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Why Immigrants Benefit the United States Economy and the Legal and Tax Issues Chinese, Filipinos and Vietnamese Face When Immigrating to the U.S.

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GOLDEN GATE UNIVERSITY SCHOOL OF LAW

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**Why Immigrants Benefit the United States Economy and the Legal and Tax Issues
Chinese, Filipinos and Vietnamese Face When Immigrating to the U.S.**

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S.J.D. Candidate**

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**SUBMITTED TO
THE GOLDEN GATE UNIVERSITY SCHOOL OF LAW,
DEPARTMENT OF INTERNATIONAL LEGAL STUDIES,
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**Professor Dr. Christian Nwachukwu Okeke
Professor Dr. Remigius Chibueze
Professor Dr. Gustave Lele**

**SAN FRANCISCO, CALIFORNIA
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To our God and Father be glory for ever and ever. Amen. Philippians 4:20

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ABSTRACT

This comprehensive study in U.S. immigration law examines its interactions with many relevant and significant laws and issues that affect immigrants. This study argues that immigrants benefit the U.S. economy because of their improvement on labor competition, contribution to the technology and science fields, and direct and indirect creation of jobs. This study draws upon scholarly research that proves immigrants help wages in their respective regions grow at high rates. The next question then turns to how immigrants can move to the U.S. through certain visas, and this study has a special focus on employment and investor visas. These are the issues immigrants face with U.S. immigration policies and laws, but they also face legal and financial issues back in their home countries.

This study also delves into legal, financial, and banking issues that immigrants face when immigrating to the U.S. with a special focus on immigrants from China, the Philippines, and Vietnam. Even though these are all immigrants from Asia, they all have unique backgrounds and face distinct legal and economic challenges when immigrating to the U.S. This study explores these Asian groups' history of immigration to the U.S. It also discusses financial issues they face with respect to their respective bank industries, money transfers and anti-money laundering issues.

This study then closes with a survey of tax issues that affect immigrants. Often, immigrants are unaware of the tax implications of moving to the U.S. This study aims to educate foreigners and legal scholars as to the tax consequences of being a resident for tax purposes, and then it discusses specific issues that subject them to the U.S. tax system. This study also focuses on the new U.S. reporting scheme—Foreign Account Tax Compliance Act.

TABLE OF CONTENTS

ACKNOWLEDGMENTS	ii
ABSTRACT	iii
TABLE OF CONTENTS	iv
LIST OF TABLES	vii
CHAPTERS	
1. INTRODUCTION	1
1.1. RESEARCH PROBLEM AND BACKGROUND	1
1.2. PURPOSE OF THIS STUDY	3
1.3. RELEVANCE OF THIS RESEARCH	6
1.4. RESEARCH QUESTIONS	6
1.5. METHODOLOGY	7
1.6. LIMITATIONS OF THIS STUDY	7
1.7. SCOPE OF THE STUDY AND CHAPTER OVERVIEW	7
2. WHY IMMIGRANTS BENEFIT THE UNITED STATES ECONOMY	9
2.1. INTRODUCTION	9
2.2. US IMMIGRATION AND THE ECONOMY	9
2.3. WAGE INCREASE AND JOB CREATION	13
2.4. ILLEGAL OR UNDOCUMENTED IMMIGRANTS	20
2.5. THE RATIONAL PERSON	22
2.6. THE EMPLOYMENT-BASED IMMIGRANT VISA SYSTEM	26
2.7. CONCLUSION	32
3. A COMPARATIVE STUDY OF UNITED STATES EMPLOYMENT AND INVESTOR VISAS	35
3.1. INTRODUCTION	35
3.2. EMPLOYMENT AND INVESTOR VISAS	39
3.2.1. THE H1-B NONIMMIGRANT VISA	39
3.2.2. THE L-1A INTRACOMPANY TRANSFEREE EXECUTIVE OR MANAGER	48
3.2.3. E-2 TREATY INVESTORS	54
3.2.4. THE EB-3 VISA FOR SKILLED, PROFESSIONAL, AND OTHER WORKERS	59
3.2.5. THE EB-5 INVESTOR VISA	62
3.3. THE ADVANTAGES AND DISADVANTAGES OF CERTAIN EMPLOYMENT AND INVESTOR VISAS	66
3.3.1. H-1B VISA	66
3.3.2. L-1A VISA	69
3.3.3. E-2 VISA	71
3.3.4. EB-3 VISA	73
3.3.5. EB-5 VISA	74
3.4. CONCLUSION	76

4. THE CHINESE IMMIGRANT EXPERIENCE TO THE UNITED STATES	77
4.1. INTRODUCTION	77
4.2. CHINESE DIASPORA	79
4.3. THE PUSH AND PULL FACTORS OF CHINESE MIGRATION	85
4.4. ANTI-MONEY LAUNDERING LAWS	88
4.5. CHINA’S BANK SYSTEM HISTORY	91
4.6. LARGE TRANSFER OF FUNDS	118
4.7. MONEY LAUNDERING ISSUES	122
4.8. CONCLUSION	133
5. THE FILIPINO IMMIGRANT EXPERIENCE TO THE UNITED STATES..	134
5.1. INTRODUCTION	134
5.2. FILIPINO DIASPORA	134
5.3. WHY DO FILIPINOS MIGRATE?	137
5.4. THE INSTITUTIONALIZATION OF MIGRATION	138
5.5. THE “CULTURE” OF MIGRATION	139
5.6. ANTI-MONEY LAUNDERING ISSUES	140
5.7. TRANSFER OF FUNDS	151
5.8. RULES ON FOREIGN INVESTMENTS	155
5.9. SOURCE OF FUNDS PROBLEMS	156
5.10. BANK HISTORY	160
5.11. BANK SYSTEM AND STRUCTURE	162
5.12. CURRENT LAWS OF LARGE TRANSFERS	168
5.13. DRUG PRODUCTION AND TRAFFICKING	171
5.14. INVESTMENT SCAMS/FRAUDS	172
5.15. CORRUPTION/GRAFT	173
5.16. CONCLUSION	175
6. THE VIETNAMESE IMMIGRANT EXPERIENCE TO THE UNITED STATES.....	178
6.1. INTRODUCTION	178
6.2. THE BOAT PEOPLE, THE VIETNAMESE DIASPORA	180
6.3. ANTI-MONEY LAUNDERING LAWS	181
6.4. MONEY LAUNDERING ISSUES	187
6.5. THE VIETNAMESE BANKING INDUSTRY	193
6.5.1. HISTORY	193
6.5.2. THE PRESENT VIETNAM BANKING SYSTEM	196
6.5.3. BANKING MANAGEMENT	198
6.5.4. CONDUCT OF BANKING BUSINESS	199
6.6. CONCLUSION	200
7. PRE-IMMIGRATION TAX PLANNING FOR FOREIGNERS IMMIGRATING TO THE UNITED STATES.....	202
7.1. INTRODUCTION	202
7.2. INCOME TAX	203
7.2.1. PERMANENT RESIDENT TEST	203
7.2.2. THE LAWFUL PERMANENT RESIDENT TEST OR “GREEN CARD TEST”	203

7.2.3. SUBSTANTIAL PRESENCE TEST.....	204
7.2.4. FIRST YEAR ELECTION	206
7.2.5. STATUTORY EXCEPTIONS	207
7.2.6. CONCLUSION-CONSEQUENCES OF BEING A RESIDENT OR NONRESIDENT ..	208
7.3. INCOME EFFECTIVELY CONNECTED TO A U.S. TRADE OR BUSINESS.....	209
7.4. FOREIGN INVESTORS REAL PROPERTY TAX ACT (FIRPTA).....	211
7.5. FOREIGN TAX CREDIT	214
7.6. FIXED OR DETERMINABLE ANNUAL OR PERIODIC INCOME.....	214
7.6.1. INTEREST	215
7.6.2. DIVIDENDS	216
7.6.3. RENTS OR ROYALTIES	217
7.6.4. CAPITAL GAINS	217
7.6.5. OTHER FIXED OR DETERMINABLE ANNUAL OR PERIODIC INCOME.....	219
7.7. TAX TREATIES.....	219
7.8. WITHHOLDING.....	222
7.9. FOREIGN TRUSTS.....	225
7.10. TRANSFER TAXES	228
7.10.1. DOMICILIARY	229
7.11. ESTATE TAX.....	230
7.11.1. ESTATE TAX FOR NON-DOMICILED ALIENS.....	230
7.11.2. ESTATE TAX FOR DOMICILED PERSONS.....	233
7.12. GIFT TAX.....	234
7.13. FOREIGN ACCOUNT TAX COMPLIANCE ACT	236
7.13.1. INTRODUCTION.....	236
7.13.2. IGA MODELS.....	237
7.13.3. THE PHILIPPINES: IGA IN EFFECT AS OF JULY 13, 2015.....	237
7.13.4. CHINA: IGA IN SUBSATNCE AS OF JUNE 26, 2014	250
7.13.5. VIETNAM: SIGNIFICANT DEVELOPMENTS.....	252
7.13.6. LATEST NEWS: LEGAL CHALLENGES	254
7.13.7. FATCA CONCLUSION	255
7.14. CONCLUSION.....	256
8. CONCLUSION.....	257
BIBLIOGRAPHY.....	260

LIST OF TABLES

TABLES

TABLE 1: E-2 APPROVED COUNTRIES	56
TABLE 2: REAL ILLICIT FINANCIAL FLOWS BY REGION	131
TABLE 3: COUNTRY RANKINGS BY LARGEST AVERAGE ILLICIT FINANCIAL FLOWS.....	132
TABLE 4: COUNTRY RANKINGS BY LARGEST AVERAGE ILLICIT FINANCIAL FLOWS.....	159
TABLE 5: PREDICATE CRIME STATISTICS BEFORE PAGC, 2004-2007	173
TABLE 6: PREDICATE CRIME STATISTICS.....	188

CHAPTER 1 INTRODUCTION

1.1. Research Problem and Background

U.S. immigration law is a complex system infused with politics and decades of shifting policies. In the middle of these changes are the people who want to make changes themselves—immigrants. Many potential immigrants see the U.S. as the Land of Opportunity. However, many of them do not know the legal and financial struggles of becoming a U.S. citizen let alone the appropriate visa for which the foreigner should apply.

Immigrants suffer difficulties in their transition or assimilation to American culture. In a study conducted by Daniel N. Diakanwa, he found that it is not an easy task for immigrants to integrate into American culture: “It requires a period of adjustment by the natives and the immigrants. It further requires an understanding of the dynamics of cultural integration as well as the internal and external changes that occur during various stages of cultural integration.”¹ To Researcher and Associate Director of the Culture Learning Institute at the East-West Center in Hawaii, Gregory Trivonovitch, the stages of cultural integration are the following: the honeymoon stage, the hostility stage, the integration or acceptance stage, and the home stage. He further pointed out that “these four stages are cyclic in nature, not linear, and a person will encounter periods of adjustment continuously as he or she moves from one situation to another.”² Of the given stages, it is under the so-called hostility stage where the difficulty occurs.

As for those who seek employment in the US, the general rule is that all U.S. employers are subject to the restrictions imposed by the U.S. immigration law. This is to say that employers may only employ those who are eligible. Individuals who are eligible are either citizens of the United States, aliens who acquired a LPR status or those whom the USCIS individuals expressly authorized

¹ Daniel N. Diakanwa, *Adjusting and Integration New Immigrants in the American Culture*, 2 (October 2011)

² *Id.*, 5

to be employed. While the restrictions imposed by U.S. Immigration Law are intended to protect the U.S. workers it consequently makes it difficult for many immigrants to acquire a job in the US upon their arrival in the country.

Other than for work authorization, additional restrictions are imposed such as the need to sponsor noncitizens for work visas, which require employers to file paperwork with USCIS and pay processing fees, which cannot be transferred to employees. Notably, during said sponsorship process, employers may face additional difficulties such as the long wait for government approval (which can take months), and concerns about the availability of these visas (the government caps some visa categories). The obstacles of employment-based visa sponsorship can be particularly burdensome to public interest employers. In a competitive job market, these employers will almost always have U.S. applicants for listed positions, so they may choose not to allocate any funds for visa sponsorship.³

Another way to acquire U.S. citizenship is through investments. However, the amounts required are high and the conditions imposed are stiff. For example, on the Employment-Based Fifth Preference, also known as “EB-5,” the amount of capital required shall be \$1,000,000.⁴ If the investment is made in a targeted employment area, the amount of capital required shall then be \$500,000. If for a high employment area, the amount of capital required shall then be greater than, but not greater than 3 times, the amount of \$1,000,000.⁵ While the U.S. market offers promising opportunities for foreign investors, other than for the purpose of acquiring an LPR status, the decision, however, of whether to buy or build a business in the United States is governed by a host of factors. These factors may be geographic, demographic, financial, and industrial and often it

³ Nathaniel Ingraham, Citizenship Guide: Hiring Non-Citizens, President and Fellows of Harvard College, 2011

⁴ The Attorney General, in consultation with the Secretary of Labor and the Secretary of State, may from time to time prescribe regulations increasing the dollar amount specified under the previous sentence.

⁵ INA § 203(b)(5)(C)

includes industry maturity, financial considerations, the potential for success, internal capacity, and supplier and customer availability.⁶

1.2. Purpose of this Study

The study aims to illuminate the struggles, options, and opportunities immigrants have when moving to the U.S. This study will be a comprehensive review and analysis of current U.S. immigration law and its connection with laws of China, the Philippines and Vietnam with respect to money transfer and banking since many immigrants from these countries have to consider how to legally transfer money when they move to the U.S. Furthermore, immigrants should be aware of the complex U.S. tax system since there are different tax consequences for green card holders and foreigners. This study not only examines immigration law, but also the relevant tax issues that immigrants should know how to navigate.

Notably, federal courts continually recognized immigration law as being second only to tax law in their complexity.⁷ In comparison, it has been said that a mistake on one's taxes usually results in only a fine or an additional payment to the Internal Revenue Service (IRS) while a mistake or a poor choice on immigration can change one's life forever.⁸ The IRS agrees that the U.S. tax code is too complex, which is an enormous problem according to the IRS Taxpayer Advocate Service (TAS).⁹

According to the 2010 Report of the IRS Taxpayer Advocate to Congress, for the past 10 years, there have been approximately 4,428 tax code changes, inclusive of an estimated 579 changes in 2010 alone. As per analysis conducted in early 2010, the tax code contained 3.8 million words. This is radically higher than the 1.4 million words contained in 2001 tax code.¹⁰

⁶ KPMG LLP, Investing in the United States: A guide for international companies, 3 (2011)

⁷ Daniel Kanstroom and M. Brinton Lykes (Ed.), The New Deportations Delirium: Interdisciplinary Responses, 90 (2015)

⁸ Stuart Anderson, Immigration, 56 (2010)

⁹ Arthur B. Laffer, Ph.D., Wayne H. Winegarden, Ph.D. & John Childs, The Economic Burden Caused by Tax Code Complexity, 8 (April 2011)

¹⁰ "2010 Annual Report to Congress" National Taxpayer Advocate, Volume 1, "Most Serious Problems, #1" (2010)

The purposes of this study are to explain the essence of U.S. immigration law and assist foreigners on their exploration of U.S. immigration law. Once foreigners learn of their options, they can then understand what connected issues affect their immigration goals such as their respective countries' anti-money laundering laws.

In China, for example, The Administrative Measures for the Financial Institutions' Report of Large-sum Transactions and Doubtful Transactions,¹¹ was formulated by the People's Bank of China in accordance with the Anti-Money Laundering Law of the People's Republic of China,¹² with a view to prevent money-laundering through financial institutions and regulate the financial institutions' report of large-sum transactions and doubtful transactions.

Article 7 of the law provides that "A financial institution shall, within 5 working days after the occurrence of a large-sum transaction, timely send to the CALMAC an electronic report of large-sum transaction via its headquarters or via an institution designated by its headquarters. If it has no headquarters, or if it is unable to send the report of large-sum transaction to the CALMAC via its headquarters or via the institution designated by its headquarters, its way of report may be determined by the PBC separately."¹³ Furthermore, "For a large-sum transaction conducted through a client's account or bank card opened in or issued by a financial institution within China, the account opening financial institution or the card issuing financial institution shall submit a report. For a large-sum transaction conducted through an overseas bank card, the receiving bank shall submit a report. For a large-sum transaction that is not conducted through a client's account or bank card, the financial institution that handles this business shall submit a report."¹⁴

The Philippine government enacted Republic Act (R.A.) No. 9160 (The Anti-Money Laundering Act of 2001), which took effect on 17 October 2001 to curb money laundering. Certain

¹¹ Order of the People's Bank of China (No. 2 [2006])

¹² *Id.*

¹³ *Id.* at Art. 1

¹⁴ *Id.* at Art. 7, § 2

provisions of AMLA were amended by R.A. No. 9194 (An Act Amending R.A. 9160) effective 23 March 2003. It was further amended by RA 10167 which took effect on 2 June 2012 and the latest amendment is RA 10375 effective 15 February 2013. It has also issued the Revised Implementing Rules and Regulations (RIRR) implementing R.A. No. 9160, as amended.¹⁵

As for Vietnam, it was not until 2005 when the term “money laundering” (rua tien) was formally used and legally defined in Vietnam when both the term “money laundering” and the general legal framework of the Anti-Money Laundering in Vietnam were stipulated in Government Decree 74/2005/ND-CP. This move of the Vietnamese authorities is rather an admission and a confirmation of the existence of money laundering in Vietnam.¹⁶ The key legal instruments governing the anti-money laundering activities in Vietnam are the following:¹⁷

1. Law on Prevention and Combat of Money Laundering No. 07/2012/QH13 (AML Law);
2. Decree No. 116/2013/ND-CP of the Government, dated 4 October 2013, detailing the implementation of a number of Articles of AML Law;
3. Circular No. 35/2013/TT-NHNN of the State Bank of Vietnam, dated 31 December 2013, guiding the Provisions on Prevention and Combat of Money Laundering;
4. The Penal Code of 1999, particularly Articles 250 and 251 thereof; and
5. The Law on Drug Prevention of 2000, particularly Article 3 (5) thereof.¹⁸

The new Law on Anti-Money Laundering was passed and made effective on 1 January 2013.¹⁹ It replaced the previous legislation (Decree No. 74 of 2005) and provides tougher measures, including with respect to customer due diligence and record keeping. The 50-article Law provides measures to prevent, detect, stop and handle organizations and individuals committing acts

¹⁵ Official Gazette of the Republic of the Philippines, (February 21, 2012)

¹⁶ *Id.*, 5 Supra note 13

¹⁷ Norton Rose Fulbright, Business ethics and anti-corruption – Asia Pacific laws: Vietnam, 128 (September 2014)

¹⁸ Asia/Pacific Group on Money Laundering, Mutual Evaluation Report, Anti-Money Laundering and Combating the Financing of Terrorism VIETNAM, 7 (8 July 2009)

¹⁹ The Law on Anti-Money Laundering No. 07/2012/QH13.

of money laundering. The prevention and combat of money laundering for the purpose of financing terrorism also complies with the Law.²⁰

1.3. Relevance of this Research

Every year, more than a million immigrants move to the U.S.²¹ or on net, one immigrant arrives in every 41 seconds.²² They make the U.S. their new home after deciding to leave their country of origin. Many foreigners wish to do the same. Yet, they lack the knowledge and resources to do so. Many see the U.S. as a land of promise, but the only likelihood among all immigrants is that they will face a long, drawn-out process and as such should choose wisely the visas for which they apply.

1.4. Research Questions

Foreigners need to know what U.S. immigration issues they will face when applying for certain visas. Foreigners also need to know what are certain money transfer issues they will face when immigrating to the U.S. Additionally, they should be aware of the tax implications of becoming a resident of the U.S.

Based on these needs, foreigners will have a wide array of questions which guide this study's research questions. With the interests of immigrants in mind, this study attempts to answer, "What kind of visa is best for a person's specific situation?" Once foreigners decide on a visa, "What are the legal and financial issues they will undergo from their home countries of China, The Philippines, and Vietnam when they transfer money from their foreign accounts to the U.S.?" Lastly, "What are the tax implications of becoming a U.S. resident for tax purposes?"

²⁰ Samantha Campbell & Pham Bach Duong, The Banking Regulation Review (5th Edition), 17 (28 April 2014)

²¹ Office of Immigration Statistics, Homeland Security, 2013 Yearbook of Immigration Statistics, 5 (August 2014)

²² U.S. Census Bureau, International Data Base, 2011

There has been a lack of synthesis of all these questions and foreigners need to know how to navigate these issues in order to make their move to the U.S. as smooth as possible. Thus, there is a need to answer a global question of, “How is it possible to synthesize all these issues in such a way that makes it understandable to foreigners who have very little exposure to U.S. laws?” This study will attempt to answer these questions in a comprehensive way.

1.5. Methodology

The research methodology employed in this study is a reliance on primary resources of U.S. and international laws and rules, treaties, legal publications and other documents. Such resources all relate to the relevant topics of each respective chapter.

1.6. Limitations of this Study

Although there have been comprehensive analyses on U.S. immigration law, there is a lack of fusion on related issues such as anti-money laundering laws of specific countries and U.S. tax laws. This study attempts to do something truly unique and because of this ambition, there is a dearth of similar studies. Thus, this is a limitation of the study that needs to be acknowledged.

1.7. Scope of the Study and Chapter Overview

The scope of this study encompasses U.S. immigration and tax law and the money transfer and bank laws of China, the Philippines and Vietnam in an immigration context. This study does not focus on all U.S. visas, nor does it attempt to explain the long history of U.S. immigration law since one of the aims of this study is to give foreigners understandable presentations of their most feasible visa options. This study specifically studies anti-money laundering issues and money transfer issues in such a way that makes it comprehensible for immigrants of China, the Philippines, and Vietnam. Lastly, this study explores and explains only tax laws relevant for foreigners who wish to immigrate to the U.S. and does not review all tax codes tax residents have to consider. This

study is done in such a way that it starts with the global issues of U.S. immigration policy, then goes into more detailed issues of U.S. visas and tax laws.

Chapter two discusses the benefits immigrants bring upon the U.S. economy. It details specific contributions immigrants make to the U.S. economy and argues for the continued acceptance of immigrants. Such acceptance will only help improve the U.S. economy because of the skills foreigners possess as workers and investors. As taxpayers, foreigners help local economies grow and add diverse and innovative business contributions to help foster economic growth.

Chapter three compares employment visas, work visas, and investor visas. It provides a comprehensive comparison of the advantages and disadvantages from these groups of visas. It also discusses the history, policy and background of each visa. It allows readers to decide for themselves which visa is best for them if they are potential immigrants, or deeper understanding of U.S. immigration laws if the readers read for academic purposes.

Chapters four, five, and six discuss the history, reasons for immigrating to the U.S. along with financial issues of money transfer, bank laws, and anti-money laundering of China, the Philippines, and Vietnam respectively. Chapters four, five, and six follow similar formats, but all have unique issues and subtleties that make their experiences entirely different even though they are all Asian countries. This study attempts to discuss relevant issues that immigrants of those countries would ask regarding money transfers and money transfer restrictions.

Chapter seven examines U.S. tax issues foreigners face when immigrating to the U.S. It explores preliminary tax issues such as how to determine whether someone is a U.S. resident for tax purposes. Then it examines specific issues that foreigners need to be aware of when immigrating to the U.S. It educates foreigners of the intricacies of having foreign property to wanting to sell property in the U.S.

Chapter 2 WHY IMMIGRANTS BENEFIT THE UNITED STATES ECONOMY

2.1. Introduction

Recent studies have shown an opposition to U.S. immigration by Americans. A survey conducted in 2007 showed that Americans have given lesser support to more open immigration policies. In the following year, the survey has shown that about 50 percent of native-born Americans looked at immigration as a problem, not an opportunity. Thus, during the 2008–2009 recession period and the 2010–2011 jobless recovery, the opinion about immigration further worsened. Ideas like immigrants taking American jobs, depressing national wages, and threatening the U.S. economy have become deeply rooted and even deeper during economic recessions.²³

The different percentages on the national survey must, however, be seen to suggest that citizen's anxiety is manageable. And what is needed are immigration policies that meet the sources of public dissatisfaction and lessen public perceptions of immigration's social and economic costs. Thus, this study aims to negate that seemingly legitimate fear and anxiety over immigration by arguing that the benefits of immigration are much broader than widely imagined and the costs are more confined. In other words, immigration is beneficial for the economy of the United States as to its population, both to native or foreign-born citizens.

2.2. U.S. Immigration and the Economy

On July 25, 1785, the first President of the United States and one of the Founding Fathers, George Washington, wrote to Dr. David Humphreys,²⁴ “My first wish is to see this plague to mankind [war] banished from off the earth, and the sons and daughters of this world employed in more pleasing and innocent amusements, than in preparing implements and exercising them for the

²³ Giovanni Peri, Immigration, Labor Markets, and Productivity, *Cato Journal*, 35-36 (Winter 2012); citations omitted

²⁴ The Writings of George Washington from the *Original Manuscript Sources* 1745-1799, 202 (John C. Fitzpatrick, ed., August 1936); prepared under the direction of the United States George Washington Bicentennial Commission and published by authority Library of Congress.

destruction of mankind. Rather than quarrel about territory, let the poor, the needy, and oppressed of the earth, and those who want land, resort to the fertile plains of our western country, the second land of promise, and there dwell in peace, fulfilling the first and great commandment.” Washington eventually saw the nation become, as it has always been, a nation of immigrants. The United States of America, after all, was founded on the universal promise that “all men are created equal.”²⁵

There were many waves of immigrants from the founding of the country. From 1820 to 1920, nearly 30 million foreigners arrived in the United States and close to 400,000 immigrants arrived in 1870 alone. After a decade, the figure rose to over 450,000 and stayed high for several years. These migrants transformed America by supplying the much-needed labor in the industrialization era.²⁶ Throughout history, immigrants have come from around the globe together with their children and have kept the workforce of the United States vibrant, kept the businesses of the United States on the cutting edge, and helped build the greatest economic engine in the world.²⁷

America is truly a nation of immigrants. Nearly all people living here today are immigrants themselves, or are the descendants of immigrants who came to this country earlier in its history.²⁸ The U.S. Census Bureau estimates that in 2013, the U.S. welcomed a new immigrant, on net, every 41 seconds.²⁹ Overall in 2013, 41.3 million immigrants lived in the U.S., accounting for 13.1% of all U.S. residents.³⁰ Put another way, more than one in every eight persons in the U.S. in 2013 was a first-generation immigrant. When one considers the children of immigrants, the foreign-born presence in the U.S. is even more impressive. In 2012, some 35.7 million “second-generation

²⁵ The unanimous declaration adopted by the Continental Congress meeting at Philadelphia, Pennsylvania on July 4, 1776, which announced that the thirteen American colonies, then at war with Great Britain, regarded themselves as thirteen newly independent sovereign states, and no longer a part of the British Empire. Instead they formed a new nation—the United States of America.

²⁶ Supra note 2, 3

²⁷ 114th Congress, 1st Session, S. Res. 216 (June 25, 2015); on recognizing the month of June 2015 as “Immigrant Heritage Month”

²⁸ Matthew Denhart, *America’s Advantage: A Handbook on Immigration and Economic Growth*, The Bush Institute, 20 (March 2015)

²⁹ U.S. Census Bureau, International Data Base, 2011

³⁰ U.S. Census Bureau, 2013 American Community Survey.

immigrants”³¹ lived in the country.³² Together, the first and second generations of America’s immigrants accounted for almost 76 million people in the U.S. in 2012. That equals 24% of the total population in that year, or the equivalent of almost one out of every four persons in the U.S.

Immigrants come to the United States in three general ways. Darrel M. West, political scientist, explained that the first route is immigrants coming to the United States through marriage, family ties, special skills or as political refugees. The second route is through temporary work or tourism visas or through short-term visas for students or government exchanges who come to America for limited periods of time either to visit, work, attend government or academic events, or enroll in educational institutions. They, however, are allowed to work in America for a maximum period of three years. The third and most controversial mechanism is through illegal immigration, referring to undocumented immigrants.³³

E.G. Ravenstein, referred to as the founding father of modern migration research, suggested in 1885 that the primary causes of migration are economic³⁴ and the economic effect, thus, in his speech given on May 4, 2006 before Congress, U.S. Representative Dave Reichert emphasized that “Immigration is not just compatible with but is a necessary component of economic growth.”

It can also be argued that migration increases labor competition as stated, “The very simple logic of demand and supply implies that, other thing being fixed, an increase in the labor supply reduces wages as workers compete in an increasingly crowded economy.” Economist Giovanni Peri argued, however, that said reasoning is “partial equilibrium,” which relies on the assumption that other things are kept fixed. Thus, they do not account for the series of adjustments and responses of the economy to immigration. Still, that simple logic is often meant to imply that more workers in an economy mean lower wages and lower incomes. These partial equilibrium implications are likely to

³¹ A “second-generation immigrant” refers to an individual who reports having at least one foreign-born parent.

³² U.S. Census Bureau, Current Population Survey, Annual Social and Economic Supplement, 2012

³³ Supra note 2, 6-7

³⁴ E.G. Ravenstein, *The Laws of Migration*, 167, 198-217 (1885); E.G. Ravenstein, *The Laws of Migration*, 241, 286-89 (1889)

be incorrect, theoretically and empirically, in “general equilibrium.” The workings of four important mechanisms attenuate — and often reverse — the partial effects of an increased supply of foreign workers on the demand for native workers.³⁵

Studies show that 70 percent of agricultural workers in the United States are foreign-born and keep California and farms in the United States in business. More than one-fourth of all new businesses in the United States are started by immigrants, who, together with their children, started more than 40 percent of Fortune 500 companies.³⁶ Together, these businesses employ tens of millions of both native-born and foreign-born in the United States, generating more than \$4.5 trillion in annual revenue.³⁷ Equally significant is the fact that more than 75 percent of companies in the United States had an immigrant with either a top management or a product-development position, which helps the companies grow and innovate.³⁸

The facts do not end there. Notably, immigrants have likewise given great contribution to progress in technology and sciences. In a study conducted by the Kauffman Foundation, more than 20 percent of companies engaged in technology in the United States were started by immigrants, who, as well, created revolutionary and innovative companies, i.e., Google, Intel, and eBay, thus, paving the way to modern American life.³⁹ In fact, 14 percent of employed college graduates and 50 percent of those with doctorate degrees, who work in mathematics and computer science occupations in the United States, are immigrants. Moreover, 44 percent of new technology start-ups in Silicon Valley⁴⁰ for the period covering 2006 to 2012 were founded by at least one immigrant.⁴¹

³⁵ Giovanni Peri, *The Economic Benefits of Immigration*, Berkeley Review of Latin American Studies, 15 (Fall 2013)

³⁶ Senate Committee on Commerce, Science, and Transportation, *The Role of Immigrants in America's Innovation Economy*, S. Hrg. 113-101, 11 (May 8, 2013)

³⁷ *Supra* note 8

³⁸ *Supra* note 16, 16

³⁹ *Id.*, 4

⁴⁰ Widely known as the international hub for technological development and innovation.

⁴¹ *Supra* note 17

Talented people, often top students in their home countries, come to the United States in search of new and better opportunities. Not only from across the nation but around the world, they come to the United States, which they see as a place where hard work and perseverance is valued and rewarded. The nation's vibrant and open economy, together with the universities and research institutions that lead in technological and scientific innovation, are seen to offer them greater challenges and a bigger stage.⁴²

Throughout our nation's history, immigrants have enriched economic, intellectual, social, and cultural life in the United States in a number of fundamental respects. The nation needs a new national narrative on immigration that moves from themes of illegality and abuse to innovation and enrichment. The country needs to build a new public policy based on empirical realities, not abstract fears and emotions.

2.3. Wage Increase and Job Creation

One fear that native-born workers have is that immigrant workers reduce their wages and increase unemployment, since immigrants are feared to fill jobs that native-born workers should have had. Recent studies, however, show that there exists no considerable effect of immigration on labor markets, particularly between the number of immigrants coming to the United States and the reduction of wages or the increase of employment.⁴³

On matters of wages, there are actually two ways immigrant workers increase the wages of native-born Americans. First, immigrants and native-born workers tend to differ in their education, their occupations, and their skills. The jobs which immigrants and native-born workers perform are, at the most, interdependent. The productivity of native-workers is then increased and as result, increases their wages. Second, the inclusion of immigrant workers to the labor force rather

⁴² Supra note 16, 1

⁴³ Michael J. Trebilcock & Matthew Sudak, *The Political Economy of Emigration and Immigration*, 81 N.Y.U. L. Rev., 269 (April 2006)

stimulates new investments in the economy. This, in turn, increases the demand for labor. An increased demand for labor exerts upward pressure on wages.⁴⁴

A study conducted by the Economic Policy Institute showed that the average wage increase native-born workers experience, as a result of immigration, is calculable. In its 2010 report, it was estimated that immigration increased the wages of native-born workers by 0.4 percent for the period covering 1994 to 2007. Further, the amount of wage gain varied slightly by the level of education of the worker. College graduates received an upward pressure of 0.4 percent; those with some college 0.7 percent; high school graduates 0.3 percent; and those without a high school diploma 0.3 percent.

⁴⁵ This is almost equal with the estimates given by Economist Giovanni Peri where, for the period covering 1990 to 2006, immigration increased the wages of native-born workers by 0.6 percent; college graduates 0.5 percent; those with some college 0.9 percent; high school graduates 0.4 percent, and those without a high school diploma 0.3 percent.⁴⁶

Studies conducted on the local level have similar conclusions. Studies in Dawson County, Nebraska⁴⁷ and Miami, Florida⁴⁸ showed that both cities experienced a large arrival of immigrants over a short time period and that wages increased. Economist David Card, who conducted his study in more than 100 cities, equally found that the wages of native-born citizens tend to be higher in cities with large immigrant populations.²³ According to research, “[t]he uniformity with which the authors of [empirical work in labor economics] conclude that there is essentially no consistent evidence of labor-market effects from immigration is truly striking.”⁴⁹ However, authors Noel

⁴⁴ Giovanni Peri, *Rethinking the Effects of Immigration on Wages: New Data and Analysis from 1990–2004*, 1 (October 2006)

⁴⁵ Heidi Shierholz, *Immigration and Wages: Methodological Advancements Confirm Modest Gains for Native Workers*, 12 (February 4, 2010)

⁴⁶ Gianmarco I. P. Ottaviano and Giovanni Peri, *Immigration and National Wages: Clarifying the Theory and the Empirics*, NBER Working Paper No. 14188, 58, (July 2008)

⁴⁷ Örn Bodvarsson and Hendrik Van den Berg, “*The Impact of Immigration on a Local Economy: The Case of Dawson County, Nebraska*,” *Great Plains Research* 13, no. 2, 291–309 (Fall 2003)

⁴⁸ Örn B. Bodvarsson, Joshua J. Lewer, and Hendrik F. Van den Berg, *Measuring Immigration’s Effects on Labor Demand: A Reexamination of the Mariel Boatlift*, IZA Discussion Paper No. 2919 (IZA-Institute for the Study of Labor, July 21, 2007)

⁴⁹ Noel Gaston & Douglas Nelson, *Immigration and Labour-Market Outcomes in the United States: A Political-Economy Puzzle*, 16 *Oxford Rev. Econ. Pol’y* 104, 105, 107 (2000)

Gaston and Douglas Nelson recognize that: “It is also widely agreed that there are sizeable negative effects on migrants of the same origin and vintage, and, perhaps not quite so widely held, agreement that the small, and shrinking, group of native high-school drop-outs experience economically, and statistically, significant negative consequences from contemporary immigration.”⁵⁰

The National Research Council (NRC), after a comprehensive review of the empirical evidence in 1997, made its conclusion that “[t]he weight of the empirical evidence suggests that the impact of immigration on the wages of competing native-born workers is small...”⁵¹ The findings of the NRC is considered puzzling because accepted labor economics suggests that when the supply of labor is increased, *ceteris paribus*⁵², wages will decrease among similarly situated workers. The *ceteris paribus* assumption is important for it requires immigrants to increase the supply of labor without simultaneously increasing the demand for labor.⁵³ Notwithstanding, a balancing increase in the demand for labor is possible. This assumption is due to the fact that immigrants are also consumers of goods and services. This is to say that an increased demand for goods and services inevitably results in domestic suppliers of goods and services increasing their demand for labor or employment.⁵⁴

Indeed, immigrants, as consumers, create employment opportunities. Immigrant workers spend their wages to purchase food, clothes, appliances, cars, and other products and services from domestic suppliers of goods and services.⁵⁵ Moreover, these domestic suppliers respond to the arrival of new immigrant workers by investing in new restaurants, stores, and production facilities.¹¹

⁵⁰ David Card, How Immigration Affects U.S. Cities, CReAM Discussion Paper No 11/07 (Center for Research and Analysis of Migration, June 2007).

⁵¹ James P. Smith & Barry Edmonston, *The New Americans: Economic, Demographic, and Fiscal Effects of Immigration*, 220 (1997)

⁵² *Ceteris paribus* or *caeteris paribus* is a Latin phrase meaning "with other things the same" or "all or other things being equal or held constant" or "all other things being equal" or "all else being equal". A prediction or a statement about a causal, empirical, or logical relation between two states of affairs is *ceteris paribus* if it is acknowledged that the prediction, although usually accurate in expected conditions, can fail or the relation can be abolished by intervening factors. (Prof. Dr. Ekkehart Schlicht, *Isolation and Aggregation in Economics*, 17 (1985))

⁵³ Supra note 23

⁵⁴ *Id.*, 270

⁵⁵ Heidi Shierholz, *Immigration and Wages: Methodological Advancements Confirm Modest Gains for Native Workers*, 22 (February 4, 2010)

This results in more employment opportunities for additional workers. A study conducted by the University of Nebraska, Omaha, estimated that 12,000 jobs for the state of Nebraska in 2006 and more than 8,000 jobs in the Omaha and Lincoln metropolitan areas, were generated due to immigrants' demand for goods and services.⁵⁶

It is a fact that there exists no competition between most immigrant and native-born workers. This is equally true even in times of high unemployment. It must be noted that foreign-born workers differ from most native-born workers in a number of terms, such as what occupations they work in, where they live in the country, and the education they have. There is a tendency to believe that immigrants and native-born workers work in different occupations. Otherwise, they would usually specialize in different tasks, with native-born workers taking higher-paid jobs that require better English-language skills than many immigrant workers possess. There is no competition between immigrants and native-born workers, rather they complement each other.⁵⁷

Immigrants do not steal jobs from native-born workers. Immigrants come to the United States either to fill jobs that are available or to create and establish their own businesses as investors and entrepreneurs. Studies show that there is no connection between immigration and high unemployment at the regional, state, or county level.⁵⁸ During the 2006 immigration debates, Stanford Law School Dean Dan Siciliano, then also the Executive Director of the Program in Law, Economics, and Business, expounded that the nation's economy depends on immigrant workers filling the "growing number of less-skilled jobs for which a shrinking number of native-born workers are available."⁵⁹ Immigrant labor, according to Siciliano, does not take jobs away from native-born workers or cause the reduction of their wages. Rather, as Siciliano argued, immigrant

⁵⁶ Christopher S. Decker, *Nebraska's Immigrant Population: Economic and Fiscal Impacts*, 1 (October 2008)

⁵⁷ Michael Greenstone and Adam Looney, *Ten Economic Facts about Immigration*, 5 (September 2010)

⁵⁸ Rob Paral & Associates, *The Unemployment and Immigration Disconnect: Untying the Knot, Part I of III*, 4-6 (May 2009)

⁵⁹ *Immigration: Economic Impacts: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 63 (2006) (written testimony of Dan Siciliano, Executive Director of the Program in Law, Economics, and Business, Stanford Law School) (citing the chief economic problem with immigration policy as the limited legal options for immigrants to come and take these jobs).

workers fill in the “gaps in our labor force.”⁶⁰ When native-born workers either become older or more educated, they tend to seek high-paying or high-skilled jobs. This is where the gaps happen. To Siciliano, this is a phenomenon he described as “the economic reality of a changing native-born U.S. population.”⁶¹ In other words, employment opportunities and wages of “nonprofessional U.S. workers” are not affected due to immigration.⁶²

Other than replacing retiring native-born workers in the labor force or those who left to seek high-paying or high-skilled jobs, immigrant workers actually do more. Immigrants will likewise look after the retiring native-born workers themselves. It is expected that as the U.S. population advances in age, there shall be a high demand for healthcare workers of all kinds, both high-skilled and lesser-skilled.³⁰ Studies show that between 2010 and 2020, there is a projected increase of employment by 34.5 percent in healthcare support occupations, 25.9 percent in healthcare practitioner and technical occupations, and 26.8 percent in personal care and service occupations.³¹ Many of them will, of necessity, be immigrants.

There exists a demographic crisis in the nation’s economy. Around 77 million Baby Boomers, equivalent to about a quarter of the U.S. population, have started reaching their retirement age.⁶³ Over the next two decades, this will have a huge economic impact to such extent that it will stretch, to a breaking point, the nation’s Social Security and Medicare systems. The growth of the labor force will fall. A smaller number of workers and taxpayers will support the growing number of retirees. Under the given circumstances, immigrants will play a crucial role in filling the labor force and, as a result, the tax base.⁶⁴ The Bureau of Labor Statistics (BLS) projected that the U.S.

⁶⁰ *Id.* at 64.

⁶¹ *Id.*

⁶² Andrew J. Elmore, *Egalitarianism and Exclusion: U.S. Guest Worker Programs and a Non-Subordination Approach to the Labor-Based Admission of Nonprofessional Foreign Nationals*, 21 *Geo. Immigr. L.J.*, 530-31 (2007)

⁶³ Dixie Sommers and James C. Franklin, “*Overview of Projections to 2020*,” *Monthly Labor Review*, 10 (January 2012)

⁶⁴ Dowell Myers, *Immigrants and Boomers: Forging a New Social Contract for the Future of America* (Russell Sage Foundation, 2007); John Pitkin and Dowell Myers, *Projections of the U.S. Population, 2010–2040, by Immigrant Generation and Foreign-Born Duration in the U.S.* (Population Dynamics Research Group, School of Policy, Planning, and Development, University of Southern California, 2011);

population age 55 and older will increase by 21.7 million and reach 96.3 million, or 36.6 percent of the population, between 2010 and 2020.⁶⁵ Thus, through retirement, 33.7 million job openings will then be created. With that, economic growth will then be expected to create 21.1 million additional job openings and the demand for workers will increase.⁶⁶

Immigrants go where the jobs are, or they create jobs on their own⁶⁷ and this is best done through the businesses they establish. Immigrants tend to be more risk takers than native-born Americans according to a study conducted by the Kauffman Index of Entrepreneurial Activity, which found that “immigrants were more than twice as likely to start businesses each month in 2010 than were the native-born [Americans].” This is reflected on the upward pressure in immigrant entrepreneurship since 2006.⁶⁸ The Partnership for a New American Economy, through the use of census data, estimated that immigrant-owned businesses “generate more than \$775 billion in revenue, \$125 billion in payroll, and \$100 billion in income, employing one out of every 10 workers along the way.” Moreover, “immigrants started 28 percent of all new U.S. businesses in 2011.”⁶⁹

In either small or large businesses, immigrants do play an important role in creating jobs. A report made by the Fiscal Policy Institute showed that small businesses owned by immigrants employed 4.7 million people and had \$776 billion in receipts in 2007. Notably, 18 percent of all small business owners in the United States are immigrants. This is higher than the 13 percent immigrant share of the population or the 16 percent labor force.⁷⁰ As regards to large businesses, the Partnership for a New American Economy estimated that immigrant-founded Fortune 500 companies account for 18 percent of all Fortune 500 companies. From which, \$1.7 trillion in annual

⁶⁵ Mitra Toossi, “*Labor Force Projections to 2020: A More Slowly Growing Workforce*,” Monthly Labor Review, 47 (January 2012)

⁶⁶ C. Brett Lockard and Michael Wolf, “*Occupational Employment Projections to 2020*,” Monthly Labor Review, 102 (January 2012)

⁶⁷ Rob Paral & Associates, *Immigration and Native-Born Unemployment across Racial/Ethnic Groups: Untying the Knot, Part II of III*, 7 (May 2009)

⁶⁸ Robert W. Fairlie, *Kauffman Index of Entrepreneurial Activity, 1996–2010*, 9 (March 2011)

⁶⁹ *Id.*, 3

⁷⁰ David Dyssegaard Kallick, *Immigrant Small Business Owners: A Significant and Growing Part of the Economy*, 1 (June 2012)

revenue is generated and 3.7 million workers worldwide are employed. These companies include AT&T, Verizon, Procter & Gamble, Pfizer, Kraft, Comcast, Intel, Merck, DuPont, Google, Cigna, Kohl's, Colgate-Palmolive, PG&E, Sara Lee, Sun Microsystems, United States Steel, Qualcomm, eBay, Nordstrom, and Yahoo!⁷¹ Equally, a survey conducted in 2008 showed that one-quarter of both engineering and technology-related companies in the United States for the periods covering 1995 and 2005, had an immigrant as either a founder or co-founder. In 2005, these companies made \$52 billion in sales and had 450,000 employees.⁷²

Equally related in creating American jobs are the tens of thousands of high-skilled immigrants who come to the United States every year either to study, work, or start a business. They make both the nation and the economy stronger.⁷³ To maintain the same in the coming years or decades, there exists an imperative need for well-educated, tech- and science-savvy workers and entrepreneurs. And for both immigrants and native-born citizens who qualify as such, all the opportunity must be given unto them so that they may contribute to the success and prosperity of the nation.⁷⁴

Whether immigrants take jobs or create jobs is not quite understood. Congress needs to know how different groups of foreign-born workers affect employment so that they may design immigration policies that benefit the US economy.⁷⁵ More and more economic research proves the numerous economic benefits from immigration. Albeit small, immigration has a positive effect on the gross domestic product (GDP).⁷⁶ Immigration reduces the cost of labor-intensive goods and services.⁷⁷ The foreign-born boost invention and innovation, and are more likely to start new

⁷¹ Partnership for a New American Economy, *The "New American" Fortune 500*, 1-3 (June 2011)

⁷² Wadhwa, et al., "Skilled Immigration and Economic Growth," *Applied Research in Economic Development*, 6-14 (May 2008)

⁷³ Supra note 16

⁷⁴ *Id.*, 3

⁷⁵ Madeline Zavodny, *Immigration and American Jobs*, American Enterprise Institute For Public Policy Research And The Partnership For A New American Economy, 6 (December 2011)

⁷⁶ Council of Economic Advisers, *Immigration's Economic Impact* (June 2007)

⁷⁷ Patricia Cortés, "The Effect of Low-Skilled Immigration on US Prices: Evidence from CPI Data," *Journal of Political Economy*, 116, No. 3, 381-422 (2008)

businesses.⁷⁸ Immigration appears to encourage US natives to upgrade their skills through additional education or training.⁷⁹ Studies indicate that immigration may have a small positive effect on Americans' wages, although there is also some evidence that immigration has no effect or even a negative effect on wages, especially among the least educated.⁸⁰

2.4. Illegal or Undocumented Immigrants

Immigration in the United States consists of legal immigrants, those who have permission to reside and work in the United States, and illegal immigrants, which refers not only to those who arrive illegally but also to those who entered legally on temporary visas, but then fail to leave as stipulated. Illegal immigrants are also referred to as unauthorized immigrants, illegal aliens, or, if they are working, undocumented workers.⁸¹

No comprehensive records may be obtained as to the exact number of illegal immigrants currently residing in the United States. There are only estimates or indirect means. An estimate made by the Homeland Security in January 2011 yields that there are 11.5 million illegal immigrants in the United States. Compared to a revised 2010 estimate of 11.6 million, the results suggest little to no change in the unauthorized immigrant population from 2010 to 2011. Of said number of unauthorized immigrants now living in the United States, 55 percent entered between 1995 and 2004 and 59 percent were from Mexico.⁸²

⁷⁸ Jennifer Hunt and Marjolaine Gauthier-Loiselle, "How Much Does Immigration Boost Innovation?" *American Economic Journal: Macroeconomics* 2, No. 2, 31-56 (2010); William R. Kerr and William F. Lincoln, "The Supply Side of Innovation: H-1B Visa Reforms and US Ethnic Invention," *Journal of Labor Economics* 28, no. 3, 473-508 (2010);

⁷⁹ Jennifer Hunt, "The Impact of Immigration on the Educational Attainment of Natives" (mimeo, McGill University Department of Economics, Montreal, Canada, 2010); and Giovanni Peri and Chad Sparber, "Highly-Educated Immigrants and Native Occupational Choice," *Industrial Relations* 50, no. 3, 385-411 (2011)

