date of examination to determine whether an institution is conducting its business on a safe or sound basis: Provided, That the deficiencies/irregularities found by or discovered by an audit shall be immediately addressed;

4.5. Inquiring into the solvency and liquidity of the institution (2-D); or

4.6. Enforcing prompt corrective action. (n)

The Bangko Sentral shall also have supervision over the operations of and exercise regulatory powers over quasi-banks, trust entities[,] and other financial institutions which under special laws are subject to Bangko Sentral supervision. (2-Ca)

For the purposes of this Act, 'quasi-banks' shall refer to entities engaged in the borrowing of funds through the issuance, endorsement[,] or assignment with recourse or acceptance of deposit substitutes as defined in Section 95 of Republic Act No. 7653 (hereafter the 'New Central Bank Act') for purposes of relending or purchasing of receivables and other obligations.²⁴

23. *Id.* at 550-51 (citing An Act Establishing the Central Bank of the Philippines, Defining Its Powers in the Administration of the Monetary and Banking System, Amending the Pertinent Provisions of the Administrative Code With Respect to the Currency and the Bureau of Banking, and for Other Purposes, Republic Act No. 265 (1948)).

24. *Bank of Commerce*, 681 SCRA at 551-52 (citing The General Banking Law of 2000, § (4)).

In *United Coconut Planters Bank v. E. Ganzon, Inc.*,²⁵ the Supreme Court considered the BSP as a quasi-judicial agency²⁶ with limited and special jurisdiction based on the scattered provisions of the New Central Bank and the GBL. The BSP's jurisdiction includes the power to impose administrative sanctions on banks and quasi-banks, their directors, and/or officers in order to ensure compliance with banking laws, rules, and regulations.²⁷

B. Confidentiality Cloak Under the Philippine Legal System

R.A. No. 1405,²⁸ or the basic law on secrecy of bank deposits, was born out of the urge to “encourage and popularize savings in bank deposits” and to allay the public’s fear from government inquiry or investigation of bank deposits for tax purposes.²⁹ Thus, the legislative framework was modified, relaxing bank industry regulation to favor national economic objectives.³⁰ Consequently, “[t]he large scale devastation wrought by the Pacific War in the Philippines redefined the framework of legislative agenda in the post-war republic where rehabilitation efforts focused on the banking and financial system because of its pivotal role in the economy.”³¹

The importance of secrecy of bank deposits was judiciously and meticulously taken into account under the New Central Bank Act.³² The legislators carefully crafted the wordings of the provisions on supervision and examination³³ and bank deposits and investments,³⁴ mindful of the fact that bank supervision and examination are matters of public interest.³⁵

25. *United Coconut Planters Bank v. E. Ganzon, Inc.*, 591 SCRA 321 (2009).

26. *Id.* at 338-41.

27. THE EDITORIAL BOARD AND STAFF OF THE OFFICE OF THE GENERAL COUNSEL AND LEGAL SERVICES, BANGKO SENTRAL NG PILIPINAS, *THE NEW CENTRAL BANK ACT ANNOTATED: BANKING LAWS OF THE PHILIPPINES BOOK I* 187 (2010 ed.) [hereinafter BSP, NEW CENTRAL BANK ACT].

28. An Act Prohibiting Disclosure of or Inquiry Into, Deposits with any Banking Institution and Providing Penalty Therefor, Republic Act No. 1405 (1995). The law originated from House Bill No. 3977 and its counterpart Senate Bill No. 351.

29. Suratos & Sale, *supra* note 11, at 19.

30. *Id.* at 18.

31. *Id.*

32. CONG. REC. Vol. V, at 165-69.

33. The New Central Bank Act, Republic Act No. 7653, § 25 (1993). This Section provides —

Section 25. *Supervision and Examination.* The department heads and the examiners of the supervising and/or examining departments are hereby authorized to administer oaths to any director, officer, or employee of

Bank examiners can now freely conduct their investigations on insider abuses for the purpose of establishing cases of bank frauds and irregularities without fear of violating the secrecy of bank deposits. Thus, secrecy of bank deposits shall be waived by any director, officer, or stockholder who, together with his related interest, contracts a loan or any form of financial accommodation from: (1) his bank; or (2) from a bank (a) which is a subsidiary of a bank holding company of which both his bank and the lending bank are subsidiaries or (b) in which a controlling proportion of the shares is owned by the same interest that owns a controlling proportion of the shares of his bank, in excess of five percent of the capital and surplus of the bank, or in the maximum amount permitted by law, whichever is lower.³⁶ Nevertheless, “[a]ny information obtained from an examination of

any institution under their respective supervision or subject to their examination and to compel the presentation of all books, documents, papers[,] or records necessary in their judgment to ascertain the facts relative to the true condition of any institution as well as the books and records of persons and entities relative to or in connection with the operations, activities[,] or transactions of the institution under examination, subject to the provision of existing laws protecting or safeguarding the secrecy or confidentiality of bank deposits as well as investments of private persons, natural or juridical, in debt instruments issued by the Government.

Id.

34. *Id.* § 26. This Section provides —

Section 26. *Bank Deposits and Investments.* Any director, officer[,] or stockholder who, together with his related interest, contracts a loan or any form of financial accommodation from: (1) his bank; or (2) from a bank (a) which is a subsidiary of a bank holding company of which both his bank and the lending bank are subsidiaries or (b) in which a controlling proportion of the shares is owned by the same interest that owns a controlling proportion of the shares of his bank, in excess of five percent (5%) of the capital and surplus of the bank, or in the maximum amount permitted by law, whichever is lower, shall be required by the lending bank to waive the secrecy of his deposits of whatever nature in all banks in the Philippines. Any information obtained from an examination of his deposits shall be held strictly confidential and may be used by the examiners only in connection with their supervisory and examination responsibility or by the Bangko Sentral in an appropriate legal action it has initiated involving the deposit account.