⁸⁰ David Card, "Immigrant Inflows, Native Outflows, and the Local Labor Market Impacts of Higher Immigration," *Journal of Labor Economics* 19, no. 1, 22-64 (2001)

⁸¹ Campbell R. McConnell, Stanley L. Brue, & Sean M. Flynn, *Economics: Principles, Problems, and Policies*, 450 (2009)

⁸² Michael Hoefer, Nancy Rytina, & Bryan Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011*, Office of Immigration Statistics, Homeland Security, 1 (2011)

While there are numerous arguments hurled against illegal immigrants, there are actual economic benefits to illegal immigration. Studies conducted showed that “Illegal workers in the United States reduce wage rates in narrowly defined low-wage labor markets, but they do not reduce native-born employment by the full extent of the employment of the illegal workers. American workers who are complementary to illegal immigrant labor may experience an increase in the demand for their services and wages because of the illegal immigrants. Illegal workers may increase the overall rate of return on capital, thus promoting greater national investment. However, large numbers of illegal workers in specific industries may reduce the incentive for those industries to mechanize. A very legitimate concern is that illegal workers and their families impose greater fiscal costs on state and local governments than they contribute to tax revenues.”⁸³

In a study conducted by the Institute on Taxation and Economic Policy (ITEP),⁸⁴ undocumented immigrants contribute significantly to state and local taxes by collectively paying an estimated \$11.84 billion in 2012. It also found that in 2012, the undocumented immigrants’ nationwide average effective state and local tax rate, the share of income paid in state and local taxes by illegal immigrants, is an estimated 8 percent while the top 1 percent of taxpayers pay an average nationwide effective tax rate of just 5.4 percent.⁸⁵

Thus, to make temporary immigration reprieve available to up to 5.2 million undocumented immigrants under the executive actions of President Obama, the state and local tax contributions from illegal immigrants would increase by an estimated \$845 million a year once fully in place. Moreover, it will equally raise the effective state and local tax rate from 8.1 to 8.7 percent.⁸⁶

In 2007, the Congressional Budget Office found that allowing undocumented immigrants a pathway to citizenship will help the federal budget. It is estimated that federal revenues will

⁸³ Supra note 62, 463

⁸⁴ Matthew Gardner, Sebastian Johnson & Meg Wiehe, *Undocumented Immigrants’ State & Local Tax Contributions*, Institute on Taxation and Economic Policy (ITEP), 1 (April 2015)

⁸⁵ Institute on Taxation and Economic Policy, *Who Pays? A Distributional Analysis of the Tax Systems in All 50 States*, January 2015

⁸⁶ Supra note 63, 2

increase by \$48.3 billion and federal outlays by \$22.7 billion. This will lead to a surplus of \$25.6 billion. The revenue increase is seen from greater receipts of Social Security payroll taxes, while that in federal outlays will be through refundable income tax credits and Medicaid.⁸⁷

2.5. The Rational Person

It is without any doubt that the United States is the most preferred destination country for skilled immigrants. This is due to the fact that there are more and better opportunities in the United States not only for the well-educated but also the highly skilled. Moreover, U.S. immigration policies are more rewarding than any other nation. It is said that the United States was founded on the principle that social mobility was possible and that hard work and high achievement would be rewarded.⁸⁸

As found by the White House Council of Economic Advisers, “roughly 90% of native-born workers experience wage gains from immigration, which total between \$30 billion and \$80 billion per year.” These high-skilled workers are able to earn more for several reasons. With an influx of low-skilled workers with lower wages, the higher-skilled workers are able to increase production, and their employers are thereby able to hire more workers at all skill levels. As noted earlier, this in turn creates more managerial-type jobs and jobs for other higher-skilled workers with knowledge and skills in technologically driven occupations. The high-skilled workers could, in turn, hire low-skilled workers to help with their personal services (such as landscaping and child care), thus creating more jobs for low-skilled workers and increasing their own productivity.⁸⁹

On this context, there exists a phenomenon referred to as the international “brain drain,” which is defined as an exodus of the highly skilled and highly educated population from a country,

⁸⁷ Congressional Budget Office, *Cost Estimate of the Senate Amendment 1150 to S. 1348, the Comprehensive Immigration Reform Act of 2007*, 2 (June 4, 2007)

⁸⁸ Kayleigh Scalzo, *American Idol: The Domestic and International Implications of Preferencing the Highly Educated and Highly Skilled In U.S. Immigration Law*, 79 *Geo. Wash. L. Rev.*, 926 (2011)

⁸⁹ Emily A. Harrell & David L. Franklin, *The Political Economy of Immigration Reform*, 31 *N.C. Cent. L. Rev.*, 67 (2008)

accompanied by detrimental domestic economic consequence.⁹⁰ This phenomenon is based on two premises. First, there is a small number of highly educated people in developing nations and second, this small number will, more likely than not, emigrate.⁹¹ The continuing injection of brains and talent to developed countries, like the United States, however, results in great benefits. In fact, developed countries, at times, compete with each other over immigrant candidates.⁹² As explained, “industrial countries are trying to outbid one another . . . to attract highly skilled migrants to their domestic industries in order to gain (or retain) a relative advantage over their international competitors in the knowledge-based global economy.”⁹³

Thus, another significant strategy to boost the developing country’s economy is to encourage highly skilled immigration.⁹⁴ As Professor Kunal M. Parker, of Cleveland-Marshall College of Law, made the conclusion on said concept of the immigrant as human capital that the value of an aspiring immigrant is measured by the receiving country based on his/her profile as “homo oeconomicus”⁹⁵ or “the rational person.” Adding, brain drain is the unavoidable symptom of a widespread “reimagination of legal immigration in terms of productivity, skill, resources, and self-sufficiency.”⁹⁶

“Immigrants are an important source of human capital and a major contributing source of the entrepreneurial base in many countries.”⁹⁷ Thus, to attract immigrant entrepreneurs, many developed countries have devised both special visas and incentive programs.⁹⁸ In the present

⁹⁰ B. Lindsay Lowell, *Skilled Migration Abroad or Human Capital Flight?* Migration Info. Source, (June 1, 2003)

⁹¹ Supra note 69, 936

⁹² Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. Rev. 148, 154 (2006)

⁹³ *Id.*, 154-55

⁹⁴ Jean-Christophe Dumont & Georges Lemaitre, *Beyond the Headlines: New Evidence on the Brain Drain*, 56 *Revue Économique*, 1275, 1285, 1295 (2005)

⁹⁵ Kunal M. Parker, *Official Imaginations: Globalization, Difference, and State-Sponsored Immigration Discourses*, 76 *Or. L. Rev.* 691, 716 (1997)

⁹⁶ *Id.*, 719

⁹⁷ Herbert J. Schuetze & Heather Antecol, *Immigration, Entrepreneurship and the Venture Start-Up Process, in The Life Cycle of Entrepreneurial Ventures*, 107 (2007)

⁹⁸ ICF Int'l, *Study of The United States Immigrant Investor Pilot Program (EB-5)*, 6 (2010)

knowledge-based economy, what will greatly boost the nation's competitive edge in globalization is intellectual capital and knowledge-based assets.⁹⁹

What stimulates the economy are highly-skilled immigrants and the reason for which is because they are innovative.¹⁰⁰ They are often highly educated, with advanced degrees, in the STEM (Science, Technology, Engineering, and Mathematics) fields from U.S. universities,¹⁰¹ They are three times more likely to file patents¹⁰² than U.S.-born citizens.¹⁰³ Conclusively, their patent activities indicate innovation and how much such innovation contributes to the economy.¹⁰⁴ Companies who take and commercialize the new ideas will, in turn, stimulate the economy.¹⁰⁵ Regional studies conducted attributed its rapid job growth and expansion to the development of high-tech industries.¹⁰⁶

Even countries like China and India are now investing into their technology related industries. To fuel their innovation and growth in research and development, they engage the services of highly educated and skilled workers from the United States.¹⁰⁷ Skilled immigrants encourage investments and promote specialization in high-tech industries, according to statistical analysis,¹⁰⁸ and U.S. businesses, especially those in the technology sector, take advantage of skilled immigrants in the creation of new products and services.¹⁰⁹

⁹⁹ Vivek Wadhwa, et. al., *Intellectual Property, The Immigration Backlog, and a Reverse Brain-Drain*, 2 (2007)

¹⁰⁰ Vivek Wadhwa, et. al., *America's New Immigrant Entrepreneurs*, 4 (2007)

¹⁰¹ Michael Greenstone & Adam Looney, *The Hamilton Project, Ten Economic Facts About Immigration*, 11 (2010); Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure*, § 2.03, 2-12 to 14 (rev. ed. 2010)

¹⁰² Patents are often used by researchers to gauge inventions that ultimately contribute to an economy's total factor productivity; see Robert Shackleton, *Total Factor Productivity Growth in Historical Perspective*, 3 (2013)

¹⁰³ Greenstone & Looney, *Supra* note 72, at 11

¹⁰⁴ *Supra* note 76

¹⁰⁵ Jennifer Hunt, *Which Immigrants Are Most Innovative and Entrepreneurial?: Distinctions by Entry Visa*, 1-2 (2009)

¹⁰⁶ Joshua Wright, *For Metros with Flourishing Economies, Tech Sector at Center of Job Growth*, *Forbes* (Sept. 13, 2013, 3:44 PM)

¹⁰⁷ Vivek Wadhwa, *America's Other Immigration Crisis*, *American* (July 11, 2008)

¹⁰⁸ Giovanni Peri, *The Effect of Immigrants on U.S. Employment and Productivity*, 1 (Aug. 30, 2010)

¹⁰⁹ Giovanni Peri, *Immigration, Labor Markets, and Productivity*, 32 *Cato J.* 35, 38 (2012)

“Immigration is an important part of America’s Future Workforce. To build the economy of the future, the United States must create the workforce of the future.”¹¹⁰ There is an intense international competition among businesses, universities and research institutions in the United States. The difference between success and failure among them is the quality of their human capital and the way it manages its talent pipeline.¹¹¹ Business leaders, educators and policymakers must all come together in order to develop and implement strategies that will maximize America’s workforce competitiveness. In so doing, the United States and all its citizens will continue to thrive in this new world.¹¹² Such strategies include programs, which will encourage employers to invest in the development of a skilled workforce, the inclusion of veterans, the disabled and other underrepresented groups in the workforce and also initiatives to encourage voluntary adoption of flexible workplaces and sensible immigration policies.¹¹³

The economies of most developed countries are increasingly characterized as knowledge-based.¹¹⁴ In the long run, a “knowledge-based capital” approach¹¹⁵ has more prospective to stimulate the U.S. economy and, according to Annie Anjung Lin,¹¹⁶ entrepreneurs contribute to the U.S. economy for the following reasons:

1. Investment on physical capital investments into their business;
2. Direct job creations by hiring local workers to work in their business;

¹¹⁰ Society for Human Resource Management, *Navigating the U.S. Employment-based Immigration System: Your Guide to Understanding Why Reform Matters to America’s future*, 4 (2013)

¹¹¹ Chartered Global Management Accountant, *Talent Pipeline Draining Growth*, September 2012

¹¹² McKinsey & Company, *Talent Tensions Ahead: A CEO Briefing*, November 2012

¹¹³ Supra note 92

¹¹⁴ Supra note 24, 274

¹¹⁵ A knowledge-based capital approach is a growth policy that recognizes business innovation is more than good ideas; it is about an organization's ability to execute and translate these ideas into new products, processes, and markets; see Charles Hulten, *Stimulating Economic Growth Through Knowledge-Based Investment*3 (OECD Directorate for Sci., Tech. & Indus., Working Paper No. 2, 2013)

¹¹⁶ Supra note 78, 532

3. Creation of diverse products and services in various industries to meet the needs of their target market;¹¹⁷
4. Contribution to the global economy by selling their goods internationally; and
5. Continued contribution to a country's gross national product by operating their business.¹¹⁸

These are reasons why “[s]mall businesses are the engine of job growth in our economy.” Almost half of job creation is due to small businesses having fewer than fifty employees. Small business entrepreneurs are as important to job creation as they are in stimulating the U.S. economy and in maintaining the competitiveness of the United States in today's global economy.¹¹⁹

Thus, to maintain a strong economy and country in the coming decades, it is imperative for us to have a lot of well-educated, tech and science-savvy workers and entrepreneurs. Obviously, they are the people who are going to create the jobs in the future. And whether they be native-born or immigrants who come to this country as teenagers or adults, all the opportunity must be given to them to contribute to the success and prosperity of our country.¹²⁰

2.6. The Employment-Based Immigrant Visa System

According to Seth R. Leech and Emma Greenwood,¹²¹ the American economy benefits from both skilled and professional immigrants.¹²² Employment-based immigrants contribute to the economy and this is done by driving innovation, creating businesses, and contributing skills that are not matched by U.S. workers.¹²³ The problem, however, is that fewer skilled employees choose not to immigrate to the United States. Thus, there exists a stiff competition for skilled employees from

¹¹⁷ Robert W. Fairlie, SBA Office Of Advocacy, No. 334, *Estimating The Contribution Of Immigrant Business Owners To The U.S. Economy* (2008)

¹¹⁸ Amitabh Shukla, 5 Ways an Entrepreneur Stimulates the Economy, PAGGU.COM (Sept. 7, 2009)

¹¹⁹ Supra note 97

¹²⁰ Supra note 17

¹²¹ Seth R. Leech and Emma Greenwood, *Keeping America Competitive: A Proposal To Eliminate The Employment-Based Immigrant Visa Quota*, 3 Alb. Gov't L. Rev., 325 (2010)

¹²² Council on Foreign Relations, *Independent Task Force Report No. 63: U.S. Immigration Policy*, 4 (2009)

¹²³ *Id.*, 19-20, 84

Australia, Canada, New Zealand and the United Kingdom, all of which have welcoming immigration policies.¹²⁴ For which, these developed countries are chosen over the United States because they are more certain to acquire permanent status should they so wish.¹²⁵ Other than said countries, there is also a competition from developing countries like India, which, by tradition, is a major source of skilled immigrants for the United States. Many potential immigrants from these countries now find equally promising professional opportunities in their home country.¹²⁶

Furthermore, the Employment-Based immigration system, particularly the immigrant visa cap, may deter many potential immigrants from working in the United States. Studies show that new temporary legal arrivals under the employment-based visa dropped from 268,000 in 2000 to 185,000 in 2004.¹²⁷ “From 2001 to 2003, applications from foreign students to American universities dropped by 26%, while [foreign student applications] increased in the United Kingdom (36%), France (30%) and Australia (13%).”¹²⁸ Thus, Vivek Wadhwa noted that, “approximately one in five new legal immigrants . . . either plan to leave the United States or are uncertain about remaining.”¹²⁹ The difficulties of obtaining a green card, according to commentators, is linked to the fact that “[u]nfortunately, America's immigration policies are driving away the world's best and brightest precisely when we need them most.”¹³⁰ There are long and uncertain waiting times that rose from employment-based immigrant visa caps. As such, rather than to wait with no certainty, many immigrants in high-tech professions choose to return to their home countries.¹³¹

¹²⁴ *Id.*, 15-16, 58-59

¹²⁵ *Id.* at 58-59; see Luke Collins, *West 'Hemorrhaging' Its Best Brains, Study Claims*, Res.-Tech. Mgmt., 2,4, (July-Aug. 2009)

¹²⁶ Council on Foreign Relations, *supra* note 103, 36, *citing* Vivek Wadhwa, et. al., Ewing Marion Kauffman Found., Intellectual Property, the Immigration Backlog, and a Reverse Brain-Drain: America's New Immigrant Entrepreneurs, Part III, 5 (2007)

¹²⁷ Shikha Dalmia, *Scrap the Visa Cap*, Wall St. J., A8 (Apr. 5, 2008)

¹²⁸ *Id.*

¹²⁹ *Supra* note 108

¹³⁰ *Strengthening American Competitiveness for the 21st Century: Hearing of the S. Comm. on Health, Education, Labor, and Pensions*, 110th Cong. 42-43 (2007) (statement of William H. Gates, Chairman, Microsoft Corporation)

¹³¹ Moira Herbst, *Skilled Immigrants on Why They're Leaving the U.S.*, Bus. Wk. Online, July 26, 2009

“America is no longer the forerunner for attracting the brightest people from around the world.”¹³² As compared to other countries like Canada, New Zealand, and Australia, the United States has more low-skilled rather than high-skilled immigrants. His studies show that almost 30 percent of immigrants in the United States have a low level of education, and only 35 percent acquire a high level. While in Canada, only 22 percent possess a low level of education and more than 46 percent of its immigrants obtain a high level of education.¹³³

Wadhwa explained that one of the main reasons is due to the U.S. immigration policy towards high-skilled immigrants. The immigration policies of Canada favor entry of more immigrants with higher education levels and specialized skills. However, the United States’ immigration policies favor family relationships. And while it may be true that the United States educates some of the best and brightest and granted about five hundred thousand F-1 student visas in 2012, the H-1B visa cap is at a much smaller number. On the same year, only 150,000 H-1B employment visas were actually granted.¹³⁴

Studies conducted by Seth R. Leech and Emma Greenwood¹³⁵ noted that the United Kingdom reformed its immigration system in 2008 using the so-called “points-based system”¹³⁶ and chose to not implement visa caps on immigration.¹³⁷ Thus, immigrants intending to enter the United Kingdom can simply apply for permanent residency after residing five years in the United Kingdom on a non-immigrant visa.¹³⁸ The only requirement or filter for initial admission is a points-based system which is applied non-immigrant visa applicants.¹³⁹ It will not be applied again if, after five

¹³² Fariborz Ghadar, *Becoming American: Why Immigration Is Good for Our Nation’s Future*, 6 (2014)

¹³³ Fariborz Ghadar, “Dispelling the Immigration Myths.” *CNN.com*, December 11, 2012

¹³⁴ Randall Monger and James Yankay, “U.S. Legal Permanent Residents: 2012,” *Department of Homeland Security: Annual Flow Report*, March 2013

¹³⁵ *Supra* note 103, 350-351

¹³⁶ Paschal O. Nwokocha, American Employment-Based Immigration Program in a Competitive Global Marketplace: Need for Reform, 35 *Wm. Mitchell L. Rev.* 38, 50 (2008)

¹³⁷ *Supra* note 118, 53; Macer Hall, Immigration? No Need to Put a Cap on It Says Brown, *Express (U.K.)*, 4 (July 17, 2009)

¹³⁸ Fragomen Global, *Global Business Immigration Handbook* § 19:23 (May Update 2009)

¹³⁹ *Supra* note 120, §§ 19:1, 19:2, 19:8

years, the immigrant applies for permanent residency.¹⁴⁰ Thus, a visa cap-free immigration system of labor certification will better serve both the protecting labor and facilitating efficient Employment-Based immigration to the United States.

In Australia, while it has an annual cap on its General Skilled Migration Program (GSM),¹⁴¹ it has been reduced from 133,000 to 115,000.¹⁴² It must be noted, however, that this cap is totally different from that imposed by the U.S. immigration system and which cap only applies to skilled immigrants who are not employer-sponsored, skilled immigrants who are sponsored by a family member, and skilled immigrants who have been in Australia for at least two years who work in designated areas with a provisional regional visa.¹⁴³ Emphasis must be given to the fact that Australia has no cap on employer-sponsored immigrants.¹⁴⁴ Again, there are no like provisions in U.S. law which allow immigrants, even those without a job offer, to enter the U.S. labor market.

On the other hand, the annual numerical allotment of employment-based green cards is divided among five employment-based immigrant visa preferences¹⁴⁵ and within the first three preferences are professional and skilled workers.¹⁴⁶ The preference/category system is structured as follows: the employment-based first preference (EB-1) includes Extraordinary Ability Aliens (EA),¹⁴⁷ Multinational Managers (MNM),¹⁴⁸ and Outstanding Researchers and Professors (OR);¹⁴⁹ the employment-based second preference (EB-2) includes labor certification for professionals with advanced degrees, those selected by the Attorney General to receive National Interest Waivers

¹⁴⁰ UK Border Agency, Completing Application Form SET(O)

¹⁴¹ Austl. Gov't Dep't of Immigration & Citizenship, 2008-09 Migration Program Changes--March 2009 Frequently Asked Questions (2009)

¹⁴² *Id.*

¹⁴³ Australian Government Department of Immigration & Citizenship, Australian Immigration Fact Sheet 1

¹⁴⁴ Australian Gov't Dep't of Immigration & Citizenship, The 2009-10 Skilled Migration Program

¹⁴⁵ INA § 203(b)(1)(A)-(C), 8 U.S.C. § 1153(b)(1)(A)-(C) (2006); INA § 203(b)(2)(A)-(B), 8 U.S.C. § 1153(b)(2)(A)-(B)

¹⁴⁶ INA § 203(b)(1)(A)-(C), 8 U.S.C. § 1153(b)(1)(A)-(C)

¹⁴⁷ INA § 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A)

¹⁴⁸ INA § 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C)

¹⁴⁹ INA § 203(b)(1)(B), 8 U.S.C. § 1153(b)(1)(B)

(NIW), and exceptional ability aliens;¹⁵⁰ and the employment-based third preference (EB-3) includes labor certification for professionals and other workers (also known as “unskilled workers”).¹⁵¹

Kayleigh Scalzo¹⁵² explained that the employment-based third preference (EB-3) category serves as a catchall for those who did not qualify as EB-1 or EB-2 visa applicants.¹⁵³ Skilled immigrants are eligible for a visa only if there are no qualified workers already in the United States for their position.¹⁵⁴ Professionals are defined as those who have both a baccalaureate degree and being “members of the professions.”¹⁵⁵ The statute treats professionals and skilled workers identically, and thus the same worker availability restrictions apply to each.¹⁵⁶ “Other workers” within the EB-3 category are defined as aliens “capable . . . of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.”¹⁵⁷ And are subject to a 10,000 per annum visa cap. Consequently, they are in a less favorable position than the other EB-3 subcategories.¹⁵⁸ Processing of “other worker” applications is subject to disreputable backlogs. This is due to an enormous number of applicants within this category.¹⁵⁹

The current employment-based visa policy, undoubtedly, boosts the U.S. economic interests for the following reasons: First, the system is based on the largely erroneous premise that immigrant and native-born workers compete for jobs. Second, it operates on the false assumption that high levels of immigration are inherently damaging to the native-born labor force.¹⁶⁰

¹⁵⁰ INA § 203(b)(2)(A)-(B)(i), 8 U.S.C. § 1153(b)(2)(A)-(B)(i)

¹⁵¹ INA § 203(b)(3), 8 U.S.C. § 1153(b)(3)

¹⁵² Supra note 69

¹⁵³ 8 U.S.C. § 1153(b)(3); Demetrios G. Papademetriou & Stephen Yale-Loehr, *Balancing Interests: Rethinking U.S. Selection of Skilled Immigrants*, 46 (1996)

¹⁵⁴ 8 U.S.C. § 1153(b)(3)(A)(i)

¹⁵⁵ Id. § 1153(b)(3)(A)(ii).

¹⁵⁶ 8 U.S.C. § 1153(b)(3)(A).

¹⁵⁷ Id. § 1153(b)(3)(A)(iii).

¹⁵⁸ Id. § 1153(b)(3)(B).

¹⁵⁹ Kurzban, supra note 51, at 883-84

¹⁶⁰ Supra note 69, 940

On November 20, 2014, United Secretary of Homeland Security Jen Charles Johnson wrote to the U.S. Citizenship and Immigration Services, stating that “The employment-based immigration system is afflicted with extremely long waits for immigrant visas, or "green cards" due to relatively low green card numerical limits established by Congress 24 years ago in 1990. The effect of these caps is further compounded by an immigration system that has often failed to issue all of the immigrant visas authorized by Congress for a fiscal year. Hundreds of thousands of such visas have gone unissued in the past despite heavy demand for them.”

Adding that, “The resulting backlogs for green cards prevent U.S. employers from attracting and retaining highly skilled workers critical to their businesses. U.S. businesses have historically relied on temporary visas—such as H-1B,¹ L-1B,² or O-1 visas—to retain individuals with needed skills as they work their way through these backlogs. But as the backlogs for green cards grow longer, it is increasingly the case that temporary visas fail to fill the gap. As a result, the worker's temporary status expires and his or her departure is required. This makes little sense, particularly because the green card petition process for certain categories requires the employer to test the labor market and show the unavailability of other U.S. workers in that position.”

Secretary Jen Charles Johnson then made his recommendation to the problem by directing the USCIS “To take several steps to modernize and improve the immigrant visa process” as follows:

1. USCIS should continue and enhance its work with the Department of State to ensure that all immigrant visas authorized by Congress are issued to eligible individuals when there is sufficient demand for such visas;
2. USCIS should work with the Department of State to improve the system for determining when immigrant visas are available to applicants during the fiscal year. The Department of State has agreed to modify its visa bulletin system to more simply and reliably make such

determinations, and I expect USCIS to revise its current regulations to reflect and complement these proposed modifications;

3. Lastly, he directed that USCIS carefully consider other regulatory or policy changes to better assist and provide stability to the beneficiaries of approved employment-based immigrant visa petitions. Specifically, USCIS should consider amending its regulations to ensure that approved, long-standing visa petitions remain valid in certain cases where they seek to change jobs or employers.

Lastly, as President Obama stated in his 2013 State of the Union address, “With slowing population growth and aging of the workforce, America needs more workers. The Nation also needs to invest in the education, skills, and training of its citizens so they can fill the jobs of the future.”

2.7. Conclusion

Concurring with Commissioner Thomas Hammarberg of the Council of Europe,¹⁶¹ “Mankind can develop painlessly only when looking upon itself as one unit, one single family without dividing itself into nations other than in matters of history and traditions.”¹⁶² While there are migrants in every society, the “us” and “them” must be deleted from our so-called social system. Some politicians do try to gain popularity by promoting anti-immigration policies and these policies receive wide support. For which, however, we are brought away from the universal promise that “all men are created equal.” – a truth on which the United States of America was founded. It is imperative for each and every citizen of this nation, native-born or foreign-born alike, to realize that immigration will continue despite the numerous actions that tend to minimize, if not to eradicate, it.

¹⁶¹ Supra note 1

¹⁶² Andrei Dmitrievich Sakharov, "Reflections on Progress, Peaceful Coexistence, and Intellectual Freedom" (1968)

It is more important to be noted that immigration is an element of globalization and an integral part of 21st-century reality.

Inevitably, both immigrants and nationals will continue to live side by side. It is thus necessary to find ways to make this cohabitation beneficial to all. The key to promoting tolerance among immigrants and nationals is by cultivating a greater sense of understanding the benefits by which immigration affects the U.S. economy. Both policy makers and the population at large, must focus on this to always look on the brighter side in every situation or condition. Suffice to state that knowledge is fundamental in order to overcome the apparent barrier created between nationals and immigrants.

While nationals tend to fear and be anxious of the impact large-scale immigration will cause on the welfare and security of the United States, immigrants also have their concerns, e.g., family reunification, possible lack of legal status, lack of access to social services, personal security or loss of values. Thus, instead of looking at immigrants as a “community” and become tempted to make generalizations and operate on the basis of predefined stereotypes, every citizen should learn to look at each immigrant as an individual, a human being with his/her own background, past experiences, abilities, hopes and wishes for the future.

We must equally understand that we don't have any control over where we are born. Some are blessed enough to be born in the United States, where the rule of law governs and where wealth is, more or less, evenly distributed and everyone has equal opportunities. Others, however, live in places where they are subjected to persecution or have no possibilities for development, which thus compels them to leave their home countries and search for a better life in other countries.

We must fight the illusion that the presence of immigrants in our country is unjustifiable and immigrants have no right to be here. We should stop treating the “nation” as a point of reference and be open to pluralism in our societies and benefit from the rich cultural diversity that immigrants

bring with us. Let us recognize that immigrants have human rights. And as the Greater Lehigh Valley Chamber have rallied upon it, let us also recognize the fact that immigration reform is not the problem, but rather a part of the solution so as to create a stronger, more successful, and united nation. The United States of American is a nation of immigrants, and welcoming immigrants reflects the key values on which this country is based - hard work, perseverance, taking on challenges, acceptance of culture and show of compassion.

Immigration reform is a bipartisan issue on which everyone can agree that a working immigration system contributes to a stronger country, economically, socially, and culturally. It is clear that reforming our current immigration system can benefit everyone, however, we must ensure that we have a legal immigration system that truly works. Thus, consistency and transparency are necessary to enforce our laws, protect our borders, keep workforce talent, create jobs, and provide overall health and safety as we move towards the 21st century. Immigrants are a huge benefit to the U.S. economy. It is difficult to deny that immigrants made the United States of America the strongest economic force in the world.

Chapter 3

A COMPARATIVE STUDY OF UNITED STATES EMPLOYMENT AND INVESTOR VISAS

3. 1. Introduction

Millions of foreign nationals have migrated to the United States of America in search of the American dream. It exemplifies the ideals of freedom and equality; the pursuit of prosperity and opportunity that drives people, both Americans and foreign nationals, to go beyond the limits, geographically and individually. Amid prejudices and barriers, they achieved their personal goals founded on firm determination and perseverance. ¹⁶³

For the few, which made it to the United States, the “great country” may already be fulfilling. For the majority, however, to study and be able to work in the U.S. is their ultimate goal. As for the business minded, the aim is the global market where they may invest, create or purchase a business entity in the US. Suffice to state that most, if not all, wanted to live in the land of milk and honey. ¹⁶⁴

In his speech on January 21, 2013, President Obama said, “Our journey is not complete until we find a better way to welcome the striving, hopeful immigrants who still see America as a land of opportunity; until bright young students and engineers are enlisted in our workforce rather than expelled from our country.” ¹⁶⁵

Thus, for employment and investment, the American dream may well refer to the following:

1. A foreign professional in specialty occupations with a bachelor's or equivalent degree, e.g., programmer analysts, physical therapists, accountants, database administrators, market

¹⁶³ J. Le Vaughn and Dr. H.C. La Vaughn, American Business and Investment Visas, A Foreigner's Guide to Market Evaluation, Investment and Business Due Diligence in the USA, 13 (2012)

¹⁶⁴ *Id.*

¹⁶⁵ Available at <https://www.whitehouse.gov/issues/immigration/strengthening-enforcement>

research analysts, engineers, management analysts, graphic designers, pharmacists, financial analysts, among others;

2. A foreign national, who may be a manager or an executive, which needs to transfer to the U.S. to supervise the work of other supervisory, professional or managerial employees, or to manage an essential function, department or subdivision of their company;
3. A national of any of the treaty countries who wanted to enter the U.S. in order to develop and direct investments, purchase new business or to carry out trade activities;
4. A professional or a skilled/unskilled worker who wanted to practice his trade or profession in the U.S.; and
5. A foreign entrepreneur who can invest \$500,000 or \$1,000,000 in a commercial enterprise in a targeted employment area that will create at least 10 full-time US jobs and benefit the U.S. economy;

Why would any foreign national or entity want to invest in the U.S.? Studies show that the United States represents a quarter of all global economic activity. It is home to a quarter of the top 500 companies of the world. The U.S. is the economic sun around which almost every market – shares, bonds, currencies and commodities – revolves. No investor can afford to ignore that gravity.

166

Many economists expect China to overtake the United States in economic size in the next decade or so, although beliefs on the dynamic and qualitative differences will remain. This means that the US will still be a natural home for investors' capital for the following reasons:

First, the US economy has such a reliable and consistent long-term record of economic growth. Second, a highly skilled, well-educated and mobile workforce is the backbone of the

¹⁶⁶ JPMorgan American Investment Trust, Annual Report 2011. Available at <http://insights.jpmorgan.co.uk/investor/why-invest-in-the-united-states/>

country's high added value and productivity, as exemplified in its many market-leading companies. Third, the stable, transparent and well-regulated market places of the US give investors greater confidence in and much more information about the securities they are buying than any other overseas market.¹⁶⁷

Generally, one who seeks to enter the United States must first apply for a visa issued by the U.S. immigration authorities. By category, U.S. visas are either immigrant visas or non-immigrant visas. Pertaining to the American dream, an applicant's purpose of entry to the U.S. determines the type of visa which will be required by U.S. immigration law.

A nonimmigrant visa holder may either refer to a temporary visitor for pleasure,¹⁶⁸ or as an alien or foreign national in transit through this country.¹⁶⁹ Either may not engage in any employment. There is, however, an exception: He/she has been accorded a nonimmigrant classification which authorizes employment or he/she has been granted permission to engage in employment in accordance with the provisions of U.S. immigration law. A nonimmigrant who is permitted to engage in employment may engage only in such employment as has been authorized. Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status and as such, he/she shall be ordered removed and detained.¹⁷⁰

Thus, if a foreign professional is in specialty occupations with a bachelor's or equivalent degree, e.g., programmer analysts, physical therapists, accountants, database administrators, market research analysts, engineers, management analysts, graphic designers, pharmacists, financial analysts, among others, the visa required will be an H-1B nonimmigrant visa application.

For a foreign national who is a manager or executive and needs to transfer to the U.S. to supervise work of other supervisory, professional or managerial employees, or to manage an

¹⁶⁷ *Id.*

¹⁶⁸ Immigration and Nationality Act (INA), §101(a)(15)(B)

¹⁶⁹ *Id.*, § 101(a)(15)(C)

¹⁷⁰ *Id.*, § 214.1(e)

essential function, department or subdivision of their company, the applicable U.S. visa shall be what is referred to as an L-1A nonimmigrant visa application. For a national of any treaty country that wanted to enter the U.S. in order to develop and direct investments, purchase new business or to carry out trade activities, the applicable U.S. visa shall be an E-2 nonimmigrant visa application. As for a professional or skilled/unskilled worker that wanted to practice his trade or profession in the U.S., the applicable U.S. visa shall be an EB-3 nonimmigrant visa application.

Every year, thousands of foreign workers in multiple occupations or employment categories enter the United States. They may be artists, researchers, cultural exchange participants, information technology specialists, religious workers, investors, scientists, athletes, nurses, agricultural workers or others. According to the Bureau of Labor Statistics, the employment situation for the month of September 2015 showed that employment in professional and business services continued to trend up at more than 31,000. Job growth has averaged 45,000 per month thus far in 2015, compared with an average monthly gain of 59,000 in 2014.¹⁷¹

All foreign workers must obtain permission to work legally in the United States. Each employment category for admission has different requirements, conditions and authorized periods of stay. It is important one adheres to the terms of application or petition for admission and visa. Any violation can result in removal or denial of re-entry into the United States.¹⁷²

Immigrant visas are likewise allocated to foreign nationals intending to become a citizen of the United States. Immigrant visas are made available to Family-Sponsored immigrants,¹⁷³ Employment-Based immigrants,¹⁷⁴ and Diversity immigrants.¹⁷⁵ Under the employment-based immigrants, we shall find the provisions employment creation, for which visas shall be made

¹⁷¹ Employment Situation Summary, September 2015, Bureau of Labor Statistics, available at <http://www.bls.gov/news.release/empsit.nr0.htm>

¹⁷² See <http://www.uscis.gov/working-united-states/working-us>

¹⁷³ INA, § 203(a)

¹⁷⁴ INA, § 203(b)

¹⁷⁵ INA, § 203(c)

available in a number not to exceed 7.1 percent of such worldwide level to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial or enterprise (including a limited partnership).¹⁷⁶ Thus, if a foreign entrepreneur can invest \$500,000 or \$1,000,000 in a commercial enterprise in a targeted employment area which will create at least 10 full-time U.S. jobs and benefit the U.S. economy, the most appropriate visa to apply for and avail of is the EB-5 immigrant visa.

The following analysis will give a deeper understanding of both the legislative history and policies involved in each of the visas in this study – the H-1B, L-1A, E-2 and EB-3 nonimmigrant visas and the EB-5 immigrant visa. Further analysis will be done of the advantages and disadvantages of each visa. Finally, there will be a comparative study of the EB-5 immigrant visa against the H-1B, L-1A, E-2 or the EB-3 nonimmigrant visas. With this, one who desires the American dream, either for employment or investment, will have a better and wider perspective as to which visa is best to apply for.

3.2. Employment and Investor Visas

3. 2. 1. The H-1B Nonimmigrant Visa

a) Legislative History

On October 27, 1990, the 101st US Congress passed what is considered the most sweeping reform in US legal immigration law in the past sixty-six years. A month thereafter, on November 29, 1990, President George H. W. Bush signed into law what we now know as the Immigration Act of 1990 (the "Act").¹⁷⁷ It modified many existing nonimmigrant visa categories and created new ones under the employment-based area. For the H-1B visa category, 65,000 visas per year were introduced and this included the 66,000 cap on H-2B visa category. Moreover, the H-1B category

¹⁷⁶ INA, § 203(b)(5)

¹⁷⁷ Warren R. Leiden and David L. Neal, Highlights of The U.S. Immigration Act of 1990, Fordham International Law Journal, 328 (Volume 14, Issue 1, 1990, Article 14)

was redefined to include only foreign nationals employed in "specialty occupations."¹⁷⁸ Thus, it excluded other professions of "primacy", i.e., nurses, entertainers, athletes, and artists, and others which are subjected to a form of "labor attestation."¹⁷⁹

Almost eight years thereafter, President Bill Clinton signed into law the American Competitiveness and Workforce Improvement Act (ACWIA) on October 21, 1998. Through ACWIA, the idea of the "H-1B-dependent employer" was introduced. It further required additional attestations regarding the non-displacement of H-1B dependent workers from employers or those who committed misrepresentations in their applications. Moreover, investigative authority was given to the United States Department of Labor.¹⁸⁰ Likewise, it temporarily increased the H-1B visa cap from 65,000 to 115,000 for Fiscal Year 1999; 115,000 in 2000; and 107,500 in 2001. Starting 2002, the annual cap then returned to 65,000.¹⁸¹

On October 17, 2000, President Bill Clinton signed into law the American Competitiveness in the 21st Century Act (AC21). The annual cap was again increased to 195,000 for Fiscal Years 2001, 2002, and 2003.¹⁸² The uncapped H-1B for non-profit research institutions was likewise created and exempted from the cap workers who had already been cap-subject. In addition to this are workers on cap-subject H-1Bs who transfer from one job to another and those who apply for a 3-year extension of their current 3-year H-1B.¹⁸³

On December 6, 2004, the H-1B Visa Reform Act of 2004, a part of the Consolidated Appropriations Act of 2005, was signed into law by President George W. Bush. It expanded the investigative authority of the Department of Labor. Two standard lines of defense were also

¹⁷⁸ Occupations that require highly specialized knowledge and a bachelor's degree as a minimum for entry into the occupation

¹⁷⁹ *Id.*, 332

¹⁸⁰ American Competitiveness and Workforce Improvement Act (ACWIA), § 412

¹⁸¹ *Id.*, § 411

¹⁸² American Competitiveness in the 21st Century Act (AC21), § 102

¹⁸³ *Id.*, § 103

provided to employers - the Recognized Industry Standards Defense and the Good Faith Compliance Defense.

On February 17, 2009, President Barack Obama put into law the Employ American Workers Act, which was a part of the American Recovery and Reinvestment Act of 2009. The latter expired on sunset of February 11, 2011. With the Employ American Workers Act of 2009, Troubled Asset Relief Program (TARP) recipients were required to file additional attestations required of H-1B-dependent employers for any employee who had not yet started on a H-1B visa.

b) Legislative Policy

As provided in the Immigration and Nationality of 1990, a foreign national may be authorized to come to the United States temporarily to perform services or labor for or to receive training from an employer, if petitioned for by that employer.¹⁸⁴ Under this nonimmigrant visa category, one may be classified as an H-1B,¹⁸⁵ among other classifications provided in the Act. Under this H-1B visa category, the US employer must file a petition with the USCIS for review of the services or training undertaken. It is also for determination of the foreign national's eligibility for classification as a temporary employee or trainee, before he/she may seek permanent residency to the United States.

¹⁸⁶

To avail of the H-1B visa category, an employee must show an existing relationship with the US employer who files the petition.¹⁸⁷ On the other hand, an H-1B temporary employee refers to a foreign national who, for a temporary period of time, comes to the United States¹⁸⁸ for any of the following reasons:

¹⁸⁴ INA § 101(a)(15)(H)

¹⁸⁵ INA § 101(a)(15)(H)(i)(b)

¹⁸⁶ 8 CFR § 214.2(h)(1)(i)

¹⁸⁷ 8 CFR § 214.2(h)(2)(i)(A)

¹⁸⁸ 8 CFR § 214.2(h)(1)(ii)(B)

1. To perform services in a “specialty occupation” that meets the requirements and for whom the Secretary of Labor has determined and certified to the Attorney General that the prospective employer has filed a labor condition application.¹⁸⁹ Excluded are agricultural workers and foreign nationals referred to in section 101(a)(15)(O)¹⁹⁰ and (P)¹⁹¹ of the Act.

The term specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor. It includes, but is not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts. As a minimum requirement for entry and occupation in the United States, it requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent.¹⁹²

Furthermore, to qualify as a “specialty occupation,” the position must meet one of the following criteria:¹⁹³

¹⁸⁹ 8 CFR § 214.2(h)(1)(ii)(B)(1)

¹⁹⁰ INA § 101(a)(15)(O) an alien who: (i) has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim or, with regard to motion picture and television productions a demonstrated record of extraordinary achievement, and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of extraordinary ability; or (ii)(I) seeks to enter the United States temporarily and solely for the purpose of accompanying and assisting in the artistic or athletic performance by an alien who is admitted under clause (i) for a specific event or events, (II) is an integral part of such actual performance, (III)(a) has critical skills and experience with such alien which are not of a general nature and which cannot be performed by other individuals, or (b) in the case of a motion picture or television production, has skills and experience with such alien which are not of a general nature and which are critical either based on a pre-existing long-standing working relationship or, with respect to the specific production, because significant production (including pre- and post-production work) will take place both inside and outside the United States and the continuing participation of the alien is essential to the successful completion of the production, and (IV) has a foreign residence which the alien has no intention of abandoning; or (iii) is the alien spouse or child of an alien described in clause (i) or (ii) and is accompanying, or following to join, the alien;

¹⁹¹ INA 101(a)(15)(P) an alien having a foreign residence which the alien has no intention of abandoning who: (i) (a) is described in section 214(c)(4)(A) (relating to athletes), or (b) is described in section 214(c)(4)(B) (relating to entertainment groups); (ii)(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and (II) seeks to enter the United States temporarily and solely for the purpose of performing as such an artist or entertainer or with such a group under a reciprocal exchange program which is between an organization or organizations in the United States and an organization or organizations in one or more foreign states and which provides for the temporary exchange of artists and entertainers; (iii)(I) performs as an artist or entertainer, individually or as part of a group, or is an integral part of the performance of such a group, and (II) seeks to enter the United States temporarily and solely to perform, teach, or coach as such an artist or entertainer or with such a group under a commercial or noncommercial program that is culturally unique; or (iv) is the spouse or child of an alien described in clause (i), (ii), or (iii) and is accompanying, or following to join, the alien;

¹⁹² 8 CFR § 214.2(h)(4)(ii); INA 214(i)(1)

¹⁹³ 8 CFR § 214.2(h)(4)(iii)(A)

- a. A baccalaureate or higher degree or its equivalent. This is normally the minimum requirement for entry into the particular position. The degree requirement is common to the industry in parallel positions among similar organizations. In the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- b. The employer normally requires a degree or its equivalent for the position; or
- c. The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

And for an employee-beneficiary to qualify to perform services in a “specialty occupation,” the foreign national must meet any of the following criteria: ¹⁹⁴

- a. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- b. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- c. Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- d. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

¹⁹⁴ 8 CFR § 214.2(h)(4)(iii)(C)

Foreign nationals classified as H-1B nonimmigrants, excluding those involved in Department of Defense research and development projects or coproduction projects, may not exceed the limits identified in the Act (65,000 since 2004 to succeeding fiscal years).¹⁹⁵

2. To perform services of an exceptional nature requiring exceptional merit and ability relating to a cooperative research and development project. This may also be a coproduction project provided for under a Government-to-Government agreement administered by the Secretary of Defense.¹⁹⁶

Services of an exceptional nature relating to DOD cooperative research and development projects or coproduction projects shall be those services which require a baccalaureate or higher degree, or its equivalent, to perform the duties. The existence of this special program does not preclude the DOD from utilizing the regular H-1B provisions provided the required guidelines are met. The requirements relating to a labor condition application from the Department of Labor shall not apply to petitions involving DOD cooperative research and development projects or coproduction projects.¹⁹⁷ Foreign nationals classified as H-1B nonimmigrants to work for DOD research and development projects or coproduction projects may not exceed 100 at any time;¹⁹⁸

3. To perform services as a fashion model of distinguished merit and ability. For whom, the Secretary of Labor has determined and certified to the Attorney General that the prospective employer has filed a labor condition application under section 212(n)(1) of the Act.¹⁹⁹

¹⁹⁵ 8 CFR § 214(g)(1)(A)

¹⁹⁶ 8 CFR § 214.2(h)(1)(ii)(B)(2)

¹⁹⁷ 8 CFR § 214.2(h)(4)(vi)

¹⁹⁸ 8 CFR § 214.2(h)(8)(i)(B)

¹⁹⁹ 8 CFR § 214.2(h)(1)(ii)(B)(3)

Prominence in the field of fashion modeling may be established in the case of an individual fashion model. The work which a prominent foreign national is coming to perform in the United States must require his/her services. A petition for an H-1B alien of distinguished merit and ability in the field of fashion modeling shall be accompanied by:

- a. Any document or other required evidence that is sufficient to establish the beneficiary is a fashion model of distinguished merit and ability; and
- b. Copies of any written contracts between the petitioner and the beneficiary. In the absence of a written contract, the summary of the oral agreement under which the beneficiary will be employed will suffice.

To establish that a position requires prominence, the petitioner must prove that the position meets any of the following criteria: ²⁰⁰

- a. The services to be performed involve events or productions which have a distinguished reputation; and
- b. The services are to be performed for an organization or establishment that has a distinguished reputation for, or record of, employing prominent persons.

A petitioner may establish that a beneficiary is a fashion model of distinguished merit and ability upon submission of any two of the following forms of documentation showing that the foreign national: ²⁰¹

- a. Has achieved national or international recognition and acclaim for outstanding achievement in his/her field as evidenced by reviews in major newspapers, trade journals, magazines, or other published material;

²⁰⁰ 8 CFR § 214.2(h)(4)(vii)(B)

²⁰¹ 8 CFR § 214.2(h)(4)(vii)(C)

- b. Has performed or will perform services as a fashion model for employers with a distinguished reputation;
- c. Has received recognition for significant achievements from organizations, critics, fashion houses, modeling agencies, or other recognized experts in the field; or
- d. Commands a high salary or other substantial remuneration for services as evidenced by contracts or other reliable evidence.

As for a physician, an H-1B petition shall be accompanied by evidence that he/she:²⁰²

1. Has a license or other authorization required by the state of intended employment to practice medicine, or otherwise exempt by law, if the physician will perform direct patient care and the state requires the license or authorization; and
2. Has a full and unrestricted license to practice medicine in a foreign state or has graduated from a medical school in the United States or in a foreign state.

The H-1B employer-petitioner must establish that the physician:

1. Is coming to the United States primarily to teach or conduct research, or both, at or for a public or nonprofit private educational or research institution or agency. Likewise, that no patient care will be performed, except that which is incidental to his/her teaching or research;
2. The foreign national has passed the Federation Licensing Examination (or an equivalent examination as determined by the Secretary of Health and Human Services) or is a graduate of a United States medical school;

²⁰² 8 CFR § 214.2(h)(4)(viii)(A)

3. Has competency in oral and written English which shall be demonstrated by the passage of the English language proficiency test given by the Educational Commission for Foreign Medical Graduates; and²⁰³
4. Is a graduate of a school of medicine accredited by a body or bodies approved for that purpose by the Secretary of Education.²⁰⁴

Under the H-1B visa, the employee-beneficiary may render service or training for more than one employer. However, it is imperative that each employer must file a separate petition with the USCIS that has jurisdiction over the area where he/she will perform services or receive training, unless an established agent²⁰⁵ files the petition.²⁰⁶

The employee-beneficiary may also seek to change employers. For which, the prospective new employer must file a Form I-129 requesting classification and extension of his/her stay in the United States. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition. The validity of the petition and the employee-beneficiary's extension of stay shall conform to the prescribed limits on his/her temporary stay.²⁰⁷ He/she is not authorized to begin the employment with the new petitioner until the petition is approved.²⁰⁸

No employer may file, in the same fiscal year, more than one H-1B petition on behalf of the same beneficiary if the latter is subject to the numerical limitations²⁰⁹ provided in the Act or is

²⁰³ 8 CFR § 214.2(h)(4)(viii)(B)(2)(i)

²⁰⁴ 8 CFR § 214.2(h)(4)(viii)(B)(2)(ii)

²⁰⁵ 8 CFR § 214.2(h)(2)(i)(F) *Agents as petitioners*. A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, or in place of, the employer as its agent. A petition filed by a United States agent is subject to the following conditions;

²⁰⁶ 8 CFR § 214.2(h)(2)(i)(C)

²⁰⁷ 8 CFR § 214.2(h)(13)(iii)

²⁰⁸ 8 CFR § 214.2(h)(2)(i)(D)

²⁰⁹ INA § 214(g)(1)(A)

exempt from said limitations.²¹⁰ If an H-1B petition is denied, on a basis other than fraud or misrepresentation, the employer may file a subsequent H-1B petition on behalf of the same beneficiary in the same fiscal year. It is, however, required that the numerical limitation has not been reached or the filing qualifies as exempt from the numerical limitation. Otherwise, it will result in the denial or revocation of all such petitions.

If USCIS believes that related entities (such as a parent company, subsidiary, or affiliate) may not have a legitimate business need to file more than one H-1B petition on behalf of the same beneficiary subject to the numerical limitations or otherwise eligible for an exemption, it may issue a request for additional evidence or notice of intent to deny or notice of intent to revoke each petition. If any of the related entities fail to demonstrate a legitimate business need to file an H-1B petition on behalf of the same alien, all petitions filed on that alien's behalf by the related entities will be denied or revoked.²¹¹

3. 2. 2. The L-1A Intracompany Transferee Executive or Manager

a) Legislative History

The U.S. Congress created the L-1 visa program in 1970 for purposes of serving the best of the U.S. economy due to the limitations imposed by then existing immigration laws.²¹² The L-1 classification was intended to allow employers easy transfer of their personnel from one branch in another country to the US. It includes employees who possesses “specialized knowledge,” although it was not defined in the 1970 INA.²¹³ Thus, the appropriate interpretation was eventually defined in the succeeding agency regulations and decisions. It then included the term “proprietary” and the knowledge referred to is not available in the US labor market.

²¹⁰ INA § 214(g)(5)(C)

²¹¹ 8 CFR § 214.2(h)(2)(i)(G)

²¹² See generally Immigration Act of 1970, Pub. L. No. 91-225; H.R. Rep. 91-851, as reprinted in 1970 U.S.C.C.A.N. 2750, 2753-54 (noting the need to “help eliminate problems faced by American companies having offices abroad transferring key personnel freely within the organization”).

²¹³ Policy Memorandum, PM-602-0111, USCIS, March 24, 2015

Twenty years after and through the enactment of the Immigration and Nationality Act of 1990,²¹⁴ the term “specialized knowledge” was finally defined as “[A]n alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.”²¹⁵ Notably, the word “proprietary” was not used.²¹⁶ Congress intended to broaden the use of the L-1 visa category in specific ways.²¹⁷

In 1991, then Immigration and Naturalization Service, now the USCIS, made pertinent revisions to said definition of “specialized knowledge”²¹⁸ as follows: “[S]pecial knowledge possessed by an individual of the petitioning organization’s product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization’s processes and procedures.”

Subsequent memoranda of the USCIS clarified the meaning of specialized knowledge. Thus, in the Puleo Memo, “specialized knowledge” was defined as “knowledge that is different from that which is generally found in the particular industry, but not necessarily knowledge that is proprietary or unique.” James A. Puleo made clarifications that “specialized knowledge” must be “advanced, highly developed, or complex,” but need not be “proprietary, unique or narrowly held throughout the company”.²¹⁹

In 2002, the Ohata Memo was issued. It reiterated that the term “specialized” or “advanced” knowledge “need not be proprietary or unique.” Fujie Ohata clarified that specialized knowledge of

²¹⁴Public Law No. 101-649

²¹⁵INA § 214(c)(2)(B)

²¹⁶H.R. Rep. 101-723(I), 1990 U.S.C.C.A.N. at 6749

²¹⁷The 1990 Act expanded eligibility for L-1 classification in four ways: (1) by allowing certain accounting firms access to the L-1 program; (2) by recognizing the L-1 blanket petition process; (3) by expanding the ‘one-year’ foreign employment requirement to include employment within three years prior to admission, and (4) by providing a seven-year maximum period of L-1A admission for managers and executives. See H.R. Rep. 101-723(I)(1990), reprinted in 1990 U.S.C.C.A.N. 6710, 6749.

²¹⁸56 Fed. Reg. 31,553, 31,554 (1991)

²¹⁹James A. Puleo, Acting Executive Associate Commissioner, Office of Operations, INS, “Interpretation of Specialized Knowledge (CO 214LP)”, March 9, 1994 Memo

the company product must be “noteworthy or uncommon” and knowledge of company processes or procedures must be “advanced” but “need not be narrowly held throughout the company.”²²⁰ Two years after, Fujie Ohata issued another memorandum emphasizing the need to make an analysis on whether “the petitioning entity would suffer economic inconvenience or disruption to its U.S. or foreign-based operations if it had to hire someone other than the particular overseas employee on whose behalf the petition was filed.”²²¹

b) Legislative Policy

An L-1A visa is applicable to a foreign national, and his/her spouse and minor children if accompanying or following to join him/her, who within 3 years preceding the time of his/her application for admission into the United States, has been employed continuously for one year by a firm, corporation, or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his/her services to the same employer or a subsidiary, or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.²²²

A foreign national transferred to the United States under the L-1A nonimmigrant type is referred to as an intracompany transferee. The organization which seeks the transfer is referred to as the petitioner. The U.S. USCIS has responsibility for determining whether the foreign national is eligible for admission and whether the petitioner is a qualifying organization. The regulations set forth the standards applicable to these classifications. They also set forth procedures for admission of intracompany transferees and appeal of adverse decisions. Certain petitioners seeking the classification of foreign national as intracompany transferees may file blanket petitions with the

²²⁰FujieOhata, Associate Commissioner, Service Center Operations, INS, “Interpretation of Specialized Knowledge (HQSCOPS 70/6.1)”, Dec. 20, 2002 Memo

²²¹FujieOhata, Director, Service Center Operations, USCIS, “Interpretation of Specialized Knowledge for Chefs and Specialty Cooks Seeking L-1B Status”, Sept. 9, 2004 Memo

²²² INA, as amended, Act 101 (a)(15)(L) and 8 CFR 214.2 (1)(1)(i)

USCIS. Under the blanket petition process, the USCIS is responsible for determining whether the petitioner and its parent, branches, affiliates, or subsidiaries specified are qualifying organizations. The Department of State or, in certain cases, the USCIS is responsible for determining the classification of the foreign national.²²³

An intracompany transferee may either be in managerial or executive capacity. As defined, managerial capacity is an assignment within an organization in which the employee primarily:

1. Manages the organization, or a department, subdivision, function, or component of the organization;
2. Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
3. Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
4. Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.²²⁴

A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.²²⁵ On the other hand, executive capacity is an assignment within an organization in which the employee primarily:

²²³ 8 CFR § 214.2 (I)(1)(i)

²²⁴ 8 CFR § 214.2 (I)(1)(ii)(B)

²²⁵ *Id.*

1. Directs the management of the organization or a major component or function of the organization;
2. Establishes the goals and policies of the organization, component, or function;
3. Exercises wide latitude in discretionary decision-making; and
4. Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.²²⁶

A first-line supervisor is not considered to be acting in a managerial capacity by reason of his supervisory duties unless he supervises professionals who hold bachelor's degrees and work in positions requiring such degrees.²²⁷ A petitioner must meet the following requirements so as to be able to file a blanket petition which seeks continuing approval of itself and some or all of its parent, branches, subsidiaries, and affiliates as qualifying organizations:

1. The petitioner and each of those entities are engaged in commercial trade or services;
2. The petitioner has an office in the United States that has been doing business for one (1) year or more;²²⁸
3. The petitioner has three (3) or more domestic and foreign branches, subsidiaries, or affiliates; and
4. The petitioner and the other qualifying organizations have obtained approval of petitions for at least ten "L" managers, executives, or specialized knowledge professionals during the previous 12 months; or have US subsidiaries or affiliates with combined annual sales

²²⁶ 8 CFR § 214.2 (l)(1)(ii)(C)

²²⁷ INA § 101(a)(44)(A); 8 C.F.R. §.214.2(l)(1)(ii)(B)

²²⁸ 8 C.F.R. § 214.2(l)(3)(v)

of at least \$25 million; or have a United States work force of at least 1,000 employees.

229

Except otherwise provided, a petitioner seeking to classify a foreign national as an intracompany transferee must file a Petition for Nonimmigrant Worker (Form I-129). The petitioner shall advise USCIS whether a previous petition for the same beneficiary has been filed, and certify that another petition for the same beneficiary will not be filed unless the circumstances and conditions in the initial petition have changed. Failure to make a full disclosure of previous petitions filed may result in a denial of the petition.²³⁰

When applying for a blanket petition, the petitioner shall include in the blanket petition all of its branches, subsidiaries, and affiliates which plan to seek to transfer aliens to the United States under the blanket petition. An individual petition may be filed by the petitioner or organizations in lieu of using the blanket petition procedure. However, the petitioner and other qualifying organizations may not seek L classification for the same foreign national under both procedures, unless a consular officer first denies eligibility. Whenever a petitioner which has blanket L approval files an individual petition to seek L classification for a manager, executive, or specialized knowledge professional, the petitioner shall advise the USCIS that it has blanket L approval and certify that the beneficiary has not and will not apply to a consular officer for L classification under the approved blanket petition.²³¹

²²⁹ 8 CFR § 214.2 (I)(2)(ii)

²³⁰ 8 CFR § 214.2 (I)(4)(i)

²³¹ 8 CFR § 214.2 (I)(4)(iii)

3. 2. 3. E-2 Treaty Investors

a) Legislative History

The favored status of the treaty merchants in 1800s, later known as “treaty traders,” became today’s E-2 treaty investors. Historically, America has been open to merchants who desire to conduct trade in the United States temporarily.²³² The treaty trader (E-1) E-1 treaty trader class was created by the Immigration and Nationality Act of 1924. Due to rising international investments, it expanded and led to the creation of the E-2 treaty investor class. The objective is to further increase international investments by attracting more foreign investments to the US.²³³

However, as regards the interpretation and adjudication of the E-2 visas, the Immigration and National Act of 1952 catered limited guidance. On matters concerning the drafting of rules and regulations, both the State Department and the INS have the authority. The State Department retained primary authority since it holds the sole responsibility to negotiate and interpret treaties and agreements. The same provides the basis for granting E-2 visas. For this, whenever the interpretation and adjudication of the E-2 visas is concerned, practitioners refer to the State Department's Foreign Affairs Manual interpretative notes (FAM).²³⁴

The E-2 treaty investor visa is based on the existing authorizing treaty or agreement between the United States and the country of the foreign national petitioner. The Treaty of Friendship, Commerce, and Navigation (FCN) was, before 1981, the only instrument that conferred the E-1 and E-2 eligibility status.²³⁵

b) Legislative Policy

²³² Sun, Catherine. "The E-2 Treaty Investor Visa: The Current Law and the Proposed Regulations." American University International Law Review 11, No. 3, 513 (1996)

²³³ *Id.*, 514

²³⁴ *Id.*, 515

²³⁵ *Id.*, 516-517

The E-2 is classified as a nonimmigrant treaty investor visa.²³⁶ An applicant, to be classified as an E-2 treaty investor, must:

1. Invest or is actively in the process of investing a substantial amount of capital into a bona fide enterprise²³⁷ in the United States, as distinct from a relatively small amount of capital in a marginal enterprise solely for the purpose of earning a living;
2. Seek entry solely to develop and direct the enterprise; and
3. Intend to depart the United States upon the expiration or termination of treaty investor (E-2) status.²³⁸

A foreign national employee of an E-2 treaty investor may be classified as such if the employee is in or is coming to the United States under the following conditions:

1. To engage in duties of an executive or supervisory character; or
2. If employed in a lesser capacity, the employee has special qualifications which make his services essential to the efficient operation of the enterprise;
3. The employee must have the same nationality as the principal alien employer;
4. In addition, the employee must intend to depart the United States upon the expiration or termination of E-1 or E-2 status.²³⁹

The principal foreign national employer, who is the same E-2 treaty investor, must be:

²³⁶ INA § 101(a)(15)(E)(ii)

²³⁷ The enterprise must be a real, active, and operating commercial or entrepreneurial undertaking which produces services or goods for profit. The enterprise must meet applicable legal requirements for doing business in the particular jurisdiction in the United States.

²³⁸ 8 CFR § 214.2(e)(2)

²³⁹ 8 CFR § 214.2(e)(3)

1. A person in the United States having the nationality of the treaty country and maintaining nonimmigrant treaty investor status or, if not in the United States, would be classifiable as a treaty investor;²⁴⁰ or
2. An enterprise or organization at least 50 percent owned by persons in the United States having the nationality of the treaty country and maintaining nonimmigrant treaty investor status or who, if not in the United States, would be classifiable as treaty investors.²⁴¹

A treaty country is a foreign state with which a qualifying Treaty of Friendship, Commerce, or Navigation or its equivalent exists with the United States. A treaty country includes a foreign state that is accorded treaty visa privileges under the Act²⁴² by specific legislation.²⁴³ Thus, E-2 treaty investor visas may only be applied for by people or companies from the following countries:

Table 1. E-2 Approved Countries

Argentina	China (ROC)	Georgia	Kyrgyzstan	Pakistan	Switzerland
Armenia	Colombia	Germany	Latvia	Panama	Thailand
Australia	Congo	Grenada	Liberia	Philippines	Togo
Austria	Costa Rica	Honduras	Luxembourg	Poland	Trinidad and Tobago
Bangladesh	The Czech Republic	Iran	Mexico	Romania	Tunisia
Belarus	Ecuador	Ireland	Morocco	Senegal	Turkey
Belgium	Egypt	Italy	Moldovia	The Slovak Republic	The Ukraine
Bosnia-Herzegovina	Estonia	Jamaica	Mongolia	Spain	United Kingdom
Bulgaria	Ethiopia	Japan	Netherlands	Sri Lanka	Uzbekistan
Cameroon	Finland	Kazakhstan	Norway	Suriname	Yugoslavia
Canada	France	Korea	Oman	Sweden	

²⁴⁰ 8 CFR § 214.2(e)(3)(i)

²⁴¹ 8 CFR § 214.2(e)(3)(ii)

²⁴² INA §101(a)(15)(E)

²⁴³ 8 CFR § 214.2(e)(6)

As for Albania, Azerbaijan, Haiti, Jordan, Nicaragua, and Russia, there exist signed treaties, but not ratified. An investment, for purposes of the E-2 treaty investor visa, is the treaty investor's placing of capital, including funds and other assets (which have not been obtained, directly or indirectly, through criminal activity), at risk in the commercial sense with the objective of generating a profit.²⁴⁴ In addition, these are the following requirements:

1. The treaty investor must be in custody and control over the investment capital;
2. In case investment fortunes reverse, the capital must be subject to partial or total loss;
3. Such investment capital must be the investor's unsecured personal business capital or capital secured by personal assets;
4. Capital in the process of being invested or that has been invested, must be irrevocably committed to the enterprise. The foreign national has the burden of establishing such irrevocable commitment;
5. The foreign national may use any legal mechanism available, such as the placement of invested funds in escrow pending admission in, or approval of, E classification, that would not only irrevocably commit funds to the enterprise, but might also extend personal liability protection to the treaty investor in the event the application for E classification is denied.²⁴⁵

The spouse and child of an E-2 treaty investor accompanying or following to join him/her may receive the same classification as the principal. The nationality of said spouse or child is not

²⁴⁴ 8 CFR § 214.2(e)(12)

²⁴⁵ *Id.*

material to their classification.²⁴⁶ The period of admission, however, shall be subject to the following:

1. A treaty trader or treaty investor may be admitted for an initial period of not more than 2 years;
2. The spouse and minor children accompanying or following to join a treaty trader or treaty investor shall be admitted for the period during which the principal alien is in valid treaty trader or investor status. The temporary departure from the United States of the principal trader or investor shall not affect the derivative status of the dependent spouse and minor unmarried children, provided the familial relationship continues to exist and the principal remains eligible for admission as an E nonimmigrant to perform the activity;
3. Unless otherwise provided for in this chapter, an alien shall not be admitted in E classification for a period of time extending more than 6 months beyond the expiration date of the alien's passport.²⁴⁷

Requests for extensions of stay may be granted in increments of not more than 2 years. A treaty investor in valid E-2 status may apply for an extension of stay by filing an application for extension of stay on Form I-129 and E Supplement, with required accompanying documents and the instructions on that form.²⁴⁸ To be eligible for an extension, the foreign national must prove that he or she:

1. Has at all times maintained the terms and conditions of his or her E nonimmigrant classification;

²⁴⁶ 8 CFR § 214.2(e)(4)

²⁴⁷ 8 CFR § 214.2(e)(19)

²⁴⁸ 8 CFR § 214.2(e)(20)

2. Was physically present in the United States at the time of filing the application for extension of stay; and
3. Has not abandoned his or her extension request.²⁴⁹

3.2.4. The EB-3 Visa for Skilled, Professional, and Other Workers

a) Legislative History

On November 29, 1990, the Immigration Act of 1990 (IMMACT 90),²⁵⁰ which amended certain provisions of the Immigration and Nationality Act of 1952, was enacted. It led to the creation of employment-based visas, which were categorized into the five (5) preferences. The third preference refers to the EB-3. Pres. George H.W. Bush, during the signing of the IMMACT 90, stated, “S. 358 provides for a significant increase in the overall number of immigrants permitted to enter the United States each year. The Act maintains our Nation's historic commitment to family reunification by increasing the number of immigrant visas allocated on the basis of family ties. At the same time, S. 358 dramatically increases the number of immigrants who may be admitted to the United States because of the skills they have and the needs of our economy. This legislation will encourage the immigration of exceptionally talented people, such as scientists, engineers, and educators. Other provisions of S. 358 will promote the initiation of new business in rural areas and the investment of foreign capital in our economy.”²⁵¹

Indeed, the number of immigrants who were allowed to legally enter the US annually was increased. In fact, more than 500,000 entered the country yearly as compared to past years prior to the enactment of the Act. While the Act may have preferred family members who were already in

²⁴⁹ 8 CFR § 214.2(e)(20)(i)

²⁵⁰ Senate Bill 358 of the 101st Congress (1989-1990), approved on November 29, 1990, was assigned Public Law No. 101 - 649

²⁵¹ Bush, George, 1990, November 29. "Statement on Signing the Immigration Act of 1990." Online by Gerhard Peters and John T. Woolley, The American Presidency Project. Available at <http://www.presidency.ucsb.edu/ws/?pid=19117>

the country, 50,000 diversity visas were still granted to foreign nationals who came from countries where few availed of the Act's privileges. Thus, around 40,000 visas which allowed permanent employment and 65,000 on temporary employment were then granted.

b) Legislative Policy

The EB-3 visa category applies to skilled workers, professionals and other workers.²⁵² As stated, there are three (3) classes under this visa category as follows:

- i. Professionals (EB-3A);
- ii. Skilled workers (EB-3B); and
- iii. Other workers (EB-3C).

Under the EB-3A category, qualified immigrants are those who hold baccalaureate degrees and who are members of the professions.²⁵³ Those under the EB-3B category are those who are capable of performing skilled labor with at least 2 years training or experience, and not of a temporary or seasonal nature.²⁵⁴ As for the EB-3C category, it refers to other qualified immigrants who are capable of performing unskilled labor, but not of a temporary or seasonal nature.²⁵⁵

Visas shall be made available in a number not exceeding 28.6 percent of such worldwide level.²⁵⁶ Annually, 10,000 visas are available for each category. To qualify under this category, the other eligibility requirements must be complied as follows:

- i. a labor certification;
- ii. a permanent, full-time job offer (not of a temporary or seasonal nature); and

²⁵² INA § 203(b)(3)

²⁵³ INA § 203(b)(3)

²⁵⁴ INA § 203(b)(3)(A)(ii)

²⁵⁵ INA § 203(b)(3)(A)(ii)

²⁵⁶ INA § 203(b)(3)(A)(iii)

- iii. the ability to demonstrate that the applicant will be performing work for which qualified workers are not available in the United States.

The labor certification referred to is issued by the Secretary of Labor and contains attestations by the U.S. employer (sponsor) of the number of U.S. workers available to undertake the employment sought by an applicant and the effect of the alien's employment on the wages and working conditions of U.S. workers similarly employed. Determination of labor availability in the United States is made at the time of a visa application and at the location where the applicant wishes to work.²⁵⁷ Under the EB-3C class, not more than 10,000 of the visas made available in any fiscal year may be obtainable for qualified immigrants.²⁵⁸

There are also those who are referred to as special immigrants. They refer to those who seek to enter the U.S. solely for the purpose of carrying on the vocation of a minister of their religious denomination. Of which religious denomination, he/she must have been a member for the past 2 years prior to his/her application for admission.²⁵⁹

A subsequent EB-3 petition is entitled to earliest priority date, unless the prior petition is revoked due to fraud.²⁶⁰ This means that if the beneficiary gets a new approval under EB-3 visa category he/she should be able to port the previous priority date from his/her previously approved EB-2 petition.

²⁵⁷ INA § 203(b)(3)(C).

²⁵⁸ INA § 203(b)(3)(B)

²⁵⁹ INA § 203(b)(3)(D)

²⁶⁰ 8 CFR § 204.5(e)

3.2.5. The EB-5 Investor Visa

a) Legislative History

The Immigration and Nationality Act of 1990 created the EB-5 program to increase the number of employment-based visas. The 1990 INA was responsible for increasing the number of immigrants to legally enter the US every year. In fact, immediately after its approval and from 200,000, an estimate of 700,000 immigrants entered the US every year. Under the 1990 INA, the following visas were created: EB-1 for Priority Workers; EB-2 for Professionals who had advanced degrees or exceptional abilities; EB-3 for Skilled/Professional Workers; EB-4 for Special Immigrants; and EB-5 for the Immigrant Investor Program.

On October 6, 1992, the Immigrant Investor Pilot Program, a special section of EB-5 visas, was created.²⁶¹ It provided that the investments are affiliated with economic units known as the “Regional Center.” The main objective of which was to stimulate the US economy by creating jobs and increasing capital investments brought into the US by foreign investors. Particular to this program was the preference given by the USCIS to EB-5 visas and set aside areas for Regional Centers.

In 1998 and following the enactment of the 1990 INA, the former Immigration and Naturalization Service issued four decisions. These decisions became precedents on the application of the EB-5 visa category as it made retroactive applications to investors who applied under the former rules in good faith. However, confusions were caused among those who were subject to the two-year requirement on conditional residency, but received the status of “conditional permanent” which was followed under the old rules. Resultantly, most EB-5 visa investors were subjected to removal proceedings due to the insistency of the INS not to remove its conditions.

²⁶¹ § 610, Public Law 102-395

Subsequently, numerous court decisions held that the provisions of the new EB visa category could not be applied retroactively in relation to the approval of EB-5 petitions. In 2000, a further legislative easing came when an earlier provision that required an increase in exports was held. Thereafter, the pilot program on the EB-5 regional centers, then in a handful of states, became a nationwide provision.

Investors, who were hurt by the changes the immigration agency made in 1998, lobbied Congress for relief. Eventually, in 2002, Congress enacted changes to the EB-5 program as part of a Justice Department authorization bill²⁶² and the 21st Century Dept. of Justice Appropriations Authorization Act was enacted.²⁶³ Among other things, the 2002 Act extended unconditional green card status to EB-5 investors who met all the requirements, while those who didn't would have two more years to do so. To qualify, an investor must have filed a petition for EB-5 classification (Form I-526) and had it approved between January 1, 1995 and August 31, 1998.²⁶⁴ The law took effect November 2, 2002.

In 2003, the previous demand for the creation of 10 new jobs was replaced by a statutory provision for the calculation of indirect jobs creation that uses any reasonable methodologies.²⁶⁵ In the same year, Congress asked the US Government Accountability Office (GAO) to study the EB-5 program.²⁶⁶ The GAO report concluded that the program has been under-used for a variety of reasons, including the rigorous application process and the failure to issue regulations implementing the 2002 law.²⁶⁷ The report found that even though few people have used the EB-5 category, EB-5 participants have invested an estimated \$1 billion in a variety of US businesses.

²⁶² Yale-Loehr, "Congress Helps Stranded Immigrant Investors," 7 Bender's Immigration Bulletin 1306, Nov. 1, 2002

²⁶³ Public Law Number 107 to 273 of 116 Stat 1758

²⁶⁴ 21st Century Department of Justice Appropriations Authorization Act, §§ 11031(b)(1), 11032(b).

²⁶⁵ CMB Export LLC, Rock Island, Ill. Available at http://www.cmbeb5visa.com/EB5_InDepth.aspx

²⁶⁶ Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, § 5, 117 Stat. 1944

²⁶⁷ U.S. Government Accountability Office, No. GAO-05-256, "Immigrant Investors: Small Number of Participants Attributed to Pending Regulations and Other Factors" (Apr. 2005). Available at www.gao.gov/new.items/d05256.pdf

Later on, the USCIS issued a memo in January 2005. It provided for a new Investor and Regional Center Unit, which has the responsibility of overseeing the EB-5 program. On May 30, 2013, the USCIS issued the EB-5 Adjudications Policy Memorandum, referred to as the guiding document for USCIS administration of the EB-5 program. It builds upon prior policy guidance for adjudicating EB-5 and is applicable to, and binding on, all USCIS employees.²⁶⁸

b) Legislative Policy

Under the Immigration and Nationality Act, visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial/enterprise (including a limited partnership).

²⁶⁹

The foreign national should invest (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and which investment will benefit the United States economy and create full-time employment²⁷⁰ for not fewer than ten (10) United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).²⁷¹

Except, as otherwise provided, the amount of capital²⁷² required shall be \$1,000,000.²⁷³ If the investment shall be made in a targeted employment area,²⁷⁴ the amount of capital required shall

²⁶⁸ See at <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/about-eb-5-visa>

²⁶⁹ INA § 203(b)(5)

²⁷⁰ INA § 203(b)(5)(D) Full-time employment defined.--In this paragraph, the term `full-time employment' means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

²⁷¹ *Id.*

²⁷² 8 CFR § 204.6(e) Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided that the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. All capital shall be valued at fair market value in United States dollars. Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital for the purposes of section 203(b)(5) of the Act.

then be \$500,000. If for a high employment area,²⁷⁵ the amount of capital required shall then be greater than, but not greater than 3 times, the amount of \$1,000,000.²⁷⁶

Not less than 3,000 of the visas made available in each fiscal year shall be reserved for qualified immigrants who invest in a new commercial enterprise, which will create employment in a targeted employment area.²⁷⁷ There is also what is referred to as multiple investors. The establishment of a new commercial enterprise may be used by more than one investor as the basis of a petition for classification as an EB-5 investor.²⁷⁸ The following requirements must be complied:

1. Each petitioning investor has invested or is actively in the process of investing the required amount for the area in which the new commercial enterprise is principally doing business; and
2. Provided each individual investment results in the creation of at least ten full-time positions for qualifying employees.²⁷⁹

The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur even though there are several owners of the enterprise, including persons who are not seeking the EB-5 classification and non-natural persons, both foreign and domestic, provided that the source(s) of all capital invested is identified and all invested capital has been derived by lawful means.²⁸⁰

²⁷³ The Attorney General, in consultation with the Secretary of Labor and the Secretary of State, may from time to time prescribe regulations increasing the dollar amount specified under the previous sentence.

²⁷⁴ INA § 203(b)(5)(B)(ii) Targeted employment area defined. - In this paragraph, the term "targeted employment area" means, at the time of the investment, a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate).

²⁷⁵ Not a targeted employment area with an unemployment rate significantly below the national average unemployment rate, INA § 203(b)(5)(C)(I)&(II)

²⁷⁶ INA § 203(b)(5)(C)

²⁷⁷ INA § 203(b)(5)(B)(i)

²⁷⁸ 8 CFR § 204.6(e)(1)

²⁷⁹ *Id.*

²⁸⁰ *Id.*

3.3. The Advantages and Disadvantages of Certain Employment and Investor Visas

3.3.1. H-1B Visa

Advantages of the **H-1B Visa**. Following are the advantages of an H-1B non-immigrant visa:

1. An H-1B visa holder may change employer during his H-1B status.²⁸¹ The change of employer will not affect his/her adjustment of status, provided, however, that he/she has filed an I-485 that has been pending for at least 180 days and he/she continues to work in the same or related field for the new employer;²⁸²
2. The specialty occupation workers are allowed to enter the United States, work and receive income as professionals. It will be for a maximum cumulative period of six (6) years,²⁸³ which is extendible under certain conditions;
3. The H-1B visa holder's spouse and children under twenty-one years of age may enter and remain in the United States for the duration of the H-1B visa holder's duration of stay. They may also attend school based on their H-4 status, either part-time or full-time, even without an F-1 visa;²⁸⁴
4. An H-1B visa holder may also work for more than one US employer. He/she may benefit from multiple H-1B petitions²⁸⁵ and, in most cases, the number of H-1B visas an individual may have in their lifetime is deemed unlimited;
5. A foreign national can apply for a part-time H-1B status provided the work hours are at least 50% of the normal full-time hours in his/her industry and he/she satisfies all other requirements for an H-1B. If he/she is already an H-1B visa holder, he/she can benefit from

²⁸¹ 8 CFR §214.2(h)(2)(i)(D)

²⁸² INA § 214(n)(1)

²⁸³ Sec. 106(a), American Competitiveness Act in the 21st Century (AC)

²⁸⁴ 8 CFR 214.2(h)(9)(iv)

²⁸⁵ INA § 214(n)(1)

- a coexisting H-1B for another part-time job. In such situation, no number of hours of work is set for each employer;²⁸⁶
6. An H-1B visa allows “dual intent” both by immigration laws and USCIS regulations.²⁸⁷
Thus, there is no need for him/her to maintain foreign residence. “Dual intent” means a foreign national who seeks temporary employment in the US via a nonimmigrant H-1B visa may also petition for permanent US residence through an immigrant petition. One does not preclude the other. And he/she may do so for himself and his/her family;
 7. An H-1B visa holder may establish his/her own business and be an employee of it as well. This may be possible provided the company itself is distinct and separate from the owner, who may be the H-1B visa holder. Such distinction carries with it the independent authority to hire, pay, supervise and fire the employee;²⁸⁸
 8. Holding the payment of wages of an H-1B visa holder is illegal. The financial condition of the company to which he/she works is no reason to do so. In such cases, the company has only two options, either to continue paying his/her wages or to terminate his/her employment;
 9. With the enactment of the American Competitiveness in the Twenty-First Century Act²⁸⁹ on October 21, 2000, H-1B visa holders may now extend their status beyond the six-year limit or to a seventh or more year; and²⁹⁰
 10. A visa being not available through NAFTA, the H-1B visa is available to qualified applicants who are citizens of countries other than Canada and Mexico.

²⁸⁶ 20 C.F.R. § 655.730(c)(6)

²⁸⁷ INA §214(h)

²⁸⁸ Donald Neufeld Memo dated January 08, 2010. *See*

<http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf>

²⁸⁹ American Competitiveness in the Twenty-First Century Act of 2000 (“AC21”), Pub. L. No. 106-313, 114 Stat. 1251

²⁹⁰ AC21, § 106(a)

Disadvantages of an H-1B Visa. Following are the disadvantages of an H-1B nonimmigrant visa:

1. Due to higher costs in the application of an H-1B visa and additional employer obligations, many employers are less likely to sponsor potential employees for H-1B visas;
2. An H-1B visa holder's employment is exclusive to the H-1B visa petitioner and may only render services as stated in the H-1B petition. Generally, an H-1B visa holder may work for more than one employer provided each employer file the required H-1B visa petition prior to employment;²⁹¹
3. It is an imperative the salary meet the wage requirements prevailing at the time of the application;²⁹²
4. Processing the H-1B visa is extensive and time-consuming. Extensive as for the documents required for the petitioning US employer to submit and time-consuming as for the labor condition application;
5. While the spouse and children of an H-1B visa holder are generally granted H-4 status, allowing part-time or full-time study, they, however, are not allowed to engage in employment, unless authorized by the USCIS;²⁹³
6. The H-1B visa is subject to a quota each year.²⁹⁴ According to the USCIS, the current annual cap on the H-1B visa category is 65,000. It must be noted that not all H-1B nonimmigrant visas are subject to said annual cap. A maximum of 6,800 visas are set aside from the 65,000 each year for the H-1B1 program under the terms of the legislation

²⁹¹ Available at http://www.uscis.gov/USCIS/About%20Us/Electronic%20Reading%20Room/Custom%20Service%20Reference%20Guide/Nonimmigrant_Empl.pdf

²⁹² 20 CFR § 655.731(a)

²⁹³ **H-4 Employment Rule**, 80 Fed. Reg. 10283 (February 25, 2015), amending 8 CFR 214.2(h)(9)(iv), 8 CFR 274a.12(c)(26), and 8 CFR 274a.13(d), effective May 26, 2015

²⁹⁴ 20 CFR § 214.2(h)(8)(i)

implementing the U.S.-Chile and U.S.-Singapore free trade agreements. However, any visas not used under said group shall become available for the next fiscal year;²⁹⁵

7. An H-1B visa applicant for a new employer is not allowed to work prior to its approval of the petition by the USCIS. If the alien already holds an H-1B, the foreign national may begin work for a new employer as soon as the new employer files an H-1B petition on behalf of the employee with the USCIS;
8. Being a nonimmigrant visa, the H-1B visa does not automatically convert to a lawful permanent residence status;
9. An H-1B visa holder may be terminated of his/her employment at will by either the employer or the holder himself/herself for any or no reason at all. As soon as employment is terminated, the H-1B visa is technically not valid;
10. The H-1B employer reserves the statutory right to give job preferences to US workers over H-1B workers. Thus, H-1B workers may be replaced by qualified US workers; and
11. The H-1B petitioner is not required to show that there exists a shortage of qualified US workers. Thus, a labor certification is not among those required.

3.3.2. L-1A Visa

Advantages of an **L-1A Visa**. Following are the advantages of an L-1A nonimmigrant visa:

1. No Labor or Program Electronic Review Management (PERM) Certification²⁹⁶ is required for the L-1A work visa petition;

²⁹⁵ Available at <http://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-fiscal-year-fy-2016-cap-season>

²⁹⁶ The Labor or PERM Certification is intended for the petitioning US employer to determine with certainty that there are no willing and able U.S. workers are available for a position for which is required. In the PERM certification, the Department of Labor attests of such fact and as such, the petitioning US employer may then proceed to file the immigrant visa applied for the foreign worker and employ him on such basis;

2. The L-1A visa applier doesn't have to keep his/her foreign residency while staying in the U.S. for he/she to be considered for permanent residency;
3. No prevailing wage ²⁹⁷ requirements exist;
4. A blanket L-petition may be availed by companies that regularly file L-1A work visa petitions. The entire process, being quick and simple, favors the L-1A visa applicant as most of the processing shall be undertaken by the employer; ²⁹⁸
5. An L-1 visa applicant will be able to apply for permanent residence, less an elaborate and complex process, after only one year in L-1 status;
6. The L-1 employee may be joined by his/her spouse and any unmarried children which are under 21 years of age. The spouse may be able to obtain a work permit;
7. There is "dual intent" in L-1 visa category and as such, the L-1 visa holder may apply for a Green Card without affecting his/her L-1 visa status;
8. No specific educational background is required in the L-1A visa.

Disadvantages of an **L-1A Visa**. Following are the disadvantages of an L-1A nonimmigrant visa:

1. An L-1A visa holder transferee is authorized to perform the specific work stated in the L-1A petition with the same employer-petitioner, in the same position and the same duties. Otherwise, it shall be considered a violation of the L-1A status. The L-1 visa, either an L-1A or an L-1B, is not a work permit in the U.S., for work is exclusive to the L-1 employer who effected the transfer to the U.S.;

²⁹⁷ It means the total base hourly rate of pay and bona fide fringe benefits customary or prevailing for the same work in the same trade or occupation in the town where the project is to be constructed.

²⁹⁸ 8 CFR §214.2(l)(11)

2. The L-1A visa is limited to 7 years extended status. It shall be 5 years for specialized knowledge;
3. The L-1A visa holder who desires to change employers will need to file a petition for conversion to different classification, i.e. H-1B. Otherwise, the L-1A visa shall be terminated and the visa holder will then have to go home to his/her country of origin;
4. The L-1 visa sponsor must be a branch, subsidiary, or affiliate of the company that is the same employer outside the United States. It must have control over the business entity in the form of direct ownership and must continue in business throughout the L-1 visa holder's stay in the U.S.;
5. It is a must that the L-1 visa beneficiary holds either an executive or managerial position, for the L-1A category, or have specialized knowledge, for the L-1B category;
6. As to processing, L-1 visas are initially approved for a year for newly organized and operated U.S. companies, or three years if the U.S. company has been working for more than one year;
7. The children of the L-1 visa holder who reach the age of 21 years old must apply for their own visa to stay further in the U.S. The unmarried dependent children who are under 21 years old cannot apply for Employment Authorization Document (EAD).

3.3.3. E-2 Visa

Advantages of an **E-2 Visa**. Following are the advantages of an E-2 nonimmigrant visa:

1. Under the E-2 visa category, no specific educational background is required, for what is required is the investment necessary to establish an enterprise in the US;²⁹⁹

²⁹⁹ 8 CFR § 214.2(e)(2)(i)

2. One may remain or travel in and out of the US until the expiration of the E-2 visa. The maximum period of stay is two (2) years which may be applied for 2 year extensions;³⁰⁰
3. Countries who have signed an investment treaty with the US are eligible to apply for an E-2 investors visa and establish and operate a business within the US;³⁰¹
4. No minimum investment amount is required provided the investment is enough to establish, develop and operate a profitable business that meets the given requirements;³⁰²
5. An E-2 dependent visa shall be issued to the spouse, together with their children below the age of 21, of an E-2 investor.³⁰³ Based on it, the spouse may apply for work authorization³⁰⁴ and children are able to attend a school of their choice but not for a work visa; and
6. The E-2 visa holder has the choice of living outside of the United States for an unsettled amount of time and can re-enter the country for as long as their visa is valid.³⁰⁵

Disadvantages of an E-2 Visa. Following are the disadvantages of an E-2 nonimmigrant visa:

1. While the E-2 visa may initially be valid up to 5 years, one, however, will have to leave and return to the US to extend their status;³⁰⁶
2. Only 75 countries in the world have signed an investment treaty with the US. Foreign nationals from countries who did not, cannot enter the US and establish a business under the E-2 investors visa;³⁰⁷
3. While extensions may be allowed under the E-2 visa category, businesses which are not profitable are generally denied of their renewals. Worse, if the business fails, the E-2 visa

³⁰⁰ 8 CFR § 214.2(e)(19)(i)

³⁰¹ 8 CFR § 214.2(e)(3)(i)

³⁰² 8 CFR § 214.2(e)(14)

³⁰³ 8 CFR § 214.2(e)(4)

³⁰⁴ On January 16, 2002, President Bush signed H.R. 2277 (PL 107-124) into law that allowed spouses of both treaty traders and investors to acquire employment permit.

³⁰⁵ 8 CFR § 214.2(e)(8)(vi)

³⁰⁶ 8 CFR §214.2(e)(1)

³⁰⁷ See at <http://travel.state.gov/content/visas/en/fees/treaty.html>

holder must leave the United States even while still within the 2-year maximum period of stay;

4. The E-2 visa holder cannot seek other employment in the US other than to work for the business he/she invested in and established;³⁰⁸
5. The children of the E-2 visa holder who reached the age of 21 and above must apply for a different visa to remain in the U.S.; and
6. The E-2 investor visa is not “dual intent” but “semi-dual intent”.³⁰⁹ It doesn’t lead to permanent residency.

3.3.4. EB-3 Visa

Advantages of an EB-3 Visa. Following are the advantages of an EB-3 nonimmigrant visa:

1. The EB-3 visa is allotted 40,000 visas on an annual basis. In addition, there are potentially more visas under this category from any unused EB-1 or EB-2 visa categories; and³¹⁰
2. The eligibility requirement is stricter than that of the EB-2 visa category.

Disadvantages of an EB-3 Visa. Following are the disadvantages of an EB-3 nonimmigrant visa:

1. Applications for an EB-3 visa are subject to a longer wait in order for their priority dates to become current. There being so many applicants for the EB-3 visa status, it takes a number of years before one’s application may have greater chances of being processed. Longer delays are expected in the future under the EB-3 visa category;
2. The skilled worker’s classification is for individuals with at least two years training or experience not of a temporary or seasonal nature;³¹¹

³⁰⁸ 8 CFR 214.2(e)(8)(ii)

³⁰⁹ Believed to be not a “dual intent” visa by the Department of State, a resident visa applied for in a Consulate or Embassy is rarely approved. The USCIS, however, believes otherwise and treats the E-2 visa as “dual intent”. Thus, one may obtain extensions in the US pending an application for permanent residency.

³¹⁰ INA §203(b)(3)

3. Regardless of one's education and experience, the EB-3 visa applicant must have a job offer in the US before he can apply for one; and ³¹²
4. Work experience cannot be substituted for education when applying as a professional. ³¹³

3.3.5. EB-5 Visa

Advantages of an EB-5 Visa. Following are the advantages of an EB-5 immigrant visa:

1. The EB-5 investor may reside in any State in the US that he/she desires to;
2. Unlike the E-2 investor visa of which personal management of the business is a must, it is not with EB-5 investor visa. It is not required for an EB-5 investor visa holder to manage the operation of the business invested to;
3. In addition to the income earned from his/her own business, the EB-5 investor may still work for any employer and position in the US;
4. Other than the EB-5 visa holder, even his/her children may work and attend school in the US. The best part of this, they may also qualify for scholarships and in-state tuition;
5. Unlike E-2 investors, EB-5 visa holders need not have to depart from the US and return for purposes of renewal because a temporary resident visa had been issued unto him/her;
6. EB-5 visa holders need not worry about denial of the renewal of their visa;
7. Being an immigrant visa, the EB-5 visa allows permanent residency in the US for the investors, their spouse and children below the age of 21;
8. The EB-5 visa holder may leave and return to the US without need of any other visa;
9. The EB-5 visa holder may sponsor family members for permanent residency in the US; and

³¹¹ INA § 203(b)(3)(A)(ii)

³¹² INA § 203(b)(3)(C).

³¹³ INA § 203(b)(3)

10. As is required by the EB-1 visa, “extraordinary ability” is not a requirement and the same with permanent employment in the US. There is equally no requirement for a Labor or PERM certification.

Disadvantages of an **EB-5 Visa**. Following are the disadvantages of an EB-5 immigrant visa:

1. Unlike the E-2 visa category, the EB-5 requires a higher investment at a minimum of \$500,000 ³¹⁴ for a “targeted employment area” and \$1,000,000 for a new commercial enterprise. ³¹⁵ Additionally, one will need to pay legal fees and other expenses. Another, said amounts may not be enough to create permanent employment for 10 workers. One may be required to allocate more money which is imperative to satisfactorily meet the requirements of the EB-5 visa category. Thus, the EB-5 investors visa is also referred to as the “Millionaires’ Visa”;
2. More and more EB-5 visa petitions are denied than approved, due to its rigorous requirements for eligibility. Another is the fact that it is being used as an avenue of money laundering; ³¹⁶
3. While one may invest anywhere in the US, it is imperative that the EB-5 investor will be able to prove investment sustainability for 3 additional years and will actively handle the operation of his business; ³¹⁷
4. It is required that the EB-5 investor prove that the source of the amount invested is from legitimate means, i.e. employment, business ownership, investment, inheritance, or a gift. Should it be a gift, it is still required to have come from legitimate sources. Thus, it is a must

³¹⁴ 8 U.S.C. § 1153(b)(5)(C)(ii); 8 C.F.R. § 204.6(f)(2)

³¹⁵ 8 U.S.C. § 1153(b)(5)(C)(i)

³¹⁶ See U.S. v. O’Connor, 158 F. Supp. 2d 697, 723-38(E.D. Va 2001)

³¹⁷ 22 CFR § 42.32

that the EB-5 investor petitioner submit income tax returns from his/her country of origin. In addition, he/she must clearly show how the investment funds were obtained; and ³¹⁸

5. Either on direct investment or through the Regional Centers, there is no guarantee of a good return of investment. Like any other investments, risk remains a factor.

3.4. Conclusion

Immigrants have to be aware of the differences among the visas with which they choose. Often, immigrants make the mistake of picking one visa and sticking to it regardless of other potentially more beneficial visas for that particular applicant. There are many visas from which visa applicants may choose. However, there are many advantages and disadvantages to each one. This study highlights those advantages and disadvantages of which each applicant should be aware. For example, a person who does not have quite enough capital for an EB-5 visa, should consider E-2 where the investment requirement is lower. The applicant should also consider her long-term goals of moving to the U.S. permanently or just for work. Having these things in mind will help the visa applicant make the most-informed decision thereby making the transition to the U.S. significantly smoother than had she not considered these issues.

³¹⁸ 8 C.F.R. § 204.6(j)(3)

Chapter 4 THE CHINESE IMMIGRANT EXPERIENCE TO THE UNITED STATES

4.1. Introduction

China is vast by any standards, stretching for three thousand miles across the eastern part of the Eurasian land mass from the most westerly part of Xinjiang, which is just to the west of the city of Khabarovsk and serves as a reminder for Westerners, Europeans in particular, who tend to assume that all of Russia lies to the west of China. China occupies an area of 3,657,765 square miles and has a land border of some 13,800 miles, mostly with Central Asia. China's coastline is over 9,000 miles long and functions as an important maritime frontier.³¹⁹

China is the world's most populous country, with some 1.3 billion inhabitants at the beginning of the 21st century. Its economy grew in the first decade of the 21st century by an average of around 10% a year. Seeking a regional and global role, with a new political and economic presence in Africa, Latin America, and the Middle East, China has taken frequent steps to portray itself as a responsible member of the world community. It played a role in troublesome areas such as Iran and North Korea where the West has little sway.³²⁰

China is now a major actor in world markets. Through much of the early 2000s, China's burgeoning exports led to concerns in the US and EU about the Chinese trade surplus. The West was also concerned about the strength of the Chinese currency (the yuan or renminbi) against the dollar, with the Americans and French frequently lobbying the People's Bank of China to revalue it upwards. The Chinese current account surplus also means that it has had cash to spend on investments around the world, from the US, to Africa, and Russia. Chinese companies bought the

³¹⁹ Michael Dillon, *Contemporary China, An Introduction* 3-4 (2008)

³²⁰ Rana Mitter, *Modern China, a Very Short Introduction* 2 (2008)

assets of the bankrupt British Rover car group in 2005: Chinese capital was offered to help blue-chip UK high street bank Barclays pay for a takeover of a Dutch rival, ABN-AMRO, in 2007.³²¹

Yet China is also undertaking one of the most precarious balancing acts in world history. While the country has the fastest-growing major economy in the world, it is also becoming one of the globe's most unequal societies, even while its policies lift millions out of poverty. For the rural and urban poor, health care and education are available only to those who can pay for them. China is also in the grip of a resource and environmental crisis.³²² China continues to maintain a one-party dictatorship and heavily constrains political dissent: yet every year, there are thousands of demonstrations against official policies and practice, some of them violent. Corruption also runs rife.

³²³

Today, China generally refers to the "People's Republic of China," the state that was established in 1949 after the victory of the Chinese Communist Party under the leadership of Chairman Mao Zedong. About 2,500 years ago, a group of independent states that were in conflict with one another existed in the heartland of what we now call "China"; literature and history from this period is recognizably Chinese, readable by those today who take the trouble to learn the classical form of the language. From 221B.C., successive emperors and dynasties united these states, leading to a succession of dynasties that created China's classical civilization: the Han, the Tang, the Song, the Yuan, the Ming, and the Qing among them. They created a civilization in which art, literature, statecraft, medicine, and technology all thrived.³²⁴

However, the term "China," or the term Zhongguo ('middle kingdom', the current Chinese word for 'China'), was not how the people of those eras would have thought of themselves. The idea of being "Chinese" in the sense that we understand it, as either national or ethnic identity, is a

³²¹ *Id.*, 3-4.

³²² *Id.*, 4.

³²³ *Id.*

³²⁴ *Id.*, 6.

product of the 19th century (as is the term Zhongguo). Yet there clearly was a shared sense of what we might call “Chineseness” between these people, which outlasted the rise and fall of dynasties.³²⁵

4.2. Chinese Diaspora

Tradition holds that the Chinese were a non-migratory people. As Victor Purcell, author of *The Chinese in Southeast Asia*, noted “Generally speaking, no Chinese will leave his home to seek his fortune at a distance unless he is in some way driven to do so . . . No Chinese leaves his home not intending to return. His hope is always to come back rich, to die and be buried where his ancestors are buried.” Yet, the reality was different as shown in the history of Chinese migration out of China.