Id.

35. CONG. REC. Vol. V, at 165-69.

36. *Id.* (citing *Ramos v. Central Bank*, 41 SCRA 608 (1971), where Justice Fred Ruiz Castro’s separate opinion narrated how the officers of Overseas Bank of

his deposits shall be held strictly confidential and may be used by the examiners only in connection with their supervisory and examination responsibility or by the [BSP] in an appropriate legal action it has initiated involving the deposit account.”³⁷ Moreover, all books, documents, papers, or records deemed necessary by the bank examiners to ascertain the facts relative to the true condition of any institution as well as the books and records of persons and entities relative to or in connection with the operations, activities, or transactions of the institution under examination that may be presented in the course of bank examination will still be subject to the provision of existing laws protecting or safeguarding the secrecy or confidentiality of bank deposits.³⁸

Over the years, the protection of confidentiality has been broadened, allowing it to catch up with the developments in the market and banking concepts, products, and instruments.

Under R.A. No. 6426 or the Foreign Currency Deposit Act of the Philippines, “all foreign currency deposits” are considered absolutely confidential in nature.³⁹ Thus, in no instance can such foreign currency deposits be examined, inquired, or looked into by any person, government official, bureau, or office whether judicial, administrative, or legislative, or any other entity, whether public or private, except only upon the written permission of the depositor.⁴⁰ Foreign currency deposits “shall be exempt from attachment, garnishment, or any other order or process of any court, legislative body, government agency, or any administrative body whatsoever.”⁴¹

Under Presidential Decree (P.D.) No. 1034 or the Offshore Banking Act, the provisions of R.A. No. 1405 (Secrecy of Bank Deposits Law) shall apply to deposits in offshore banking units.⁴²

Manila tried to hide their bank fraud and irregularities under the protection of the law on secrecy of bank deposits).

37. The New Central Bank Act, § 26.

38. *Id.* § 25.

39. An Act Instituting a Foreign Currency Deposit System in the Philippines, and for Other Purposes [Foreign Currency Deposit Act], Republic Act No. 6426, § 8 (1974). Foreign Currency Deposits include “[a]ll foreign currency deposits authorized under this Act, as amended by P.D. No. 1034, as well as foreign currency deposits authorized under P.D. No. 1035.” *Id.*

40. *Id.*

41. *Id.*

42. Authorizing the Establishment of an Offshore Banking System in the Philippines, Presidential Decree No. 1034, § 1 (a) (1976). Section 1 (a) provides

Under the GBL, “[c]onsistent with the provisions of [R.A] No. 1405, otherwise known as the [Secrecy of Bank Deposits Law], no bank shall employ casual or non-regular personnel or too lengthy probationary personnel in the conduct of its business involving bank deposits.”⁴³

While the secrecy of bank deposits admits of exceptions, such are limited to those specified under R.A. 1405⁴⁴ and other laws.⁴⁵

As discussed, laws reflect a balancing act between the right of bank depositors to confidentiality of bank deposits and government regulation of the banking industry. By affording extensive protection to bank deposits, people will feel more secure in entrusting their money in banks. In this way, banks can discharge their utmost function as efficient financial intermediaries

(a) ‘Offshore Banking’ shall refer to the conduct of banking transactions in foreign currencies involving the receipt of funds from external sources and the utilization of such funds as provided in this Decree.

Id.

43. The General Banking Law of 2000, § 55.4.

44. R.A. No. 1405, § 2. Section 2 enumerates the following exceptions: written permission of the depositor, or in cases of impeachment, or upon order of a competent court in cases of bribery or dereliction of duty of public officials, or in cases where the money deposited or invested is the subject matter of the litigation. *Id.*

45. See THE EDITORIAL BOARD AND STAFF OF THE OFFICE OF THE GENERAL COUNSEL AND LEGAL SERVICES, BANGKO SENTRAL NG PILIPINAS, SPECIAL BANKING LAWS ANNOTATED: BANKING LAWS OF THE PHILIPPINES BOOK III 638-48 (2010) (citing Anti-Graft and Corrupt Practices Act, Republic Act No. 3019 (1960); An Act Providing for the Functional and Structural Organization of the Office of the Ombudsman, and for Other Purposes [The Ombudsman Act of 1989], Republic Act No. 6770 (1989); An Act Amending the National Internal Revenue Code, as Amended, and for Other Purposes [Tax Reform Act of 1997], Republic Act No. 8424 (1997); An Act Defining the Crime of Money Laundering, Providing Penalties Therefor and for Other Purposes [Anti-Money Laundering Act of 2001], Republic Act No. 9160 (2001); An Act Defining the Crime of Financing of Terrorism, Providing Penalties Therefor and for Other Purposes [The Terrorism Financing Prevention and Suppression Act of 2012], Republic Act No. 10168; An Act Establishing the Philippine Deposit Insurance Corporation, Defining its Powers and Duties and for Other Purposes, Republic Act No. 3591 (1963); The General Banking Law of 2000; An Act Instituting a Foreign Currency Deposit System in the Philippines, and for Other Purposes [Foreign Currency Deposit Act of the Philippines], Republic Act No. 6426 (1974); & An Act Providing for the Rehabilitation or Liquidation of Financially Distressed Enterprises and Individuals [Financial Rehabilitation and Insolvency Act (FRIA) of 2010], Republic Act No. 10142 (2010)) [hereinafter BSP, SPECIAL BANKING LAWS].

between providers and users of funds.⁴⁶ Consequently, economic progress, which is inextricably linked with efficient channeling of capital and credit facilities, is expected.