Pre-1978: Origins of China's Household Registration System³²⁶

On January 9, 1958, then President of the People's Republic of China Mao Zedong, issued a Decree, referred to as Regulations on Household Registration in the People's Republic of China. Commonly referred to as the hukou system, the Household Registration System (HRS) has been China's predominant mechanism for population management since its formal inception in 1958. The foundation was laid at the time of China's “Great Leap Forward,” when the goals of its economy shifted towards the production of the heavy industries, such as energy, iron and steel. The new policies of the state led by Chairman Mao Zedong had halted agricultural production of traditional private farming and instead formed agricultural collectives which favored industrialization. The hukou system was created as a social institution system that would support industrialization goals for China's economy. It controlled migration and spatial hierarchies of the

³²⁵ *Id.*, 6-7.

³²⁶ CheeBeng Tan, *Routledge Handbook of the Chinese Diaspora*, 39 (2013)

population, which in turn supported an artificial balance under the conditions of a dual economy by controlling flows of resources between cities and the countryside.³²⁷

However, this also led to a stark imbalance between agricultural and industrial sectors and, eventually, created socio-economic gaps between populations in rural and urban areas, which exist to this day. Peasants were inevitably tied to the land in rural areas, to support heavy industry development, and their movements were restricted. As an ascribed attribute, a person's hukou, either agricultural (rural) or non-agricultural (urban), determined the person's access to state-funded social welfare including employment, subsidized housing, food, education, medical care and pensions.³²⁸ The HRS was successful in halting rural influxes into Chinese cities throughout the Cultural Revolution (1966-1976) until 1978, during which policies rigorously controlled formal migration from rural to urban areas. Though urban residents were allowed to move between cities and flows from the opposite direction were allowed, migration was still severely restricted and rarely sanctioned. Transferring one's agricultural hukou status to non-agricultural status via higher education, serving in the army and/ or membership in the Chinese Communist Party represented a rise in social status and a rare form of social mobility.³²⁹

From 1978 to 2000: Reforms and the Rise of Migration

The year 1978 marked the official end of the Cultural Revolution and was a turning point for economic reform in the country. Migration policies were soon relaxed to some extent under Deng Xiaoping's new socialist market economy, as they became increasingly incompatible with China's rapid development.³³⁰ China's central leadership boosted agricultural production on the country's limited arable land, which created an increasing surplus of workers throughout rural areas. In

³²⁷ White, L.T. Deviance, Modernization, Rations, and Household Register In Urban China, in Amy Auerbacher Wilson, Sidney Leonard Greenblatt, and Richard Whittingham Wilson (eds) *Deviance and Social Control in Chinese Society*, Praeger Publishers, 151-172 (1977)

³²⁸ Perry. E. J. and Selden. M. (eds), *Chinese Society: Change, Conflict, and Resistance*, (2003)

³²⁹ *Id.*,

³³⁰ *Id.*

response, the government adjusted to changes within the labor market by easing some hukou restrictions to regulate and reallocate the excess of rural workers. Additionally, development of township and village enterprises was encouraged. Population movement began to swell as people in both rural and urban areas were affected.³³¹

Migration is often analyzed in terms of push and pull factors. Push factors, such as economic, social or political problems, drive people away from a place while pull factors attract migrants to a place (i.e. employment opportunities, better quality of life, etc.). Increased migration in China during the decade after the Cultural Revolution centered on factors tied to political reasons and economic growth, motivated at its core by an inherent pull of the Chinese to seek better lives. The late 1980s brought even more urbanization leading to an unprecedented wave of internal migration. As economic reform progressed, patterns emerged favoring eastern coastal development in areas such as Shanghai, Guangzhou and Shenzhen.³³² The number of peasants who left home for jobs increased sharply from less than 2 million in the early 1980s to 30 million in 1989. This swelled to 62 million in 1993 and 80 million in 1995.³³³

Migration in 21st Century China: Continuing Growth

According to the National Population Census of China, the number of rural-urban migrants reached 88.4 million in 2000, 73 percent of the total number of internal migrants in China. By 2004, the Chinese National Statistical Bureau estimated that 118 million rural-urban migrants were living in urban areas, representing 23.8 per cent of China's total rural working population. Consensus between the Ministry of Agriculture and the Ministry of Labor and Social Security estimate there are now approximately 120 million rural-urban migrants in the country. Including migrants working

³³¹ *Id.*, 40.

³³² Zhao, Y., and Liu, Q., A historical study of rural-to-urban migration in China: 1949-1985, *Chinese Journal of Population Science*, 9(3), 239-253 (1997)

³³³ Beijing Planning Office of Philosophy and Social Science, *Contemporary China's Floating Population* (Chinese), (2004)

within the same administrative regions but in different counties, there are approximately 200 million³³⁴ migrants and migrant populations are projected to reach 350 million by 2050.³³⁵

The majority of the Chinese overseas, about 75%, are in Asia, especially Southeast Asia. The second largest concentration of the Chinese in diaspora is in America, which accounts for 19%. Peter S. Li and Eva Xiaoling Li expect the Chinese population in America to continue to grow so that by 2040 Asia will account for 68% of the overseas Chinese population, while America will account for 26%. It is also estimated that, with the present annual rate of growth, the Chinese overseas population will reach 52 million in 2030 and 59 million in 2040. Indeed, there has been continuous migration from China to different parts of the world as well as re-migration of the Chinese overseas from one country to another, including re-migrating back to China. These processes affect not only the ethnoscape and economy of the countries where the Chinese have migrated, but also the internal diversity and social relations among the Chinese.³³⁶

Population of Chinese Overseas³³⁷

In 2009, the Chinese overseas population was 39.5 million, distributed in about 130 countries and five regions of the world. Asia, not including China, was home to the largest number of Chinese overseas, some 29.7 million people, or 75% of the global Chinese overseas population. The second largest concentration was in America, which accounted for 7.3 million of the Chinese overseas population, or 18.5%.³³⁸

Demographic data between 1955 and 2009 indicate that the population of Chinese overseas had gone through many changes. First, in the 51-year period, the population of overseas Chinese has expanded 3.4 times, from 11 million in 1955 to 39 million in 2009. The increase has been steady, although some periods witnessed a faster growth rate than others. In the first period, from

³³⁴ Ministry of Labour and Social Security, *On Widening Migrant Workers' Participation in Health Insurance Schemes*

³³⁵ *People's Daily Newspaper*, Migrant population in China has reached 211 million, (2010)

³³⁶ Tan Chee-Beng, *Routledge Handbook of the Chinese Diaspora* (2013)

³³⁷ *Id.*, 20.

³³⁸ *Id.*

1955 to 1960, the population declined slightly from 11.5 million to 11.3 million. The drop probably had to do with the establishment of the People's Republic of China in 1949 and the subsequent difficulty to emigrate from China. It also was related to the independence movements in Southeast Asia and the emergence of the Cold War between the East and the West, both of which discouraged Chinese immigration. In the 20-year period between 1960 and 1980, the Chinese overseas population grew steadily, from 11.3 million to 19.4 million, or 1.7 times. After 1980, the Chinese overseas population continued to expand, from 19.4 million in 1980 to 25.3 million in 1990, and then to 39.5 million in 2009. Thus, in the 29-year period between 1980 and 2009, the Chinese overseas population almost doubled. It is difficult to estimate how the future of Chinese overseas population will change, as the total number and its world distribution are affected by demographic and social forces. However, if the same rate of population growth in each region between 2000 and 2009 can be maintained, then the future of the Chinese overseas population can be estimated to be 46 million in 2020, 52 million in 2030, and 59 million in 2040.³³⁹

Although the Chinese overseas population is distributed in some 130 countries outside of China, 23 countries with the largest concentration account for about 96% of the total Chinese overseas population, with the remaining 107 countries sharing the rest of the 4%. In 2009, Indonesia was home to some 7.8 million Chinese overseas, accounting for almost 20% of the global Chinese overseas population. Thailand came second with 7.2 million ethnic Chinese, and Malaysia with 6.5 million (Table 1.4). Thus, the three countries with the largest concentration of ethnic Chinese: Indonesia, Thailand and Malaysia - accounted for about 55% of the total Chinese overseas population in 2009. However, the proportional share of these countries has slipped slightly in the 12-year period between 1997 and 2009, from 58% to 55%. Two other countries in Asia also had a sizable ethnic Chinese population: 2.8 million in Singapore and 1.2 million in the Philippines. In

³³⁹ *Id.*

2009, the five countries in Asia: Indonesia, Thailand, Malaysia, Singapore and the Philippines, accounted for 65% of the total Chinese overseas population, or 86% of all the ethnic Chinese in Asia outside of China.³⁴⁰

In the Americas, the USA had the largest ethnic Chinese population of 4.2 million in 2009. When the ethnic Chinese population of 1.3 million in Canada is added, the two countries accounted for 14% of the total Chinese overseas population or 76% of all the ethnic Chinese in the Americas. In the Oceania region, Australia accounted for 1.9% of the total Chinese overseas population, and New Zealand, 0.4%. Together, the number of ethnic Chinese in Australia and New Zealand made up 95% of the ethnic Chinese in the Oceania region. In contrast, England, France, Holland and Italy accounted for 68% of the ethnic Chinese in Europe, although globally, the ethnic Chinese in these four countries made up only about 2% of the total Chinese overseas population.³⁴¹

In recent years, international migration has taken on new characteristics. For example, the outflows and inflows between developing countries have become more prevalent, Europe and Asia are emerging as the most popular immigration destinations, while immigration regions tend to be relatively compact. In addition to these trends, international immigration is being fuelled by the 2008-2009 global financial crisis and its after-shocks. With the growth in the number of international immigrants and the increasingly clear benefits in the areas of science and the economy, issues like immigrant integration have attracted growing attention. With an overall population of 60 million, Chinese immigrants can be found everywhere in the world, but are concentrated mainly in the U.S., Canada, Australia, Japan, and other European countries.³⁴²

During 2013 - 2014, new changes in the development of Chinese international migration arose. The number of overseas Chinese immigrants is continuously increasing, while the influence

³⁴⁰ *Id.*, 21-22.

³⁴¹ *Id.*, 22.

³⁴² Wang Huiyao, Annual Report on Chinese International Migration, Center for China and Globalization (2015)

of foreign migrants on China's internationalization is rising as well. As the number of immigrants coming to China has gone up, China has become the largest source country of foreign travelers.³⁴³

4.3. The Push And Pull Factors Of Chinese Migration

Chinese migration has a long history, but the mass emigration of the Chinese from mainland China took place only in the latter part of the 19th century and the beginning of the 20th. The latest exodus of the Chinese, which started at the end of the 20th century, is still ongoing.³⁴⁴

When and Why Chinese Migrate

What have been the reasons for Chinese emigration in the last two centuries? Many scholars generally attribute it to the push and pull factors. In the second half of the 19th century and the beginning of the 20th, overpopulation, famine, poverty and socio-political upheavals in China were the push factors while the demand for manpower and economic opportunities in Southeast Asia and the West were the pull factors. Towards the end of the 20th century, overpopulation, hardship and lack of economic opportunities in mainland China and the fear of a Communist takeover in both Hong Kong and Taiwan served as the push factors, while the demand for manpower and economic opportunities outside China served as the pull factors. Many people also take the view that the recent Chinese migration has been part of a global migration. Nevertheless, the phenomenon of the recent Chinese migration has been the most spectacular.³⁴⁵

Chinese Migrants to Developed Countries³⁴⁶

According to ZhuangGuotu (of Xiamen University), in 2006, there were at least six million Chinese migrants in the world, of whom 4 to 4.6 million originated from mainland China, and 700–800 thousand originated from Hong Kong and Taiwan.³⁴⁷ These new migrants can be divided into

³⁴³ *Id.*

³⁴⁴ Leo Suryadinata, Chinese Migration in the Globalizing World: A Brief Comparison between Developed and Developing Countries, CHC Bulletin, 1 (Issues 13 & 14, May and November 2009)

³⁴⁵ *Id.*

³⁴⁶ *Id.*, 2.

³⁴⁷ *Id.*, citing Zhang Guotu, "Zhongguoxinyiminyudongnanyawenhua", CHC Bulletin, 8 (May 2007),

four categories: overseas students with their families, ordinary migrants joining their family overseas, investors and businessmen, and workers (some of whom are illegal migrants, often called undocumented migrants). Regarding overseas Chinese students and their families, mainland Chinese migrants make up one quarter of these, while Hong Kong and Taiwan migrants make up 50%. After 1999, the numbers of new migrants from mainland China continued to rise rapidly, while Taiwanese and Hong Kong migrants continued to decline drastically. It should also be noted that the above estimates do not include the Chinese from Southeast Asia who re-migrated to these developed countries.

Most new Chinese migrants went to developed countries rather than Southeast Asia. The former probably received 80% of the new Chinese migrants while the latter took only 20%. This is different from the earlier pattern when about 90% of Chinese migrants went to Southeast Asia. The arrival of these new Chinese migrants has major impacts on the populations of the local Chinese in the developed countries, especially in the “migrant states” such as USA, Australia and New Zealand. They have transformed the structure of the local Chinese communities into new migrant communities as their numbers are much larger than those of the old settlers.³⁴⁸

To understand in detail, the push and pull factors of Chinese migration, we will take into consideration the migration from China to the United States of America. From 1849 to 1882, more than 100,000 Chinese immigrants immigrated to the American West to become contract laborers. In 1882, Congress passed the Chinese Exclusion Act, limiting the amount of immigrants that could arrive to the United States. There was very little immigration until 1965, when the Immigration and Nationality Act of 1965 reopened the borders for immigrants. From 1965 onward, there has been

³⁴⁸ *Id.*, 2-3

steadily high immigration from China, and in the 1990 census, Chinese Americans numbered at 1.6 million, the highest of any Asian American group.³⁴⁹

Push Factors of Chinese Migration to the US

Early Chinese immigrants were young male peasants looking for work to escape the economic hardship of rural China. From the 1960s onward, there have been two different push factors. One is the political instability and repression in Communist China. The other pertains to those seeking a higher and better education in the fields of science, engineering and various other disciplines.³⁵⁰

Push Factors of Chinese Migration to the US

The rapid industrialization of the American West following the gold rush made it a destination for Chinese contract laborers in the late 19th century. Recent political refugees are drawn to the United States due to its democratic government and acceptance of asylee-seekers. The other group of recent Chinese immigrants, those seeking education, are drawn by American universities and colleges, which sponsor their student visas. They often stay in the United States, drawn by the significantly higher pay and opportunities.³⁵¹

19th century Chinese immigrants were contract laborers. They worked in extremely dangerous and unskilled positions in the fields of mining, railroad construction, agriculture, irrigation, and manufacturing. The demand for Chinese labor diminished, and what followed was the Chinese Exclusion Act, pushing Chinese Americans to the cities. They struggled and had to find jobs in labor-intensive manufacturing, service industries such as laundry and restaurants, and small import-export business. Chinese who remained in rural areas moved into agricultural occupations in California and small retail businesses in predominately African American communities in

³⁴⁹ Jeffrey Lehman, Gale Encyclopedia of Multicultural America, 2nd edition, 2000

³⁵⁰ *Id.*

³⁵¹ *Id.*

the Deep South. After World War Two, Chinese Americans spread out into a diverse array of occupations, and now part of the occupational ladder, from low level manufacturing jobs to highly educated professionals, doctors and lawyers. One industry they particularly gathered to was the defense industry, where highly talented Chinese immigrants were quickly hired by various firms following World War Two.³⁵²

According to Dr. Huiyao Wang, PhD,³⁵³ China ranked as the fourth most migrant-sending country in the world in 2013. Most emigrants from China tend to go to countries in North America. Not surprisingly, the most popular destinations are the United States, Canada, Australia, and New Zealand.³⁵⁴ A remarkable feature of Chinese emigration has been the growth of skilled migrants, including students-turned-migrants, emigrating professionals, academics and chain migrants.

Following are the new patterns of why Chinese migrate:

- Student migrants: China has seen the world's largest student-sending country;
- There has been an increasing number of new migrant categories, including investor and entrepreneur migrants and migrating in search of a better education for their children;
- Labor migrants continue to form an important share of Chinese emigrants;
- Environmental pollution became another driver for Chinese emigration; and
- In 2013, China became the biggest tourism source market in the world.³⁵⁵

4.4. Anti-Money Laundering Laws³⁵⁶

The People's Republic of China has recently sought to bring its AML provisions into alignment with other Asian jurisdictions with robust financial crime deterrence legislation and procedures, such as those that have been implemented in Singapore. The position of China both

³⁵² *Id.*

³⁵³ Dr. Wang is a Director General of Center of China and Globalization, a Senior Fellow at Harvard Kennedy School and Asia Pacific Foundation of Canada.

³⁵⁴ Huiyao Wang, PhD, Recent Trends in Migration Between China and Other Developing Countries, Center for China and Globalization (CCG) (2014)

³⁵⁵ *Id.*

³⁵⁶ Dennis Cox, Handbook of Anti-Money Laundering, 396 (2014)

geographically and economically has highlighted the need for stringency. Moreover, the strength of the money-laundering-deterrence regimes in its neighboring jurisdictions has prompted an urgent response from China. In China, money laundering most commonly arises through the following channels:

- a. Cash Smuggling;
- b. The use of legitimate banking systems – various deposit accounts;
- c. Underpriced export/counterfeit goods; and
- d. Underground banking systems.

In recent years, there has been an increase in more technologically based crime due to the emergence of e-banking and e-currency.

Key Legislation ³⁵⁷

The relevant AML laws in China are: 1) Anti-Money Laundering Law of the People's Republic of China; and The People's Bank of China Decree No. 1 (2006) – The Rules for Anti-Money Laundering by Financial Institutions.

Together, the AML laws and rules provide a procedural guide for financial institutions. The money laundering offenses are also found in the 1997 revision of the 1979 Penal Code under Articles 191, 312 and 349.

Financial Action Task Force (FATF) Assessment ³⁵⁸

China was placed on an enhanced follow-up process as a result of partially compliant and non-compliant ratings in certain Core and Key Recommendations in its mutual evaluation report of 2007. However, it was removed from the enhanced follow-up in 2012 following process in the AML regime.

The Primary AML Investigation/Regulatory Authorities ³⁵⁹

³⁵⁷ *Id.*

³⁵⁸ *Id.*

1. The People's Bank of China

The State Council appointed The People's Bank of China as the designated central bank in September 1983. In accordance with this status, The People's Bank of China (PBC) is the administrative authority for money-laundering-deterrence legislation. The Rules for Anti-Money Laundering by Financial Institutions, formed in accordance with the law of the People's Republic of China on anti-money laundering, set out the functions of the PBC.

The Rules establish the PBC as the competent authority and the supervisory authority for China's banking system, whose responsibilities have been consolidated to confer certain duties to the appropriate financial institutions. Article 5 of the AML Rules lays down the PBC's supervisory responsibilities and duties pertinent to money laundering:

- To stipulate anti-money laundering regulations for financial institutions solely or jointly with the China Banking Regulatory Commission, the China Securities Regulatory Commission and the China Insurance Regulatory Commission;
- To monitor fund flow in both RMB and foreign currencies for anti-money laundering purposes;
- To supervise and inspect the fulfilling of anti-money laundering obligations by financial institutions;
- To investigate suspicious transactions within its competence;
- To report transactions suspected of being involved with money-laundering crime to law enforcement agencies;
- To exchange information and documents relevant to money laundering with overseas anti-money laundering institutions in line with relevant laws and administrative regulations; and
- Other responsibilities as defined by the State Council.

³⁵⁹ *Id.*, 397.

2. The Financial Intelligence Unit ³⁶⁰

The Financial Intelligence Unit is housed within PBC with two separate operational units: The Anti-Money Laundering Bureau and The China Anti-Money Laundering and Analysis Centre.

The Anti-Money Laundering Bureau (AMLB) organizes and coordinates China's AML affairs, conducting administrative investigations, dissemination and providing policy oversight. Decisions about whether to carry out an administrative investigation into a suspicious transaction report (STR) or to disseminate a STR to the Ministry of Public Security or other law enforcement agencies are made under AML law.

The China Anti-Money Laundering and Analysis Centre (CAMLAC) specializes in data collection, processing and analysis. It also has an extensive range of legally documented duties to perform within the realm of suspicious transaction.

4.5. China's Bank System History ³⁶¹

Before 1840, the Chinese banking system consisted of money and exchange shops. Foreign banks, which first appeared during the Opium War, monopolized Chinese banking for about fifty years. In 1897, the first commercial bank, known as the Imperial Bank of China, was set up when the Qing Government realized the outflow of silver. By 1927, there were 203 Chinese banks, consisting of official banks, private commercial banks, and money shops. In 1946, the four official banks, ³⁶² together with the Central Trust Bank, Postal Saving and Exchange House, and Central Cooperative Funds, controlled the major commercial banking activities and monopolized the credit business. In June 1947, the deposits of these institutions accounted for 91.7 percent of national deposits, and 93.3 percent of total loans. ³⁶³

³⁶⁰ *Id.*

³⁶¹ Kui-Wai Li, *Financing China Trade and Investment*, 23-24 (1997)

³⁶² Zhong Yang Bank, Bank of China, Bank of Communications, and China Farmers Bank

³⁶³ *Supra* note 43

Over a period of six years in the 1950s, the People's Bank of China (PBC) expropriated and centralized all banks. With branches being set up all over China, PBC had become an instrument in the implementation of a highly centralized and planned economic administrative system. Funds were controlled by the head office and could flow only vertically. Currency issue coexisted with commercial banking business, and since both the bank and the enterprises were state-owned, currency issue could not be controlled.³⁶⁴

Since the late 1970s, several steps were taken. The Agricultural Bank of China (ABC) was reestablished in 1979. The Bank of China (BOC) was separated from PBC, became the international department dealing with foreign exchange business, and has become one of the four specialized banks. The People's Construction Bank of China (PCBC) was separated from the Ministry of Finance (MOF). It mainly deals with the loans related to capital construction allocated by the MOF. In the meantime, the People's Insurance Company of China (PICC) was set up to develop domestic insurance, while the China International Trust and Investment Company (CITIC) was set up to develop the trust and investment business. The China Investment Company (CIC), accountable to PCBC, was set up in 1981 to engage in foreign fund raising and administration of international loans.³⁶⁵

A new banking structure emerged with PBC being the central bank and the four state-owned specialized banks (ABC, BOC, PCBC, and CIC) concentrated on different economic sectors. PBC was both a central bank and a specialized bank that dealt specially with urban credit business. The PBC's function of administering other specialized banks often conflicted with its commercial banking activities. PBC began to function as a central bank from 1984 and would not deal with commercial banking business any longer. Meanwhile, the Industrial and Commercial Bank of China (ICBC) was set up to deal with industrial and commercial deposits and loans which were originally

³⁶⁴ *Id.*, 24.

³⁶⁵ *Id.*, 24.

handled by the PBC. Between 1984 and 1993, China's banking sector changed drastically. Regional commercial banks appeared.³⁶⁶

China's central bank, the People's Bank of China (PBC), was founded on December 1, 1948, but incorporated other banks in the 1950s. On January 1, 1984, the State Council passed a resolution proposing the People's Bank of China to be the Central Bank.³⁶⁷ China's economic reforms started in 1979 when the mono banking system was abolished. At that time, the People's Bank of China (PBOC) was the only financial institution serving as the Central Bank and at the same time providing banking services all over the country. The People's Bank of China's (PBOC) specialist banking functions were subsequently devolved to three State-Owned Commercial Banks (SOCBs): namely the Agricultural Bank of China (ABC) in charge of agriculture, the China Construction Bank in charge of loans for construction and fixed asset long-term loans and the Bank of China (BOC) for handling foreign exchange business. The functions of the PBOC were further reorganized in 1984 when the PBOC became the effective Central Bank and all of its branches were transferred to the Industrial Commercial Bank of China (ICBC) which became the fourth main SOCB.³⁶⁸

On December 11, 2001, China joined the WTO. On its accession, China promised that foreign banks would be permitted to provide services to all Chinese clients from December 11, 2006. Fulfilling these commitments required an extensive institutional reform of China's banking system. This process was painful, stressful, and expensive. In 2002, the 16th CPC National Meeting called for reform in the financial sector. In 2003, as part of the reform by the State Council, the Law on the People's Bank of China (1995) and the Commercial Banking Law (1995) were amended to pave the way for the establishment of the CBRC to oversee the banking sector. The CBRC's

³⁶⁶ *Id.*, 25.

³⁶⁷ *Id.*

³⁶⁸ Michael Tan, Corporate Governance and Banking in China, 3 (2013)

mandate was to conduct regulation of and supervision over all banking institutions, and their business activities in China. At the same time, revisions to the Law on the People's Bank of China (1995) strengthened the PBOC's responsibility for monetary policy and relieved it of responsibility for the regulation of financial institutions. ³⁶⁹

Financial Regulation ³⁷⁰

For years, foreign investors have lobbied China for real access to foreign exchange and quality financial services in order to meet the needs of their China operations. In response, the government has made significant changes since 1995 to China's banking and financial systems, including the adoption of new banking laws, rules governing the activities of foreign-funded financial institutions, rules and regulations affecting foreign exchange, regulations concerning the establishment of trusts and trust administration, and the regulation of group finance and financial leasing companies. Post-WTO, China's domestic banking institutions are preparing for foreign competition by upgrading their information technology infrastructure and by courting potential foreign investors. This chapter addresses the regulation of China's financial system and foreign exchange control rules. This chapter also addresses the accounting and auditing standards applicable to foreign-invested enterprises (FIEs) and the annual inspection process designed to allow fiscal government agencies to conduct a review of company operations and legal compliance.³⁷¹

Banking Regulation ³⁷²

Prior to 1978, under the centrally planned economy in China, the People's Bank of China (PBOC) was in effect the only bank operating in China.³⁷³ The PBOC performed the functions of both a central bank and a commercial bank, with responsibilities including currency issuance,

³⁶⁹ He Wei Ping, *Banking Regulation in China: The Role of Private Sectors*, 16 (2014)

³⁷⁰ James M. Zimmerman, Esq., *China Law Deskbook, A Legal Guide for Foreign-Invested Enterprises*, Third Edition, Volume 1, 449 (May 19, 2010)

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ In 1980 China's membership in the World Bank and the International Monetary Fund was reinsured. In December 1981, the China Investment Bank was established to make use of World Bank funds;

deposits, lending, settlements, and foreign exchange. In 1978, the State Council created various banks with the intent of severing the commercial bank functions from the traditional central bank functions. The four commercial banks created were designed to focus on specific industry sectors, which included the Industrial and Commercial Bank of China (ICBC),³⁷⁴ the Bank of China (BOC),³⁷⁵ the Agricultural Bank of China (ABC),³⁷⁶ and the Construction Bank of China (CBC), formerly known as the People's Construction Bank of China.³⁷⁷ In 1985, these banks were further authorized to expand their operations, and the original areas of specialty are no longer clearly defined (e.g., agricultural sector for the ABC and the project finance sector for the CBC). All four commercial banks have expanded into international business and investment banking. In 1994, the State Council created three policy banks to address policy loans (such as government subsidized financing), including the Export and Import Bank of China (Eximbank),³⁷⁸ the National Development Bank of China (NDB), and the Agricultural Development Bank of China (ADB). The NDB is responsible for financing infrastructure projects, the Eximbank is responsible for encouraging export sales of China products, and the ADB is responsible for policy loans to the agricultural sector.³⁷⁹

Today, there are over a dozen national and regional commercial banks that are authorized to engage in both renminbi and foreign currency business, including the following banks: the Bank of

³⁷⁴ The ICBC was established to replace the PBOC with respect to commercial banking activities in urban areas

³⁷⁵ The BOC, which is the most profitable Chinese bank, has focused primarily on foreign trade and foreign currency exchange and has over 500 overseas offices in 19 countries and regions and has a strong presence in Hong Kong. The BOC was established in 1912 and is currently a legal entity under the control of the State Council. The BOC adheres to the Uniform Customs and Practice for Documentary Credits (UCPDC) of the International Chamber of Commerce (ICC) for the purpose of standardizing international transactions (ICC Publication No. 500). In addition, most Chinese banks adhere to the Uniform Rules for Demand Guarantees developed by the ICC (ICC Publication No. 458);

³⁷⁶ The Agricultural Bank was first established in March of 1955 but was closed during the Cultural Revolution (it merged with the PBOC in 1965);

³⁷⁷ The Construction Bank of China resumed operations in 1983; its original principal function is to administer the funds allocated for capital construction and exploration of natural resources;

³⁷⁸ In 2002, the Export-Import Bank of China merged with the export credit insurance department of People's Insurance Corp. of China to form the China Export & Credit Insurance Corp., or Sinosure. The Ministry of Finance has backed the company with a RMB4 billion (\$483.9 million) fund and the new entity is required to promote exports by offering export credit risk insurance. Under the WTO's national treatment principle, Sinosure provides insurance for both Chinese and foreign companies exporting from China;

³⁷⁹ Supra note 52, 450

Communications,³⁸⁰ CITIC Industrial Bank, China Everbright Bank, Guangdong Development Bank, Shenzhen Development Bank, Huaxia Bank, China Merchants Bank, China Minsheng Banking Corp. Ltd., and the Shanghai Pudong Development Bank.³⁸¹ China's banking system also includes cooperative banks, rural credit cooperatives, trust companies, finance companies, urban credit cooperatives, and finance leasing companies. In addition to the various domestic institutions, foreign banks have played a significant role in China's banking market. In 1995, and as amended in 2003, the NPC adopted two important banking laws that affected foreign financial institutions with operations in China, including the PRC Bank Law and the Commercial Bank Law.³⁸²

PRC Bank Law³⁸³

The Bank Law³⁸⁴ provides that the PBOC is responsible for traditional central bank functions such as developing and implementing national monetary policies; issuing and controlling the circulation of renminbi; regulating financial institutions and the banking industry; managing the foreign exchange reserves of China; managing the national treasury; and engaging in international financial activities.³⁸⁵ The PBOC is authorized to use a number of tools to implement the fiscal policies of the state, including the establishment of interest rates;³⁸⁶ requiring that financial

³⁸⁰ The Bank of Communications was first established in 1908 and was merged with the PBOC in 1958. In 1986, the State Council authorized the establishment of the Bank of Communications with its headquarters in Shanghai. Fifty percent of the shares of the Bank of Communications are held by the PBOC, and local enterprises hold the balance of the bank's equity interest;

³⁸¹ For an analysis of China's early banking system, see J. Tang and M. Doyle, Money and Banking § 9.2, in *Business Law in China* (ICC 1997); F. Tamagna, *Banking and Finance in China* (Institute of Pacific Relations 1942)

³⁸² *Supra* note 52, 451

³⁸³ *Id.*, 452

³⁸⁴ Law of the People's Republic of China on the People's Bank of China (adopted on March 18, 1995 by the 3rd Sess. of the 8th National People's Congress, and revised at the 6th Sess. of the Standing Committee of the 10th National People's Congress on December 27, 2003), reprinted in *China Laws for Foreign Business* (CCH), Business Regulation 1 8-450 (hereinafter the "Bank Law"). The PBOC is under the direct supervision of the State Council. In November 1998, the Chinese government abolished the provincial branches of the PBOC and set up nine regional branches divided by geographical areas. Eliminating the central bank's provincial subsidiaries is designed to eliminate the financial risks incurred by local governments' intervention in the PBOC's work. In the past, provincial leaders have been accused of ignoring national policies and improperly forcing the local PBOC offices to support underperforming local enterprises and projects that lacked economic feasibility. See Xu, *Bank Reform to Tighten Control*, *China Daily*, Nov. 17, 1998;

³⁸⁵ *Id.*, citing Bank Law, Art. 4

³⁸⁶ Provisional Regulations on Interest Rate Control (promulgated on December 11, 1990 by the PBOC), reprinted in *China Laws for Foreign Business* (CCH), Business Regulations H 8-750 (outlines the PBOC's standards for interest rate formulation and penalties for violations of interest rate control provisions); Announcement of the People's Bank of China on the Reduction of Deposit and Loan Interest Rates and the Reform of the Deposit Reserve Fund System (promulgated on March 25, 1998 by the PBOC), reprinted in *China Laws for Foreign Business* (CCH), Business Regulations 1 8-710;

institutions deposit reserve funds; conducting transactions involving bonds and foreign exchange on the open market; and providing requirements for the issuance of commercial loans.³⁸⁷ The PBOC is administered by a governor nominated by the State Council and confirmed by the NPC. The Bank Law sets forth the organizational structure for the PBOC, financial and accounting requirements, and rules governing the issuance and control of renminbi.³⁸⁸

In 2003, the PBOC was reorganized with the creation of the China Banking Regulatory Commission (CBRC) and assumed responsibility for regulating and supervising the banking industry (previously functions of several departments of the PBOC). The PRC government approved of restructuring the central bank's role in formulating and implementing monetary policy and ensuring the overall stability of China's financial system. The PBOC is also responsible for administering the PRC's credit rating system and efforts against money laundering.³⁸⁹

Since the opening of the Chinese economy in the late 1970s, China has struggled with significant non-performing loan (NPL) balances from state-owned banks. As a result of the intervention of the government, the NPL ratios have significantly decreased post-WTO from a ratio of over 30 percent (US\$317 billion) in 2001 to 1.66 percent (US\$73.7 billion) in October 2009. The CBRC has taken action to stabilize the banking system and correct the systemic problems which created an environment leading to high NPLs, such as the dominant role of state-owned banks in China's financial markets, weak internal controls, uncontrolled policy loans to state-owned

³⁸⁷ *Id.*, citing Bank Law, Art. 23

³⁸⁸ *Id.*

³⁸⁹ *Supra* note 52, 452, citing China Banking Regulatory Commission. Pursuant to the revised Bank Law, the PBOC's Monetary Policy Committee is responsible for the formulation and adjustment of monetary policies. Bank Law, Art. 12. The PBOC is also responsible for (1) regulating the inter-bank lending, bond, foreign exchange, and gold markets (Bank Law, Art. 4); (2) formulating rules jointly with the CBRC for payment and settlement procedures (Bank Law, Art. 28); (3) supervising financial institutions with respect to deposit payments, foreign exchange control, and money laundering activities (Bank Law, Art. 32); and (4) requesting the intervention of the CBRC with financial institutions in matters involving monetary policies and financial stability (Bank Law, Art. 33). The amendments to the Bank Law in 2003 included the establishment of various departments including the Financial Market Department, Financial Stability Bureau, Credit Reference Administration Bureau, and the Anti-Money Laundering Bureau (previously part of the PBOC's Security Bureau);

enterprises, unnecessary administrative controls on the lending activities of financial institutions, and inappropriate banking regulation and supervision.³⁹⁰

Commercial Bank Law³⁹¹

The second important banking law enacted in 1995 was China's first commercial bank law.³⁹² The stated purpose of the 1995 Commercial Bank Law is to standardize China's banking system, promote the development of its "socialist market economy," and elevate China's practices to international banking standards.³⁹³ The provisions of the Commercial Bank Law are applicable to foreign-funded commercial banks, equity joint venture commercial banks, and the branch offices of foreign commercial banks.³⁹⁴ A commercial bank may engage in the following activities:³⁹⁵

- a. receive public deposits;
- b. provide short-term, medium-term, or long-term loans;
- c. conduct domestic and overseas settlements;
- d. make payments on negotiable instruments;

³⁹⁰ Supra note 52, 453, citing *Jianbo Lou, China's Troubled Bank Loans—Workout And Prevention* (International Banking, Finance and Economic Law, Vol. 22, 2001);

³⁹¹ *Id.*, 453.

³⁹² *Id.*, citing Commercial Bank Law of the People's Republic of China (adopted on May 10, 1995 by the 13th Sess. of the 8th National People's Congress, and as amended by the National People's Congress on December 27, 2003), reprinted in China Laws For Foreign Business (CCH), Business Regulation ¶ 8-350 (hereinafter the "Commercial Bank Law"). The amendments to the Commercial Bank Law expand the scope of both foreign and domestic banks while easing government restrictions. The expanded scope of operations includes bill acceptance, financial debt purchase and sales, bank card services, and foreign exchange settlement and sales. The amendments transfer much of the PBOC's authority to supervise and regulate China's commercial banks, credit cooperatives, policy banks, financial asset management companies, trust companies, financial companies, financial lease companies, and other banking institutions to the CBRC. The PBOC remains China's central bank, with authority to formulate and implement monetary policies and to monitor and safeguard financial markets, including a new power to trade bonds on the open market. In certain circumstances, the PBOC may request the CBRC to investigate a regulated financial institution. See also Administrative Regulations Governing Financial Institutions (promulgated on August 9, 1994 by the People's Bank of China, and as amended in 2003 by the China Banking Regulatory Commission), reprinted in China Laws for Foreign Business (CCH), Business Regulation ¶ 8-400 (outlines procedures for the administration of financial institutions, standards for applications, standards for control of licenses, standards for management of capital funds or working funds, qualifications for principal personnel, and penalties for violations of the law); Administrative Measures on Financial Licenses (CBRC Order No. 2, issued by the China Banking Regulatory Commission on December 28, 2006). See The U.S.-China Business Council, CBRC Grunts New Streamlined Financial Licenses, China Market Intelligence (July 16, 2003).

³⁹³ *Id.*, citing Commercial Bank Law, Art. 1. As amended in 2003, the language concerning the "socialist market economy" was dropped. Article 1 now states: "This Law is formulated in order to strengthen banking regulation, to standardize regulation, to prevent and dispel banking risk, to protect the lawful rights and interests of depositors and other customers, and to encourage healthy growth of the banking industry.";

³⁹⁴ *Id.*, citing *Id.* at Art. 88. Although the Commercial Bank Law applies to foreign-funded financial institutions, they are restricted in the scope of their operations.

³⁹⁵ *Id.*, 454.

- e. issue financial bonds and other debt instruments;
- f. act as an agent to issue, purchase, and underwrite government bonds;
- g. purchase and sell government bonds for its own account;
- h. engage in inter-bank loans;
- i. purchase and sell foreign exchange on its own account or on behalf of its customers;
- j. provide trade financing services such as letters of credit and guarantees;
- k. act as an insurance agent;
- l. establish branch offices;³⁹⁶
- m. provide safety deposit boxes for customers; and
- n. issue credit cards and other credit services.³⁹⁷

A commercial bank is an autonomous entity with legal person status and must be sufficiently capitalized to engage in banking activities.³⁹⁸ Commercial banks are required to act independent of governmental enterprises and free from influence of local government officials who, in the past, demanded that banks support local interests notwithstanding that many enterprises were financially incapable of repaying loans.³⁹⁹ Commercial banks are now independently liable for their liquidity and profitability, and by law are required to protect the interests of their depositors and are prohibited from exercising favoritism toward a local government in its loan writing decisions.⁴⁰⁰

Commercial Bank Operational Standards⁴⁰¹

In general, the key operating standard for financial institutions under the Commercial Bank Law, in light of China's history of favoritism, is to closely examine the creditworthiness of

³⁹⁶ *Id.*, citing *Id.* at Arts. 19-23. A branch office of a commercial bank is required to obtain the approval of the CBRC, which involves the review of the banks accounting records and information concerning the proposed branch office. A commercial bank is required to exercise a system-wide accounting system in order to control the activities of its branch operations. All civil liability incurred by a branch shall be borne by the head office. A commercial bank is required to publicly announce the opening of any new branch office.

³⁹⁷ *Id.*, citing *Id.*, Art. 3. The use of installment loans for consumer consumption, such as with the purchase of automobiles, has yet to be fully embraced in China, but change is ongoing.

³⁹⁸ *Id.*, Art. 4

³⁹⁹ *Id.*, Art. 41

⁴⁰⁰ *Supra* note 52, 456, citing *Id.* at Art. 6.

⁴⁰¹ *Id.*, 458.

borrowers and to implement collection procedures to ensure the recovery of loans per schedule.⁴⁰² By law, the banks are protected in their efforts to recover unpaid debts from borrowers. In the past, financial institutions had little leverage to force a powerful governmental enterprise to repay its loan obligations. As a result, many enterprises defaulted on their obligations, leaving the banks with large underperforming portfolios. Although commercial banks have the discretion to operate their loan facilities, they are required to adhere to the “national industrial policies” of the PRC.⁴⁰³

The Commercial Bank Law also requires financial institutions to abide by the principles of fair competition and not engage in “unfair rivalry” when promoting their business.⁴⁰⁴ This rule reflects the realization that competition for banking business may become heated as the system continues to evolve into a free market, especially as foreign-funded institutions seek to become players in China’s banking industry. Commercial banks are also required to meet capital adequacy requirements, which in the past were difficult for domestic banks to maintain. Specifically, banks in China are required to maintain an 8 percent capital adequacy ratio and 4 percent core capital ratio. Commercial banks and their boards of directors, senior managers, and supervisors are further required to establish and adhere to a compliance risk management system to safeguard the operations of the bank and ensure full compliance with the law.⁴⁰⁵

(1) Rules for Loan Contracts.⁴⁰⁶ A commercial loan must be in writing and signed by the bank and the borrower.⁴⁰⁷ A commercial bank is required to fully evaluate the credit of a potential borrower, including the ability to repay a loan, source of funds, income, method of repayment, and assets.⁴⁰⁸ A bank has the discretion to demand that a borrower provide a guarantee secured by a mortgage or

⁴⁰² Commercial Bank Law, Art. 7.

⁴⁰³ *Id.*, Art. 34.

⁴⁰⁴ *Id.*, Art. 9.

⁴⁰⁵ *Supra* note 52, 459, *citing* Risk Management Guidelines on Compliance of Commercial Banks (issued by the China Banking Regulatory Commission on October 25, 2006), reprinted in China Laws i or Foreign Business (CCH), Business Regulation H 8-355 (outlines compliance management duties of the board of directors, supervisors, and senior managers; duties of compliance management department; and compliance risks).

⁴⁰⁶ *Id.*

⁴⁰⁷ Commercial Bank Law, Art. 37

⁴⁰⁸ *Id.*, Art. 35

pledge of property.⁴⁰⁹ The interest rates charged by a bank are required to be consistent with the upper and lower limits set by the CBRC.⁴¹⁰ A borrower is required to repay both the principal and interest within the time required under the loan contract. If a borrower is in default of a loan, a commercial bank has a right to attach the secured property and sell the property to satisfy the debt due. An auction must be conducted within one year of attachment.⁴¹¹

A commercial bank is prohibited from issuing an unsecured loan to a “related party” including directors, supervisors, management personnel, credit operation personnel, and their relatives or to individuals that have an interest in the bank or have held senior management positions in the bank. However, a commercial bank may issue a secured loan to a “related party” so long as the terms and conditions of the loan are consistent with loans granted to other borrowers.⁴¹²

(2) Protection for Depositors.⁴¹³ Commercial banks are required to operate in compliance with the principles of voluntary deposits, freedom of withdrawal, interest on deposits, and confidentiality of depositors when handling the business of personal savings deposits.⁴¹⁴ Confidentiality standards provide that, except when required by law, a commercial bank may refuse to allow third persons information concerning the accounts of individuals and entities with the bank.⁴¹⁵ Banks are required to set and publish the deposit interest rates in accordance with the upper and lower limits set by the CBRC, and are required to maintain sufficient reserves to ensure the payment of both principal and interest on demand by depositors.⁴¹⁶

⁴⁰⁹ *Id.*, Art. 36

⁴¹⁰ *Id.*, Art. 38

⁴¹¹ *Id.*, Art. 42

⁴¹² *Id.*, Art. 40

⁴¹³ *Id.*, 460.

⁴¹⁴ *Id.*, Art. 29

⁴¹⁵ *Id.*, Arts. 29, 30

⁴¹⁶ *Id.*, Arts. 31-33. In September 2003, the PBOC raised the deposit reserve ratio from 6 percent to 7 percent of the total loans that each financial institution must deposit with the PBOC. See U.S.-China Business Council. PBOC Raises Deposit Reserve Ratio, *China Market Intelligence* (August 27, 2003). In April 2004, the PBOC increased the bank reserve requirement of bank deposits to 7.5 percent in a move to clamp down on the fast growth of money supply and credit. The order applies to China’s largest banks but exempts rural and urban credit cooperatives, which continue to be bound by a 6 percent reserve requirement. PBOC Hikes Reserve Requirement to 7.5%, *China Daily*, April 12, 2004. In 2007-2008, the Chinese government significantly raised the country’s bank reserve ratio, or the percentage of depositors’ bank balances that must be set aside in reserves, in an effort to curb inflation. China

An enterprise is allowed to open one basic account for handling its deposits, payments, and transfers. An enterprise is prohibited from opening an account in the name of an individual with the enterprise's funds.⁴¹⁷ Banks are required to maintain normal business hours that are publicly announced and convenient to its customers. A commercial bank is prohibited from reducing its normal business hours or closing its business.⁴¹⁸ A bank is allowed to charge fees for its services, but is required to meet the fee standards of the CBRC.⁴¹⁹

(3) Records, Accounting, and Reporting.⁴²⁰ A commercial bank is required to maintain financial accounting statements, loan application files, loan agreements, and other documents and records concerning the bank's operations.⁴²¹ A bank is also required to establish an accounting system and internal control system that is consistent with CBRC standards.⁴²² An institution is required to release to the public information concerning their business performance and audit reports within three months before the end of the accounting year (i.e., calendar year).⁴²³ In addition, a commercial bank is required to submit a balance sheet, profit and loss statement, and other accounting records to the CBRC on a quarterly basis.⁴²⁴

The CBRC has the power to conduct audits and inspections of the records of a commercial bank, including an evaluation of the deposits, loans, settlement of accounts, bad debts, and other

ordered banks to set aside 16.5 percent of deposits with the central bank, which was a 7.5 percentage point increase in the requirement since the start of 2007. See N. Piboontanasawat, China Raises Bank Reserve Ratio as Inflation Surges, Bloomberg, May 12, 2008. In the latter part of 2008 and 2009, the government took steps to reduce the reserve ratio by encouraging consumption in response to the economic crisis. China Slashes Interest Rates. Reserve Ratio as Fears of Economy Grow, AFX News, November 26, 2008

⁴¹⁷ *Id.*, Art. 48

⁴¹⁸ *Id.*, Art. 49

⁴¹⁹ *Id.*, Art. 50. See Provisional Rules on the Administration of Commercial Banking Service Pricing (promulgated on June 26, 2003 by the CBRC). The bank service fee rules are effective October 1, 2001, and govern the pricing of commercial banking services. The rules categorize services into two classifications: government-regulated services and market-based services. Government-regulated services are defined as basic RMB settlement operations and other services specified by the CBRC. Such services have minimal fees. All other services may be set by the market. The rules further provide that certain basic banking activities are not subject to any charges, such as opening an RMB bank account, closing an account, or making deposits at different branches of a bank in the same city. Banks may charge for certain activities such as withdrawals of large sums of cash and deposits in small denominations. The rules also set forth a reporting mechanism for changes to bank service charges: changes must be reported to the CBRC 15 days prior to implementation and posted at each bank location at least ten days prior to implementation

⁴²⁰ *Supra* note 52, 461.

⁴²¹ *Supra* note 89, Art. 51

⁴²² *Id.*, Arts. 54, 55, 59, 60

⁴²³ *Id.*, Arts. 56, 58

⁴²⁴ *Id.*, Art. 61

aspects of the commercial banking operation at any time and without notice.⁴²⁵ A commercial bank is required to produce any requested report or document upon demand. A commercial bank is also subject to the auditing supervision of the Auditor General of the Chinese National Audit Office, which is directly responsible to the State Council.⁴²⁶ The Commercial Bank Law outlines the standards for bank takeovers by the PBOC, the duration of the takeover period, dissolution procedures for institutions subject to takeover, and protection of depositors and creditors.⁴²⁷

(4) Bank Employee Standards.⁴²⁸ The employees of a commercial bank are required to abide by the law and regulations applicable to banking operations. Bank employees are prohibited from engaging in the following activities:

- a. using their professional positions to extort money, accept bribes, or receive rebates and commissions;
- b. using their professional positions to embezzle funds of the bank or its customers;
- c. practicing favoritism in granting loans to, or provisions of guarantees for, relatives and friends;
- d. holding concurrent positions in other economic organizations;
- e. disclosing state or commercial secrets obtained during the course of their employment; or
- f. engaging in other activities that violate the law, administrative regulations, and standards.⁴²⁹

An employee that engages in any of the activities noted in the preceding list is subject to administrative penalties, criminal penalties, and civil liability.⁴³⁰

(5) Online Banking Measures. The China Banking Regulatory Commission (CBRC) has adopted standards for online banking services and risk management issues. The Online Banking Measures

⁴²⁵ *Id.*, Art. 62; Banking Supervision and Administration Law, Arts. 33-42

⁴²⁶ *Id.*, Art. 63

⁴²⁷ *Id.*, Art. 7

⁴²⁸ *Id.*, 462.