III. FOREIGN ACCOUNT TAX COMPLIANCE ACT (FATCA)

A. Global Information Sharing

On 18 March 2010, United States (U.S.) President Barack Obama signed into law the Foreign Account Tax Compliance Act (FATCA) which is primarily intended to combat international tax evasion by U.S. citizens and residents through the use of offshore accounts.⁴⁷ It requires foreign financial institutions (FFIs)⁴⁸ and other financial intermediaries to report information to the Internal Revenue Service (IRS) on foreign accounts held by U.S. taxpayers or by foreign entities that are substantially owned by U.S. taxpayers.⁴⁹ This law meant to complement the Hiring Incentives to Restore Employment (HIRE) Act.⁵⁰ Under the FATCA, FFIs are required to

46. Sta. Maria, *supra* note 4, at 97.

47. Thomson Reuters, About FATCA, FAQs, available at <http://fatca.thomsonreuters.com/about-fatca/faqs/> (last accessed June 30, 2013).

48. See Neil Aragon, FATCA Regs Expand Deemed-Compliant FFIs, available at <http://www.lexisnexis.com/community/taxlaw/blogs/fatca/archive/2013/03/12/fatca-regs-expand-deemed-compliant-ffis.aspx> (last accessed June 10, 2013) & Shearman & Sterling, Key Aspects of the FATCA Regime (A client publication) 4-5, available at <http://www.shearman.com/files/Publication/4a2d6d20-5450-4e0b-ad00-f7877cc20d5d/Presentation/PublicationAttachment/9e3fbc25-e29f-4b78-96f6-99fa73bef44c/Key-Aspects-of-the-FATCA-Regime-Tax-052112.pdf> (last accessed June 10, 2013). Under the FATCA, FFIs are either “registered deemed compliant” or “certified deemed compliant.” Registered deemed compliant are local FFI, non reporting member of PFFI, Qualified Investment Vehicle, Restricted Funds (sale to U.S. persons is prohibited) and FFI under Government to Government agreements will register and receive a FFI Employee Identification Number and be recognized as deemed compliant if they meet the requirements set out in the regulations. Certified deemed compliant are non registering local banks (very small local banks with only local clients), retirement plans, non-profit organizations, certain owner documented FFI (reporting already done through withholding agent) and FFI with only low value accounts which do not register but self-certify with Internal Revenue Service [via] W-8 every three (3) years. *Id.*

49. Reese Darragh & Tammy Whitehouse, *Foreign Banks, Others Brace for FATCA*, COMPLIANCE WEEK, Mar. 2012, at 12.

50. Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, 124 Stat. 71, 97-117. (U.S.) The HIRE Act is aimed at providing hiring incentives to restore some of the jobs lost in the latest economic recession. The goal is to help put Americans back to work as soon as possible. Business owners that hire qualifying workers sooner rather than later will get the most out of the tax

perform dual tasks: first, to identify U.S. account holders; and second, to make the necessary report to the IRS of the U.S. Government.⁵¹

Individual accounts over \$50,000.00 and entity accounts or cash value of insurance or annuity contracts over \$250,000.00 are covered by the reporting requirement under FATCA.⁵² For these accounts, “due diligence” requires FFIs to review and identify indications of U.S. citizenship by asking the accountholder for U.S. passport or other U.S. ID, U.S. place of birth, U.S. address, power of attorney (POA), or signatory authority granted to a person with U.S. address and U.S. address solely used by the accountholder, and U.S. phone number.⁵³ The FFIs are also required to observe the standing instruction to transfer the funds to an account maintained in the U.S.⁵⁴ Moreover, FFIs must conduct an electronic search on pre-existing accounts.⁵⁵ Exempt accounts include those below \$50,000.00 and cash value of insurance or annuity contracts under \$250,000.00.⁵⁶ On the other hand, accounts with balance over \$1,000,000.00 requires additional due diligence, i.e., manual review of non-electronic files maintained, including inquiry made to the relationship manager or account manager for the account.⁵⁷ In turn, U.S. Financial Institutions (FIs) are required to report non-resident alien account holders to the IRS; this information, together with withholding tax information will be made available for reciprocal

credits, as the tax credits diminish over time, disappearing completely by January 1, 2011. It is of particular interest to businesses thinking about HR outsourcing as it includes new tax benefits directly related to hiring employees and writing off investments in equipment. See HIRE Act of 2010, Hiring Incentives to Restore Employment Act, available at <http://hireact.org/> (last accessed June 10, 2013).

51. Chinchic Killfoil, Tax Attache, U.S. Embassy, Foreign Tax Account Compliance Act (FATCA) Presentation at the Bangko Sentral ng Pilipinas (Apr. 10, 2013).

52. HIRE Act, 124 Stat. 109.

53. U.S. Internal Revenue Service, Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities (Notice of Proposed Rulemaking and Notice of Public Hearing) 22-23, available at <http://www.irs.gov/pub/newsroom/reg-121647-10.pdf> (last accessed June 30, 2013).

54. *Id.*

55. *Id.* at 43.

56. *Id.* at 22.

57. *Id.* See also Killfoil, *supra* note 51.

information sharing.⁵⁸ Reported information on these “high risk accounts” should aid the IRS in pursuing any U.S. tax due on those accounts.⁵⁹

As part of the FATCA implementation, FFIs are required to create an online account and password upon completing an online registration form supported by an agreement.⁶⁰ The registered FFI will be given a Global Intermediary Identification Number (GIIN)⁶¹ and will be placed in the IRS PFFI list searchable by the public through the website “irs.gov.fatca.” As to transmission of data, involved are the Organization for Economic Cooperation and Development (OECD) and the Information Technology (IT) professionals from different countries in order to secure the required information in standard format. Bulk data transfer will also be through electronic transmission.⁶² The IRS assures that this electronic design one-stop FATCA registration portal will secure account management, providing web-based application with 24/7 accessibility.⁶³ Security features include password and challenge questions, customized homepage, tools to oversee member and/or branch information, and streamlined environment for FIs to register in one place.⁶⁴

Registration will require the FI to provide basic institutional information such as the address, incorporation details, branch country, and points of contact, among others.⁶⁵

58. Killfoil, *supra* note 51.

59. Darragh & Whitehouse, *supra* note 49.

60. Killfoil, *supra* note 51.

61. *See* Killfoil, *supra* note 51. The GIIN is a distinct global ID that will be used to identify a financial institution, which allows identification of the financial institution’s FATCA ID, FI type, and country of residence; associates each entity with other affiliates/branches in the same member group; allows a single identification number to identify all information associated with a particular financial institution; and provides a means to identify FFI in a chain of investments. *Id.*

62. *Id.*

63. Internal Revenue Service, Foreign Account Tax Compliance Acts (FATCA) Update and Registration Overview (A Presentation on FATCA by the IRS) 6, available at http://www.deloitte.com/assets/Dcom-Switzerland/Local%20Assets/Documents/EN/Tax/FATCA/2013/ch_en_IRS_presentation_19032013.pdf (last accessed June 10, 2013).

64. *Id.*

65. *See* Internal Revenue Service, *supra* note 63, at 10. Online registration portal will require the following: basic information on the lead/single/member/sponsoring entities, branch details, name and contact information for the responsible officer, and points of contact, if applicable (Part I); member details, if applicable (Part II); and qualified intermediary,

The legal mechanism by which the U.S. Treasury will address legal issues on privacy and confidentiality in covered jurisdictions is through negotiation of Intergovernmental Agreements (IGAs). There are two (2) categories of IGAs, namely: Model 1 or Government to Government exchange of information and Model 2 or limited reporting of Reporting FIs directly to the IRS.⁶⁶ Under the Model 1 approach, banks will report information to their government. In turn, there will be automatic sharing of information, government to government, under a tax treaty and reciprocal information sharing through the AEOI.⁶⁷ Under the Model 2 approach, banks report information directly to IRS. Domestic laws restricting reporting are removed and will be supplemented by Exchange of Information (EOI) treaties upon request under Double Taxation Agreements (DTA) if possible.⁶⁸

Final regulations on IGAs were issued last 13 January 2013.⁶⁹ First to sign an IGA was the U.K.,⁷⁰ followed by Switzerland, Ireland, Mexico, Denmark, Norway, Italy, Spain, Germany, and the Netherlands.⁷¹ The U.S. Treasury Department is taking the lead in discussing the IGAs while IRS is working closely with the U.S. Treasury to address implementation issues.⁷² The OECD has a facilitating role in the ongoing discussions with more than 50 countries for possible multilateral information sharing in the future.⁷³

The overreaching and mandatory tenor of FATCA is evident from the consequences of non-compliance, which include, among others, the imposition of 30% withholding penalty on U.S. source income by U.S. withholding agents and 30% withholding penalty by Participating FFI on Non-Participating FFI.⁷⁴ The IRS proposal requires the withholding on

withholding partnership and withholding trust information, if applicable (Part III). *Id.*

66. *Id.* at 4.

67. *Id.*

68. *Id.*

69. U.S. Department of Treasury, Treasury and IRS Issue Final Regulations to Combat Offshore Tax Evasion, *available at* <http://www.treasury.gov/press-center/press-releases/Pages/tg1825.aspx> (last accessed June 10, 2013).

70. PricewaterHouseCoopers, The United States and United Kingdom sign the first bilateral FATCA intergovernmental agreement, *available at* <http://www.pwc.com/us/en/financial-services/publications/fatca-publications/us-uk-bilateral-fatca-intergovernmental-agreement.jhtml> (last accessed June 10, 2013).

71. Killfoil, *supra* note 51.

72. *Id.*

73. *Id.*

74. *Id.*

U.S. source interest and dividends gross proceeds from certain U.S. securities and pass-thru payments beginning in 2014 for foreign banks that do not cooperate.⁷⁵

Obviously, the intended success of the FATCA relies heavily on information sharing through required offshore reporting. While legal prohibitions have been duly foreseen, such are not seen as a ground for impossibility of implementation but only as temporary impediments. Thus, concerned jurisdictions are given until 1 January 2016 within which to comply with the FATCA.⁷⁶ In the meantime, FFIs of these jurisdictions should agree to perform “due diligence” to ID accounts and maintain records for full compliance in the future.⁷⁷

Incidentally, increased information sharing among countries is expected to result from the new reporting requirements on FFIs under the FATCA.⁷⁸

B. Brickbats

The IRS admits that FATCA, whose primary objective is disclosure of U.S. taxpayers’ foreign accounts, changes the landscape of international tax compliance.⁷⁹