⁴²⁹ *Id.*, Arts. 52, 53

⁴³⁰ *Id.*, Arts.81-85; Banking Supervision and Administration Law, Arts. 43-46, 49

apply to all banking institutions that are approved by the CBRC, including policy banks, Chinese-owned commercial banks, equity joint venture banks, wholly foreign-owned banks, and branches of foreign banks.⁴³¹ Any banking institution that offers online services is required to apply to the CBRC for approval and registration.⁴³²

The Online Banking Measures list the requirements for approval to offer online services. Eligible banks are required to meet or exceed the following criteria:⁴³³

- a. maintains a sound internal management system and control mechanisms which can assess and regulate the risks associated with online banking;
- b. maintains the necessary hardware, software, and technical expertise to support an online banking system; and
- c. maintains a sound financial position.⁴³⁴

The Online Banking Measures detail the application process, CBRC application standards and documents, and procedures for applying to provide additional online services.

The Online Banking Measures outline the statutory precautions that must be taken by financial institutions to ensure the management of risks associated with online banking services. All online banks must take proper security measures such as commercial encryption, physical security measures that can effectively guard against unlawful access to key equipment, and protection of customers' right to privacy.⁴³⁵

⁴³¹ Online Banking Measures, Arts. 3, 4

⁴³² *Id.*, Art. 8. These rules also apply to financial institutions registered in Hong Kong, Taiwan, and Macao that offer PRC clients online banking services as well as Mainland Chinese banks that offer online banking services overseas;

⁴³³ *Supra* note 52, 463.

⁴³⁴ *Supra* note 113, Arts. 9, 10, 11, 15

⁴³⁵ *Id.*, at Arts. 31-53 (risk management standards), 54-61 (management of data exchange and transfer), 62-70 (management of outsourcing of IT functions), and 71-74 (management of cross-border data exchange).

The Online Banking Measures provide that banks which fail to meet the requirements stipulated in the procedures may be subject to various administrative penalties.⁴³⁶ The CBRC is empowered to order a party to cease its online services in the event a financial institution:⁴³⁷

- a. offers online services without the approval and registration of the CBRC;
- b. violates state laws or regulations or threatens social welfare through its online services;
- c. engages in unfair competition by the use of its online services;
- d. lacks the necessary resources or experienced technical persons, which leads to major capital loss through its online services;
- e. maintains inadequate systems security, which threatens customer interests and the security of the bank's organization; or
- f. fails to report a major incident to the CBRC.⁴³⁸

(6) Liability and Penalties.⁴³⁹ A bank is subject to civil liability to its depositors for delays or refusals to pay principal or interest on deposits, illegal withholding or freezing of deposits, or breach of confidentiality concerning depositors' accounts.⁴⁴⁰ A commercial bank is also subject to monetary penalties, suspension of business activities, revocation of business license, or criminal liability if it violates any provision of the bank law or related regulations.⁴⁴¹ If a commercial bank or employee of a bank disputes any administrative penalty issued by the CBRC, the bank or the employee may initiate litigation with the people's court pursuant to the Administrative Litigation Law.⁴⁴²

⁴³⁶ *Id.*, Art. 93

⁴³⁷ *Id.*

⁴³⁸ *Id.*, Arts. 90, 92, 93

⁴³⁹ *Supra* note 52

⁴⁴⁰ Commercial Bank Law, Art. 73.

⁴⁴¹ *Id.*, Chap. 8

⁴⁴² *Id.*, Art. 86. For a discussion concerning the Administrative Litigation Law, see *infra* Chapter 22. "Litigation in the People's Court," § C.

(7) Money Laundering Prevention.⁴⁴³ In 2003 and 2006, the PRC government adopted a series of regulations and a basic law designed to prevent money laundering. These regulations apply to all financial institutions in China, including commercial banks, finance companies, trust companies, lease financing companies, and foreign-invested financial institutions.⁴⁴⁴

Under the Anti-Money Laundering Law, the PBOC is authorized by the State Council to supervise anti-money laundering efforts nationwide. The PBOC is responsible for (1) formulating anti-money laundering regulations, (2) monitoring the flow of RMB and foreign currencies, (3) supervising and inspecting the financial institutions' performance of anti-money laundering obligations, (4) investigating suspicious transactions, (5) reporting to the public security authorities any transaction suspected to be criminal, and (6) exchanging anti-money laundering information with overseas anti-money laundering institutions.⁴⁴⁵

The PBOC established the China Anti-Money Laundering Monitor and Analysis Center (CALMAC) to receive and analyze data concerning large-sum or suspicious transactions in RMB and foreign currencies. CALMAC's analysis is then reported to the PBOC. CALMAC has the power to require financial institutions to supplement materials regarding the PBOC. CALMAC has the power to require financial institutions to supplement materials regarding the aforementioned transactions.⁴⁴⁶ A financial institution shall report to CALMAC any large-sum transactions in RMB or a foreign currency, as well as any suspicious transactions.

FIE Financial Institutions⁴⁴⁷

The State Council and the CBRC adopted regulations and measures specifically addressing the application process, capital requirements, appointment and expertise of personnel, reporting

⁴⁴³ Supra note 52, 464.

⁴⁴⁴ *Id.*, citing Anti-Money Laundering Law of the People's Republic of China (promulgated by the Standing Committee of the National People's Congress on October 31, 2006, and effective on January 1, 2007)

⁴⁴⁵ *Id.*, citing *Id.*, Art. 5.

⁴⁴⁶ *Id.*, citing *Id.*, Art. 6.

⁴⁴⁷ *Id.*, 467

requirements, and other rules specifically applicable to foreign-funded financial institutions.⁴⁴⁸ The FIE Bank Regulations apply to a number of different types of foreign-invested financial institutions, including the following:

- a. Foreign Bank: the headquarters of a bank with foreign capital within the territory of the PRC.
- b. Foreign Bank Branch: a branch of a foreign bank established in the territory of the PRC.
- c. Joint Equity Bank: a bank established as an equity joint venture between a foreign financial institution and a Chinese enterprise within the territory of the PRC.⁴⁴⁹
- d. Representative Office: a representative office of a foreign bank.⁴⁵⁰

An FIE financial institution is required to abide by the laws of the PRC if it operates in China and may not “harm the social interests” of the PRC.⁴⁵¹ The law protects the legal rights and interests of FIE financial institutions operating in China. The CBRC is the agency with regulatory authority over institutions, and a branch office of the CBRC is responsible for the day-to-day supervision of institutions within its locale.⁴⁵² A foreign bank branch may engage in the previously listed business activities except that a branch is not allowed to provide bank card services and, if approved to provide RMB services, can only accept fixed deposits from Chinese nationals in an

⁴⁴⁸ *Id.*, citing See Regulations of the People’s Republic of China on Administration of Foreign-Funded Banks (adopted at the 155th Executive Meeting of the State Council on November 8, 2006, promulgated by the State Council and effective December 11, 2006);

⁴⁴⁹ *Id.*, citing Specific to joint equity banks, the CBRC issued a risk rating system to assess the risk, management systems, and profitability of joint equity banks in China. The system sets forth 100-point rating categories for such issues as capital adequacy, risk conditions, management and governance conditions, profitability, etc. The system only applies to joint equity banks in China and it is assumed that the CBRC is testing the rating system to determine whether to apply the program to all banks if successful. Provisional Risk Rating System for Joint Equity Banks (issued on February 22, 2004 by the CBRC)

⁴⁵⁰ *Id.*, citing FIE Bank Regulations, Art. 2(1)-(4). Prior to 2006, the FIE Bank Regulations addressed the establishment of a WFOE finance company or JV finance company. Those provisions were removed from the Regulations in 2006. The FIE Bank Administrative Licensing Measures (articles 17-26) address the process for setting up a WFOE finance company and JV finance company. The minimum registered capital for either a WFOE/J V finance company is RMB200 million. FIE Bank Administrative Licensing Measures, Art. 17. The overseas shareholder of a proposed FIE bank (WFOE or J V bank) or a representative office of a foreign financial institution shall satisfy the following requirements: (1) have persistent profit-earning capacity, good reputation, and no record of material violation of laws or regulations; (2) the shareholder of a proposed FIE bank or representative office shall have experience in engaging in international financial activities; (3) have in place effective systems of anti-money laundering; (4) the shareholder of a proposed FIE bank or representative office is under effective supervision by the financial supervisory authority of its home country or region, and the application thereof is approved by the financial supervisory authority of its home country or region; and (5) other prudential requirements prescribed by the CBRC. FIE Bank Regulations, Art. 9

⁴⁵¹ *Id.*, citing *Id.*, Art. 4

⁴⁵² *Id.*, citing *Id.*, Arts. 5-7

amount in excess of RMB1 million.⁴⁵³ Foreign bank branches are required to maintain working capital thresholds in order to provide foreign exchange business.⁴⁵⁴

Reporting and Audits⁴⁵⁵

The CBRC has the right to inspect and audit—on a regular or random basis—the business operations, management, and financial position of an FIE financial institution.⁴⁵⁶ An institution is required to submit financial statements and other documents required by the CBRC including statistical data, internal audit reports, and business reports.⁴⁵⁷ A foreign bank that has established two or more branches in China is required to select one branch as its reporting branch operation, which will be responsible for consolidated reporting of the branches to the CBRC.⁴⁵⁸ An institution is required to report to the CBRC any major change to its financial position, amendments to its articles of association, and change in registered capital.⁴⁵⁹

FIE Financial institutions are required to report to the CBRC (1) any serious financial or operational problems; (2) major adjustments to the institution's operating strategy; (3) important board resolutions; (4) any change in shareholders of 10 percent of the institution's total capital or shares; (5) any change to the articles of association, registered capital, or registered address of the institution's head office; (6) reorganization of the institution's head office and changes in its chairman or president; (7) any serious problems (financial or operational) of the head office of a foreign bank branch or a foreign joint venture party; and (8) major changes in the laws and

⁴⁵³ *Id.*, citing *Id.*, Art. 31 (list of permissible activities of branch operations)

⁴⁵⁴ *Id.*, citing A foreign bank branch conducting foreign exchange business is required to have working capital of no less than RMB200 million or an equivalent amount in convertible currencies. A foreign bank branch conducting foreign exchange business and RMB business is required to have a working capital of no less than RMB300 million, and the RMB-denominated portion of the operating capital shall be no less than RMB100 million. *Id.*, Arts. 49, 50;

⁴⁵⁵ *Id.*, 477

⁴⁵⁶ *Id.*, citing FIE Bank Implementing Rules, Art. 87.

⁴⁵⁷ *Id.* citing *Id.*, Art. 53; FIE Bank Implementing Rules, Arts.78, 80, 99-104. The CBRC and its delegated authorities have the right to demand that foreign-owned financial institutions follow steps to improve business management, cash management, and security precautions in accordance with the regulations governing business administration policies. *Id.* at Art. 53. A foreign-owned financial institution shall accept the CBRC and its delegated authorities' supervision and investigations by tendering and not refusing, obstructing, or hiding relevant and accurate documents, information, and written reports. Banks are also required to have written plan* for outsourcing activities (if any). ME Bank Implementing Rules, Art. 84.

⁴⁵⁸ *Id.* citing FIE Bank Implementing Rules, Art. 48; FIE Bank Implementing Rules, Arts.90, 98.

⁴⁵⁹ *Id.* citing *Id.*, Arts. 95, 96.

regulations of the locality of the head office of a foreign bank branch or a foreign joint venture party. The Implementing Rules outline the procedures for applications for approval of adjustments to registered capital, name changes, changes resulting from a merger or division, change of shareholders, change of office location, or amendments to articles of association.⁴⁶⁰

Management Personnel⁴⁶¹

The CBRC requires that senior management personnel demonstrate certain qualifications. Under the Implementing Regulations, the CBRC manages a verification and approval system for senior management personnel of FIE financial institutions.⁴⁶² For senior management personnel such as the chairman, general manager, and bank president, the financial institution is required to obtain the approval of the CBRC before such personnel can assume a position in China.⁴⁶³ A person who holds a position of general manager or president of an FIE financial institution is required to have eight years' experience in the financial industry or 12 years or more of related work experience in the economic sector (of which at least four years shall be in the financial industry), and shall have been in a position with at least five years' experience as a department manager of a branch of a financial institution.⁴⁶⁴ A general manager or president is required to be of good character with no record of individual bankruptcy, or bankruptcy in the capacity as a company manager, and have no criminal record.⁴⁶⁵

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.*, 478.

⁴⁶² *Id. citing* FIE Bank Regulations, Art. 26; FIE Bank Implementing Rules, arts. 63-77. The CBRC head office is required to approve an application for qualification of a senior manager within 30 days from receipt of the completed application and materials. FIE Bank Implementing Rules, Art. 72. See also Procedures for the Administration of the Qualifications for Office of the Senior Management Personnel of Financial Institutions (issued on March 24, 2000 by the People's Bank of China) (outlines the appointment qualifications for senior managers of FIF. financial institutions).

⁴⁶³ *Id. citing* FIE Bank Implementing Rules, Arts. 67-69.

⁴⁶⁴ *Id. citing* *Id.*, Art.70(3). A person who assumes the position of vice president (deputy general manager) of an FIE bank shall have five years or more of experience in the financial industry or ten years or more of related work experience in the economic sector (of which three years or more shall be in the financial industry), and shall have been in a position of a business department manager or equivalent or higher for three or more years. *Id.* at Art.70(4). A person who assumes the position of deputy president (deputy general manager) of a foreign bank branch or president of a sub-branch shall have four years or more of experience in the financial industry or six years or more of related work experience in the economic sector (of which two or more years shall be in the financial industry). *Id.* at Art.70(6).

⁴⁶⁵ *Id. citing* *Id.*, Arts. 64, 66, 76. Senior management personnel are required to be familiar with and comply with China's laws and regulations on financial regulation; have professional knowledge, work experience, and management skills that relate to the position;

An FIE financial institution is required to obtain approval for any changes involving senior management personnel. In the event a general manager or president of a foreign-funded financial institution or the head of any sub-branch is absent from his or her post for a continuous period of one month or more, the CBRC is required to be notified. The institution is required to appoint a replacement of any senior management personnel who is absent from his or her position for three consecutive months or more.⁴⁶⁶ The term “senior management personnel” is defined by the CBRC as a general manager or president of a bank or deputy general manager or vice president of a bank.⁴⁶⁷

Foreign Exchange Regulation⁴⁶⁸

A foreign investor in China has the right to repatriate funds subject to the foreign exchange rules and regulations. Historically, it has been difficult for foreign parties to remit profits and income abroad given that foreign currency is strictly controlled and the renminbi is not freely convertible.⁴⁶⁹ Since 1996, the government has restructured its foreign exchange regulatory system in order to encourage foreign companies to continue to invest in China and as a conciliatory point with its trading partners to gain admission to the World Trade Organization. The State Council promulgated regulations setting forth relatively flexible standards designed to facilitate the prompt

and have no record of improper conduct. The Implementing Regulations also provide that senior managers cannot be persons with any criminal record; persons having been “seriously penalized” due to a violation of the law; persons having taken “major responsibility” for or having been the person directly responsible for a bankruptcy, serious violation of regulations, or revocation of a permit to conduct financial business of any financial institution within five years; or persons having caused heavy losses to the financial institution or any other enterprise or company in which he or she was employed as a result of material error in the past five years. The Implementing Regulations outline the procedures for a verification and approval system for senior management personnel of FIE financial institutions. The head office of the CBRC is responsible for verification and approval or revocation of qualifications with respect to the chairman of the board or president (general manager) of an FIE financial institution and the general manager of a foreign bank branch. Local branches of the CBRC may approve vice chairman of the board or vice president (deputy general manager) of an FIE institution, the deputy general manager of a foreign bank branch, and the head of a sub-branch. The CBRC may revoke the qualifications of a senior manager if he or she is under investigation for criminal liability, refuses or interferes with government investigations, engages in unsound internal management and control practices, operates in serious violation of the law, or is involved in other circumstances that, according to the CBRC, justify revocation. Under prior regulations, FIE financial institutions were required to employ, within three years of commencing business operations, at least one Chinese citizen as a senior manager. This rule was dropped with the 2002 amendments.

⁴⁶⁶ *Id.*, citing *Id.*, Art. 75.

⁴⁶⁷ *Id.*, citing *Id.*, Art. 69.

⁴⁶⁸ *Id.*, 481

⁴⁶⁹ *Id.* citing Foreign Exchange Control Regulations of the People’s Republic of China (promulgated January 29, 1996 by the State Council, amended on January 4, 1997, and revised a second time on August 1, 2008 as State Council Order No. 532), Art. 7, reprinted in China Laws)

processing of foreign exchange transactions. Prior to July 1, 1996, foreign investors with operations in China were limited to conducting foreign exchange transactions through swap centers. Today, foreign exchange transactions may be conducted through approved financial institutions, and SAFE is taking steps to continue to liberalize FOREX transactions.⁴⁷⁰

Opening a Foreign Exchange Account⁴⁷¹

Only after obtaining an FERC may an FIE open a foreign exchange account at a bank authorized to engage in foreign exchange business.⁴⁷² An FIE, with approval, may open a foreign exchange account for current or capital accounts,⁴⁷³ or may open special accounts to facilitate foreign direct investment activities. In order to open a foreign exchange account, an FIE must present a bank with a notice to open an account issued by the SAFE.⁴⁷⁴ An FIE is also required to provide the bank with a certificate issued by the SAFE if it intends to open a loan account for foreign debts or foreign exchange loans.⁴⁷⁵

After a bank has opened a foreign exchange account for an FIE, the bank is required to specify on the FIE's FERC the account currency, account number, account type, and the date on which the account is opened.⁴⁷⁶ Each foreign exchange account has a strictly defined scope of use.⁴⁷⁷ The FOREX Administrative Regulations provide for the opening of foreign exchange clearance accounts employed for the purpose of revenue and expenditures on current account items and, with approval, expenditures for capital account items.⁴⁷⁸ The rules also provide for the

⁴⁷⁰ *Id.*, 481-482.

⁴⁷¹ *Id.*, 483.

⁴⁷² *Id. citing* FOREX Registration Measures, Arts. 5, 6; FOREX Administrative Regulations, Arts.12, 28(3).

⁴⁷³ *Id. citing* *Id.*, Arts. 6, 20 (outlining the different types of current and capital accounts). The regulations provide that the scope of exchange control includes the regulation of foreign currency, payment instruments denominated in foreign currency, securities denominated in foreign currency, and other assets denominated in foreign currency. FOREX Regulations, Art. 16. See also Notice on Improving Business Operational Issues Relating to Administration of Sale of Foreign Currency for Payment of Foreign Currency Capital Funds of Foreign Investment Enterprises (Huizongfa 142, promulgated by the State Administration of Foreign Exchange on August 29, 2008), reprinted in CHINA LAWS FOR BANKING BUSINESS (CCI I), Business Regulation 8-925.

⁴⁷⁴ *Id. citing* *Id.*, Art. 12.

⁴⁷⁵ *Id. citing* *Id.*, Arts.6 (11), 20(1), 22.

⁴⁷⁶ *Id. citing* FOREX Registration Measures, Art. 6; FOREX Administrative Regulations, Art. 31.

⁴⁷⁷ *Id. citing* *Id.*, Arts. 16,17. An FIE may apply to open a foreign exchange account outside the place of its registration. *Id.*, Art. 36.

⁴⁷⁸ *Id. citing* FOREX Administrative Regulations, Arts. 6, 20.

opening of a foreign exchange special account that can be used for the payment of foreign debts and foreign exchange loans issued by Chinese financial institutions.⁴⁷⁹ An FIE is required to use the foreign exchange account in accordance with the FERC and, in general, is limited as to the type of account, scope of the revenue and expenditures, maximum amount of currency to be held in a particular account, and the term of the account.⁴⁸⁰ The circulation of foreign currency is prohibited and may not be quoted for settlement purposes in the PRC.⁴⁸¹

An FIE may repatriate profits, dividends, and income after taxation from its own foreign exchange account or with foreign exchange purchased at designated institutions. The banks require the submission of a resolution of the FIE's board of directors outlining the profit distribution plan before the approval of a repatriation of profits and other distributions. The SAFE has adopted rules which unify the procedures for FOREX account opening and management for FIEs and domestic enterprises. Under these rules, local SAFE branches have jurisdiction to supervise FOREX matters. The rules do not apply to special customs areas, such as bonded and export- processing zones. The rules require the consolidation of foreign exchange current settlement accounts and special-purpose foreign exchange accounts into a foreign exchange current account. These regulations relax account-opening requirements for Chinese-funded enterprises.⁴⁸²

The rules actively promote the expansion of the SAFE's FOREX account management information system and outline reporting requirements for financial institutions engaged in current account FOREX activities. Since the SAFE can closely monitor daily transactions, banks in areas covered by the system will no longer be subject to yearly SAFE inspections. Enterprises demonstrating a need may open multiple accounts of one or more foreign currencies in one or several banks as long as the total FOREX amount does not exceed the enterprise's approved ceiling

⁴⁷⁹ *Id. citing* Id., Arts.6(11), 20(1), 22.

⁴⁸⁰ *Id. citing* Id., Art. 42.

⁴⁸¹ *Id.*, 484.

⁴⁸² *Id.*, 485.

for each currency. SAFE must still approve foreign exchange payments under capital account items, as capital account controls will not be relaxed for several years.⁴⁸³

Control over Foreign Exchange Transactions⁴⁸⁴

Financial institutions are obligated to examine foreign exchange transactions to determine whether account holders are using their respective accounts in a manner consistent with the regulations, and are bound by law to report this information to the SAFE.⁴⁸⁵ If the amount of foreign exchange in an account exceeds the maximum limit set by the SAFE, the excess must be sold to a foreign exchange bank “. . . to a foreign exchange bank or traded through the inter-bank system foreign exchange trading system.”⁴⁸⁶ The FERC allows an account holder to engage in foreign exchange transactions without the need to obtain approval for individual transactions.⁴⁸⁷ The FERC is valid for a one-year period of time and must be renewed annually.

If an FIE, after completion of the FERC procedures, changes its name, address, or scope of business, or is assigned or merges with another organization, the FIE is required to apply to the SAFE for an amended FERC.⁴⁸⁸ The approval of the SAFE is also required if the FIE intends to use profits derived from the operation for reinvestment in China or to increase its registered capital.⁴⁸⁹ If an FIE uses its profits to increase its registered capital, approval from the SAIC or local authorities is also required.⁴⁹⁰ A holding or investment company is required to obtain the approval of the SAFE if it intends to transfer its foreign exchange funds for investment in China.⁴⁹¹

⁴⁸³ *Id.*

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.* citing FOREX Settlement Regulations, Art.39; FOREX Administrative Regulations, Art. 40.

⁴⁸⁶ *Id.* citing *Id.*, Art. 10.

⁴⁸⁷ *Id.* citing FOREX Registration Measures, Art. 7.

⁴⁸⁸ *Id.* citing *Id.*, Art.8; FOREX Administrative Regulations, Art. 37.

⁴⁸⁹ *Id.*, citing Notice on Certain Issues Concerning the Alteration of Capital Funds by Foreign Investment Enterprises (SAFE Order No. 188, promulgated June 28, 1996 by the State Administration of Foreign Exchange), Arts. 1, 2, 4, reprinted in CHINA LAWS For Foreign BUSINESS (CCH), Business Regulation 8-792 (hereinafter “FOREX Capital Funds Alteration Notice”).

⁴⁹⁰ *Id.*, citing Notice on Certain Issues Concerning the Alteration of Capital Funds by Foreign Investment Enterprises, Art. 2.

⁴⁹¹ *Id.*, citing *Id.*, Art. 3.

If an FIE terminates its operation or is legally liquidated and dissolved, it must, within 30 days of completing the liquidation procedures, apply to the SAFE for cancellation of the FERC.⁴⁹² Upon liquidation, an FIE is required to surrender its FERC and close its foreign exchange account. If the funds in a foreign exchange account are exhausted, the bank may cancel the account. An FIE is also prohibited from altering its FERC and is barred from assigning, lending, leasing, or selling its FERC to other parties.⁴⁹³ A violation of the registration measures may result in monetary fines issued by the SAFE.⁴⁹⁴ The SAFE is authorized to supervise foreign exchange account transactions and may monitor the activities of financial institutions.⁴⁹⁵ The government abolished the foreign exchange swap centers and requires all enterprises, domestic and foreign-related, to use the inter-bank system currently employed.⁴⁹⁶

The foreign exchange swapping system was originally set up by the Bank of China in Guangdong in 1980, and thereafter extended nationwide to twelve key cities. The first official foreign exchange swap center opened in Shenzhen in 1985. FOREX swap centers were later opened in Shanghai and Beijing in 1986 and in Tianjin in 1987. Up to 1987, the swap centers provided

⁴⁹² *Id.*, 486, *citing* FOREX Registration Measures, Art.9; FOREX Administrative Regulations, arts. 38, 41.

⁴⁹³ *Id.*, *citing* *Id.*, Art.11; FOREX Administrative Regulations, Art. 42.

⁴⁹⁴ *Id.*, *citing* *Id.*, Art.12; FOREX Administrative Regulations, arts.42, 44.

⁴⁹⁵ *Id.*, *citing* FOREX Administrative Regulations, Art. 33. The State Council authorizes a reward system to allow individuals to report and expose violations of foreign exchange rules. FOREX Regulations, Art.38; FOREX Administrative Regulations, Art. 39. The Supreme People's Court issued a notice emphasizing that harsh penalties are to be imposed upon persons that trade in foreign exchange using false or invalid FERCs. See Tang, Court Seeks Stiff Penalties for Illegal Currency Traders, China Daily, September 1, 1998, available on Lexis, News Library, See Decision Concerning Punishment of Criminal Offenses Involving Fraudulent Purchase, Evasion and Illegal Trading of Foreign Exchange (issued on Dec. 29, 1998 by the Standing Committee of the 9th National People's Congress), reprinted in 139 China International Business (MOFTF.C) 50 (1999) (provides for large fines and prison terms ranging up to life imprisonment for fraudulent foreign exchange transactions). See also Provisional Rules of the Ministry of Foreign Trade and Economic Cooperation Concerning the Imposition of Administrative Penalties on Foreign Economic and Trade Enterprises Engaged in Foreign Exchange Evasion and Illegal Arbitrage in Foreign Exchange (issued on October 9, 1998 by the MOFTF.C), reprinted in 1 CHINA LAW UPDATE 19 (Feb. 1999) (outlines administrative penalties for violations of foreign exchange trading rules by FIEs and administrative litigation procedures for contesting penalty decisions). See also Provisional Regulations Regarding the Administrative Punishments on Disciplinary Measures on Activities Violating the Foreign Exchange Administrative Regulations, Including Arbitrage, Illegal Procurement, Illegal Evasion and Illegal Transactions in Foreign Exchange (issued on January 25, 1999 by the Ministry of Supervision, the Ministry of Personnel, the People's Bank of China, the State General Administration of Customs, and the State Administration of Foreign Exchange) (hereinafter the "FOREX Disciplinary Measures").

⁴⁹⁶ *Id.*, 487, *citing* See also Circular of China Foreign Exchange Trading Center and National Inter-bank Funding Center pertinent to the Promulgation of the Rules for the Swap Transactions of RMB versus Foreign Exchange in Foreign Exchange Market of the National Inter-bank, Zhong Hui Jiao Fa (2006) No. 118, issued by the State Administration of Foreign Exchange on April 21, 2006; Notice of the People's Bank of China on Issues Regarding Launching RMB Swaps against Foreign Currencies in the Interbank Foreign Exchange Market, issued by the People's Bank of China on August 17, 2007 (outlines procedures for SAFE regulation of inter-bank swaps through China Foreign Exchange Trading Center (CFETC)).

services to FIEs only. In April 1988, all domestic enterprises were also allowed to sell their retained earnings in FOREX swap centers. In 1992, there were over 100 FOREX swap centers nationwide, and with a transaction volume of US 25 billion. In 1994, a national inter-bank foreign exchange market replaced the FOREX swap markets, and a more formal foreign exchange selling and buying system was introduced. The China Foreign Exchange Trading Center (CFETC) is responsible for providing the RMB/foreign currency trading system and develops swap trading regulations, collects transaction data and monitors market activities. The swap centers were exchanges that at one time were located throughout China where buyers and sellers of foreign exchange traded renminbi for other currencies. In order for a joint venture to obtain foreign exchange at a swap center, other parties had to be willing to trade foreign exchange. Since the restructuring of China's foreign exchange system at the beginning of 1994, swap centers were opened only for use by FIEs, such as joint ventures. Chinese entities other than FIEs were gradually allowed to enter into foreign exchange transactions at designated foreign exchange banks, which differ from swap centers in that the bank itself is the counter-party for the transaction. As part of the 1994 reforms, the swap centers are now run by the foreign exchange banks, and the Chinese government has abolished swap centers because all entities have been allowed access to the foreign exchange banks. During the transition period, however, the swap centers continued to operate.⁴⁹⁷ Foreign-funded financial institutions, with the approval of the CBRC and the SAFE, may operate as a designated foreign exchange bank, which allows them to engage in foreign exchange transactions.⁴⁹⁸

Domestic Enterprises and Foreign Exchange Control⁴⁹⁹

Traditionally, a domestic enterprise was required to repatriate all its foreign exchange receipts relating to its capital account transactions and was prohibited from depositing its foreign

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.*, 487.

⁴⁹⁹ *Id.* 490.

exchange with an overseas institution without authorization.⁵⁰⁰ Domestic enterprises may make external payments from their own foreign exchange accounts or with foreign exchange purchased at designated banks upon presentation of commercial invoices justifying payments.⁵⁰¹ With the approval of the SAFE, a domestic enterprise may use foreign exchange for overseas investments. A domestic enterprise is also required to obtain the approval of the SAFE to use foreign exchange for payments under guarantee contracts.⁵⁰² In 2003, the SAFE adopted rules that authorize FOREX purchases up to \$3 million (up from a previous limit of Si million) for qualified Chinese companies in order to facilitate overseas investment.⁵⁰³ In 2009, the government took steps to simplify procedures for Chinese companies to obtain approval for making outbound investments and adopted policy statements and measures to facilitate overseas investment.⁵⁰⁴ In addition, the SAFE enabled Chinese companies to make loans to overseas enterprises in which they have a financial interest.⁵⁰⁵ The 2009 rules are designed to help Chinese overseas companies obtain working capital needs and as a way to better use China's large foreign exchange reserves. The 2009 measures removed many

⁵⁰⁰ *Id.*, citing FOREX Regulations, Arts. 9, 10. See also Notice on Several Issues Concerning the Adjustment of Administrative Policies for Foreign Exchange Accounts Under the International Contracting Project and Other Current Account Items issued by the State Administration of Foreign Exchange, effective on September 1, 2003). This Notice allows domestic companies engaged in international business activities to retain 100 percent of their foreign currency earnings in foreign currency. Prior rules allowed domestic companies to retain only 20 percent of their foreign earnings in foreign currency and required that the remaining 80 percent be converted into RMB. Domestic companies engaged in international transportation, overseas project contracting and labor services, and public bidding and tenders may retain their foreign earnings in their original form.

⁵⁰¹ *Id.*, citing The PBOC (and now the CBRC) and the SAFE adopted a new computer system that went into effect November 1, 1998 and allows financial institutions to obtain computer-generated import declaration papers to verify an enterprise's need to obtain foreign exchange to purchase imports. See generally Zhang, New System to Be Used to Prevent Cheating, CHINA DAILY, Oct. 26, 1998.

⁵⁰² *Id.*, citing Supplementary Notice of the State Administration of Foreign Exchange on Relevant Issues Concerning RMB Loans under Foreign Exchange Guarantees (HuiFa No. 26, promulgated by the State Administration of Foreign Exchange on April 15, 2005); Notice on Revision to the Administrative Procedures on Provision of Overseas Financial Guarantee by Domestic Banks for Overseas Investment Enterprises (HuiFa No. 61, promulgated by the State Administration of Foreign Exchange on August 16, 2005), reprinted in CHINA LAWS FOR FOREIGN BUSINESS (CCH), Business Regulation ¶ 8-885.

⁵⁰³ *Id.*, citing Part of the motivation behind the increased limits of FOREX available to domestic companies is the surge in foreign exchange reserves held by Chinese companies and the pressure on the PRC government to loosen financial controls and revalue the RMB. See generally U.S.-China Business Council, SAFE Expands Local FOREX Approval for Chinese Companies, CHINA MARKET INTELLIGENCE (November 12, 2003).

⁵⁰⁴ *Id.*, citing Circular on Issuing Regulations on Foreign Exchange Administration of the Overseas Direct Investment of Domestic Institutions (promulgated by the State Administration of Foreign Exchange on July 13, 2009, and effective on August 1, 2009). See also Measures for Administration of Overseas Investment (Order No. 5, promulgated by the Ministry of Commerce of the People's Republic of China on March 16, 2009 and effective on May 1, 2009), reprinted in CHINA LAWS FOR FOREIGN BUSINESS (CCH), Business Regulation ¶ 8-743 (provides support for PRC outbound investors and provides for expedited approval procedures for certain qualifying transactions with an investment of under US\$100 million).

⁵⁰⁵ *Id.*, citing Circular on Several Issues Concerning the Administration of Foreign Exchange in Outbound Lending by Domestic Enterprises (promulgated by the State Administration of Foreign Exchange on June 9, 2009, and effective August 1, 2009).

of the restrictions imposed on outbound investments, offered more flexibility, and simplified the approval process for outbound lending, including authorization for local SAFE approval. In a key change, the 2009 measures allowed companies to use their own FOREX deposits or convert RMB funds to foreign currency for purposes of foreign loans. All domestic enterprises (with the exception of financial institutions) are allowed to engage in outbound lending, and loans may be either direct or through an entrustment process via a financial institution. Companies interested in outbound investment must satisfy a number of requirements; the lender and borrower must be incorporated and have fully contributed their registered capital and the company must have a record of good business practices and internal control systems, among other standards. Outbound loans are subject to quotas valid for two years and in amounts less than 30 percent of the lender's ownership interest in the borrower, or the lender's duly registered outbound investment quota.⁵⁰⁶

Foreign Exchange Held by Individuals⁵⁰⁷

An individual may hold foreign exchange. The State Council recognizes the principles of voluntary deposit, unrestricted withdrawal, interest on deposits, and confidentiality with respect to foreign exchange savings deposits.⁵⁰⁸ An individual who imports or exports foreign exchange is required to declare the currency with customs. Since September 2003, Chinese citizens are allowed to purchase and travel abroad with more foreign exchange.⁵⁰⁹

⁵⁰⁶ *Id.*, 491.

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.*, citing FOREX Administrative Regulations, Arts. 6(13), 9, 15. Measures on Individual Foreign Exchange Control (I'BOC Order No. 3, promulgated on December 25, 2006, and effective on February 1, 2007), reprinted in CHINA LAWS FOR FOREIGN BUSINESS (CCH), Business Regulation 8-895; Implementation Regulations for the Administrative Measures on Individual Foreign Exchange (HuiFaNo. 1, promulgated by the State Administration of Foreign Exchange on January 5, 2007), reprinted in CHINA LAWS FOR FOREIGN BUSINESS (CCH), Business Regulation 1 8-896 (guidelines to facilitate foreign exchange income and expenditure of individuals, simplify business formalities, and standardize foreign exchange control and guidelines for foreign exchange control on individual current accounts and individual capital accounts); Notice of the General Affairs Department of the State Administration of Foreign Exchange on Relevant Issues Concerning Upgrading the Information System of Administration of Individual Purchase of Foreign Currency by Domestic Residents (HuiZongFa No. 36, promulgated by the State Administration of Foreign Exchange on April 27, 2006).

⁵⁰⁹ *Id.*, citing Notice on the Provisional Management Rules on Entering and Exiting China with Foreign Currency (issued on September 1, 2003 by the State Administration of Foreign Exchange and the General Administration of Customs). This rule allows PRC citizens to travel abroad with \$5,000 without reporting to the SAFE. This is an increase over the previous \$2,000 allowance. PRC citizens must report the movement of between \$5,000 and \$10,000 to the SAFE; movement of a sum in excess of \$10,000 is prohibited. See also Implementing Rules on the Management of Purchasing Foreign Exchange by Domestic Residents (issued and

4.6. Large Transfer Of Funds

On March 1, 2007, President Zhou Xiaochuan promulgated and made effective The Administrative Measures for the Financial Institutions' Report of Large-sum Transactions and Doubtful Transactions,⁵¹⁰ which was formulated by the People's Bank of China in accordance with the Anti-Money Laundering Law of the People's Republic of China. The Law of the People's Republic of China and other laws were adopted at the 25th executive meeting of the presidents of the People's Bank of China on November 6, 2006.⁵¹¹ This is designed to prevent money-laundering through financial institutions and regulate the financial institutions' report of large-sum transactions and doubtful transactions. These measures are formulated in accordance with the Anti-Money Laundering Law of the People's Republic of China, the Law of the People's Republic of China and other laws and administrative regulations.⁵¹²

Article 7 of the Administrative Measures for the Financial Institutions' Report of Large-Sum Transactions and Doubtful Transactions provides that "A financial institution shall, within 5 working days after the occurrence of a large-sum transaction, timely send to the CALMAC an electronic report of large-sum transaction via its headquarters or via an institution designated by its headquarters. If it has no headquarters, or if it is unable to send the report of large-sum transaction to the CALMAC via its headquarters or via the institution designated by its headquarters, its way of report may be determined by the PBC separately."⁵¹³

Furthermore, "For a large-sum transaction conducted through a client's account or bank card opened in or issued by a financial institution within China, the account opening financial institution or the card issuing financial institution shall submit a report. For a large-sum transaction conducted

effective on August 1, 2002, by the State Administration of Foreign Exchange) (provides that all state-owned banks may apply to the SAFE for approval to sell FOREX to qualified domestic residents and ends the monopoly held by the Bank of China on retail FOREX sales).

⁵¹⁰Order of the People's Bank of China (No. 2 [2006])

⁵¹¹*Id.*

⁵¹²*Id.* at Art. 1

⁵¹³*Id.* at Art. 1

through an overseas bank card, the receiving bank shall submit a report. For a large-sum transaction that is not conducted through a client's account or bank card, the financial institution that handles this business shall submit a report.”⁵¹⁴

Article 9 thereof states that “A financial institution shall report the following large-sum transactions to the CALMAC:

- 1) A single transaction or the total of RMB transaction (s) or foreign currency transaction(s) on the current day in the form of deposit of cash, withdrawal of cash, settlement or sale of foreign exchange in cash, exchange of notes, cash remittance, payment of cash instrument, which reaches 200, 000 yuan or more, or which reaches the equivalent value of USD 10, 000 or more;
- 2) A single transfer or the total of transfers on the current day between the bank accounts of legal persons, other organizations and individual and individual commercial households reaches 2 million yuan more, or which reaches the equivalent value of USD 200, 000 or more;
- 3) A single transfer or total of transfers on the current day between the bank accounts of natural persons, or between the bank account of natural person and the bank account of a legal person, any other organization or individual industrial and commercial household, which reaches 500, 000 yuan or more, or which reaches the equivalent value of USD 100, 000 or more; and
- 4) A single transnational transaction or the total of transnational transactions on the current day, to which one party is a natural person and which reaches the equivalent value of USD 10, 000 or more.”⁵¹⁵

⁵¹⁴ *Id.* at Art. 7, § 2

⁵¹⁵ *Id.*

And further provides that “The aggregate amount of transactions shall be based on a single client, of which the receipts and payments of money shall be calculated accumulatively and be reported, unless it is otherwise provided for by the PBC.”⁵¹⁶ And “Where necessary, the PBC may adjust the criteria on large-sum of transactions as described in Paragraph 1.”⁵¹⁷

Under these standards, both foreign currency and renminbi transactions through financial institutions in China will receive a higher level of scrutiny than in the past.⁵¹⁸ The Anti-Money Laundering Law requires the banks to “know your customer” and specifically requires financial institutions to examine for authenticity and legality the documents presented by customers requiring bank services, regardless of whether they are individuals, corporations, or other entities.⁵¹⁹

To fulfill China’s international commitment and to crack down on increasing money laundering activities, China adopted and promulgated the Anti-Money Laundering Law. China has ratified the following international treaties regarding anti-money laundering: The United Nations Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances 1988 (the Vienna Convention); The United Nations Convention Against Transnational Organized Crime 2000 (the Palermo Convention); and the United Nations Convention Against Corruption.⁵²⁰

These documents are to be photocopied and the copies kept in files. The second key aspect of the anti-money laundering program is reporting of large or suspicious transactions, which relates to internal book transfers as well as to cash transactions. Suspicious transactions are required to be immediately reported to the China Anti-Money Laundering Monitor and Analysis Center

⁵¹⁶ *Id.* at Art. 9, par. 2

⁵¹⁷ *Id.* at Art. 9, par. 4

⁵¹⁸ James M. Zimmerman, Esq., China Law Deskbook, A Legal Guide for Foreign-Invested Enterprises, Third Edition, Volume 1, 465 (May 19, 2010), *citing* In September 2001, immediately following the 9/11 terrorist attack on the United States, the PBOC established an anti-money laundering working group to develop a program applicable to Chinese financial institutions. In July 2002, the PBOC set up a payment transaction monitoring office and an anti-money laundering office. The target transactions are proceeds from smuggling, drugs, corruption, and terrorism that are laundered through the mechanism of normal bank settlements. The State Administration of Foreign Exchange (SAFE) is responsible for monitoring foreign currency transactions and the PBOC Payments and Settlements Management Office monitors RMB transactions

⁵¹⁹ *Id.*

⁵²⁰ *Id.*

(CALMAC). The third important aspect of the program is record keeping. The regulations mandate that banks maintain records of customer accounts and transaction data.⁵²¹

Pursuant to the Anti-Money Laundering Law, financial institutions and their employees are obligated to participate in the prevention of money laundering, maintain the confidentiality of anti-money laundering information, and cooperate with law enforcement officials in anti-money laundering efforts. Financial institutions are required by law to assist and cooperate with judicial, customs, and taxation authorities in investigating, freezing, or withholding account funds in suspected transactions.⁵²² Financial institutions are also required to establish anti-money laundering internal control mechanisms, which include establishing a specialized department to handle anti-money laundering efforts or designating an already established department to handle the task.⁵²³

The Anti-Money Laundering Law also requires that financial institutions record client identification information.⁵²⁴ According to the regulations, customers opening a savings account or settling accounts are required to present proper identification. Bank employees are required to check the identification documents and register the names and other information in banking transactions. When a financial institution suspects that a large or suspicious transaction may be linked to criminal activities, it is required to promptly report to CALMAC.⁵²⁵ Financial institutions are required to maintain account and transaction records for a minimum of five years.⁵²⁶ The Anti-Money Laundering Law provides for a fine of up to RMB500,000 for violations, and senior management may be disqualified from working at a financial institution following serious infractions.⁵²⁷ The regulations further provide that in serious cases, financial institutions failing to comply with the law may be subject to criminal prosecution.

⁵²¹ *Id.*, 466.

⁵²² *Id.*, citing Anti-Money Laundering Law, Arts. 15-22

⁵²³ *Id.*, citing *Id.*, Art. 15

⁵²⁴ *Id.*, citing *Id.*, Art. 16

⁵²⁵ *Id.*, citing *Id.*, Art. 20

⁵²⁶ *Id.*, citing *Id.*, Art. 19

⁵²⁷ *Id.*, citing *Id.*, Arts. 30-33

4.7. Money Laundering Issues ⁵²⁸

In recent years, the availability of stolen money in China's economy is a result of money laundering that has become active, cross-border, and multiregional in terms of its organizers. In December 2000, Guangzhou law enforcement agencies discovered an underground bank and arrested nine suspects, four of whom were from Taiwan. The police found a large sum of Chinese currency, foreign currency, and certificates of deposits used for money laundering on the mainland since 1998 and helped Taiwan businessmen transfer funds illegally from the PRC to Taiwan, laundering a total of 58 million yuan. In short, Taiwanese underground banks provide a financial channel for Taiwan business people in the PRC. ⁵²⁹

Money laundering occasionally involves legal practitioners who are not "state agents" but whose role remains controversial. In 2001, auditors at the Bank of China in Guangdong discovered that between 1992 and 2001, a total of US\$75 million was fraudulently taken from the bank. Three successive managers had arranged a series of loans to a state-run enterprise, which then moved the funds to a Hong Kong bank account held by a registered company, Ever Joint Property Company Limited. The managing director of Ever Joint was John Hui, who had formerly worked for Sinhua Bank and who transferred all the proceeds to another company, Susan Liang and Company. Hui's cross-border money laundering implicated a lawyer. Yet the High Court ruled there was no evidence to prove that the lawyer had reasonable grounds to investigate the suspicious account of his client, Hui. ⁵³⁰

In 2002, the Hong Kong police estimated that money laundering amounted to HK\$934 billion, of which HK\$900 billion was from illegal gambling and the rest from the proceeds of drug trade. Although anti-money laundering legislation had been enacted in 1989, the police encountered

⁵²⁸ Sonny Shiu-Hing Lo, *The Politics of Cross-Border Crime in Greater China, Case Studies of Mainland China, Hong Kong and Macao*, 47 (2009)

⁵²⁹ *Id.* 47-48.