Expectedly, the move towards extraterritorial implementation of the U.S. tax rules has given rise to unfavorable reaction, some involving unprecedented efforts to fight off FATCA. One article⁸⁰ cites the coordinated mutual response by the six Asian investment industry associations,⁸¹ thereby setting an important precedent of unifying the usual “fragmented voice” of the Asian business sector.⁸² But whether it spurs Asian regulators to find a common platform to negotiate U.S. or European regulation has yet to be seen.⁸³

75. Darragh & Whitehouse, *supra* note 49.

76. Killfoil, *supra* note 51.

77. *Id.*

78. Matthew Gilleard, *Information Sharing: How and Why it is Increasing*, INT’L TAX REV., Feb. 2013, at 24.

79. Internal Revenue Service, *supra* note 63.

80. Sally Wong, *Asian Fund Associations Join Forces versus FATCA*, ASIAN INVESTOR, June 2012, at 48.

81. *Id.* These are the Association of Mutual Funds in India, Federation of Investment Managers (Malaysia), Financial Services Council (Australia), Hong Kong Investment Funds Association, Investment Management Association of Singapore, and Securities Investment Trust & Consulting Association (Taiwan).
Id.

82. *Id.*

83. *Id.*

Companies, including foreign banks and other institutions, continue to fret over compliance with the reporting requirements of the FATCA.⁸⁴

There are reports that the growing anxiety over FATCA compliance resulted to foreign banks “denying U.S. persons banking services, closing long-held accounts, and refusing to open new accounts, including run-of-the-mill accounts used to receive salary, pay bills, service mortgages, write checks, service debit/credit cards, and more.”⁸⁵ The possibility that target accountholders may divest themselves of their U.S. securities also causes fear on the U.S. economy.⁸⁶

American citizens living and working abroad are threatened of being put into serious financial jeopardy in terms of financial services such as pension funds, investment instruments, and other financial vehicles that are essential to the financial security of middle-income Americans.⁸⁷

Foreign banks and financial institutions have, in great numbers, warned the U.S. that compliance with FATCA obligations will be impracticable, if not impossible; ruinous for some banks; illegal in some countries due to privacy laws; and counterproductive because of the risk of divestment in U.S. securities.⁸⁸

IV. FATCA UNDER THE PHILIPPINE JURISPRUDENTIAL AND LEGAL FRAMEWORK

The cross border dimension of FATCA is tested against the strong jurisprudential trend and legal framework of the Philippines in the areas of banking, constitutional law, and public and private international law.

*A. The Implementation of FATCA in Philippine Jurisdiction Constitutes an Exception to the Application of Foreign Law*⁸⁹

First, it is contrary to an important public policy and law on the secrecy of bank deposits.

84. Darragh & Whitehouse, *supra* note 49.

85. Federation of American Women’s Clubs Overseas, FATCA and Overseas Americans — and overseas American Spouses, *available at* http://www.fawco.org/index.php?option=com_content&view=article&id=1786:fatca-and-overseas-americans-and-overseas-american-spouses&catid=182:us-taxation&Itemid=604 (last accessed June 10, 2013).

86. *Id.*

87. *Id.*

88. *Id.*

89. Grounds used in this Section are based on the exceptions to the application of foreign law enumerated in JOVITO R. SALONGA, PRIVATE INTERNATIONAL LAW 93-110 (1979 ed.).

As discussed, while the law uses the regulatory and supervisory powers of the BSP to curtail bank frauds and irregularities, the protection of confidentiality extended to bank deposits remain sacred. In fact, except only under specified and limited circumstances, absolute confidentiality extends its protection to all types of bank deposits.⁹⁰

In *Ejercito v. Sandiganbayan (Special Division)*,⁹¹ the Supreme Court broadened the scope of protection of confidentiality when it ruled that “deposits” is to be understood broadly and not limited only to accounts which give rise to a creditor–debtor relationship between the depositor and the bank.⁹² Thus, generally, the law on secrecy of bank deposits applies not only to money which is deposited, but also to those which are invested.⁹³ Thus, confidentiality extends to investments in bonds issued by government, but does not cover commercial instruments and private bonds, and bonds issued by private government are not covered by the protection.⁹⁴

In *Philippine Savings Bank v. Philippine Impeachment Court*,⁹⁵ the Supreme Court strictly applied the standard on confidentiality over foreign currency deposits, to wit —

A clear right to maintain the confidentiality of the foreign currency deposits of the Chief Justice is provided under Section 8 of [R.A.] No. 6426, otherwise known as the Foreign Currency Deposit Act of the Philippines (*R.A. 6426*). This law establishes the *absolute confidentiality* of foreign currency deposits:

Section 8. *Secrecy of foreign currency deposits.* — All foreign currency deposits authorized under this Act, as amended by P.D. No. 1035, as well as foreign currency deposits authorized under P.D. No. 1034, are hereby declared as and considered of an *absolutely confidential nature and, except upon the written permission of the depositor*, in no instance shall foreign currency deposits be examined, inquired[,], or looked into by any person, government official, bureau[,], or office whether judicial or administrative or legislative, or any other entity whether public or private; *Provided, however*, That said foreign currency deposits shall be exempt from attachment, garnishment, or any other order or process of any court, legislative body, government agency[.]

90. See e.g., R.A. No. 1405; The General Banking Law of 2000; An Act Providing for the Regulation of the Organization and Operations of Thrift Banks, and for Other Purposes [Thrift Banks Act of 1995], Republic Act No. 7906 (1995); & An Act Providing for the Creation, Organization and Operation of Rural Banks [Rural Act of 1992], Republic Act No. 7353 (1992).

91. *Ejercito v. Sandiganbayan (Special Division)*, 509 SCRA 190 (2006).

92. *Id.* at 210.

93. *Id.* at 211.

94. BSP, SPECIAL BANKING LAWS, *supra* note 45, at 530.

95. *Philippine Savings Bank v. Senate Impeachment Court*, 686 SCRA 35 (2012).

or any administrative body whatsoever. (*As amended by P.D. No. 1035, and further amended by P.D. No. 1246, prom. Nov. 21, 1977*).

Under R.A. No. 6426 there is only a single exception to the secrecy of foreign currency deposits, that is, disclosure is allowed only upon the written permission of the depositor. In *Intengan v. Court of Appeals*, the Court ruled that *where the accounts in question are U.S. dollar deposits, the applicable law is not R.A. 1405 but R.A. 6426*. Similarly, in the recent case of *Government Service Insurance System v. 15th Division of the Court of Appeals*, the Court also held that R.A. 6426 is the applicable law for foreign currency deposits and not R.A. 1405. In ruling that Westmont Bank cannot be compelled to disclose the dollar deposits of Domsat Holdings, Inc, the Court ruled —

These two laws both support the confidentiality of bank deposits. There is no conflict between them. R.A. 1405 was enacted for the purpose of giving encouragement to the people to deposit their money in banking institutions and to discourage private hoarding so that the same may be properly utilized by banks in authorized loans to assist in the economic development of the country. It covers all bank deposits in the Philippines and no distinction was made between domestic and foreign deposits. Thus, *R.A. 1405 is considered a law of general application*. On the other hand, *R.A. 6426 was intended to encourage deposits from foreign lenders and investors. It is a special law designed especially for foreign currency deposits in the Philippines*. A general law does not nullify a specific or special law. *Generalia specialibus non derogant*. Therefore, it is beyond cavil that R.A. 6426 applies in this case.

The written consent under R.A. 6426 constitutes a waiver of the depositor's right to privacy in relation to such deposit. In the present case, neither the prosecution nor the Impeachment Court has presented any such written waiver by the alleged depositor, Chief Justice Renato C. Corona. Also, while impeachment may be an exception to the secrecy of bank deposits under R.A. 1405, it is not an exemption to the absolute confidentiality of foreign currency deposits under R.A. 6426.⁹⁶

However the main issue of “whether the Impeachment Court acted arbitrarily when it issued the assailed subpoena to obtain information concerning the subject foreign currency deposits notwithstanding the confidentiality of such deposits under R.A. 6426” was rendered moot and academic by the subsequent impeachment of Chief Justice Corona and his

96. Supreme Court *En Banc*, Notice of Resolution, G.R. No. 200238, Feb. 9, 2012, available at <http://sc.judiciary.gov.ph/jurisprudence/2012/february2012/200238-TRO.pdf> (last accessed June 23, 2013) (citing Foreign Currency Deposit Act, § 8 and Government Service Insurance System v. 15th Division of the Court of Appeals, 651 SCRA 661 (2011)) (emphases supplied).

execution of a waiver against the confidentiality of all his bank accounts, whether in peso or foreign currency.⁹⁷

In *Republic v. Eugenio, Jr.*,⁹⁸ the Supreme Court ruled that a bank account may not be inspected by the government following an *ex parte* proceeding under the Anti Money Laundering Act.⁹⁹ It also upheld the right to privacy, notwithstanding the legally recognized exceptions thereto, describing the right to privacy as a “right innately cherished by all” which “embodies even the right to be ‘let alone,’” and “the most comprehensive of rights and the right most valued by civilized people.”¹⁰⁰ Thus, —

However, sufficient for our purposes, we can assert there is a right to privacy governing bank accounts in the Philippines, and that such right finds application to the case at bar. The source of such right is statutory, expressed as it is in R.A. No. 1405 otherwise known as the Bank Secrecy Act of 1955. The right to privacy is enshrined in Section 2 of that law, to wit:

SECTION 2. All deposits of whatever nature with banks or banking institutions in the Philippines including investments in bonds issued by the Government of the Philippines, its political subdivisions and its instrumentalities, are hereby considered as of an absolutely confidential nature and may not be examined, inquired[,] or looked into by any person, government official, bureau[,] or office, except upon written permission of the depositor, or in cases of impeachment, or upon order of a competent court in cases of bribery or dereliction of duty of public officials, or in cases where the money deposited or invested is the subject matter of the litigation.

Because of the Bank Secrecy Act, the confidentiality of bank deposits remains a basic state policy in the Philippines. Subsequent laws, including the AMLA, may have added exceptions to the Bank Secrecy Act, yet the secrecy of bank deposits still lies as the general rule. It falls within the zones of privacy recognized by our laws. The framers of the 1987 Constitution likewise recognized that bank accounts are not covered by either the right to information under Section 7, Article III or under the requirement of full public disclosure under Section 28, Article II. Unless the Bank Secrecy Act is repealed or amended, the legal order is obliged to conserve the absolutely confidential nature of Philippine bank deposits.

Any exception to the rule of absolute confidentiality must be specifically legislated. Section 2 of the Bank Secrecy Act itself prescribes exceptions whereby these bank accounts may be examined by ‘any person,

97. *Philippine Savings Bank (PSBANK) v. Senate Impeachment Court*, 686 SCRA 35, 38 (2012).

98. *Republic v. Eugenio, Jr.*, 545 SCRA 384 (2008).