⁵³⁰ *Id.*, 48.

difficulties in controlling this activity. From 1989 to 2002, the police confiscated only HK4.7 billion in property and successfully prosecuted 69 people by the accounting and legal sectors; from 1999 to August 2002, only 17 out of 25,202 cases were referred to the police by members of the two professions. The Organized Crime and Trade Bureau complained that the Anti-Money Laundering Legislation argued that the Legislative Council rejected attempts to revise the legislation twice within two years because it was concerned about whether the revised legislation would bring about justice.⁵³¹

Relaxation of the cross-border visitation police had the unintended consequence of facilitating cross-border money laundering. According to the PRC foreign exchange control policy, a mainland Chinese could only carry 6,000 yuan and US\$2,000 to the HKSAR in 2003. Yet Chinese customs found that from July 1 to August 19, 2003, there were 105 cases that violated the regulations; one case involved 15,415,000 yuan. Some individuals brought tens of thousands of renminbi into the HKSAR. At the same time, 1,072 mainlanders who returned to China from the HKSAR did not accurately report the goods they had bought, such as watches, mobile phones, and digital cameras, leading to penalties for tax evasion. Their penalties totaled 1,100,000 yuan. Although there was no evidence to prove that many mainlanders who carried an excessive amount of renminbi intended to launder money in the HKSAR, the high number of violations and the high monetary value involved naturally raised suspicions of money laundering. In one case, a mainland Chinese from Jiangxi carried 300,000 yuan in his briefcase which was discovered by the Chinese customs at the Lower border. Many mainland Chinese complained about the limited amount of cash they could bring into the HKSAR, prompting the PRC's Hong Kong and Macao Affairs Office to

⁵³¹ *Id.*

consider relaxing these limits. The irony was that a further relaxation would provide more opportunity for money laundering.⁵³²

In January 2004, the High Court in Hong Kong heard a landmark case involving six people charged with engaging a five-year scheme to launder HK\$3.2 billion over a 35-day period. Prosecutors said this was the biggest money laundering case in the world. A driver simply carried cash in plastic bags from Shenzhen to the HKSAR. He smuggled HK\$92 million across the border and then deposited the cash with a money changer. Members of the laundering syndicate allegedly hacked into the changer's Po Sang Bank account to transfer the money to 1,300 other bank accounts. According to the Po Sang Bank manager, its staff members are required to seek permission from superiors prior to the handling of transactions over HK\$200,000. A former senior manager of the Po Sang Bank, Lam Yiu-Chung, used his position to help the syndicate access the bank's suspense account – normally used to hold doubtful receipts temporarily until they are classified – so that the transactions could avoid detection. According to a witness who formerly worked in the Po Sang Bank, seven of 270 transactions in the bank's suspense account were “noncash”, or electronic.⁵³³

This court case illustrated how more Chinese brought a large amount of cash across the PRC border into Hong Kong, where money changers and bank managers with questionable integrity become useful channels for money laundering. In June 2006, Guangzhou customs acknowledged that from January to May, it found 39 cases of money laundering totaling 7.1 million yuan. In one case, a mainland woman carried HK\$820,000 in a handbag during her trip from the Guangzhou railway station to the HKSAR. Although the PRC government stipulates that an outbound mainlander can now carry a limit of 20,000 yuan and any inbound traveler has to report to the

⁵³² *Id.*

⁵³³ *Id.*, 49.

customs office in writing whether he or she has more than US\$50,000 in cash, many mainland Chinese have turned a deaf ear to these rules and participate in cross-border money laundering.⁵³⁴

Money laundering is multidirectional and involves various countries. In February 2004, a court case in the HKSAR revealed that a four-member family from Fujian province was involved in the transfer of HK\$2 billion within four years, during which time they laundered the proceeds collected by snakeheads from illegal Chinese immigrants in Europe and Australia. The family opened accounts in Australia and Britain. Because Australian law requires a report submitted to authorities on bank transactions over A\$10,000, the huge amount of money laundered through the five bank accounts in Australia alarmed law enforcement authorities. Members of the family deposited A\$1,410,000 to their bank account in Hong Kong separately in 117 transfers, in an attempt to evade a money laundering investigation. After confirming the deposits, the family transferred them to the PRC. Clearly, the HKSAR was a transit for money laundering.⁵³⁵

With more mainland Chinese visiting the HKSAR and buying apartments in the territory, the possibility of opening another channel for money laundering emerges. A real estate agency in the HKSAR conducted a survey of 2,684 Shenzhen residents, analyzing their intention to buy residential apartments in the HKSAR. According to survey finding, 9 percent of the respondents intended to buy apartments in the HKSAR, and 24 percent expressed their interest in conducting an on-site inspection of Hong Kong apartments. The real estate agencies in the HKSAR were keen to organize large-scale visits for mainlanders interested in buying Hong Kong apartments. In August 2003, a woman from Shanghai bought a luxurious apartment for HK\$17,420,000 through a video conference meeting with a Hong Kong real estate agency. However, the Estate Agents Authority requested that real estate agencies cooperate in the prevention of money laundering. In response, the Hong Kong real estate sector decelerated the process of organizing mainland visits to inspect and

⁵³⁴ *Id.*

⁵³⁵ *Id.*

buy Hong Kong apartments. Still, the property boom in Hong Kong from 2003 to 2008 provided tremendous opportunities for mainland Chinese to launder their money easily through the HKSAR property market.⁵³⁶

Cross-boundary money laundering has become much easier since the increase in mainlanders' visits to Macao after 2003. From January 2005 to April 2006, the Zhuhai police identified and disbanded underground banks that had holdings totaling 15.85 million yuan. Illegal money transfers between Macao and Zhuhai were of great concern, for many Zhuhai underground banks used travelers as a conduit for money laundering. As a result, Zhuhai's "monetary order and urban image" were affected. In one case, five mainland Chinese were arrested in a trading company in Gongbei as they planned to transfer 3 million yuan illegally to Macao. Another case involved a Taiwanese in cooperation with the Zhuhai Chinese. According to the Zhuhai police, there were two types of illicit underground banks: one involved local deposits and the other concerned remittance to Macao and elsewhere. The majority of the Zhuhai cases were of the latter type. The largest case of underground banking in Zhuhai took place in 2001, when a syndicate was found to handle illegal deposits and remittances worth 7.3 million.⁵³⁷

Some PRC officials launder their dirty money through Hong Kong. In March 2004, a court case in the HKSAR exposed the problem of mainland officials engaging in money laundering in Hong Kong through their close relatives. A party secretary in a mainland city had a monthly salary of only HK\$800, but his wife opened a Hong Kong account with deposits of HK\$4.76 million. Although his wife denied that she had brought the money from the mainland to Hong Kong, the case unveiled extensive money laundering by mainland officials in the enclave. The party secretary's wife applied to emigrate and claimed that her husband was a factory manager earning a monthly salary of C\$2,000. In another case, a business informant told the author that a mainland

⁵³⁶ *Id.*, 50.

⁵³⁷ *Id.*

factory manager often demanded that his Hong Kong business partner pay him by depositing money into a bank account in the HKSAR. It is difficult for the HKSAR government to detect money laundering by mainland officials in the territory, where the number of mainland visitors has risen sharply and where bank accounts of shell companies cannot be thoroughly screened.⁵³⁸

Due to the widespread phenomenon of money laundering in Guangdong and Fujian provinces, both Hong Kong and Macao are convenient locations for illegal money transfer and laundering. In China, it is believed that 60 percent of money has been laundered in the provinces of Guangdong and Zhejiang. As part of Guangdong, Hong Kong and Macao are also likely to be affected.⁵³⁹ In October 2003, a crime syndicate smuggled a 22-year-old Fujianese woman from China to Germany through Hong Kong. When the German authorities arrested her, she revealed that she had paid the crime syndicate 50,000 yuan. Holding a mainland Chinese passport with a Nigerian visa, she left Lowu for Hong Kong, where she was joined by four other mainland Chinese. She was supposed to fly from Hong Kong to Nigeria and then on to Germany using an HKSAR passport. She was arrested upon arrival in Frankfurt when German immigration agents found that her HKSAR passport was counterfeit. The revelation of her experience showed that the smuggling syndicate utilized *guanxi* to obtain the Nigerian visa and counterfeit Hong Kong passport.⁵⁴⁰

The kingpin behind the Chinese human smuggling operation was Cheng Chui-ping, also known as Big Sister Ping. She was wanted in the United States after the freighter Golden Venture ran aground off New York in 1993. The ship was found to have on-board 300 illegal Chinese migrants, 10 of whom were drowned when they tried to swim ashore. Cheng had smuggled hundreds of Chinese into the United States from 1984 to 1994, when the United States issued an arrest warrant for her and she fled to Hong Kong. The Hong Kong police caught her in April 2000.

⁵³⁸ *Id.*

⁵³⁹ *Id.*

⁵⁴⁰ *Id.*, 52.

HKSAR Chief Executive Tung Chee-Hwa signed an extradition order after Cheng had lost a court appeal to remain in Hong Kong. In March 2006, the U.S. Attorney for the Southern District of New York announced that Cheng had been sentenced to 35 years in prison for “her role in leading an international alien smuggling ring.” Cheng was charged with alien smuggling, money laundering, and trafficking in ransom proceeds.⁵⁴¹

Reported on June 5, 2015 by the Associated Press that after a four-year investigation by Italy's financial police, they discovered that more than 4.5 billion euros (\$4.9 billion) — the proceeds of counterfeiting, prostitution, labor exploitation and tax evasion — had been smuggled out of Italy to China in less than four years using a money transfer service. Nearly half that money was funneled through one of China's largest state banks, the Bank of China, which earned more than 758,000 euros in commissions on the transfers, according to Italian investigative documents obtained by The Associated Press. Italian officials said that when they tried to appeal to Chinese authorities for help, they got nowhere.⁵⁴²

Once the money left Italy, it vanished behind China's great legal firewall. Italian police had no way to track the flow of dirty money in China and no way to get the cash back to Italy's depleted state coffers. The Bank of China, which is now under investigation in Italy for money laundering, denied wrongdoing, saying it has always complied with Italian regulations.⁵⁴³

A great legal firewall separates China from the West, despite the deep economic ties - both licit and illicit - that bind them. A combination of inconsistent cooperation, incompatible legal systems and China's secrecy laws have allowed criminals to globalize more effectively than law enforcement — and made it harder for Western companies and courts to put them out of business. The legal firewall has also helped people who sell counterfeit goods use major, state-run Chinese

⁵⁴¹ *Id.*

⁵⁴² Erika Kinetz, The Associated Press, Money Laundering Investigation Stymied by China, Italy Says, New York Times (June 5, 2015)

⁵⁴³ *Id.*

banks as financial shelters on a significant scale, AP found in an article published. Counterfeiters have used the banks, including the Bank of China, to process credit card payments and move their money beyond the reach of U.S. law enforcement. But Western companies that have pursued Chinese counterfeiters in the U.S., where many counterfeit goods are sold, have been blocked by China's secrecy laws, which prohibit banks from freezing funds or releasing information on the order of a foreign court. The banks say they are caught in a jurisdictional dispute between the U.S. and China, which maintains that bank secrecy is a matter of national sovereignty.⁵⁴⁴

"Chinese financial institutions can effectively operate behind a firewall that keeps them largely immune from the jurisdiction of U.S. courts and regulatory agencies, leaving U.S. partners, competitors, and investors vulnerable," said a May report from the U.S.-China Economic and Security Review Commission, which advises Congress. The consequences of that legal firewall are becoming more palpable as Chinese businesses go global. Chinese companies have invested \$46 billion in the U.S. since 2000, most of it in the last five years, according to the Rhodium Group, a New York research firm. Chinese banks have expanded their reach, opening overseas branches and buying stakes in foreign banks. Chinese firms have voraciously tapped U.S. financial markets, with the 2014 IPO of e-commerce giant Alibaba ranked the largest in history.⁵⁴⁵

China, Leading Source of Illicit Financial Flows⁵⁴⁶

Over the period 2000 to 2011, cumulative illicit financial flows from China totaled a massive US\$3.79 trillion, if one were to exclude the country's intra-regional trade with Hong Kong and Macao. It was found that if adjustments for such trade were not made, the resulting outflows due to trade misinvoicing would be significantly understated due to trade data distortions. The sharp rise in illicit outflows, from US\$172.6 billion in 2000 to US\$602.9 billion in 2011, implied

⁵⁴⁴ *Id.*

⁵⁴⁵ *Id.*

⁵⁴⁶ Executive Summary, Illicit Financial Flows From China and The Role Of Trade Misinvoicing, Global Financial Integrity, Global Financial Integrity. Available at <http://www.chinadebate.com/illicit-financial-flows-from-china-and-the-role-of-trade-misinvoicing-global-financial-integrity/>

an increase of about 7.2 percent per year in inflation-adjusted terms, which was just below the 10.2 percent average rate of economic growth.⁵⁴⁷

While estimates are based on gross outflows, they do not differ much from the net of illicit inflows from outflows—a methodology with which we disagree with because there is no such thing as “net crime.” Nevertheless, even if illicit inflows are netted from illicit outflows, China still suffered net illicit outflows of US\$3.75 trillion over this period. One of the adverse effects of illicit flows from China has been a worsening of the country’s income inequality as the rich get richer through tax evasion (which comprises by far the major portion of such outflows) and through using the world’s shadow financial system to shelter and multiply their illicit wealth. Misinvoiced trade between Chinese companies and the United States increased from US\$48.8 billion in 2000 to US\$59.0 billion in 2011. The volume of trade misinvoicing between mainland China and the United States rose to US\$72.0 billion before the financial crisis of 2008, but has declined since then, probably as a result of lower growth in bilateral trade between the countries.⁵⁴⁸

The commodity groupings most susceptible to trade misinvoicing include UN Commodity Trade Statistics Database (COMTRADE) group 84 (nuclear reactors, boilers, machinery, etc.) and group 85, (electrical and electronic equipment), with the sub-group for electronic circuits (HS Code 854231) showing the largest cumulative illicit outflows (US\$84.1 billion). Trade misinvoicing related to the sub-group for mobile phones (HS Code 851712) increased at the fastest pace from 2007-2011. This is consistent with previous studies at GFI which indicate that the more specialized a product, the easier it is to misinvoice.⁵⁴⁹

⁵⁴⁷ *Id.*

⁵⁴⁸ *Id.*

⁵⁴⁹ *Id.*

Asia continues to be the region of the developing world with the greatest volume of illicit financial flows, comprising 40.3 percent of the world total over the ten years of this study. It is followed by Developing Europe at 21.0 percent, the Western Hemisphere at 19.9 percent, MENA (the Middle East and North Africa) at 10.8 percent, and Sub-Saharan Africa at 8.0 percent.⁵⁵⁰

MENA saw the largest percent increase in illicit outflows from 2003 to 2012, at 24.2 percent per annum. Sub-Saharan Africa followed at 13.2 percent with Developing Europe at 9.8 percent, Asia at 9.5 percent, and the Western Hemisphere at 3.5 percent.⁵⁵¹

Asia's regional total is driven by the People's Republic of China, the leading source of illicit financial flows from developing countries for nine of the ten years of this study. Similarly, Developing Europe's large share of global IFFs is primarily due to the Russian Federation, the number two country for nine of the ten years of the study, which briefly surpassed China in 2011 to become the world's top exporter of illicit capital before ceding this place back to China in 2012.⁵⁵²

Table 2. Real Illicit Financial Flows by Region

Table D: Real Illicit Financial Flows by Region, Growth Rate, 2003-2012
(in billions of constant U.S. dollars, base year 2010, or in percent)

Region	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	Cumulative	Average	Trend Rate of Growth	Percent of Total
Sub-Saharan Africa	16.2	25.6	44.9	57.3	71.7	71.5	80.1	58.0	59.9	62.7	547.8	54.8	13.2%	8.0%
Asia	175.5	210.4	216.8	225.7	243.2	256.6	285.6	368.1	341.3	433.0	2,756.2	275.6	9.5%	40.3%
Developing Europe	91.1	93.0	100.8	107.6	140.9	163.8	187.1	170.3	230.5	152.2	1,437.3	143.7	9.8%	21.0%
MENA	8.0	28.6	67.8	57.3	45.6	128.5	126.7	74.2	100.4	103.6	740.6	74.1	24.2%	10.8%
Western Hemisphere	107.0	122.1	143.6	115.9	133.6	152.7	120.0	151.4	158.0	154.3	1,358.6	135.9	3.5%	19.9%
All Developing Countries	397.8	479.7	573.9	563.8	635.0	773.1	799.5	821.9	890.1	905.8	6,840.5	684.1	9.4%	100.0%

⁵⁵⁰ Dev Kar and Joseph Spanjers, *Illicit Financial Flows from Developing Countries: 2003-2012*, December 2014

⁵⁵¹ *Id.*

⁵⁵² *Id.*

Table 3. Country Rankings by Largest Average Illicit Financial Flows

Table 2. Country Rankings by Largest Average Illicit Financial Flows, 2003-2012 (HMN + GER)
(in millions of U.S. dollars, nominal)

Rank	Country	Average IFF (where data is available)	Rank	Country	Average IFF (where data is available)
1	China, P.R.: Mainland	125,242	38	Azerbaijan, Republic of	2,285
2	Russian Federation	97,386	39	Ethiopia	2,206
3	Mexico	51,426	40	Lithuania	2,162
4	India	43,959	41	Togo	1,824
5	Malaysia	39,487	42	Ecuador	1,645
6	Saudi Arabia	30,862	43	Bahamas, The	1,634
7	Brazil	21,710	44	Equatorial Guinea	1,607
8	Indonesia	18,784	45	Hungary	1,576
9	Thailand	17,168	46	Algeria	1,575
10	Nigeria	15,746	47	Congo, Republic of	1,535
11	United Arab Emirates	13,530	48	Nicaragua	1,509
12	South Africa	12,214	49	Croatia	1,499
13	Iraq	11,137	50	Argentina	1,411
14	Costa Rica	9,403	51	Bangladesh	1,316
15	Philippines	9,349	52	Sudan	1,290
16	Belarus	8,453	53	Colombia	1,212
17	Poland	5,312	54	Dominican Republic	1,205
18	Panama	4,848	55	Guatemala	1,176
19	Serbia, Republic of	4,566	56	Qatar	1,152
20	Chile	4,564	57	Libya	1,078
21	Brunei Darussalam	4,299	58	Romania	1,034
22	Syrian Arab Republic	3,768	59	Morocco	998
23	Egypt	3,768	60	Liberia	982
24	Paraguay	3,697	61	Bahrain, Kingdom of	971
25	Venezuela, Republica Bolivariana de	3,677	62	Chad	930
26	Turkey	3,560	63	Peru	903
27	Honduras	3,294	64	Botswana	856
28	Trinidad and Tobago	3,210	65	Uruguay	846
29	Vietnam	2,805	66	El Salvador	788
30	Aruba	2,654	67	Cameroon	783
31	Zambia	2,597	68	Nepal	754
32	Kazakhstan	2,538	69	Armenia, Republic of	750
33	Bulgaria	2,535	70	Uganda	713
34	Latvia	2,490	71	Oman	699
35	Lebanon	2,462	72	Myanmar	682
36	Kuwait	2,460	73	Angola	631
37	Cote d'Ivoire	2,406			

The top five exporters of illicit capital over the past ten years on average are: China, Russia, Mexico, India, and Malaysia. Compared to GFI's estimates in Illicit Financial Flows from Developing Countries: 2002-2011, hereafter referred to as the 2013 IFF Update, these rankings have changed only slightly—India and Malaysia switched ranks in this report, with India moving up to the number four slot.⁵⁵³

⁵⁵³ *Id.*

This is due to a continuation of India's upward trend, which began in 2009, and Malaysia's downward trend that began in 2010. China registered a particularly large increase from 2011 (US\$162.8 billion) to 2012 (US\$249.6 billion). This is due primarily to its return to a trend of large and increasing HMN outflows that began in 2009 but dropped off precipitously in 2011.⁵⁵⁴

4.8. Conclusion

Chinese immigrants to the U.S. are not only the biggest Asian immigrant group, but also have one of the longest immigration histories to the U.S. Chinese immigrants have and continue to use many various visas to move to the U.S. They do in such numbers that create backlogs even for the EB-5 investor visa. This is a unique situation to them and potential immigrants need to be aware of such issues and plan accordingly. Furthermore, there are even backlogs for EB-3 applicants from China. Chinese immigrants may have to wait years before immigrating to the U.S. Nevertheless, that has not stopped many Chinese immigrants from making the U.S. their home. Many Chinese still see the U.S. as a way to leave their socialist government for a democratic system. They also see the U.S. as a way to escape the pollution that has recently invaded their homeland. Another important factor is the American education system. Many Chinese highly value education and see the U.S. as providing the best education in the world. These factors combine to show why Chinese immigrants are the biggest Asian group in the U.S.

⁵⁵⁴ *Id.*

Chapter 5 THE FILIPINO IMMIGRANT EXPERIENCE TO THE UNITED STATES

5.1. Introduction

The Philippine archipelago consists of some 7,100 islands and islets with a total land area of approximately 300,000 square kilometers. The islands are grouped into three geographic regions: Luzon, the largest island in the north covering an area of 141,395 square kilometers; the Visayas in the central region, covering an area of 55,606 square kilometers; and Mindanao in the south, covering an area of 101,999 square kilometers. Manila is the country's capital. The population of the Philippines as of 1 August 2007 was 88.6 million. The Republic of the Philippines is a constitutional Republic. The ratification of the new Constitution in 1987 restored a presidential form of government composed of three branches: executive, legislative and judicial.⁵⁵⁵

The Philippines is a lower-middle income country, with gross per capita income estimated at US\$3,730 in purchasing power parity (PPP) terms as of 2007 and characterized by a market-based economy. In 2007, real gross domestic product (GDP) growth was 7.2%. This was the strongest in the past three decades and exceeded the government's target of 6.1-6.7% per annum. Notwithstanding this performance, the economy continued to show persistent structural weaknesses—a low tax intake, high unemployment and under-employment, and rising poverty. A slowdown in real growth is forecast for 2008. The unemployment rate declined to 7.3% in 2007 from 8.0% in 2006, but is expected to rise again in 2008. Inflation averaged 2.8% in 2007.⁵⁵⁶

5.2. Filipino Diaspora

When Spain began its colonization of the Philippine Islands in 1565, it conscripted native Filipinos (Indios) to build Manila galleon ships which would ply the trade route from Manila to

⁵⁵⁵ Asia/Pacific Group on Money Laundering, Mutual Evaluation Report, Anti-Money Laundering and Combating the Financing of Terrorism, Republic of the Philippines, 16 (8 July 2009)

⁵⁵⁶ *Id.*

Acapulco and to also serve as sailors on those ships. Once in Acapulco, many of the Filipino mariners chose not to return to Manila but instead to work on other ships that traveled to Spain and other ports in Europe. In an 1892 editorial in *La Solidaridad* published in Barcelona, Spain, Editor Graciano Lopez Jaena noted the large presence of Filipino mariner communities in cities throughout Europe and as well as in Philadelphia, New York and New Orleans in the U.S. ⁵⁵⁷

Filipinos who jumped ship in New Orleans set up Filipino settlements in the marshlands of Barataria Bay, Louisiana — pioneering the dried-shrimp industry in the US — which became the subject of Lafcadio Hearn’s 1883 article published in *Harper’s Weekly* entitled “The Mahogany-Colored Manilamen of Louisiana.” After the Philippines was annexed by the U.S. in 1901, starting from 1906 through 1925, more than 125,000 Filipino workers were brought to the U.S. by the Hawaiian Sugar Planters Association to work on the sugar cane fields of Hawaii and then brought to the mainland to work on other crops in the farm valleys of the U.S. ⁵⁵⁸

After WW II, and through the ‘50s and ‘60s, tens of thousands of Filipinos were recruited to work on U.S. Navy ships as stewards. After the liberalization of U.S. immigration laws in 1965, at least 50,000 Filipino professionals and petitioned relatives of immigrants annually migrated to the U.S. Much later, after martial law was declared in the Philippines in 1972, Filipinos were encouraged to work abroad, especially in the Middle East, in order to remit their salaries back to the Philippines to prop up the fragile economy. A new term entered the Philippine vocabulary – first, Overseas Contract Workers (OCWs) and then later, Overseas Filipino Workers (OFWs). ⁵⁵⁹

Today, the Philippines ranks as the third largest migration sending country in the world. As of December 2008, an estimated 9 million Filipinos live and work abroad, which is about 10 % of the population. According to the Office of the Undersecretary for Migrant Workers' Affairs, 1.4

⁵⁵⁷ *Id.*

⁵⁵⁸ *Id.*

⁵⁵⁹ *Id.*

million Filipinos were deployed overseas in 2008, i.e., more than 3,700 Filipinos left the country every day. In addition, the distribution of migrants is very wide: today, a Filipino can be found in over 200 countries around the world. The occupational profile of Filipino migrants is very diverse and ranges across all skill levels.⁵⁶⁰ However, the areas of sea-faring, nursing and domestic work can be distinguished as particular ‘Filipino’ niches. Of the three categories of Filipino migrants, the most numerous are the temporary migrants, followed by permanent migrants, and migrants in an irregular situation as the smallest group.⁵⁶¹

The top ten destination countries and territories for Overseas Filipino Workers in 2008 were: Saudi Arabia, United Arab Emirates, Qatar, Hong Kong, Singapore, Kuwait, Taiwan, Italy, Canada and Bahrain. Filipinos who have obtained permanent residency status recorded highest in the US, Canada, Japan, Germany, United Kingdom and Australia.⁵⁶² Overseas Filipino workers are considered to be the “new heroes” in the country. Special celebrations are taking place in their honor, like the Filipino Migrants Workers Day on 7 June, the Month of Overseas Filipinos in December and the National Migrants’ Sunday on the first Sunday of Lent. At the airports there are special lines for OFWs and huge billboards greet them on their return to their home country. The Presidential Awards for Filipino Individuals and Organizations Overseas is a biennial award conferred on Filipino individuals and organizations that contribute to Philippine development or promote the interests of Filipino communities overseas. It is also given to Filipinos overseas who have distinguished themselves in their professions.⁵⁶³

⁵⁶⁰ Migration Profile, Philippines, European Union External Action, 6 (September 2009)

⁵⁶¹ *Id.*

⁵⁶² *Id.*

⁵⁶³ *Id.*

5.3. Why do Filipinos Migrate?

The employment of land-based and sea-based workers has been on an upward trend since the 1970s. There are various reasons for this trend, including the increasing demand for migrant workers worldwide, higher salaries and better living standards abroad and some countries' preference for Filipinos (for reasons of language, professionalism, religion, good reputation etc.).

There are also internal factors to the Philippines that maintain the large flows of emigration. These can be divided into three main areas: persisting economic push factors, the institutionalization of migration and the development of a 'culture of migration' in the Philippines. From the 1970s, the Philippines has moved from one economic crisis to another. In the 1970s, it was the oil crisis; in the 1980s the economic downturn towards the end of the Marcos years, and in the 1990s and beyond, the economic crisis in Asia and political instability stalled economic growth. In short, the political and economic environment has not been conducive to investments, critical for generating economic growth and employment. The challenge of generating jobs is especially daunting given the demographic profile of the Philippines, aggravated by the inequality in wealth distribution and the high poverty incidence. In the absence of sustainable development, these push factors continue to exert pressure on the country, families and individuals to pursue overseas employment. Due to lack of economic opportunities in the Philippines, the temporary work abroad has become more or less permanent, and is a de facto source of employment for many Filipinos, and many labor migrants extend their stay abroad for as long as it is possible. The failure of economic and sustainable development, which pushes people to emigrate, is the same cause that keeps migrant workers from returning to the Philippines for good.

In another study, labor flows in the Philippines has been determined mainly by three factors:⁵⁶⁴

1. Rapid Population Growth has been a large contributing factor in labor migration. Rapid population growth, which was one of the highest in the world during the 70s-90s, has caused urban growth problems such as overcrowding, traffic congestion, the emergence of squatter areas and slums and ultimately unemployment. This has led to migrant workers from the countryside exploring outside of the country.
2. Uneven population distribution in the urbanized areas of the country and its other regions has caused socio-economic imbalance. This socioeconomic imbalance or disparities has been seen to have caused the augmentation of the macroeconomic policies rendering it favorable for the urbanized areas and giving much more attention to the industrial sector than the agricultural sector on the other regions of the country. Trade policies have also been seen to be highly biased on the rural development favoring industrial centers like the Metro Manila.
3. Poor labor absorptive capacity of the country's economy has been a contributing factor for the magnitude of labor migration outside the country. This draws back to the rapid growth of the population outpacing the growth of the country thus causing further unemployment.

5.4. The Institutionalization of Migration

The Philippines' success in securing a niche in the global labor market did not happen by chance. The role of the state in steering the country onto this path is critical. The Labor Code of 1974 served as a template for the program, but over the years many innovations have been introduced resulting in a de facto 'institutionalization' of migration. To date, the Philippines has perhaps the most extensive institutional and legal framework governing the migration of its people.

⁵⁶⁴ Graziano Battistella & Anthony Paganoni (Eds.), Philippine Labor Migration: Impact and Policy, Scalabrini Migration Center, (1992), <http://trove.nla.gov.au/work/22732879?selectedversion=NBD9631418>

There is a plethora of separate government agencies involved with migration management and a legal framework governs this area.

However, the picture is far from perfect. There are obvious gaps between policy and legislation and implementation. The comprehensive program aimed at protecting migrants at all stages of the process, from pre-departure to onsite to return and reintegration is hampered by the lack of resources to implement the provisions effectively. A particular area in need of improvement is reintegration.

5.5. The “Culture” of Migration

After more than 30 years of large-scale migration, Filipinos have become a people who have grown 'used' to mobility, and studies show that more than 30% of the population is considering leaving for another country. Beside the government's role in encouraging migration, other institutions in Philippine society are also playing a supporting role in the migration of Filipinos. There are over 1,000 licensed recruitment agencies for land-based workers, and another 300 agencies dealing particularly with seafarers. Despite the oversight system in place, the illegal practices of both authorized and unauthorized recruitment agencies are a serious concern and are putting the migrants and their families in very vulnerable situations. In addition, the educational system is highly responsive to the demands of the global labor market, offering curricula and programs promising to produce trained workers in short time. In this “leave” oriented environment, it remains a challenge to convince people that a good life can be possible at home.

Filipinos abroad are primarily classified into three groups when pertaining to their immigration status. This classification is what an inter-agency government group is using when determining annual stock estimates of the Filipino presence abroad (in Commission on Filipinos Overseas, 2006):

1. Permanent migrants – These refer to Filipino migrants and legal permanent residents abroad. Permanent migrants may be Filipinos who are Filipino citizens, who are Philippine passport holders, or who have been naturalized citizens in the host country. Popular labels to these kinds of migrants are “immigrants” and “emigrants”;
2. Temporary migrants – These refer to Filipinos whose stay overseas, while regular and properly documented, is temporary. This is owed to the employment-related nature of their status in the host country. Temporary migrants include contract workers, intra-company transferees, students, trainees, entrepreneurs, businessmen, traders, and others whose stay abroad is six months or more, as well as their accompanying. These migrants are popularly referred to as “overseas contract workers (OCWs)” or “overseas Filipino workers (OFWs)”;
- and
3. Irregular migrants – These are migrants whose stay abroad is not properly documented. They also do not have valid residence and work permits; they can also be overstaying workers or tourists in a foreign country. Migrants falling into this category shall have been in such status for six months or more. A nondiscriminatory label for these migrants is “undocumented migrants”. In Filipino international migration parlance, these migrants are called “TNTs” (Tago Ng Tago or always in hiding).⁵⁶⁵

5.6. Anti-Money Laundering Issues

While a developed financial system – including banks and non-bank financial intermediaries – the Philippines still significantly relies on cash-based transactions. According to World Bank estimates, as of 2007 the estimated share of the adult population with access to an account with a financial intermediary was 26%. One local financial service provider estimated that about 80% of the population is currently either de-banked or unbanked. It is thus not rare to see customers

⁵⁶⁵ Jeremiaah M. Opiniano, Statistics on Filipinos’ International Migration: Issues and Steps Towards Harmonizing the Data, 10th National Convention on Statistics, (October 1-2, 2007)

engaging in significant transactions (e.g. the purchase of a real estate property or other high value items) in cash. ⁵⁶⁶

The domestic financial system exhibited resilience in the face of international market turbulence. With the exception of a handful of banks, the banking system as a whole was mildly affected given their small holdings of sub-prime linked securities (0.2% of total assets according to the BSP). ⁵⁶⁷ Corruption in the Philippines remains a serious challenge. In the last two years, the country's Corruption Perception Index (CPI) score 8 dropped from 2.5 in 2006 to 2.3 in 2008. The Philippines currently holds the 141st position in the CPI global ranking (out of 180), having lost 20 positions since 2006. ⁵⁶⁸

Since 2000, the Philippines has been among 11 nations placed under financial sanctions by the Paris-based Financial Action Task Force (FATF) – the international anti-money laundering watchdog – a group of 29 industrialized countries that coalesced to curb money laundering in Asia. Being placed under sanctions made financial transactions difficult and increased the cost of remittances and trade. Offshore banks refused transactions from the Philippines. With the urging of FATF, the Philippine Congress passed in 2003 the Anti-Money Laundering Law (AMLA), which effectively lifted the sanctions and granted the Central Bank the authority to monitor deposits without the need for a court order. The stiff half-century Philippine bank secrecy law, which required judicial approval for inspecting accounts, had been a sticking point with the FATF. Now all banks would be required to report suspicious accounts to the Central Bank. Suspicious accounts are monies realized from predicate crimes, which include kidnapping, illegal drugs, hijacking,

⁵⁶⁶ Supra note 1, 17

⁵⁶⁷ *Id.*

⁵⁶⁸ *Id.*, 18-19

murder, terrorist activities, graft and corruption, smuggling, and illegal trafficking of women and children.⁵⁶⁹

Even before it was prodded by the FATF,⁵⁷⁰ the Philippines had shown its commitment to enact the AMLA when the government became a signatory to three international accords—the 1988 Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substance, the 1998 United Nations Political Declaration and Action Plan against Money Laundering, and the 1988 United Nations Convention against Transnational Organized Crime. As a signatory to those multilateral agreements, the government was mandated to enact an anti-money laundering law. Over the years, Congress had been trying to enact the law. For instance, in the Tenth and Eleventh Congresses, Congressman Raul Gonzales filed the so-called Rico bill; it was approved in the House but did not prosper in the Senate. The anti-money laundering bill filed by the late Senator Robert Barbers in the Senate did not prosper beyond the committee level. The failure of the legislature to take decisive action, despite the existence of a political obligation due to the international agreements, seems to suggest that the legislators saw no urgency in having an anti-money laundering law. The legislative body was lukewarm because the mandate obligates, but does not penalize noncompliance. Thus, there was little incentive for the legislators to prioritize the law over other bills.⁵⁷¹

The attitude of the legislators was shared by the executive branch. The Aquino, Ramos, Estrada, and Arroyo administrations were apparently half-hearted in pushing the law. No definite advisory came from the Office of the President declaring the urgency of such a measure. The

⁵⁶⁹ Antonio R. Guillermo, *Historical Dictionary of the Philippines*, 290 (2012)

⁵⁷⁰ FATF now has 34 member jurisdiction (i.e., Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Denmark, Finland, France, Germany, Greece, Hong Kong, Iceland, India, Ireland, Italy, Japan, Kingdom of Netherlands, Luxembourg, Mexico, New Zealand, Norway, Portugal, Republic of Korea, Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States) and two regional organizations (i.e., the European Commission and Gulf Cooperation Council)

⁵⁷¹ Bing Baltazar C. Brillo, PhD, *The Financial Action Task Force and the AMLA of the Philippines: Dynamics between Veto Players and a NonVeto Player in Policymaking*, *Banwa Social Science Journal*, Vol. 7, No. 1, 49 (2011)

Department of Foreign Affairs (DFA), which handles the correspondence of the government with international organizations, appeared not to see the necessity, as it did not bother to inform Congress of the discussions with the FATF. Furthermore, before the Eleventh Congress adjourned, it had a special session, but its agenda did not include the anti-money laundering bill. Two bank-related laws—the revision of the General Banking Act and the amendments to the Bangko Sentral Act—were acted upon, yet the Bangko Sentral ng Pilipinas (BSP) never brought up the concern of the FATF.⁵⁷²

The initial effort to enact an anti-money laundering law began only when President Arroyo made a commitment to the FATF in May 2001 that she would certify to the newly elected Twelfth Congress the urgency of passing the said law (FATF-GAFI, 2001). The formal efforts commenced in the executive department when the Inter-Agency Committee composed of the Department of Justice (DOJ), Department of Finance (DOF), Securities and Exchange Commission (SEC), and the BSP was formed. The Inter-Agency Committee conducted preliminary hearings where key stakeholders (such as the Banking Association of the Philippines [BAP], enforcers such as the National Bureau of Investigation [NBI], the Philippine National Police [PNP], and legal experts from the University of the Philippines Law Center) were invited. The hearings resulted in the executive version of the anti-money laundering law. As chairman of the Inter-Agency Committee, Justice Undersecretary Jose Calida asserted that the draft was not only a product of careful deliberations and consultations with the stakeholders, but it was also patterned after the anti-money laundering laws of other countries.⁵⁷³

According to BSP Governor Rafael Buenaventura, the anti-money laundering law must address five principal criteria to comply with the standards set by the FATF. First, make money laundering activity a criminal offence which will make it a crime, per se. Second, a reporting system

⁵⁷² *Id.*

⁵⁷³ *Id.*, 49-50

must be put in place so that covered individuals or institutions are required to make reports on unusual transactions. Third, an implementing agency must be created. Fourth, an exception must be made to the Bank Deposit Secrecy Law (Republic Act 1405), which makes it difficult to look into suspicious accounts (as the 1993 Banko Sentral Act removed from the Monetary Board the authority to look into suspicious accounts without a court order or a waiver from the depositor). Fifth, there must be a commitment to provide for international cooperation, particularly reciprocal exchange of information with foreign countries and institutions.⁵⁷⁴

The formal efforts in the legislative branch commenced when the Senate and the House of Representatives conducted parallel committee hearings. In the House, the hearings were handled jointly by the Committee on Banks and Financial Intermediaries as the lead committee, headed by Congressman Jaime Lopez, and the Committee on Justice and the Committee on Economic Affairs. In the Senate, the hearings were conducted jointly by the Committee on Banks, Financial Institutions, and Currencies, chaired by Senator Ramon Magsaysay, and the Committee on Justice and Human Rights, chaired by Senator Francis Pangilinan. The hearings commenced on 22 August in the House and on 29 August in the Senate, 39 and 32 days, respectively, before the 30 September 2001 deadline of the FATF.⁵⁷⁵

The posturing among lawmakers against the FATF demand weakened when they became cognizant of the implications of the NCCT list as well as the possible additional countermeasures if the law was not passed before the deadline. Being in the NCCT list meant that financial transactions involving the Philippines would be examined more closely by the international financial community. The lack of an anti-money laundering law would mean that financial transactions relating to the country would be deemed suspicious. Other countries, particularly the FATF

⁵⁷⁴ *Id.*, 50

⁵⁷⁵ *Id.*

members, in turn, would inquire, investigate, and verify transactions emanating from the Philippines. Those actions would result in delays and additional costs.⁵⁷⁶

Other powerful interest groups, such as the Overseas Filipino Workers (OFW), Trade Union Congress of the Philippines, and the Makati Business Club also intensified the pressure on the lawmakers by consistently feeding media with press releases and newspaper advertisements in support of the immediate enactment of the anti-money laundering law throughout the process. The news articles, columns, and advertisements served as a propaganda tool which painted the lawmakers as sluggish in performing their function and hinted that their procrastination put the entire country at risk of sanctions. Moreover, amid fears that the FATF sanctions would hit the OFWs the hardest, unconventional tactics were also employed. According to Executive Director Noel Josue, the members of Kaibigan ng OFWs (Kaibigan), other OFW groups here and overseas bombarded the mobile phones and websites of each opposing senator and his staff daily with hate messages. The messages included warnings that the OFW groups would remember the names of the senators and that OFWs and their families would not vote for them in the elections (Nocum and Contreras, 2003).⁵⁷⁷

Finally, to curb money laundering, the Philippine government enacted Republic Act (R.A.) No. 9160 (The Anti-Money Laundering Act of 2001), which took effect on 17 October 2001. Certain provisions of AMLA were amended by R.A. No. 9194 (An Act Amending R.A. 9160) effective 23 March 2003. It was further amended by RA 10167 which took effect on June 2, 2012 and the latest amendment is RA 10375 effective 15 February 2013. It has also issued the Revised Implementing Rules and Regulations (RIRR) implementing R.A. No. 9160, as amended.⁵⁷⁸

⁵⁷⁶ *Id.*, 52

⁵⁷⁷ *Id.*, 53

⁵⁷⁸ Official Gazette of the Republic of the Philippines, (February 21, 2012)

Thus, on 11 February 2005, the Cook Islands, Indonesia and the Philippines were removed from the list of Non-Cooperative Countries and Territories (NCCTs). Recent FATF visits to these countries confirmed that they are effectively implementing anti-money laundering (AML) measures to remedy deficiencies which were identified by the FATF. The Cook Islands, Indonesia, and the Philippines have AML systems that include strict customer identification, suspicious transaction reporting, bank examinations, and legal capacities to investigate and prosecute money laundering. All three countries have developed financial intelligence units (FIUs)-specialized units that analyze financial data, coordinate national efforts, and facilitate international co-operation. The FATF will now monitor the implementation of these measures in the three countries to ensure that they sustain their recent commitments and progress. The current NCCT list includes Myanmar, Nauru, and Nigeria.⁵⁷⁹

As defined by RA 9160, further amended by RA 10365, money laundering is committed by any person who, knowing that any monetary instrument or property represents, involves, or relates to the proceeds of any unlawful activity:

1. transacts said monetary instrument or property;
2. converts, transfers, disposes of, moves, acquires, possesses or uses said monetary instrument or property;
3. conceals or disguises the true nature, source, location, disposition, movement or ownership of or rights with respect to said monetary instrument or property;
4. attempts or conspires to commit money laundering offenses referred to in paragraphs (a), (b) or (c);
5. aids, abets, assists in or counsels the commission of the money laundering offenses referred to in paragraphs (a), (b) or (c) above; and

⁵⁷⁹ Bangko Sentral ng Pilipinas, Key Prudential Regulations, Anti-Money Laundering, (2010), http://www.bsp.gov.ph/regulations/key_aml.asp

6. performs or fails to perform any act as a result of which he facilitates the offense of money laundering referred to in paragraphs (a), (b) or (c) above.

Money laundering is also committed by any covered person who, knowing that a covered or suspicious transaction⁵⁸⁰ is required under this Act to be reported to the Anti-Money Laundering Council (AMLC), fails to do so.⁵⁸¹

The Salient features of the law are as follows:

1. It criminalizes money laundering, meaning it makes money laundering a crime, and provides penalties for its commission, including hefty fines and imprisonment;
2. It states clearly the determination of the government to prevent the Philippines from becoming a haven for money laundering, while ensuring to preserve the integrity and confidentiality of good bank accounts;
3. It creates an Anti-Money Laundering Council (AMLC) that is tasked to oversee the implementation of the law and to act as a financial intelligence unit to receive and analyze covered and suspicious transaction reports;
4. It establishes the rules and the administration process for the prevention, detection and prosecution of money laundering activities;
5. It relaxes the bank deposit secrecy laws authorizing the AMLC and the Bangko Sentral ng Pilipinas access to deposit and investment accounts in specific circumstances;
6. It requires covered institutions to report covered and suspicious transactions and to cooperate with the government in prosecuting offenders. It also requires them to know their customers and to safely keep all records of their transactions;

⁵⁸⁰ Any act establishing any right or obligation or giving rise to any contractual or legal relationship between the parties thereto. It also includes any movement of funds by any means with a covered institution.

⁵⁸¹ Anti-Money Laundering Act of 2001, as amended by RA 10365, Section 4

7. It carries provisions to protect innocent parties by providing penalties for causing the disclosure to the public of confidential information contained in the covered and suspicious transactions; and
8. It establishes procedures for international cooperation and assistance in the apprehension and prosecution of money laundering suspects.⁵⁸²

Principles and Policies to Combat Money Laundering:

1. Conduct business in conformity with high ethical standards in order to protect its safety and soundness as well as the integrity of the national banking and financial system;
2. Know sufficiently your customer at all times and ensure that the financially or socially disadvantaged are not denied access to financial services while at the same time prevent suspicious individuals or entities from opening or maintaining an account or transacting with the covered institution by himself/herself or otherwise;
3. Adopt and effectively implement a sound AML and terrorist financing risk management system that identifies, assesses, monitors and controls risks associated with money laundering and terrorist financing;
4. Comply fully with this part and existing laws aimed at combating money laundering and terrorist financing by making sure that officers and employees are aware of their respective responsibilities and carry them out in accordance with superior and principled culture of compliance; and
5. Fully cooperate with Anti-Money Laundering Council (AMLC) for the effective implementation and enforcement of the AMLA, as amended, and its RIRR.⁵⁸³

The term ‘covered persons’ shall exclude lawyers and accountants acting as independent legal professionals in relation to information concerning their clients or where disclosure of

⁵⁸² *Id.*

⁵⁸³ Bangko Sentral ng Pilipinas (BSP) Circular No. 706, Updated Anti-Money Laundering Rules and Regulations, 05 January 2011

information would compromise client confidences or the attorney-client relationship: Provided, That these lawyers and accountants are authorized to practice in the Philippines and shall continue to be subject to the provisions of their respective codes of conduct and/or professional responsibility or any of its amendments.⁵⁸⁴

The threshold amount for a single covered transaction (cash or other equivalent monetary instrument) was lowered from P4M to P500,000.00 within one (1) banking day. It expands the reporting requirements to include the reporting of suspicious transactions regardless of the amount involved; authorizes AMLC to inquire into or examine any particular deposit or investment, with any banking institution or non-bank financial institution and their subsidiaries and affiliates upon order of any competent court in cases of violation of this Act, when it has been established that there is probable cause that the deposits or investments are related to an unlawful activity. However, no court order is required in cases involving unlawful activities of kidnapping for ransom, narcotics offenses and hijacking, destructive arson and murder, including those perpetrated by terrorists against non-combatant persons and similar targets; authorizes the Bangko Sentral ng Pilipinas to inquire into or examine any deposit or investment with any banking institution or non-bank financial institution and their subsidiaries and affiliates when the examination is made in the course of a periodic or special examination, in accordance with the rules of examination of the BSP to ensure compliance with R.A. No. 9160, as amended; and transfers the authority to freeze any money/property from the AMLC to the Court of Appeals.

Notably, the provisions of R.A. 9160, as amended, and its Implementing Rules and Regulations (IRR) shall not apply to deposits, investments, and all other accounts of customers with covered institutions that were opened or created prior to the effectivity of R.A. 9160 on 17 October 2001. Hence, no covered transaction reports, investigation and prosecution of money

⁵⁸⁴ Supra note 30, Section 3 (a)

laundering cases, or any other action authorized under the R.A. 9160, may be undertaken with respect to such deposits, investments and accounts as well as transactions or circumstances in relation thereto, which have been completed prior to 17 October 2001. Notwithstanding, the R.A. 9160 and its Implementing Rules and Regulations shall apply to all movements of funds respecting such deposits, investments and accounts as well as transactions or circumstances in relation thereto, that are initiated or commenced on or after 17 October 2001.⁵⁸⁵

R.A. 9160, otherwise known as the Anti-Money Laundering Act of 2001, was promulgated primarily to allow the examination of bank accounts suspected to be sourced from illegal activities but which otherwise are protected from examination or freezing under existing laws on secrecy of bank deposits. Other laws pertinent to the study are R.A. 1405, otherwise known as An Act Prohibiting Disclosure of or Inquiry into Deposits with any Banking Institution and providing penalty therefor, which was promulgated forty-six years ago to encourage people to deposit their money in banking institutions and to discourage private hoarding so that these private funds may be properly utilized to assist in the economic development of the country. Under this law, all deposits of whatever natures which are deposited with banks or banking institutions are considered as of an absolutely confidential nature.

Examination of the account is allowed only by way of exception in four (4) cases:

1. upon written permission of the depositor;
 2. in cases of impeachment;
 3. upon order of a competent court in cases of bribery or dereliction of duty of public officials;
- or
4. in cases where the money deposited is the subject matter of the litigation.

⁵⁸⁵ Section 5(a), Rules and Regulations Implementing the Anti-Money Laundering Act of 2001

Similarly, R.A. 6426, otherwise known as An Act Instituting Foreign Currency Deposit System in the Philippines, and for Other Purposes, which was promulgated on April 4, 1972, extended the veil of absolute confidentiality and immunity from examination to foreign currency deposits with authorized Philippines banks and banking institutions.

5.7. Transfer of Funds

Funds transfers are remittances of funds from one bank to another, either locally or internationally, in local or foreign currencies. It is used for moving the proceeds of loans, reimbursing letters of credit, payment of collections, foreign exchange transactions, etc. This may also include the movement of money between customers or between accounts of the same customer, or from a customer to a third party who is not a customer of the bank. Transfers can be effected by teletransmission, draft, manager's check, or certified check depending on the request of the applicant. The term also includes Automated Clearing House transfers, transfers made at automated teller machines, and point-of-sale terminals.⁵⁸⁶

On the withdrawability and transferability of deposits, there shall be no restrictions on the withdrawal by the depositor of his deposit or on the transfer of the same abroad, except those arising from the contract between the depositor and the bank.⁵⁸⁷ However, there shall be strict adherence to BSP regulations on fund transfers in cases where clients use the electronic banking services to transfer funds. The electronic banking service shall not be used for money laundering or other illegal activities that will undermine the confidence of the public.⁵⁸⁸

The bank should maintain a policies and procedures manual for funds transfers that are reasonably designed to prevent the financial institution from being used to facilitate money

⁵⁸⁶ Bangko Sentral ng Pilipinas (BSP) Circular No. 436, Minimum Guidelines For Fund Transfers, Annex "A" (2004)

⁵⁸⁷ Manual of Regulations for Banks, Section 82

⁵⁸⁸ Conditions for Monetary Board approval, Manual of Regulations for Banks

laundering and the financing of terrorist activities. At a minimum, the manual must incorporate policies, procedures and internal controls to:

1. Verify customer information (KYC);
2. Verify transactions that show indicators of suspicious transactions, particularly those instances stated under Rule 3.b1 of the Revised Implementing Rules and Regulations (R.A. No. 9160, as amended by R.A. No. 9194);
3. File reports (including covered transaction/suspicious transactions reports);
4. Respond to regulators/law enforcement requests;
5. Provide education and/or training of personnel; and
6. Provide security procedures.

The bank should not accept funds transfer instruction from and/or pay-out funds transfers to non-customers, unless in cases where the initiating party is an authenticated primary customer of a sending group or unit of the bank. If the fund sender/remitter is not a bank or coming from non-FATF member or non-compliant countries on AML, the receiving bank must do the due diligence on the beneficiary of the fund. Whenever possible, manually initiated funds transfer instructions should not be the primary delivery method. Every effort should be made to provide the client with an electronic banking solution.

Because of the risk associated with dealing with fund/wire transfers, where a covered institution may unknowingly transmit proceeds of unlawful activities or funds intended to finance terrorist activities, it shall establish policies and procedures designed to prevent it from being utilized for that purpose which shall include, but not limited to, the following:

The beneficiary institution shall not accept instructions to pay-out fund transfers to non-customer beneficiary, unless it has conducted the necessary customer due diligence to establish the true and full identity and existence of said beneficiary. Should the originator and beneficiary be

the same person, the beneficiary institution may rely on the customer due diligence conducted by the originating institution provided the rules on third party reliance under Subsec. X806.2. e.1 are met, treating the originating institution as third party as therein defined.