99. *Id.*

100. *Id.* at 412.

government official, bureau, or office[;]' namely when: (1) upon written permission of the depositor; (2) in cases of impeachment; (3) the examination of bank accounts is upon order of a competent court in cases of bribery or dereliction of duty of public officials; and (4) the money deposited or invested is the subject matter of the litigation. Section 8 of R.A. 3019, the Anti-Graft and Corrupt Practices Act, has been recognized by this Court as constituting an additional exception to the rule of absolute confidentiality, and there have been other similar recognitions as well.

The AMLA also provides exceptions to the Bank Secrecy Act. Under Section 11, the AMLC may inquire into a bank account upon order of any competent court in cases of violation of the AMLA, it having been established that there is probable cause that the deposits or investments are related to unlawful activities as defined in Section 3 (i) of the law, or a money laundering offense under Section 4 thereof. Further, in instances where there is probable cause that the deposits or investments are related to kidnapping for ransom, certain violations of the Comprehensive Dangerous Drugs Act of 2002, hijacking and other violations under R.A. No. 6235, destructive arson and murder, then there is no need for the AMLC to obtain a court order before it could inquire into such accounts.

It cannot be successfully argued the proceedings relating to the bank inquiry order under Section 11 of the AMLA is a 'litigation' encompassed in one of the exceptions to the Bank Secrecy Act which is when 'the money deposited or invested is the subject matter of the litigation.' The orientation of the bank inquiry order is simply to serve as a provisional relief or remedy. As earlier stated, the application for such does not entail a full-blown trial.

Nevertheless, just because the AMLA establishes additional exceptions to the Bank Secrecy Act it does not mean that the later law has dispensed with the general principle established in the older law that '[a]ll deposits of whatever nature with banks or banking institutions in the Philippines ... are hereby considered as of an absolutely confidential nature.' Indeed, by force of statute, all bank deposits are absolutely confidential, and that nature is unaltered even by the legislated exceptions referred to above. There is disfavor towards construing these exceptions in such a manner that would authorize unlimited discretion on the part of the government or of any party seeking to enforce those exceptions and inquire into bank deposits. If there are doubts in upholding the absolutely confidential nature of bank deposits against affirming the authority to inquire into such accounts, then such doubts must be resolved in favor of the former. Such a stance would persist unless Congress passes a law reversing the general state policy of preserving the absolutely confidential nature of Philippine bank accounts.¹⁰¹

Under the present legal framework, FATCA does not constitute an exception under either R.A. 1405 or other laws. Needless to state, secrecy of

101. *Id.* at 413-17.

bank deposits is of great importance which underscores the fact that compliance with the FATCA is violative of the country's public policy and laws on the matter. Its application would also endanger the vital interests of the Philippines.

Second, tax laws, such as the FATCA, are territorial in nature. Thus, where the foreign law is fiscal in nature, i.e., foreign revenue law, tax law, local rates, and the like, the forum may refuse its enforcement since a sovereign has no legal duty to assist foreign governments in the financing of their activities.¹⁰²

B. International Engagements Must Not Violate Domestic Law

Under the 1987 Constitution of the Philippines, the State shall develop a self-reliant and independent national economy effectively controlled by Filipinos.¹⁰³ Moreover, the State shall pursue a trade policy that serves the general welfare and utilizes all forms and arrangements of exchange on the basis of equality and reciprocity.¹⁰⁴ Thus, economic exchange must be founded on the general welfare and the protection of local enterprises¹⁰⁵ and mutual benefit.¹⁰⁶

102. SALONGA, *supra* note 89, at 108.

103. PHIL. CONST. art. II, § 19.

104. PHIL. CONST. art. XII, § 13.

105. PHIL. CONST. art. XII, § 1 provides —

Section 1. The goals of the national economy are a more equitable distribution of opportunities, income, and wealth; a sustained increase in the amount of goods and services produced by the nation for the benefit of the people; and an expanding productivity as the key to raising the quality of life for all, especially the underprivileged.

The State shall promote industrialization and full employment based on sound agricultural development and agrarian reform, through industries that make full of efficient use of human and natural resources, and which are competitive in both domestic and foreign markets. However, the State shall protect Filipino enterprises against unfair foreign competition and trade practices.

In the pursuit of these goals, all sectors of the economy and all regions of the country shall be given optimum opportunity to develop. Private enterprises, including corporations, cooperatives, and similar collective organizations, shall be encouraged to broaden the base of their ownership.

PHIL. CONST. art. XII, § 1.

106. JOAQUIN G. BERNAS, S.J., *THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY* 1179-80 (2003 ed.).

As to whether compliance with the FATCA will work to the welfare of the country and its citizens and industry may be difficult to discern at this point. Given the supposed increasing number of information requests between governments, the Philippine government may follow the bandwagon in the Asia Pacific and Latin America regions on expanding tax treaties to attract more foreign investors and increase international engagement. According to a 2009 study, tax treaties are associated with higher stocks and foreign direct investment (FDI).¹⁰⁷

However, compliance will have to go through the stringent requirements of the law on bank secrecy, which provides penal sanctions for violation of the secrecy of bank deposits.

Under the present state of Philippine banking laws, reporting of information under the FATCA may be considered an unsafe or unsound banking practice. Generally, an unsafe or unsound banking practice “embraces any action or lack of action which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk, loss[,] or damage to an institution, its shareholders[,] and the general public.”¹⁰⁸

Section 56 of the GBL defines what constitutes conducting business in an unsafe or unsound manner, to wit —

Section 56. *Conducting Business in an Unsafe or Unsound Manner.* In determining whether a particular act or omission, which is not otherwise prohibited by any law, rule[,] or regulation affecting banks, quasi-banks[,] or trust entities, may be deemed as conducting business in an unsafe or unsound manner for purposes of this Section, the Monetary Board shall consider any of the following circumstances:

56.1 The act or omission has resulted or may result in material loss or damage, or abnormal risk or danger to the safety, stability, liquidity[,] or solvency of the institution;

56.2 The act or omission has resulted or may result in material loss or damage or abnormal risk to the institution's depositors, creditors, investors, stockholders[,] or to the Bangko Sentral or to the public in general;

56.3 The act or omission has caused any undue injury, or has given any unwarranted benefits, advantage[,] or preference to the bank or any party in the discharge by the director or officer of his duties and responsibilities through manifest partiality, evident bad faith[,] or gross inexcusable negligence; or

¹⁰⁷. Gilleard, *supra* note 78.

¹⁰⁸. BSP, NEW CENTRAL BANK ACT, *supra* note 27, at 178 (citing *First National Bank of Lamarque v. Smith*, 610 F.2d 1258, 1265 (5th Circ. 1980) (U.S.)).

56.4 The act or omission involves entering into any contract or transaction manifestly and grossly disadvantageous to the bank, quasi-bank[,] or trust entity, whether or not the director or officer profited or will profit thereby.

Whenever a bank, quasi-bank[,] or trust entity persists in conducting its business in an unsafe or unsound manner, the Monetary Board may, without prejudice to the administrative sanctions provided in Section 37 of the New Central Bank Act, take action under Section 30 of the same Act and/or immediately exclude the erring bank from clearing, the provisions of law to the contrary notwithstanding.¹⁰⁹

Thus, continued and flagrant violation of the law on confidentiality of bank deposits may be considered as unsafe or unsound banking activity under the Manual of Regulations for Banks and the GBL¹¹⁰ or even gross negligence for failure to discharge its duty of exercising extraordinary diligence and reasonable business prudence.

Worse, undue disclosure of account information in violation of the bank secrecy laws could result to public hysteria eventually leading to bank runs.

Given this legal backdrop, any treaty entered into in compliance with the FATCA without resolving the foregoing issues would be open to attack and may be declared unconstitutional by the Supreme Court,¹¹¹ subject to international economic repercussions. Moreover, despite such declaration of unconstitutionality, the treaty does not lose its character as international law and does not excuse the Philippines from compliance thereto.¹¹²

C. Possible Amendments to Philippine Legal Framework — Beneficial?

The country's banking laws "must be construed in the light of the purpose of their enactment, the evils to be cured, and the remedy designed, as well as in connecting with statutes in [*pari materia*] and in harmony, with general principles of law."¹¹³

Undeniably, the application of FATCA poses a threat of injustice or injury to the residents of the Philippines and the country's banking industry and economy in general.

Under basic precepts of public international law, protection is extended not only to citizens of the Philippines but also foreign citizens residing or

109. The General Banking Law of 2000, § 56. See also Bangko Sentral ng Pilipinas, Manual of Regulations for Banks [MORB], app. 48 (Apr. 29, 2013).

110. MORB, app. 48.

111. PHIL CONST. art. VIII, § 4.

112. JOAQUIN G. BERNAS, S.J., INTRODUCTION TO PUBLIC INTERNATIONAL LAW 61 (2003 ed.) [hereinafter BERNAS, PUBLIC INTERNATIONAL LAW].

113. *Priest v. Whitney Loan & Trust Co.*, 219 Iowa 1281, 261 N.W. 374 (U.S.).

sojourning in the country.¹¹⁴ Under R.A. No. 9225 or the Citizenship Retention and Re-acquisition Act of 2003, former natural-born citizens of the Philippines, as defined by Philippine law and jurisprudence, who have lost their Philippine citizenship by reason of their naturalization as citizens of a foreign country¹¹⁵ are deemed to have re-acquired Philippine citizenship upon taking the oath of allegiance to the Republic.¹¹⁶ Thus, citizens with both U.S. and Philippine citizenship will be covered by the reporting requirements as part of the implementation of the FATCA. It should be noted also that under the rules for IRS form 8938, which became effective for tax year 2011, assets jointly held with foreign spouses must be reported as if solely owned by the American.¹¹⁷

Local banks and financial intermediaries covered by the FATCA are required not only to report to the IRS, either directly or through the national government, information on bank deposits contrary to their obligation under the laws, but also to register online to secure a GIIN.¹¹⁸ Thus, covered institutions will also be compelled to disclose information pertaining to its existence and operations.

Noticeably, the Philippines was not represented among the Asian investment industry associations openly fighting off the FATCA. For sure, the determination of the legal issues haunting the early phase of the FATCA implementation in Philippine jurisdiction will involve a tug of war between the constitutional and statutory rights of its citizens and financial institutions on the one hand, and global cooperation on the other hand. This is an impending legal issue that the Philippines has to seriously consider and resolve as such will not only radically challenge the country's present legal framework, but will also test the parameters of our national economic principles.

114. See BERNAS, PUBLIC INTERNATIONAL LAW, *supra* note 112, at 264.

115. Bureau of Immigration, Rules and Regulations Implementing the Citizenship Retention and Re-acquisition Act of 2003, Republic Act No. 9225 (2003).

116. An Act Making the Citizenship of Philippine Citizens Who Acquire Foreign Citizenship Permanent, Amending for the Purpose Commonwealth Act No. 63, as Amended, and for Other Purposes [Citizenship Retention and Re-acquisition Act of 2003], Republic Act No. 9225, § 3 (2003).

117. Federation of American Women's Clubs Overseas, *supra* note 85.

118. U.S. Internal Revenue Service, *supra* note 53.