The originating institution shall not accept instructions to fund/wire transfer from a non-customer originator, unless it has conducted the necessary customer due diligence to establish the true and full identity and existence of said originator. In cross border transfers, if the originator is a high risk customer as herein described, the beneficiary institution shall conduct enhanced due diligence on the beneficiary and the originator. Where additional information cannot be obtained, or any information or document provided is false or falsified, or result of the validation process is unsatisfactory, the beneficiary institution shall refuse to effect the fund/wire transfer or the pay-out of funds without prejudice to the reporting of a suspicious transaction to the AMLC when circumstances warrant.

Whenever possible, manually initiated fund transfer (MIFT) instructions should not be the primary delivery method. Every effort shall be made to provide client with an electronic banking solution. However, where MIFT is utilized, the existing rules on validation procedures as prescribed by Circular No. 436 dated 18 June 2004 shall apply.

Cross border and domestic fund/wire transfers and related message amounting to P50,000 or more or its equivalent shall include accurate and meaningful originator information. The following are the originator information that shall remain with the transfer or related message through the payment chain:

1. Name of the originator;
2. Address or in its absence the national identity number or date and place of birth of the originator; and

3. Account number of the originator or in its absence, a unique reference number must be included.⁵⁸⁹
4. Should any wire transfer amounting to P50,000 or more or its equivalent be unaccompanied by the required originator information, the beneficiary institution shall exert all efforts to establish the true and full identity and existence of the originator by requiring additional information from the originating institution or intermediary institution. It shall likewise apply enhanced due diligence to establish the true and full identity and existence of the beneficiary. Where additional information cannot be obtained, or any information or document provided is false or falsified, or result of the validation process is unsatisfactory, the beneficiary institution shall refuse to effect the fund/wire transfer or the pay-out of funds without prejudice to the reporting of a suspicious transaction to the AMLC when circumstances warrant.⁵⁹⁰

Subject to prior approval of the BSP, loans and other credit accommodations covered by a legally effective credit risk transfer arrangement such as guarantee, letter of indemnity, standby letter of credit or credit derivative, may be excluded from the total credit commitment of the bank to a borrower in reckoning compliance with the SBL. Notably, Section 4.2 of the Manual of Regulations on Foreign Exchange Transactions of the Bangko Sentral ng Pilipinas (BSP) provides, as to foreign currency, that any person, who brings into or takes out of the Philippines foreign currency, as well as other foreign currency-denominated bearer monetary instruments, in excess of USD10,000 or its equivalent, is required to declare the same in writing and to furnish information on the source and purpose of the transport of such currency or monetary instrument (Annex K). As used herein, “other foreign currency-denominated bearer monetary instruments” shall refer to

⁵⁸⁹ The implementation of the originator information requirement is deferred for one (1) year, or until 26 July 2012 (M-2011-049 dated 07 September 2011)

⁵⁹⁰ Supra note 33

the following foreign exchange-denominated instruments in bearer form whereby title thereto passes to another by endorsement, assignment or delivery: travelers' checks, other checks, drafts, notes, money orders, bonds, deposit certificates, securities, commercial papers, trust certificates, custodial receipts, deposit substitute instruments, trading orders, transaction tickets and confirmation of sale/investment.”⁵⁹¹

5.8. Rules on Foreign Investments⁵⁹²

Pursuant to the Rule on Foreign Investments of the Bangko Sentral ng Pilipinas (BSP), residents of the Philippines are free to invest abroad without restriction for investments not funded by foreign exchange purchased from Authorized Agent Banks (AABs)⁵⁹³ and/or AAB-foreign exchange from AABs and/or AAB-foreign exchange corporations for investments abroad up to US\$60 million⁵⁹⁴ or its equivalent, an investor a year, or a fund a year for qualified investors. However, purchases to fund outward investments exceeding the limit require BSP approval. Residents may also purchase foreign exchange from Foreign Exchange Deposits (FXDs) and Money Changers (MCs) for outward investments, including investments in bonds or note of the Philippines and other Philippine entities requiring settlement in foreign currency regardless of the amount, provided such purchases are supported by documents prescribed under existing regulations. Residents may also purchase foreign exchange from AABs and/or AAB-foreign exchange corporations without BSP approval for investments in bond/notes of the Philippines or other Philippine resident entities requiring settlement in foreign currency, provided such purchases when

⁵⁹¹ As amended by Circular No. 794 dated 18 April 2013

⁵⁹² Bangko Sentral ng Pilipinas, Key Prudential Regulations, Rules on Foreign Investments, (2010), http://www.bsp.gov.ph/regulations/key_foreigninv.asp

⁵⁹³ AABs shall refer to all categories of banks [except Offshore Banking Units (OBUs)] duly licensed by the BSP. It is understood that each category of bank should function within the operational parameters defined by existing laws/regulations for the specific bank category to which they respectively belong

⁵⁹⁴ previously, US\$30 million

aggregated with the aforementioned outward investments do not exceed US\$60 million an investor a year.⁵⁹⁵

5.9. Source of Funds Problems

Indications are that the majority of illicit funds are obtained through crimes committed within the Philippines, but there is also evidence of foreign persons transferring the proceeds derived from crimes committed overseas to the Philippines to conceal the funds.⁵⁹⁶ According to local authorities, criminals use a range of techniques to launder money in the Philippines. Generally, money launderers use the services offered by mainstream retail banking. To a much lesser extent, the securities and insurance sectors are also exploited. Money laundering in the Philippines is thus predominantly carried out using the regulated financial sector, particularly through the use of false identities and false names in bank accounts facilitated by forged documents, as well as through domestic and international funds transfers.⁵⁹⁷

A small number of cases involving the use of money changers and foreign currency dealers have also been reported. In addition, cash smuggling into and out of the Philippines has been an ongoing practice for decades. The latest case involved the seizure by the Bureau of Customs (BOC) of 19 Million Yen (US\$180,402) from two Japanese arriving at the international airport, who failed to disclose that they were carrying such large amounts of currency. Similarly, three top PNP officials recently failed to declare EUR105,000 while traveling on a business trip abroad.⁵⁹⁸

R.A. 9160 remains not perfect, as any other law. The second part of the report titled “Money Laundering and Financial Crimes” said legislation pending in the Philippine Senate seeks to address other deficiencies by expanding the definition of a money laundering offense according to standards specified by international conventions to which the Philippines is a party, and expanding the lists of

⁵⁹⁵ Supra note 42

⁵⁹⁶ Asia/Pacific Group of Money Laundering, Mutual Evaluation Report Anti-Money Laundering and Combating the Financing of Terrorism, the Philippines (July 8, 2009)

⁵⁹⁷ *Id.*

⁵⁹⁸ *Id.*

covered institutions and predicate crimes. “There is no single supervisory authority responsible for entities in the non-profit sector; coordination is insufficient. Monitoring is weak due to insufficient coordination and resources of non-profit organization regulatory bodies,” the report said. It said the Philippines should pass the pending bill on anti-money laundering.⁵⁹⁹

In addition, the country should seek to include casinos in the proposed list of covered institutions. Casinos currently are not covered under the Anti-Money Laundering Act (AMLA), and the laws surrounding online gaming are even less clear. In 2011, gaming generated \$1.3 billion and the revenue streams will expand further with a large, new casino slated to open soon in Manila. The Philippine Amusement and Gaming Corp., a fully owned government entity, regulates the gaming industry. Remittances sent to the Philippines by its large expatriate community also provide a channel for money laundering. However, banks and money remitters are now able to capture the bulk of remittances, approximately 80-90 percent, sent by overseas foreign workers to the Philippines. Further stated, “Corruption is a source of laundered funds, and smuggling, particularly bulk cash smuggling, is a major problem,” the report said.⁶⁰⁰

Governance issues and corruption in particular tend to be a major driver of illicit flows. Le and Rishi find that there is a significant link between corruption and capital flight, based on the World Bank Residual method adjusted for trade misinvoicing.⁶⁰¹ The Philippines has statutes ensuring the stability of its financial system, including the secrecy of bank deposits. Foreign countries have similar statutes for that purpose. Corrupt Philippine officials have taken advantage of these domestic and foreign laws to conceal, protect, and spirit away their ill-gotten wealth, and later launder the proceeds through seemingly legitimate investments. The identification, seizure and confiscation, transfer, and disposition of the ill-gotten wealth in favor of the Philippine Government

⁵⁹⁹ Pia Lee-Brago, Phl monitoring vs money laundering weak – US, The Philippine Star, (June 2, 2013), <http://www.philstar.com/headlines/2013/06/02/949157/phl-monitoring-vs-money-laundering-weak-us-report>

⁶⁰⁰ *Id.*

⁶⁰¹ Quan V. Le and Meenakshi Rishi, “Corruption and Capital Flight: An Empirical Assessment,” International Economic Journal 20(4), 2006

demand international cooperation, especially from the competent law enforcement and judicial authorities where this ill-gotten wealth are located. Bilateral treaties provide an effective legal framework as to the mechanics for this cooperation.⁶⁰²

The passage of an anti-money laundering law by the Philippines has boosted the anti-corruption initiatives of the Office of the Ombudsman in its domestic investigations and prosecution. Further, the ratification and implementation of bilateral and regional MLATs⁶⁰³ would ensure the placement of mechanisms to detect, trace, seize, confiscate, transfer, forfeit, and dispose, in favor of the Philippine Government, wealth unlawfully accumulated by its corrupt officials. Finally, to ensure a successful and sustained anti-corruption campaign that would cut through international borders, the competencies of Philippine anti-corruption investigators and lawyers must be upgraded to equip them with the knowledge and legal skills to use the various MLATs and other treaties vis-à-vis the anti-corruption and anti-money laundering laws of other states.⁶⁰⁴

In an international study conducted by the Washington-based research and advisory group Global Financial Integrity (GFI) and released on December 2014, the Philippines is the 15th largest exporter of illicit money among developing and emerging economies as of 2012.⁶⁰⁵

⁶⁰² Simeon Marcelo, Ombudsman of the Republic of the Philippines, Denying safe havens through judicial cooperation: The experience of the Philippines

⁶⁰³ Mutual Legal Assistance Treaty (MLAT). The main objective of these MLATs is to improve the cooperative efforts of the Philippines and the other states to effectively prevent, investigate, and prosecute crimes, including those relating to corruption in the public sector.

⁶⁰⁴ *Id.*

⁶⁰⁵ Dev Kar and Joseph Spanjers, Illicit Financial Flows from Developing Countries: 2003-2012, December 2014, Global Financial Integrity

Table 4. Country Rankings by Largest Average Illicit Financial Flows

Table 2. Country Rankings by Largest Average Illicit Financial Flows, 2003-2012 (HMN + GER)
(in millions of U.S. dollars, nominal)

Rank	Country	Average IFF (where data is available)	Rank	Country	Average IFF (where data is available)
1	China, P.R.: Mainland	125,242	38	Azerbaijan, Republic of	2,285
2	Russian Federation	97,386	39	Ethiopia	2,206
3	Mexico	51,426	40	Lithuania	2,162
4	India	43,959	41	Togo	1,824
5	Malaysia	39,487	42	Ecuador	1,645
6	Saudi Arabia	30,862	43	Bahamas, The	1,634
7	Brazil	21,710	44	Equatorial Guinea	1,607
8	Indonesia	18,784	45	Hungary	1,576
9	Thailand	17,168	46	Algeria	1,575
10	Nigeria	15,746	47	Congo, Republic of	1,535
11	United Arab Emirates	13,530	48	Nicaragua	1,509
12	South Africa	12,214	49	Croatia	1,499
13	Iraq	11,137	50	Argentina	1,411
14	Costa Rica	9,403	51	Bangladesh	1,316
15	Philippines	9,349	52	Sudan	1,290
16	Belarus	8,453	53	Colombia	1,212
17	Poland	5,312	54	Dominican Republic	1,205
18	Panama	4,848	55	Guatemala	1,176
19	Serbia, Republic of	4,566	56	Qatar	1,152
20	Chile	4,564	57	Libya	1,078
21	Brunei Darussalam	4,299	58	Romania	1,034
22	Syrian Arab Republic	3,768	59	Morocco	998
23	Egypt	3,768	60	Liberia	982
24	Paraguay	3,697	61	Bahrain, Kingdom of	971
25	Venezuela, Republica Bolivariana de	3,677	62	Chad	930
26	Turkey	3,560	63	Peru	903
27	Honduras	3,294	64	Botswana	856
28	Trinidad and Tobago	3,210	65	Uruguay	846
29	Vietnam	2,805	66	El Salvador	788
30	Aruba	2,654	67	Cameroon	783
31	Zambia	2,597	68	Nepal	754
32	Kazakhstan	2,538	69	Armenia, Republic of	750
33	Bulgaria	2,535	70	Uganda	713
34	Latvia	2,490	71	Oman	699
35	Lebanon	2,462	72	Myanmar	682
36	Kuwait	2,460	73	Angola	631
37	Cote d'Ivoire	2,406			

The ranking reflects a portion of the corruption, money laundering, and false trade documentation in the Southeast Asian country of nearly 100 million, over 20% of whom are estimated to be poor, according to government data. Over \$9.16 billion in dirty money came out of the Philippines in 2012 – an amount that reportedly facilitated crime, corruption, and tax evasion, said (GFI). The study showed that a total of \$93.49 billion or an average of \$9.35 billion yearly from 2003 to 2012 illegally streamed out of the country, depriving the economy of funds which could have been used to combat poverty and boost growth. The amount of funds drained from the

Philippine economy is projected to be larger than reported, as some forms of illicit financial flows that are "typically intended to be hidden" are "difficult to estimate with precision," the study showed.

606

In a separate study on the illicit financial flows to and from the Philippines, GFI Chief Economist Dev Kar concluded that the unrecorded capital flows are generated through the deliberate misinvoicing of external trade and through balance of payment leakages. The estimates of illicit flows presented in this study support the findings of past researchers such as Boyce and Zarsky (1988), Beja (2005), and others that undervaluation and smuggling of imports is a widespread practice in the Philippines. In comparison, illicit outflows through export under-invoicing, rather than import over-invoicing, is the predominant method of transferring illicit capital from the country.⁶⁰⁷

5.10. Bank History

During the Spanish colonization, around the 16th century, the first organized credit institutions, known as Obras Pias, were established in the Philippines. Their capital came from pious Catholics and the profits were intended to maintain hospitals, orphanages and other charitable works. The Obras Pias served as commercial banks and marine insurance companies with the bulk of the funds invested in the galleon trade.⁶⁰⁸ By the end of the Spanish regime, the banks in existence were: El Banco Espanol Filipino de Isabel,⁶⁰⁹ which was given the sole mandate under a Spanish Royal Decree of 1854 to issue banknotes called pesos Fuertes; the Chartered Bank of India,

⁶⁰⁶ Rappler, PH 15th largest exporter of dirty money in developing world, (December 16, 2014), <http://www.rappler.com/nation/78145-ph-export-illicit-money-developing-world>

⁶⁰⁷ Dev Kar and Brian LeBlanc, Illicit Financial Flows to and from the Philippines: A Study in Dynamic Simulation, 1960-2011, *Global Financial Integrity*, 17 (February 2014)

⁶⁰⁸ Thomas Benjamin B. Marcelo, *Foreign Banks in the Philippines, Perspectives from Bangko Sentral ng Pilipinas; Money and Banking in the Philippines*, 404 (2003)

⁶⁰⁹ Presently the Bank of Philippine Islands, which was granted a Charter in 1828 and commenced operations in 1851

a branch of the HSBC; the Monte de Piedad; and the Banco Peninsular Ultramarino de Madrid. During this period, there was no significant Filipino interest, initiative or capital in banking.⁶¹⁰

In 1901, the American Bank was the first to open its branch, but was placed under receivership by the Insular Treasurer for making doubtful loans after only four (4) years of operation. At the turn of the 20th century, Guaranty Trust Corporation (GTC) and International Banking Corporation (IBC) were similarly established by the Americans. In 1918, the Manila branch of the Yokohama Specie Bank was given a license to do business in the Philippines. In 1919, 1920 and 1930, foreign bank branches of the Asia Baking Corporation, the Chinese-American Bank of Commerce of Peking, China and the National City Bank of New York opened, respectively.⁶¹¹

During the Second World War, only Filipino-owned and Japanese banks were allowed to operate. The Chartered Bank of India, Australia and China, the HSBC and the National City Bank of New York were all treated as enemy properties and placed under liquidation by the Japanese Military Government. Meanwhile, the Nampo Kaihatsu Kinko opened a Manila branch in 1942 and acted as the Japanese Government's fiscal agent in the Philippines.⁶¹² After liberation, every domestic bank which operated during the Japanese occupation was unable to reopen since the greater part of their assets consisted of worthless Japanese war notes, bonds and obligations of the Japanese-sponsored Republic and balances with Japanese banks. The then President of the Philippines likewise issued Executive Order No. 96 invalidating all Japanese occupation deposits.⁶¹³

In June 1945, Executive Order No. 48 paved the way for the reopening of some banks. The first license to open was granted to the National City Bank of New York in June 1945. In the same year, other foreign banks, namely, Chartered Bank of India, Australia and China, HSBC, and

⁶¹⁰ Bankers Association of the Philippines, History of Banking in the Philippines, Banking in the Philippines (1957)

⁶¹¹ Thomas Benjamin B. Marcelo, Foreign Banks in the Philippines, Perspective from Bangko Sentral ng Pilipinas, Money Banking in the Philippines 405 (2003)

⁶¹² Supra note 61

⁶¹³ *Id.*

Nederlandsche Indische Handelsbanks, were similarly granted the license to reopen. In 1947, a branch of the Bank of America, NT & SA (Bank of America) of San Francisco, California, U.S.A., was allowed to establish a branch in Manila. Afterwards, in 1950, Bank of America absorbed the assets and liabilities of the local branch of the Nederlandsche Indische Handelsbanks.⁶¹⁴ In 1949, when the Central Bank of the Philippines started operation, the banking system then consisted of seven (7) commercial banks, three (3) thrift banks, the sole government specialized bank, the Agricultural and Industrial Bank, and seven (7) foreign bank branches.⁶¹⁵

5.11. Bank System and Structure

Banks refer to entities engaged in the lending of funds obtained in the form of deposits. They are moneyed institutes founded to facilitate the borrowing, lending and safekeeping of money and to deal in notes, bills of exchange, and credits.⁶¹⁶ The terms “bank” and “banking institution” are synonymous and interchangeable.

The Philippine banking structure consists of the government-owned Central Bank of the Philippines (created in 1949), which acts as the government's fiscal agent and administers the monetary and banking system; and some 45 commercial banks, of which 17 are foreign-majority-owned. Other institutions include more than 111 thrift banks, 787 rural banks, 38 private development banks, 7 savings banks, and 10 investment houses, and two specialized government banks. The largest commercial bank, the Philippine National Bank (PNB), is a government institution with over 194 local offices and 12 overseas branches. It supplies about half the commercial credit, basically as agricultural loans. The government operates about 1,145 postal savings banks and the Development Bank of the Philippines, the Land Bank of the Philippines, and

⁶¹⁴ *Id.*

⁶¹⁵ Amando M. Tetangco, Jr., Money and Banking in the Philippine Setting, Perspective from Bangko Sentral ng Pilipinas, Money and Banking in the Philippines, 107 (2003)

⁶¹⁶ Republic of the Philippines vs. Security Credit & Acceptance Corporation, G.R. No. L-20583, January 23, 1967 (19 SCRA 58)

the Philippine Amanah Bank (for Mindanao). There are also 13 offshore banking units in the country, and 26 foreign bank representative offices. Total assets reached approximately \$65 billion in March 2001, 39% of which belonged to the five largest banks. The International Monetary Fund reports that in 2001, currency and demand deposits—an aggregate commonly known as M1—were equal to \$7.7 billion. In that same year, M2—an aggregate equal to M1 plus savings deposits, small time deposits, and money market mutual funds— was \$41.9 billion. The discount rate, the interest rate at which the central bank lends to financial institutions in the short term, was 8.298%.

Republic Act No. 8791, otherwise known as the General Banking Law of 2000, defines “banks” as “entities engaged in the lending of funds obtained in the form of deposits.”⁶¹⁷ Banks are 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 No. 73S3 (hereafter the “Rural Banks Act”); e) Cooperative banks, as defined in Republic Act No 6938 (hereafter the “Cooperative Code”); f) Islamic banks as defined in Republic Act 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 Bangko Sentral ng Pilipinas.⁶¹⁸

The operations and activities of banks shall be subject to supervision of the Bangko Sentral. “Supervision” shall include the following:

1. The issuance of rules of, conduct or the establishment 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;

⁶¹⁷ RA 8791, General Banking Law of 2000, Section 3.1

⁶¹⁸ *Id.*, Section 3.2

2. The conduct of examination to determine compliance with laws and regulations if the circumstances so warrant as determined by the Monetary Board;
3. Overseeing to ascertain that laws and regulations are complied with;
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;
5. Inquiring into the solvency and liquidity of the institution (2-D); or
6. Enforcing prompt corrective action. (n)
7. The Bangko Sentral shall also have supervision over the operations of and exercise regulatory powers over quasi-banks⁶¹⁹, trust entities and other financial institutions which under special laws are subject to Bangko Sentral supervision.

As to the management of banking institutions, Section 16 of the General Banking Law of 2000 adopts the “Fit and Proper Rule”, and states as follows:

“To maintain the quality of bank management and afford better protection to depositors and the public in general the Monetary Board shall prescribe, pass upon and review the qualifications and disqualifications of individuals elected or appointed bank directors or officers and disqualify those found unfit.

After due notice to the board of directors of the bank, the Monetary Board may disqualify, suspend or remove any bank director or officer who commits or omits an act which render him unfit for the position. In determining whether an individual is fit and proper to hold the position of a

⁶¹⁹ For the purposes of RA 8791, “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 re-lending or purchasing of receivables and other obligations. (2-Da)

director or officer of a bank, regard shall be given to his integrity, experience, education, training, and competence.”

The operation and regular activity of the bank depends on its classification:

A universal bank shall have the authority to exercise, in addition to the powers authorized for a commercial bank in Section 29, the powers of an investment house as provided in existing laws and the power to invest in non-allied enterprises as provided in this Act.⁶²⁰ A commercial bank shall have, in addition to the general powers incident to corporations, all such powers as may be necessary to carry on the business of commercial banking such as accepting drafts and issuing letters of credit; discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; accepting or creating demand deposits; receiving other types of deposits and deposit substitutes; buying and selling foreign exchange and gold or silver bullion; acquiring marketable bonds and other debt securities; and extending credit, subject to such rules as the Monetary Board may promulgate. These rules may include the determination of bonds and other debt securities eligible for investment, the maturities and aggregate amount of such investment.⁶²¹

In addition to the operations specifically authorized in the General Banking Law of 2000, a bank may perform the following services:

1. Receive in custody funds, documents and valuable objects;
2. Act as financial agent and buy and sell, by order of and for the account of their customers, shares, evidences of indebtedness and all types of securities;
3. Make collections and payments for the account of others and perform such other services for their customers as are not incompatible with banking business;
4. Upon prior approval of the Monetary Board, act as managing agent, adviser, consultant or administrator of investment management/advisory/consultancy accounts; and

⁶²⁰ Supra note 70, Section 23

⁶²¹ Supra note 70, Section 29

5. Rent out safety deposit boxes.

Thrift banks are 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, otherwise known as the “Thrift Banks Act”. Thrift banks shall include savings and mortgage banks, private development banks, and stock savings and loans associations organized under existing laws, and any banking corporation that may be organized for the following purposes:

1. Accumulating the savings of depositors and investing them, together with capital loans secured by bonds, mortgages in real estate and insured improvements thereon, chattel mortgage, bonds and other forms of security or in loans for personal or household finance, whether secured or unsecured, or in financing for homebuilding and home development; in readily marketable and debt securities; in commercial papers and accounts receivables, drafts, bills of exchange, acceptances or notes arising out of commercial transactions; and in such other investments and loans which the Monetary Board may determine as necessary in the furtherance of national economic objectives;
2. Providing short-term working capital, medium-and long-term financing, to businesses engaged in agriculture, services, industry and housing; and
3. Providing diversified financial and allied services for its chosen market and constituencies specially for small and medium enterprises and individuals.⁶²²

Rural Banks, on the other hand, are governed by Republic Act No. 7353, otherwise known as the “Rural Act of 1992,” which provides that “The State hereby recognizes the need to promote comprehensive rural development with the end in view of attaining equitable distribution of opportunities, income and wealth; a sustained increase in the amount of goods and services produced by the nation of the benefit of the people; and in expanding productivity as a key raising

⁶²² RA 9601, Thrift Banks Act of 1995, Section 3

the quality of life for all, especially the underprivileged. Towards these ends, the State hereby encourages and assists in the establishment of rural banking system designed to make needed credit available and readily accessible in the rural areas on reasonable terms.”⁶²³

Cooperative Banks are governed by Republic Act No. 6938, otherwise known as the “Cooperative Code of the Philippines.” As defined in this code, a cooperative is a duly registered association of persons, with a common bond of interest, who have voluntarily joined together to achieve a lawful common social or economic end, making equitable contributions to the capital required and accepting a fair share of the risks and benefits of the undertaking in accordance with universally accepted cooperative principles.⁶²⁴ Lastly, the Islamic banks was created by Republic Act No. 6848, otherwise known as the "Charter of Al Amanah Islamic Investment Bank of the Philippines," which shall be hereinafter called the Islamic Bank. Its principal domicile and place of business shall be in Zamboanga City. It may establish branches, agencies or other offices at such places in the Philippines or abroad subject to the laws, rules and regulations of the Central Bank.⁶²⁵

The banking industry is impressed with public interest; The fiduciary nature of banking, previously imposed by case law, is now enshrined in Republic Act No. 8791 or the General Banking Law of 2000 – Section 2 thereof specifically says that the State recognizes the fiduciary nature of banking which requires high standards of integrity and performance.⁶²⁶

Section 2 of R.A. No. 8791 provides:

“Sec. 2. Declaration of Policy. – The State recognizes the vital role of banks in providing an environment conducive to the sustained development of the national economy and the fiduciary nature of banking that requires high standards of integrity and performance. In furtherance thereof, the State shall promote and maintain a stable and efficient banking and

⁶²³ RA 7353, Rural Act of 1992, Section 2

⁶²⁴ RA 6938, Cooperative Code of the Philippines, Article 3

⁶²⁵ RA 6848, Charter of Al Amanah Islamic Investment Bank of the Philippines, Section 2

⁶²⁶ Bank of the Philippine Islands vs. Lifetime Marketing Corporation, 555 SCRA 373

financial system that is globally competitive, dynamic and responsive to the demands of a developing country.”

The degree of diligence required of banks is more than that of a reasonable man or a good father of a family; In view of the fiduciary nature of their relationship with their depositors, banks are duty-bound to treat the accounts of their clients with the highest degree of care.⁶²⁷

5.12. Current Laws of Large Transfers

Any person, who brings into or takes out of the Philippines foreign currency, as well as other foreign currency-denominated bearer monetary instruments,⁶²⁸ in excess of USD\$10,000 or its equivalent is required to declare the same in writing and to furnish information on the source and purpose of the transport of such currency or monetary instrument.⁶²⁹ Pursuant to Republic Act No. 6426, as amended, all foreign currency deposits are declared as and considered of an absolutely confidential nature and, except upon the written permission of the depositor, in no instance shall 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.⁶³⁰

The absolutely confidential nature of foreign currency deposits under Republic Act No. 6426, as amended, shall not apply in instances expressly provided under other special laws, including the following:⁶³¹

1. Directors, officers, stockholders, and related interests who contract a loan or any form of financial accommodation from their bank or related bank, and are required to execute a

⁶²⁷ Philippine Savings Bank vs. Chowking Food Corporation, 557 SCRA 318

⁶²⁸ “other foreign currency-denominated bearer monetary instruments” shall refer to the following foreign exchange -denominated instruments in bearer form whereby title thereto passes to another by endorsement, assignment or delivery: travelers’ checks, other checks, drafts, notes, money orders, bonds, deposit certificates, securities, commercial papers, trust certificates, custodial receipts, deposit substitute instruments, trading orders, transaction tickets and confirmation of sale/investment.

⁶²⁹ Manual of Foreign Exchange Transactions, Bangko Sentral ng Pilipinas, as amended by Circular No. 794 dated 18 April 2013, Section 4.2

⁶³⁰ Supra note 82, Section 76

⁶³¹ *Id.*

written waiver of secrecy of deposits of whatever nature in all banks in the Philippines, in accordance with Section 26 of Republic Act No. 7653 (New Central Bank Act);

2. A covered institution that reports foreign currency deposits in covered transaction reports or suspicious transaction reports to the Anti-Money Laundering Council (AMLC), pursuant to Section 9(c) of Republic Act No. 9160, as amended (The Anti-Money Laundering Act of 2001);
3. Upon order by the Court of Appeals, the AMLC may inquire into or examine foreign currency deposits, including related accounts, with any banking institution or non-bank financial institution in cases of violation of Republic Act No. 9160, as amended, when it has been established that the foreign currency deposits, including the related accounts involved, are related to an unlawful activity as defined in Section 3(i) of Republic Act No. 9160 or a money laundering offense defined under Section 4 thereof, pursuant to Section 11 of Republic Act No. 9160, as amended by Republic Act No. 10167;
4. Without need of court order, the AMLC may inquire into or examine foreign currency deposits with any banking institution or non-bank financial institution when probable cause exists that a particular foreign currency deposit, including related accounts involved, with any banking institution or non-bank financial institution is related to:
 - a. Section 3(i)(1), (2) and (12) of Republic Act No. 9160, as amended, (i.e., kidnapping for ransom, violation of Republic Act No. 9165 or the Comprehensive Dangerous Drugs Act, hijacking and other violations under Republic Act No. 6235, destructive arson and murder as defined under the Revised Penal Code, including those perpetrated by terrorists against noncombatant persons and similar targets);

- b. Felonies and offenses of a nature similar to those mentioned in Section 3(i)(1), (2) and (12) of Republic Act No. 9160, as amended, which are punishable under the penal laws of other countries; and
- c. Terrorism and conspiracy to commit terrorism as defined and penalized under Republic Act No. 9372 (Human Security Act of 2007).

The inquiry into or examination of foreign currency deposits by the AMLC in the above said instances are in accordance with Section 11 of Republic Act No. 9160, as amended by Republic Act No. 10167.⁶³²

Without a court order, the Anti-Money Laundering Council is authorized to inquire into or examine foreign currency deposits with any banking institution or non-bank financial institution and their subsidiaries and affiliates, for purposes of investigating any property or funds that are in any way related to financing of terrorism or acts of terrorism, as well as property or funds of any person or persons in relation to whom there is probable cause to believe that such person or persons are committing or attempting or conspiring to commit, or participating in or facilitating the financing of terrorism or acts of terrorism as defined in Republic Act No. 10168 (Terrorism Financing Prevention and Suppression Act of 2012), pursuant to Section 10 of said law.⁶³³

Additionally, the Commission on Audit, pursuant to its mandate under Section 2(1) Article IX-D of the 1987 Constitution, is authorized to examine and audit government deposits or funds and properties, owned or held in trust by, or pertaining to the Government or any of its subdivisions, agencies or instrumentalities, subdivisions, government-owned and-controlled corporations with original charters. The Presidential Commission on Good Government, in accordance with its statutory authority under Section 3(e), Executive Order No. 1, S. 1986, in the conduct of its investigations to recover ill-gotten wealth, may issue subpoena requiring the production of books,

⁶³² *Id.*

⁶³³ *Id.*

records, and other statement of accounts and other documents.⁶³⁴ There shall be no restrictions on the withdrawal by the depositor of his deposit or on the transfer of the same abroad, except those arising from the contract between the depositor and the bank.⁶³⁵

5.13. Drug Production and Trafficking

The picture in the Philippines is dominated by crystal methamphetamine (locally referred to as “shabu”): the country is a significant producer, transit point and consumer country of the drug. The Philippines continues to have the world’s highest estimated annual methamphetamine prevalence rate (6%). Several seizures of clandestine laboratories and chemical warehouses, (accounting for 8.4 metric tons of shabu over the 2000-2006 period) placed the country 5th on a global basis. Drug manufacture is managed by transnational organized crime syndicates together with local drug groups, smuggling chemicals into the country via mislabeled shipments and setting up laboratories first in the Metro Manila area, and later, as a result of enforcement actions, in other regions.⁶³⁶

As an indication of the potential amount of proceeds involved, the price of a tablet of shabu as of 2005 was USD\$22.6 on a retail basis, and USD\$21.7 on a wholesale (1,000 tablets) basis. Overall, illegal drugs, controlled substances, essential chemicals and laboratory equipment valued at more than PHP34.5 billion (US\$734 m) were seized/confiscated by the Philippine Drug Enforcement Agency (PDEA) from 2004 to 2007.⁶³⁷ As of 15 May 2008, the PDEA had filed a total of 95,762 illegal drug-related cases of which 6,226 had resulted in conviction. The number of dismissed cases totaled 4,902 while 2,008 cases were provisionally dismissed. A total of 5,430 cases resulted in acquittal. The AMLC had filed cases for forfeiture of assets amounting to

⁶³⁴ *Id.*

⁶³⁵ *Supra* note 82, Section 78

⁶³⁶ *Id.*, 21-22

⁶³⁷ *Id.*, 22

PHP73,256,452.22 – approximately US\$ 1.5 m - in the names of suspected illegal drug traffickers.

638

5.14. Investment Scams/Fraud

Investment scams in the form of pyramid and ponzi schemes are often used to prey on Philippine citizens and investors. In the Philippines, fraud is generally referred to as estafa. The Philippine form of ponzi or pyramid scheme is called “networking” or “pseudo-deposit-taking activities” or “high yield investment programs” which involves the recruitment of agents/investors upon which the recruiter earns a commission even though there is no underlying product being sold. The swindle consists of the misrepresentation that the activity to solicit the so-called “investment” has been duly authorized by the SEC, when in fact, it has not.⁶³⁹

In 2007, for example, a scam was perpetrated targeting the more affluent members of society. When the scheme collapsed, the principal suspect fled the country with proceeds estimated around US\$200 million. In coordination with the regulatory authorities and law enforcement agencies, 27 people allegedly involved in the scam were arrested and charged with syndicated estafa. The AMLC was able to obtain a freeze on the bank deposits of the suspects. Thereafter, the AMLC secured an Asset Preservation Order from the court to prevent the suspects’ bank deposits from being withdrawn. Forfeiture proceedings against these deposits are currently pending. At the moment, there are two criminal complaints for money laundering predicated on investment frauds pending before the Department of Justice (DOJ), and one before court. The assessment team was also informed of attempts by at least one known individual involved in investment frauds, to engage in investments in insurance products, and then later disinvest demanding to be paid in cash.⁶⁴⁰

⁶³⁸ *Id.*

⁶³⁹ *Id.*

⁶⁴⁰ *Id.*

5.15. Corruption/Graft

Corruption through bribery and embezzlement are thought to be the source of significant illegal proceeds within the Philippines. As already stated, corruption in revenue-generating agencies is taking a particularly heavy toll on the local economy. The Presidential Anti-Graft Commission (PAGC) has handled multiple corruption cases related to presidential appointees in the last four years.⁶⁴¹

Table 5. Predicate Crime Statistics Before PAGC, 2004-2007

YEAR	Total No. of Cases Resolved	Affirmed PAGC Cases with Non-Punitive Recommendation	PAGC Cases with OP Decision imposing penalties			
			Dismissal	Suspension	Reprimand	Accessory Penalties
2004	112	94	4	0	1	0
2005	25	16	1	0	0	0
2006	92	57	9	5	1	1
2007	112	57	11	5	3	0
TOTAL	341	224	25	10	5	1

Money laundering has aroused interest because of the impeachment trial of CJ Corona and, coincidentally, the threat of an international financial blacklisting if the Philippines does not enact into law amendments to its Anti-Money Laundering Act to suit international standards.⁶⁴²

There is an observation that the Philippine Anti-Money Laundering Law is severely restrictive and not compliant with international standards and best practices. This observation is obviously referring to the impeachment trial of CJ Corona and the prosecution's request that his alleged dollar accounts in the Philippine Savings Bank be opened for public scrutiny. The allegation is that since Corona's official Statement of Assets and Liabilities did not include any dollar deposits, then there is basis for assuming he misrepresented his SALN.⁶⁴³

⁶⁴¹ *Id.*, 22-23

⁶⁴² Dr. Efren S. Cruz, Corona, Money Laundering, Business World Online, (March 12, 2012), <http://www.bworldonline.com/content.php?section=9&title=Corona,-money-laundering&id=48257>

⁶⁴³ *Id.*

The public is aware that the Philippine Savings Bank refused to disclose the dollar accounts citing a bank secrecy law for foreign currency deposits. The Philippine Supreme Court then issued a TRO on the Senate's order to PS Bank to reveal the contents of the Corona secret dollar account. The senator-judges decided to comply with the Supreme Court decision by a vote of 13 senators in favor of not opening the secret dollar accounts and 10 in favor of requiring the PS Bank to open the dollar accounts. However, observers believe that this bank secrecy law encourages money laundering. The other question is why peso accounts can be publicly disclosed while foreign currency accounts are shielded. There have also been a lot of questions raised on whether CJ Corona can be accused of money laundering for withdrawing over P30 million in deposit accounts in his name from the Philippine Savings Bank on December 12 last year, which was the very day he was impeached by the House of Representatives. This has aroused the general public's curiosity about this practice. Money laundering refers to the process of concealing the source of illegally obtained money. The methods by which money can be laundered are very varied. But one has to first understand the motive for this illegal practice. The goal of a large number of criminal acts is to generate a profit for the individual or groups which commit the crime. However, in order to enjoy these profits, criminals must disguise their illegal origins.⁶⁴⁴

Huge amounts of proceeds can result from activities of organized crime in activities like illegal arms sale, drug trafficking, smuggling, prostitution rings and child trafficking. Other activities like embezzlement, insider trading and computer fraud schemes can also lead to big profits. Then there are the profits made from corrupt practices, specifically bribery and tax evasion. When substantial profits are made from these illicit practices, the individual or group must find a way to control and spend the funds without attracting attention to the underlying activity or to the

⁶⁴⁴ *Id.*

perpetrators of the crime. The way to "legitimize" these ill-gotten gains is through money laundering. Money is normally laundered in three steps or stages, as follows: ⁶⁴⁵

- The first step is through "**placement**" which means introducing the money into the financial system either through a secret bank account or an offshore bank.
- The second is "**layering**" or trying to camouflage the illegal source. The launderer normally engages in a series of conversions or movements of funds to distance them from the source. The launderer may disguise, for example, the monetary transfers as payments for goods or services to give them a legitimate appearance.
- The third step is "**integration**" in which the funds re-enter the legitimate economy. The launderer might choose to invest the illegal funds into real estate, luxury assets or business ventures.

5.16. Conclusion

Rapid population growth, uneven population distribution and poor labor absorptive capacity – these are the three main factors that push the Filipino diaspora. It cannot, however, be denied that inefficient government services play a vital role in resulting to said factors. And the government is inefficient because of the more serious problem of corruption - the grand/political corruption.

To Filipinos, the most significant factor that affects their lives, whether rich or poor, is corruption. Corruption in the country remains a serious challenge. In fact, the Philippines currently holds the 141st position in the CPI global ranking (out of 180), having lost 20 positions since 2006.⁶⁴⁶ For which, the Philippines has slipped in economic rankings. In 1960, the Philippines had a \$300 gross domestic product (GDP) per capita, which was second in Asia only to Japan at \$500. Successive governments maintained an import-substitution strategy for much longer than the East Asian “miracle” economies, so that the Philippines did not receive the foreign investment which led

⁶⁴⁵ *Id.*

⁶⁴⁶ *Supra* note 1, 11

to export and job creation booms like those of Taiwan and Thailand. Because of widespread corruption, complicated tax laws and tax evasion, tax revenue remains low, accounting for only 15 percent of GDP. This limits the government's ability to invest and improve infrastructure. Efforts to increase tax collections, end monopolies, liberalize trade, and privatize state-owned businesses have been blocked in Congress by those who would lose privileges. The country has a low savings rate and high levels of domestic and foreign trade.⁶⁴⁷ And to provide an idea of the size of the corruption phenomenon and its potential impact on local society, a 2001 World Bank study estimated that across 1995-2000 approximately US\$12 billion was lost to corruption within the Philippines.⁶⁴⁸

Economies that are afflicted by a high level of corruption – which involves the misuse of power, whether in the form of money or authority, in order to achieve certain goals in illegal, dishonest or unfair ways – are not capable of prospering as fully as those with a low level of corruption. Corrupted economies are just not able to function properly because corruption prevents the natural laws of the economy from functioning freely. As a result, corruption in a nation's political and economic operations causes its entire society to suffer. According to the World Bank, the average income in countries with a high level of corruption is about a third of that of countries with a low level of corruption. Also, the infant mortality rate in such countries is about 3 times higher and the literacy rate is 25% lower. No country has been able to completely eliminate corruption, but studies show that the level of corruption in countries with emerging market economies is much higher than it is in developed countries. Where do most Filipinos migrate to? Study shows that Filipino immigrants constitute one of the largest foreign-born groups in the United States. Thus, there will continue to be a strong relationship between the two countries of

⁶⁴⁷ Susan F. Martin, Philip L. Martin, & Patrick Veil, *Managing Migration: The Promise of Cooperation*, 194 (2006)

⁶⁴⁸ Philippine Country Management Unit, World Bank, *Combating Corruption in the Philippines: An Update*, World Bank, (September 30, 2001)

immigration of Filipinos to the U.S. and those who do immigrate should be aware of the difficulties of doing so.

Chapter 6 THE VIETNAMESE IMMIGRANT EXPERIENCE TO THE UNITED STATES

6.1. Introduction

Vietnam is a one-party state. Power is vested in the Vietnamese Communist Party (VCP), together with some dialogue that takes place within the legislative National Assembly. Since 1976, the principal institutional structures of political power and governance have evolved with the *politburo*, the VCP's executive body, setting the government policy with a growing influence in the process by the National Assembly. In January 2011, the 11th party congress of the VCP confirmed the existing structures of political rule. The delegates pledged to maintain one-party rule and continue Vietnam's market-led policies.⁶⁴⁹

Historically, after resisting numerous encroachments and dominations by the huge Chinese empire, then by its People's Republic, Vietnam has nevertheless kept to its own identity and survived various aggressive actions by outside forces. Vietnam fought off aggressive neighbors, like Laos and Cambodia. It reemerged as a nation, albeit divided, after being colonized by France. It was also taken over by the Japanese and won against the military might and overwhelming technology of the United States. Now, Vietnam's biggest struggle is against itself. It may have been served well by the ideologies it adopted to regain its independence, but not in the present period. Progress is being made, albeit uncertain of what the ultimate result will be. What matters now is that Vietnam is opening up. For its Asian neighbors and the rest of the world, this is rather important.⁶⁵⁰

Since the Vietnamese Communist Party launched its policy of economic reform or renovation, in Vietnamese *doi moi*, at its Sixth Party Congress in 1986, Vietnam has experienced a remarkable transformation in its economic and social spheres. The Vietnamese economy is unquestionably richer and more dynamic than it ever was in the years preceding *doi moi* and

⁶⁴⁹ Bertelsmann Stiftung, *Vietnam Country Report*, Gütersloh, 2 (2014)

⁶⁵⁰ Bruce M. Lockhart & William J. Duicker, *The A to Z of Vietnam*, vii (2006)

decades indicated by the war in Vietnam involving US intervention, and before that, the French colonialism. War had been a feature of everyday life in Vietnam, from the start of World War II in 1939, to the collapse of the Republic of Vietnam (South Vietnam) in 1975. However, Vietnam has not undergone a system-changing revolution but a gradual process of economic transformation which was initiated in 1986.⁶⁵¹

Geographically, the Socialist Republic of Vietnam has an area of 331.210 km². It is estimated to be one-third larger than the United Kingdom, 50 percent more than the Australian State of Victoria and slightly larger than the state of New Mexico in the USA. Vietnam stretches from north to south along the western shore of the South China Sea, with the area of the northern Red River basin joined to the southern Mekong Delta via a narrow coastal strip. Both the Red River basin and the Mekong Delta are intensively cultivated and densely populated. To the north, Vietnam shares a border with the People's Republic of China and to the west, with Laos and Cambodia.⁶⁵²

In 2011, Vietnam's population was estimated to be 90.5 million. The major urban centers are Hanoi, the capital with an estimated population of 2.7 million, Ho Chi Minh City, with 6 million, and Haiphong, 1.9 million, deriving from the 2009 census. Vietnam has rejected the exclusive attachment to the Soviet model of economic management. Rather, it has developed a system *sui generis* that seeks to combine socialism and the market.⁶⁵³

In 1990, only 35 percent of the population had access to, what may be considered, basic sanitation facilities. By 2008, the proportion was 75 per cent. The percentage of poor households decreased from 30 percent in 1992 to 7 percent in 2005. Vietnam rose from a low to a lower middle income country. Cities like Hanoi and Ho Chi Minh City (the former Saigon) became centers of

⁶⁵¹ Vincent Edwards & Anh Phan, *Managers and Management in Vietnam: 25 years of Economic Renovation (Doi Moi)*, 1 (2013)

⁶⁵² *Id.*

⁶⁵³ *Id.*, supra note 3

economic activity. Overall, however, the Vietnamese economy has tended to grow from year to year, increasing national and individual wealth.⁶⁵⁴

For many, Vietnam is the story of a war but for the political economist, it is the story of a rapid, government-decreed economic transformation from a Marxist, planned, closed economy to a trade-open, globally integrated, investment-seeking one.⁶⁵⁵ The reforms of 1986 encompassed a reduced role of the government in economic planning and privatization of much of the economy, an emphasis on attracting foreign investment in the failing domestic economy; and a greater role for provinces in economic governance.⁶⁵⁶ The Party did not reverse itself later because the reforms were successful and investment started flowing into the country. Also, the standard-of-living indicators improved as it turned Vietnam from a starving country into one of the world's top food exporters, and the government had succeeded in re-establishing its legitimacy in the eyes of its people.⁶⁵⁷

6.2. The Boat People, the Vietnamese Diaspora

As it is with any other Asian nation, the Vietnamese are diasporic. The Vietnamese diaspora is well described in four categories as follows:⁶⁵⁸

1. The *first category* refers to those who left Vietnam before 1975 by reason of the French colonization. They are those who now live in neighboring countries such as Cambodia, Laos and China. A number also migrated to France and French-speaking areas such as Quebec;

⁶⁵⁴ *Id.*, 2

⁶⁵⁵ Thomas Jandl, *Vietnam in the Global Economy: The Dynamics of Integration, Decentralization, and Contested Politics*, 1 (2013)

⁶⁵⁶ *Id.*, 2

⁶⁵⁷ *Id.*, 3

⁶⁵⁸ Danny Ben-Moshe & Dr. Joanne Pyke, *The Vietnam Diasporas in Australia: Current and Potential Links with the Homeland*, 19 (2012)

2. The *second category* and large majority of migrants are refugees who left following 1975 due to the brutality of war. They are those who escaped to North America, Western Europe (particularly Germany) and Australia;
3. The *third category* refers to who migrated for employment and education in the Soviet bloc and stayed on following the Soviet collapse; and
4. The *fourth category* and the most recent group are those who are referred to as economic migrants. They include those who have undertaken study in the US, Canada, Australia and the UK, and have stayed on in those countries to work and live as permanent residents. The recent migration movement is by the women who have married men from Taiwan and South Korea through marriage agencies and have consequently moved to those countries.

Earlier studies show that land reform campaign, brutality of the war, and famine caused the massive exodus from Vietnam to other countries. The biggest cause, however, remained the fear of the communists.⁶⁵⁹ According to the 2006 Census, the US became a home to the largest population group of more than 1.6 million Vietnamese. Other countries include: Cambodia (600,000), Taiwan (200,000), France (250,000), Canada (151,000), Laos (150,000) and Germany (125,000). The fourth largest in the world with a population of 159,848 are the Vietnamese population in Australia.⁶⁶⁰

6.3. Anti-Money Laundering Laws

The global fight against money laundering has been the subject of numerous international anti-money laundering (AML)-related legal instruments such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Vienna Convention), the United Nations Convention against Transnational Organized Crime (Palermo

⁶⁵⁹ Nghia M. Vo, *The Vietnamese Boat People, 1954 and 1975-1992*, 17 (2006)

⁶⁶⁰ *Id.*, supra note 2

Convention), the United Nations Convention against Corruption (UNCAC), and the Financial Action Task Force (FATF) Recommendations. All these legal instruments impose binding obligations on all parties to criminalize acts of money laundering.⁶⁶¹ For years, Vietnam engaged with the international AML regime. It became a party to the primary AML-related conventions when it ratified the 1988 Vienna Convention, UNCAC, and the Palermo Convention in 1997, 2009, and 2012. Vietnam also became a member of the Asia/Pacific Group on Money Laundering (APG). With its participation in these international institutions, Vietnam has gradually adopted the international AML standards and established its own AML regime.⁶⁶²

The key legal instruments governing the anti-money laundering activities in Vietnam are the following:⁶⁶³

1. Law on Prevention and Combat of Money Laundering No. 07/2012/QH13 (AML Law);
2. Decree No. 116/2013/ND-CP of the Government, dated 4 October 2013, detailing the Implementation of a number of Articles of AML Law;
3. Circular No. 35/2013/TT-NHNN of the State Bank of Vietnam, dated 31 December 2013, guiding the Provisions on Prevention and Combat of Money Laundering;
4. The Penal Code of 1999, particularly Articles 250 and 251 thereof; and
5. The Law on Drug Prevention of 2000, particularly Article 3 (5) thereof.⁶⁶⁴

The new Law on Anti-Money Laundering was passed and made effective on January 1, 2013.⁶⁶⁵ It replaced the previous legislation (Decree No. 74 of 2005) and provides tougher

⁶⁶¹ Chat Le Nguyen, *Criminalisation of Money Laundering in the International Anti-Money Laundering Regime and its Adoption by Vietnam*, Australian Journal of Asian Law, 1 (2013).

⁶⁶² *Id.*

⁶⁶³ Norton Rose Fulbright, *Business ethics and anti-corruption – Asia Pacific laws: Vietnam*, 128 (September 2014)

⁶⁶⁴ Asia/Pacific Group on Money Laundering, *Mutual Evaluation Report, Anti-Money Laundering and Combating the Financing of Terrorism VIETNAM*, 7 (8 July 2009)

⁶⁶⁵ The Law on Anti-Money Laundering No. 07/2012/QH13.

measures, including with respect to customer due diligence and record keeping. The 50-article Law provides measures to prevent, detect, stop and handle organizations and individuals committing acts of money laundering. The prevention and combat of money laundering for the purpose of financing terrorism also comply with the Law. ⁶⁶⁶

The definition of “money laundering” is based on international laws. Evolving from Decree No. 74 of 2005, on anti-money laundering, the Law clearly defines “money laundering” based on relevant international conventions. As per the Law, money laundering means acts of organizations or individuals aiming to legalize the origin of property acquired from crimes, including the act prescribed in Article 251 of the Penal Code (Legalizing money and/or property acquired from a crime); assisting organizations and individuals involved in a crime in shirking their legal liability by legalizing the origin of property acquired from a crime; and possessing a property, if at the time of receipt of the property the possessing organization or individual clearly knows that the property is acquired from a crime, in order to legalize the origin of the property. ⁶⁶⁷

The prohibited acts ⁶⁶⁸ are as follows:

1. Organizing and taking part or creating conditions to carry out the acts of money laundering.
2. Opening or maintaining anonymous accounts or accounts using false names.
3. Establishing and maintaining business relationships with the banks established in a country or territory, but not being present tangibly in that country or territory and not subject to the management and supervision of the competent management agencies.
4. Illegally providing the services of cash, check and other currency instruments receiving or the valuable storage instrument and making payments to the beneficiaries at another location.

⁶⁶⁶ Samantha Campbell & Pham Bach Duong, *The Banking Regulation Review (5th Edition)*, 17 (28 April 2014)

⁶⁶⁷ *Supra* note 17, Article 4

⁶⁶⁸ *Id.*, Article 7

5. Abusing the positions and powers in the prevention of money laundering to infringe upon the legitimate rights and interests of organizations and individuals.
6. Hindering the provision of information for the prevention of money laundering.
7. Threatening or taking revenge of the person detecting, providing information, reports and denunciations to the acts of money laundering.

According to the Law, reporting subjects must report to the State Bank of Vietnam upon implementing high-value transactions, suspicious transactions or money wire transfer transactions. The Prime Minister will prescribe the minimum value of high-value transactions subject to reporting. Under Decree 74, such value is VND 500 million, or equivalent value, for foreign currencies or gold for one or more than one saving transaction conducted in a day by an organization or individual, or VND 200 million for other transactions. ⁶⁶⁹

For suspicious transactions, the Law stipulates in Article 22 eight basic signs leading to suspicion:

1. The client provides incorrect, incomplete and inconsistent client identification information;
2. The clients persuade the reporting subjects not to make report on the transactions to the competent State agencies;
3. Unable to identify clients by the information provided by the client or the transaction related to a party whose identity cannot be identified.
4. The individual or agency phone number provided by the client agencies cannot be contacted or this phone number does not exist after opening the account or doing the transaction;
5. The transactions are done by the order or under the authorization of the organizations and individuals in the warning list;

⁶⁶⁹ *Id.*, Article 23

6. The transactions that through the client identification information or through the consideration of economic and legal grounds of the transaction can be determined the relationship between the parties taking part in transaction with the criminal activities or in relation with the organizations and individuals in the warning list;
7. The organizations and individuals are involved in transactions with large amounts inconsistent with the income, business activities of these organizations and individuals;
8. Clients' transactions done through the reporting subjects are not in proper process and procedures as prescribed by law.

In addition to the above signs, other suspicious signs in banking, insurance business, securities, prize-winning games and casino and real estate business are equally stipulated under said Article of the Law. Reporting time limit for a suspicious transaction is 48 hours after such transaction is performed. For high-value transactions and transactions of money wire transfer, reporting subjects must make daily reports, for electronic data file reports, or make reports within two working days after the transaction concerned is performed, for written reports or other forms of report.⁶⁷⁰

There had been 603 convictions under Article 250 and one conviction under Article 251 of the Penal Code 1999. Convictions have been predominately confession based.⁶⁷¹ The Anti-Money Laundering Information Centre (AMLIC), which is Vietnam's Financial Intelligence Unit (FIU), is based within the State Bank of Vietnam (SBV). Essentially, it is the lead agency on AML/CFT.⁶⁷²

Chapter III of the AML Law provides and defines the functions of the following state authorities responsible in reporting, preventing, and fighting money laundering:

⁶⁷⁰ *Id.*, Article 26

⁶⁷¹ *Id.*, Supra note 16

⁶⁷² *Id.*

1. Anti-Money Laundering Administration (“AMLA”) under the Banking Inspectorate and Supervision Department of the State Bank of Vietnam (“SBV”). The AMLA assists the Chief Inspector of the SBV to implement anti-money laundering (“AML”) regulations and international AML commitments to which Vietnam is a signatory. The AMLA’s duties and powers are set out in Decision No. 1654/QD-NHNN of the SBV dated July 14, 2009;
2. State Bank of Vietnam has the primary role to regulate and supervise implementation of AML regulations;
3. Ministry of Public Security (“MPS”) is responsible for discovery and investigation of money laundering crimes;
4. Ministry of Finance is responsible for implementation of AML measures in insurance, business, in securities, and in prize-winning games and casinos;
5. Ministry of Construction is responsible for implementation of AML measures in the real estate business; and
6. Ministry of Justice is responsible for implementation of AML measures which apply to lawyers, legal practice organizations, notaries and notary public offices.

On 11 November 2014, the State Bank of Vietnam issued Circular No. 31/2014/TT-NHNN, which became effective on 26 December 2014. It amended Circular 35/2013/TT-NHNN issued on 31 December 2013. Circular 31 made more efficient the process for which banks will conduct "Know Your Customer" checks on both individual and corporate customers by reducing the required information and the disclosure of average income from 6 months to 3 months and by eliminating the requirement for individuals to supply information about their families.⁶⁷³

⁶⁷³ Circular No. 35/2013/TT-NHNN (December 31, 2013), as amended by Circular No. 31/2014/TT-NHNN (November 11, 2014), §§ 2, 3, 4 of Article 3

Moreover, Circular 31 required banks to report domestic transactions with values of VND500 million (or equivalent foreign currencies) or above, and cross-border transactions with values from USD1,000 (or equivalent other foreign currencies) or above to the SBV's Department of Anti-Money Laundering (AML).⁶⁷⁴ On electronic transfer transactions, debit card, credit card, and interbank transactions are excluded. This includes transfer and payment transactions among financial institutions where both the initiator and the beneficiary are financial institutions.⁶⁷⁵

Vietnam's anti-money laundering laws, essentially, have complied with the international standards as provided by the Financial Action Task Force (FATF). However, with regard to convictions under Art 250 (third party laundering) of the 1999 Penal Code, 80 percent were through confessions. Up to March 2013, however, conviction was had under the amended Art 251.⁶⁷⁶

The absence of convictions under the amended Art 251 and the majority of confession-based convictions under the Art 250 only proves the ineffective implementation of said provisions. There are numerous reasons given, which include, among others, the unwillingness of law enforcement agencies to engage in investigating and prosecuting money launderers; the wieldy nature of the legal provisions themselves; and insufficient law enforcement resources devoted to AML, i.e. lack of investigators experienced in money laundering. Above all is the lack of a genuine commitment to investigate money laundering activities in Vietnam.⁶⁷⁷

6.4. Money Laundering Issues

It was not until 2005 when the term “money laundering” (rua tien) was formally used and legally defined in Vietnam when both the term “money laundering” and the general legal

⁶⁷⁴ *Id.*, § 1(a), Article 7

⁶⁷⁵ *Id.*, § 1(b), Article 7

⁶⁷⁶ *Id.*, 13 Supra note 13

⁶⁷⁷ *Id.*

framework of the Anti-Money Laundering in Vietnam were stipulated in Government Decree 74/2005/ND-CP. This move of the Vietnamese authorities is rather an admission and a confirmation of the existence of money laundering in Vietnam.⁶⁷⁸ According to authorities, the main sources of illicit funds in Vietnam are fraud, gambling, trading in weapons, prostitution, trading in illegal narcotics, trafficking and counterfeiting of fake goods, and corruption and trafficking of women and children. Based on predicate crime statistics, fraud and drug trafficking are the major proceeds of crime.⁶⁷⁹

A summary of statistics on predicate crimes in Vietnam since 2006 involving the illicit source of funds is shown in the table below:⁶⁸⁰

Table 6. Predicate Crime Statistics

Table: Predicate Crime Statistics

Penal Offences	Percentage (%)of total Adjudications
Fraud e.g. particularly involving real estate	61.00
Gambling, trading in weapons, prostitution	19.27
Trading in illegal narcotics	15.75
Trafficking and counterfeiting of fake goods, etc	2.22
Corruption	1.13
Trafficking in women and children	0.4

1. Fraudulent activities on immovable or real property constitutes a significant source of illicit proceeds,⁶⁸¹ as follows:

a) Falsification of land and house use right certificates as collateral for bank loans;

⁶⁷⁸ *Id.*, 5 Supra note 13

⁶⁷⁹ *Id.*, 7 supra note 16

⁶⁸⁰ *Id.*, 20

⁶⁸¹ *Id.*, 21

- b) Forged signatures of bank personnel on real estate investment proposals and loan applications;
- c) False pretenses by the use of other people's IDs to obtain loans;
- d) Fraudulent funds raised by the use of stolen or falsified IDs by foreigners;
- e) Bank personnel's misappropriation of cash repayments made by borrowers; and
- f) Conspiracy among bank officials from different banks to alter paperwork and defraud bank employees;⁶⁸²

Other fraudulent activities include money trading scams, i.e. online "ponzi" schemes;⁶⁸³

2. Generally, *gambling* is illegal in Vietnam.⁶⁸⁴ Only a small number of establishments are licensed to operate small scale casinos and electronic gaming operations catering to foreigners;
3. On *trafficking of illegal narcotics*, Vietnam is no longer listed in drug production analysis. Illegal narcotics seized in Vietnam are not cultivated and manufactured thereat but in Myanmar and Lao PDR, which are, respectively, the world's second and third largest producers of raw opium. About one percent of the total cultivation in Southeast Asia, however, is from Vietnam and it is considered an important transit route in Southeast Asia for the trafficking of illicit drugs, mainly heroin and opium, amphetamine-type stimulants (ATS) and cannabis;

The geographic location of Vietnam and its insufficient capacity to counter drug trafficking, makes it an attractive transit site for drug traffickers to smuggle drugs from the Golden Triangle to Australia, the United States, Canada and to European countries.⁶⁸⁵ In the meantime, Vietnam has experienced an ever growing number of drug users in recent decades⁶⁸⁶ and drug-related crimes

⁶⁸² State Bank of Vietnam Guidance No. 4294

⁶⁸³ *Id.*, 21, *Supra* note 16

⁶⁸⁴ The Penal Code of 1999, Articles 248 and 249

⁶⁸⁵ US Department of State Report, 582 (2011)

⁶⁸⁶ *Id.*, 584

have increased at a very high rate in recent years. A significant part of the profits generated from the drug trafficking-related crimes is believed to have been laundered in Vietnam.⁶⁸⁷

4. On *trafficking and counterfeiting of fake goods*, Vietnam is considered the world leader in software piracy. Based on international reports, there exists a significant market activity in the sale and purchase of fake products. On *counterfeit money*, reports have noted that drug traffickers are the ones who are involved in counterfeiting money. Most commonly counterfeited are fake US dollar notes. In addition, are the Chinese Yuan and Vietnamese Dong;⁶⁸⁸
5. On *corruption*, there are reports of high profile corruption cases in Vietnam. A recent announcement made by the Ministry of Public Security stated that an investigation was conducted into allegations that a foreign contractor had bribed a senior official who was overseeing the East-West Highway Project. This is Ho Chi Minh City's biggest infrastructure project funded by Japan. Said official was suspended from his post last November 2008. Allegedly, he accepted bribes of US\$820,000 in 2003 and 2006 from a foreign contractor in exchange for helping it win the contract for the project; and⁶⁸⁹
6. On *women and children trafficking*, Vietnam is primarily a source country for women and children trafficked for commercial sexual exploitation and forced labor according to the June 2008 report of the US State Department Trafficking in Persons. From Vietnam, they are brought to the People's Republic of China (PRC), Cambodia, Thailand, the Republic of Korea, Malaysia, Chinese Taipei, and Macau. Those brought in China, Cambodia and Macau, China ends in providing sexual services. Victims are tied in repaying amounts of US\$1,000 to

⁶⁸⁷ *Id.*, Supra note 30

⁶⁸⁸ *Id.*, 22 Supra note 16

⁶⁸⁹ *Id.*, 23

US\$1,500 according to unofficial reports.⁶⁹⁰ A number of Vietnamese workers migrate to seek employment in the Middle East and in Eastern Europe but are often under demanding employment conditions.⁶⁹¹

The methods and trends utilized in money laundering in Vietnam are as follows:⁶⁹²

1. *Co-mingling*. This is the most popular way of money laundering in Vietnam and done through investments in businesses, real properties, stock market and transactions through banks' services. Notably, organizations involved in money laundering are mainly legally established businesses in Vietnam;
2. *Securities*. This involves the buying and selling of shares of unlisted joint stock companies through registered securities companies. The latter provide share registry services for companies and brokers between a potential buyer and seller;
3. *Cash Courier*. This is committed by engaging the services of the Vietnam Airline employees and pilots as cash couriers of large amounts of undeclared cash into Vietnam by bringing large amounts of cash to Vietnam provided they are declared. Notably, the government of Vietnam does not require any information on the source or use of funds brought into the country.

In one high profile case involving Vietnam Airlines' employees, one pilot of Vietnam Airlines was arrested in 2006 in Australia and subsequently jailed for 4½ years when he attempted to smuggle AU\$6.5 million out of Australia. Another pilot was arrested in April 2008 and was accused of collecting the proceeds of drug sales amounting to AU\$4 million on seventeen (17) occasions from Vietnamese money remitters in Melbourne and Sydney in 2005 and 2006. Likewise, two (2) flight attendants were arrested for illegally transporting US\$300,000 into South Korea. In

⁶⁹⁰ *Id.*, 22 supra note 16

⁶⁹¹ *Id.*, 23

⁶⁹² *Id.*

September 2008, two (2) airline employees were sentenced in Hanoi for illegally transporting money across the border. The accused admitted he had transported money previously back from Germany. In the most recent case, one Vietnam Airline employee was caught carrying a bag with 342,000 Euros at Hanoi Noi Bai Airport;

4. *Bank Transfers*. There have been many cases of opening bank accounts followed by immediate withdrawals of large sums of money by foreign nationals. In one recent case, attempts were committed by foreigners with the use of counterfeit passports to withdraw funds amounting to more than US\$164,600;
5. *Alternative Remittance Systems*. This is used to transfer proceeds of drug sales back to Vietnam and then abroad again;
6. *Precious stones and metals*. In Vietnam, the gold retail sector is largely not regulated. A common practice in real estate transactions is the use of gold as currency. With real estate related fraud and the tendency for gold and jewelry shops to offer illegal money changing and remittance services, the gold retail sector is where the conversion, transfer and integration of illicit proceeds is conducted;
7. *Multiple Methods*. Capable of laundering tens of millions of dollars per month back to Vietnam is the trafficking network of ecstasy and marijuana between the US and Vietnam. It does not only utilize the formal banking system and bulk cash smuggling but also multiple US based money remittances businesses. It had been reported through these multiple methods that over US\$100 million annually had been remitted to Vietnam. A huge portion of said money is deemed derived from criminal activity. Thus, law enforcement agencies in both Australia and the United Kingdom have tracked large transfers of drug profits back to Vietnam and then out of the country again.

In addition, there are a large number of illegal money changers, i.e. black market operators in Vietnam. Numerous gold shops offer money changing services. The black market during the on-site offered US\$1: VND17,300/17,350 as against the official exchange rate of US\$1: VND16,850. Banks are prohibited from exchanging more or less than five percent of this amount. ⁶⁹³

6.5. The Vietnamese Banking Industry

6.5.1. History

Pre-colonial Vietnam was under a subsistence and barter economy. Inter-regional trade was limited to a small degree. When colonial ruling entered, ownership of large estates and taxation of small farmer, particularly those involved in rice production, was introduced. ⁶⁹⁴ As centuries turned, the various dynasties issued currencies in zinc and silver, either for purposes of exchange or award. When the French colonized the country in 1884, they introduced a new currency, the *piastre*, which became a specific Indochinese monetary unit. Thus, the *piastre* remained the currency in the Republic of Vietnam until it was finally abandoned in 1978. ⁶⁹⁵

Following the withdrawal of the French in late 1954, the *National Bank of Vietnam* was founded in the new (South) Republic of Vietnam. It was indeed a central bank. The commercial banks were located primarily in the region of Saigon-Cholon (i.e. Ho Chi Minh City), and they were focused on trade finance. The dominant commercial bank during the colonial period was the *Bank of Indochina*. After 1954, the commercial banking system continued to be limited in scope and scale. It consisted of some twelve banks and the majority of branches were foreign banks. In 1976, the Vietnam State Bank merged with the National Bank of South Vietnam. The merge gave birth to the *State Bank of Vietnam*, which became the sole provider of formal financial intermediation

⁶⁹³ *Id.*, 29

⁶⁹⁴ Lisa Roman, *Institutions in Transition, Vietnamese State Bank Reform*, 65 (1999)

⁶⁹⁵ *Id.*, 66

throughout the entire Vietnam. The state budgets were unified in 1977. Thereafter, the monetary reform of May 1979 made the *dong* the nationwide currency.⁶⁹⁶

Prior to 1990, the *State Bank of Vietnam* (SBV) functioned as both a central bank and a commercial bank. With the 1990 Ordinance on Banks, credit cooperatives and financial companies were passed, the functions of the SBV were delegated to four newly created state-owned commercial banks (SOCBs):

1. The industrial and commercial lending department was assigned to the Vietnam Industrial and Commercial Bank (formerly Incombank, now Vietinbank);
2. The agricultural department to the Vietnam Bank for Agriculture and Rural Development (Agribank);
3. The international trade department to the Bank for Foreign Trade of Vietnam (Vietcombank); and
4. The infrastructure department to the Bank for Investment and Development of Vietnam (BIDV).⁶⁹⁷

Thus, the SBV's role was narrowed to that of a central bank that generally functions in the formulation of monetary policies, management of foreign exchange reserves, and licensing and supervision of credit institutions, a term that encompasses commercial banks; while financial intermediation functions, which include funds mobilization and allocation, were shifted to commercial banks.⁶⁹⁸ Banking reforms in Vietnam continued and were motivated by its entry into international trade and investment agreements, i.e. the US-Vietnam Bilateral Trade Agreement in 2001 and its accession to the World Trade Organization (WTO) in 2007. Such reforms then allowed

⁶⁹⁶ *Id.*

⁶⁹⁷ Bao Tran Tran, Bernice Ong & Scott Weldon, *Vietnam Banking Industry Report*, 7 (23 Jan 2015)

⁶⁹⁸ *Id.*, 1 *Supra* note 18

the entry of foreign banks in Vietnam which led to an increased presence of foreign banks in Vietnam. The foreign banks helped expand the competitiveness and strengths of the banks. In 2008, the SBV granted licenses to wholly foreign-owned banks. In January 2014, the ownership limit for a single foreign investor was raised from 15 to 20%, with a maximum ownership for all foreign investors to be capped at 30%.⁶⁹⁹

When the new banking decrees were established in October 1990, Vietnam's banking system had undergone a restructuring process. While the State Bank of Vietnam controls the whole system, local commercial banks now have the freedom to carry out currency trading, banking services, and financial services. Moreover, foreign banks have come to Vietnam in increasing numbers. Today, three banks are now issuing individual and corporate credit cards in Vietnam, namely: Vietcombank (Vietnam foreign trade bank), Asian Commercial Bank and Firstvina Bank. Currently, commercial banks in Vietnam accept five types of credit cards including: MasterCard, Visa, Amex, JCB and Diners Club.⁷⁰⁰

In 2006, a banking development plan up to 2020 was approved. The plan includes moving the SBV towards a modern central bank, giving it more independence in its monetary and exchange rate policy with improved supervision capacity over the banking system. As regards the operations of state credit institutions, the Law on Credit Institutions 1997 was enacted, together with amendments to the Credit Institutions Law 2004. It included governance on state joint stock credit institutions, cooperative credit organizations, joint-venture credit institutions, and non-bank credit institutions with 100% foreign capital.⁷⁰¹

⁶⁹⁹ *Id.*

⁷⁰⁰ Sak Onkvisit and John J. Shaw, *International Marketing, Strategy and Theory*, 238 (2009)

⁷⁰¹ *Id.*, Supra note 50

6.5.2. The Present Vietnam Banking System

The Vietnam banking system currently consists of the following:

1. Six (6) state-owned commercial banks;
2. 36 local joint stock commercial banks;
3. Five joint venture banks;
4. 37 branches of foreign banks; and
5. 54 representative offices of foreign banks in Vietnam.

The Vietnamese banking sector is highly administered.⁷⁰² Currently, Vietnamese banks are principally lenders to large corporations. This includes a high proportion of state-owned enterprises (SOEs). Consumer banking remains undeveloped and is still in its early stages. Although growing rapidly, there is still a significant lack of know-how, management experience and enforceable governance controls in the Vietnamese banking and finance sector.⁷⁰³

The Law on the State Bank of Vietnam and the Law on Credit Institutions, both passed on June 16, 2010 and made effective on January 1, 2011, governs the banking activity in Vietnam.⁷⁰⁴ This includes a number of implementing decrees, circulars and decisions issued by the government, the State Bank of Vietnam and the Ministry of Finance.⁷⁰⁵ The State Bank of Vietnam (SBV) performs the traditional role of a central bank. It regulates the banking system in Vietnam in coordination with the Ministry of Finance and its provincial branches. Through its Banking

⁷⁰² *Id.*, 2

⁷⁰³ *Id.*, 3

⁷⁰⁴ The two laws replace the Law on the State Bank of Vietnam and the Law on Credit Institutions adopted in 1997 and amended in 2004

⁷⁰⁵ *Id.*, Supra note 55

Inspection and Supervisory Department, the SBV is the authority empowered to grant establishment and operating licenses to banks in Vietnam.⁷⁰⁶

A commercial bank may engage in deposit taking activities with the condition that it opens its own deposit account at the SBV with the minimum compulsory reserve level. In addition, banks may also conduct lending activities. As of April 2010, the statutory ceiling on the interest rate⁷⁰⁷ was removed with respect to all forms of bank loans in local currency.

As regards to off-shore entities, lending by Vietnamese banks is only permitted to off-shore affiliates and subsidiaries of Vietnamese companies. This, however, is subject to registration with the SBV, unless otherwise authorized.⁷⁰⁸ Banks are also not permitted to provide loans to enterprises that they control and that operate in the securities sector, nor are they permitted to provide unsecured loans for investment in any business in the securities sector.⁷⁰⁹

Banks established in Vietnam must operate under one of the following permitted forms:⁷¹⁰

- a) a state-owned commercial bank established and organized in the form of a one;
- b) member limited liability company where 100 per cent of the charter capital is owned by the state;
- c) a joint stock commercial bank (i.e., a company limited by shares);
- d) a joint venture commercial bank established and organized in the form of a limited liability company; and
- e) an entirely foreign-owned commercial bank established and organized in the form of a limited liability company.

⁷⁰⁶ Decree No 156/2013/ND-CP (November 11, 2013)

⁷⁰⁷ Fixed by the Civil Code at 150 per cent of the basis rate announced by the SBV, and lifted in 2009 with respect to consumer-lending activities only.

⁷⁰⁸ Circular 45/2011/TT-NHNN (30 December 2011), Article 8

⁷⁰⁹ Law on Credit Institutions, Article 126.4

⁷¹⁰ *Id.*, 5 *supra* note 21

Mutual structures are contemplated by law and exist most commonly in rural areas under the similar forms of cooperative banks and peoples credit funds. Limited liability micro-finance institutions can also be established to provide credit services to individuals, households and micro-enterprises.

6.5.3. Banking Management

The Law on Credit Institutions (LCI) governs the management of commercial banks together with the role and responsibility of the shareholders.⁷¹¹ Equally governing to such not contrary to the LCI are the provisions of Decree No. 59/2009/ND-CP dated 16 July 2009 on the organization and operation of commercial banks (Decree 59), which was adopted shortly before the LCI was passed.⁷¹² The management structure of an entirely state-owned bank, a joint-venture bank or a bank with entirely foreign capital corresponds to that of a limited liability company and is constituted by the members' council, the board of controllers and the general director.⁷¹³ Relative to a joint-stock commercial bank, the board of management is responsible to the shareholders for the operation of the bank. Both the members' council and the board of management consist of five to 11 members.⁷¹⁴ For joint-stock commercial banks, at least half of the members must be independent and members who are not executive officials of the credit institution.⁷¹⁵ In both types of structures, the board of controllers is constituted by at least three members, at least half of whom must be full-time.⁷¹⁶

The board of management, the members' council or the owner may appoint one of its members, if applicable, or employ another person as the general director. The general director

⁷¹¹ Supra Note 60, Articles 66 and 70

⁷¹² *Id.*, 9 supra note 21

⁷¹³ Supra Note 60, Article 32

⁷¹⁴ *Id.*, Article 62.1

⁷¹⁵ *Id.*, Article 62.1

⁷¹⁶ *Id.*, Article 44.2

manages the daily business of the bank, supervised by the board of management or the members' council and the board of controllers and is responsible to the board of management or the members' council. A foreign bank branch in Vietnam may be managed by only one general director who may not be a manager or executive of any other credit institution or economic institution in Vietnam.⁷¹⁷

6.5.4. Conduct of Banking Business

To protect depositors, all credit institutions and local branches of foreign banks established under the LCI and permitted to receive deposits from individuals must participate in the deposit insurance scheme. Vietnam's deposit insurance system was updated in 2012 with the Law on Deposit Insurance made effective on January 1, 2013. As provided in said law, eligible Vietnamese dong deposits including term deposits, non-term deposits, savings deposits, certificates of deposit, promissory notes and bills will be protected up to a limit provided by the Prime Minister per depositor per bank.⁷¹⁸

As regards to bank secrecy, banks are prohibited from disclosing any details relating to a depositor or a client unless it is requested by customers, by the general director of a deposit insurance organization, or by a state body during an inspection or for the internal activities of the bank.⁷¹⁹ Such disclosure may also be done during a merger or acquisition. However, there is a restriction when the relevant information is classified as "state secrets."⁷²⁰

Moreover, a bank cannot also carry out investigations into deposits or to freeze a deposit, deduct from or transfer deposits without the consent of depositors. An exception is when it is requested to do so by a competent court or a judgment enforcement authority.⁷²¹ On 11 November 2013 and pursuant to the Law on the State Bank of Vietnam 2010, the Government issued Decree

⁷¹⁷ *Id.*, 10 Supra note 18

⁷¹⁸ Decree 68/2013/ND-CP (June 28, 2013)

⁷¹⁹ Decree 70/2000/ND-CP (November 21, 2000), Article 5

⁷²⁰ *Id.*, 16 Supra note 18

⁷²¹ *Id.*

No. 156/2013/ND-CP dated 11 November 2013 (Decree 156) on redefining the functions, tasks, powers and organizational structure of the State Bank of Vietnam. According to Decree 156, the SBV Governor promulgated several decisions to define the tasks, mandates and organizational structure of the following SBV functional entities (and listed below are the first three out of 26):⁷²²

1. *Monetary Policy Department*, which is tasked in advising and assisting the Governor in the formulation of national monetary policy by utilizing monetary policy tools in accordance with the laws;
2. *Foreign Exchange Management Department*, which is tasked in advising and assisting the Governor in the management of foreign exchange, forex operations in accordance with the laws;
3. *Payment Department*, which is tasked in advising and assisting the Governor in the management of payment sector in accordance with the laws;

6.6. Conclusion

Vietnamese immigrants to the U.S. have to face many challenges when making the change to the American system. Millions of Vietnamese immigrants have a long history of immigrating to the U.S. ever since the Vietnam War in hopes of safety from political persecution, while many others have come to the U.S. to realize the American Dream. For those who come to the U.S. primarily for better financial stability, there are many legal and economic issues they have to take into consideration. They not only have to know the U.S. immigration laws, but they also have to be aware of the banking and money transfer laws of Vietnam. There are strict restrictions on transferring money out of Vietnam and this causes problems when Vietnamese want to immigrate to the U.S. partly because there are many legal fees they have to pay just to immigrate to the U.S.

⁷²² <http://www.sbv.gov.vn>

They also have to be aware of Vietnamese anti-money laundering laws since there are times when Vietnamese immigrants have to transfer large amounts of money. However, to many and despite these hardships, it is worth it to move to the U.S.

Chapter 7

PRE-IMMIGRATION TAX PLANNING FOR FOREIGNERS IMMIGRATING TO THE UNITED STATES

7.1.Introduction

Why should foreigners be aware of U.S. tax schemes? Clearly, when exploring the possibility of immigrating or even visiting the United States, it is prudent to know what tax liability you might be subjected to by the U.S. government. It is important to know when a visitor is considered a resident because U.S. resident aliens are taxed as if they were a citizen. It should be noted what counts for residency for immigration purposes is different than residency for tax purposes.

When planning to immigrate, it is also important for people to look at their current wealth because once an individual crosses the threshold for being domiciled in the United States, their property becomes subject to tax whenever it is transferred, including donations and inheritance. There are several strategies which can be explored to reduce one's exposure and liability to the United States tax system, including creating trusts or transferring property to non-U.S. residents before immigrating.

There are times when even a nonresident alien is subject to U.S. taxes, if there is income whose source is within the United States or if any business is conducted while temporarily in the United States. As nonresidents prepare to immigrate to the United States, it is not uncommon for them to begin visiting the United States more often, making business connections, purchasing property, making investments, or conducting other business before they are officially considered U.S. residents. This activity may be taxable as well, and foreigners should be aware of whether they have become exposed to tax liability, and what their responsibilities are if they have.

7.2. Income Tax

There are many types of taxes in the United States, like income tax, transfer taxes, excise taxes, sales or consumption taxes, and property tax. There are multiple layers of governments, and each state and municipality, along with the federal government, has some authority to tax individuals, trusts and corporations. This document will primarily address the responsibilities of nonresident alien individuals with respect to the federal income tax and transfer taxes. Starting with income taxes, the first step is to determine whether an individual's income is taxed as a resident or a nonresident.

7.2.1. Permanent Resident Test

There are several ways in which a person may be considered a resident of the United States for tax purposes. Generally, any citizen of the United States or other lawful permanent resident is subject to income taxes on their worldwide income. Individuals that are not permanent residents may still be subject to U.S. income taxes if they are substantially present during the tax year in question. Finally, any individual that wishes to be taxed as a U.S. citizen may make an election to do so.

7.2.2. The Lawful Permanent Resident Test or “Green Card Test”

The Lawful Permanent Resident Test is fairly straightforward. When a person receives a green card or is otherwise availed of the “privilege of residing permanently in the United States as an immigrant,” that person is considered a permanent resident and required to pay income taxes to the federal government.⁷²³ U.S. immigration laws and tax laws often differ, but in this instance, immigration law controls this determination.⁷²⁴ This includes all United States citizens, regardless

⁷²³ Treas. Reg. §§ 301.7701(b)-1(1)(A)(i) and (b)(6).

⁷²⁴ I.R.C. § 7701(b)(6).

of their place of residence during the relevant tax year. Investors that obtain an EB-5 Visa are also considered U.S. residents for tax purposes.⁷²⁵

A green card holder is considered to be a permanent resident until that status is officially revoked or judicially determined to be abandoned.⁷²⁶ So, a green card holder may be taxed on her foreign income even if she spent the entire year in that foreign country. However, if a tax treaty exists between the United States and the green card holder's new country of residence, then the green card holder may be excused from U.S. tax treatment once the holder notifies the IRS that the new country has begun treating her as a resident.⁷²⁷ As discussed in a later section, tax treaties vary depending on which country was a party to the treaty, so individual cases should have their treaties verified for such a clause.

7.2.3. Substantial Presence Test

Persons who are neither U.S. citizens nor permanent residents may still be required to pay taxes as residents if they are considered to have a "substantial presence" in the States. The way to determine whether a person has a substantial presence in the United States can be somewhat complicated. The test created by Congress applies fractional "multipliers" to a person's previous two years in the United States. Overall, a person is considered to have a substantial presence if they are ever in the U.S. for thirty-one days of the current year, and, after applying the multipliers to the previous two years, present in the U.S. for at least 183 days over the last three years.

The first requirement for the test is that a person must be in the U.S. for thirty-one days in the current calendar year. This is a straightforward requirement. A person is "present" in the United States on any day in which she spends any amount of time within the United States.⁷²⁸ A person does not need to count any days in which she was involuntarily prevented from leaving the

⁷²⁵ Gary S. Wolfe, U.S. Pre-Immigration Tax Planning 5 (2014).

⁷²⁶ Treas. Reg. § 301.7701(b)-1(b)(2) - (3).

⁷²⁷ Boris I. Bittker & Lawrence Lokken, Fundamentals of International Taxation 65-25 (2014/2105 Edition).

⁷²⁸ I.R.C. § 7701(b)(7)(A).

United States due to a medical condition that arose while present in the U.S.⁷²⁹ Other statutory exemptions, discussed below, that apply to types of income may apply to exclude days under the substantial presence test as well. Diplomats, commuters, as well as travelers on temporary layovers may have some exempt days and some days which count against the substantial presence test.

The second requirement is called the 183-day test, which applies the aforementioned multipliers to the previous two years. Under this test, the individual adds the number of days present in the current year to one-third of the days present in the previous year, plus one-sixth of the days present in the year before the previous year. If this total is at least 183 days, then the 183-day test is satisfied. It follows that any person which spends more than 183 days in the United States in a single year has a substantial presence in the United States during that year, regardless of that person's previous presence.

For example, say a person is present in the United States for 125 days in 2012, 120 days in 2011, and 150 days in 2010. Firstly, this person is present for more than thirty-one days in 2012, so the first step is satisfied. Secondly, we apply the 183-day test. When applying the multipliers of the test, only 40 days of 2011, or one-third of 120 days, count towards the test. Likewise, only 25 days of 2010, or one-sixth of 150, will count towards the test. Adding the 125 days for 2012, the 40 days of 2011, and the 25 days of 2010, this person was present for 185 days over the past three years. This person has satisfied the 183-day test. Therefore, both tests were satisfied and this person has a substantial presence in the United States for the calendar year of 2012.

However, even if a person satisfies the Substantial Presence Test, they may still be considered a nonresident if they satisfy the Closer Connection Exception.⁷³⁰ A person is considered to be a nonresident if (1) less than 183 days are spent in the U.S. during the current year, (2) the person has a tax home in another country during that year, and (3) the person has a closer

⁷²⁹ I.R.C. § 7701(b)(3)(D)(II).

⁷³⁰ I.R.C. § 7701(b)(3)(B).

connection with that country than with the U.S. A person has a tax home in a foreign country if that country is the person's regular place of business, or the person's principal place of business if she has more than one.⁷³¹ If the person has no business, then her tax home is her regular place of abode.

A person has a closer connection with a country where she maintained more significant contacts during that year.⁷³² Factors to consider when determining a person's contacts include the locations of the person's permanent home, family, personal belongings, relationships with organizations, routine personal banking, business activity outside of her principal business, voting and driving privileges, and the person's designated home on forms or documents.⁷³³ However, a person cannot qualify for the Closer Connection Exception if she has applied for permanent residency with the United States.⁷³⁴ If a person does qualify under the Closer Connection Exception, then that person is taxed as a nonresident alien.

7.2.4. First Year Election

If you are determined to be a permanent resident under either test, you may elect to be treated as a resident for the year prior to the one in which you qualify, if you find the election would be advantageous in your situation.⁷³⁵ There are certain requirements to do so. The election must be for the year preceding the year in which you first pass the Substantial Presence Test in a three-year span. You must also have been present for at least thirty-one days in the election year. This thirty-one day span begins a testing period that lasts until December 31 of the election year. The final requirement is that you remained in the United States for at least seventy-five percent of that testing year. For example, if there is a non-U.S. citizen that enters the United States on July 1, 2010, remains until August 2, when he goes on a one-week trip to Mexico, then returns for the rest

⁷³¹ Treas. Reg. § 301.7701(b)-2(c)(1).

⁷³² Treas.Reg. § 301.7701(b)-2(d).

⁷³³ *Id.*

⁷³⁴ I.R.C. § 7701(b)(3)(C).

⁷³⁵ I.R.C. § 7701(b)(4).

of the year, and then he is granted a green card in 2011. He will be able to take the election for 2010 because he was present for at least thirty-one consecutive days and was present in the United States for more than seventy percent of the days remaining in 2010.

7.2.5. Statutory Exceptions

In addition to the Closer Connection Exception and medical condition exception discussed above, there are other exemptions from the substantial presence test. Most of these exceptions depend on the role of the exempt individual as well as the activity conducted in the U.S. and may either exempt the income connected to that activity or which days are counted as present for the substantial presence test, depending on the exemption. Foreign government-related individuals and their families are exempt for the days in which they are conducting full-time diplomatic or consular activities.⁷³⁶ A teacher or trainee that is temporarily in the United States under a J visa may exclude that time unless that individual had taken the teacher or student exemption in two or more of the previous six years.⁷³⁷

Individuals which have a place of residence in Canada or Mexico and that regularly commute to a workplace in the United States are not considered present in the U.S. on any day they commuted.⁷³⁸ “Commuting” requires that the person leaves for work and returns home during the same 24-hour period.⁷³⁹ Crew members of a foreign transportation vessel do not count any days in which they are temporarily in the U.S. and are not conducting trade or business in the U.S.⁷⁴⁰ The last exception is for individuals who are in transit between two non-U.S. locations. The time spent on a layover in the United States does not count toward the exception if the time spent is less than 24 hours.⁷⁴¹

⁷³⁶ I.R.C. § 7701(b)(5)(B).

⁷³⁷ I.R.C. § 7701(b)(5)(C).

⁷³⁸ I.R.C. § 7701(b)(5).

⁷³⁹ Treas. Reg. § 301.7701(b)-3(e)(2)(i).

⁷⁴⁰ I.R.C. § 7701(b)(7)(D).

⁷⁴¹ I.R.C. § 7701(b)(7)(C).

7.2.6. Conclusion - Consequences of Being a Resident or Nonresident

If you are considered a permanent resident by the IRS, then you are subject to federal income tax in the same manner as a U.S. citizen. In general, U.S. citizens and permanent residents are taxed on all income, regardless of where the income comes from, unless there is an explicit exception.⁷⁴² Different tax rates apply according to the type of income it is. For example, qualified dividends, non-qualified dividends, gains on the disposition of property, and wages for services all have different rates that apply.

For immigrants who may continue to maintain connections with their country of origin, it is most notable that once individuals are considered U.S. residents for a tax year, they may be taxed in later years on income from outside the United States, even if they have not resided in the United States for a single day that year. A minimal exception exists where \$80,000 of foreign earned income can be excluded from if the individual spent more than 330 days of the tax year in a foreign country.⁷⁴³

There are some general benefits of U.S. residency which should be considered as foreign individuals come closer to the designation of residency, such as deductions from gross income for expenses related to profitable activities or for charitable contributions. There are also exemptions and tax credits that may further reduce a person's tax liability. However, the detailed rules of taxation as a U.S. citizen or permanent resident is beyond the scope of the current discussion.

The general rule for nonresidents is that income earned from a U.S. source is subject to taxation by the United States. There are two main categories of income by nonresidents: income that is effectively connected to a United States trade or business, and income from a fixed or determinable annual or periodic, or "FDAP." If income is effectively connected to a U.S. trade or

⁷⁴² I.R.C. § 61.

⁷⁴³ I.R.C. 911.(a)(1).

business, then the nonresident alien will be subject to U.S. taxes for this income in the same way as U.S. citizens, including applicable deductions and credits.

For FDAP income, the first step is to determine whether income is from a U.S. source or foreign source. Determining the source of income and the subsequent tax treatment of that income depends on what type of income it is. Also, depending on what type of tax is owed, withholding methods may be used to ensure that the U.S. government receives the tax.

7.3. Income Effectively Connected to a U.S. Trade or Business

A nonresident alien is taxed in the same manner as a U.S. resident for any income that is effectively connected to a United States trade or business. Activities are considered a trade or business if they are profit-oriented activities that are regular, substantial, and continuous.⁷⁴⁴ Some examples which the courts have concluded to be regular, substantial, and continuous are the purchasing and exporting of goods for sale in foreign countries, and the buying and selling of real property where the individual collected rents and paid operating expenses, made improvements and repairs, and hired labor over a period of years.⁷⁴⁵ Even if the individual is never present in the country, income may be effectively connected if produced through an agent.⁷⁴⁶ On the other hand, merely holding a U.S. office in which a small staff performed clerical and routine services has at times been ruled as not effectively connected to U.S. trade or business because the real business was investment activity conducted outside of the United States.⁷⁴⁷

If a nonresident is the beneficiary of a trust that is engaged in a U.S. trade or business, then this individual is considered to be engaged in a U.S. trade or business.⁷⁴⁸ In the same manner, if a partnership conducts a trade or business in the United States, then any partner of the partnership is

⁷⁴⁴ See e.g., *U.S. v. Balanovski*, 236 F.2d 298 (2d Cir. 1956), cert. denied, 352 U.S. 968.

⁷⁴⁵ *Balanovski*, 236 F.2d 298; *Taiyo Haw. Co. v. Commissioner*, 108 T.C. 590 (1960), aff'd, 299 F.2d 623 (2d Cir. 1962).

⁷⁴⁶ See e.g., *Lewenhaupt v. Commissioner*, 20 T.C. 151 (1953).

⁷⁴⁷ *Scottish American Investment Co. v. Commissioner*, 12 T.C. 49 (1949).

⁷⁴⁸ I.R.C. § 875(b).

also considered to be engaged in the U.S. trade or business.⁷⁴⁹ Thus, if the partner receives a distribution from the partnership, a portion of those proceeds which corresponds with the U.S. trade or business is taxable income to the nonresident foreigner. Similarly, the proceeds from a sale of ownership interest in a partnership that has a fixed office or permanent establishment will also have some component that is taxable income or loss.⁷⁵⁰

Passive investments, however, are excluded. The trading of securities, commodities, and derivatives through a resident broker, commission agent, custodian or other independent agent is explicitly not a trade or business.⁷⁵¹ Similarly, a non-dealer individual that trades in stocks, securities, or commodities in her own account is not a trade or business, regardless of whether the trading took place in the United States or not.⁷⁵² Also, a foreign individual or company is not considered to be engaged in a U.S. trade or business for merely being a partner of a partnership which is trading its own stocks or securities.⁷⁵³ For commodities trading income to be excluded, the trading must be from a customary transaction that occurs in an organized commodities exchange, and the taxpayer must not be part of a U.S. office that can have an effect on the commodity.⁷⁵⁴

In general, any income from personal services performed within the United States is a U.S. trade or business.⁷⁵⁵ This includes single performances by an athlete or entertainment artist.⁷⁵⁶ There is a narrow exception for nonresidents that are providing personal services to other nonresidents who are not engaged in a U.S. trade or business if the service provider is only

⁷⁴⁹ I.R.C. § 875(a).

⁷⁵⁰ Rev. Rul. 91-32.

⁷⁵¹ I.R.C. § 864.

⁷⁵² I.R.C. § 864(b)(2)(A)(ii).

⁷⁵³ Treas. Reg. § 1.864-2(c)(2)(ii).

⁷⁵⁴ Treas. Reg. § 1.864-2(d)

⁷⁵⁵ I.R.C. § 864(b).

⁷⁵⁶ See Rev. Rul. 70-543, 1970-2 C.B. 172.

temporarily in the United States, is present for no more than ninety days, and the total compensation is \$3,000 or less.⁷⁵⁷

If a nonresident has a U.S. trade or business during the year, then any other income that is sourced from the United States is effectively connected to that trade or business.⁷⁵⁸ For example, if an individual conducts retail sales in a foreign country, and also conducts an unrelated trade or business in the United States, like personal services, then this individual must include in income the proceeds from any retail sales with a source in the U.S., even if there is no regular retail business in the United States.

Income that is effectively connected to a U.S. trade or business is taxed as if the income was earned by a U.S. citizen.⁷⁵⁹ Similarly, a nonresident may apply deductible items related to that income, such as expenses, and foreign tax credits for taxes paid to certain foreign countries that are connected with the U.S. trade or business.⁷⁶⁰

7.4. Foreign Investors Real Property Tax Act (FIRPTA)

In 1980, Congress enacted Foreign Investors Real Property Tax Act, which imposed a tax on nonresidents for capital gains on real property located in the United States or the U.S. Virgin Islands.⁷⁶¹ The term “real property” includes land, natural resources, buildings and their structural components, permanent structures, and personal property associated with the use of the real property, such as walls, furnishings, and equipment used for mining, farming, or construction.⁷⁶² An “interest” in real property includes fee ownership, life estates, remainders, partial or co-ownership, leaseholds, options to acquire, and rights of refusal in interests in the real property.⁷⁶³

⁷⁵⁷ I.R.C. § 864(b)(1); Treas. Reg. § 1.864-2(b)(2).

⁷⁵⁸ I.R.C. 864(c); Treas. Reg. 1.864-4(b).

⁷⁵⁹ I.R.C. § 871(b).

⁷⁶⁰ I.R.C. §§ 873(b) and 906.

⁷⁶¹ I.R.C. §§ 897(a)(1) and (c)(1)(A)(i).

⁷⁶² I.R.C. §§ 897(c)(1)(A) and (c)(6)(B).

⁷⁶³ I.R.C. § 897(c)(6)(A).

Interest as a creditor, such as a mortgage, are not included as long as the creditor does not have any right to share in the appreciation of the property's value, profits or sale proceeds.⁷⁶⁴

Normally, sales of real estate are not necessarily characterized as a trade or business. For example, the sales of a person's primary residence may yield gain, but does not otherwise qualify as a trade, business, or other for-profit activity. However, under FIRPTA, all income derived from property in the United States is considered to be effectively connected to a U.S. trade or business, even if the activity is entirely passive.⁷⁶⁵

Taxation of real estate is based on the amount of capital gain or loss on the sale. The gain or loss is determined by taking the difference between the property's basis and the amount realized by the seller from the sale.⁷⁶⁶ The basis is generally either the original cost of the property or a transferred basis if received through a non-recognized transaction.⁷⁶⁷ The original basis is then adjusted for the costs of any improvements on the property or other transactions designated by the tax code.⁷⁶⁸ The amount realized refers to any cash received plus the fair market value of any property received in the transaction.⁷⁶⁹ A resulting gain is taxed at a rate which corresponds with the individual's overall income.⁷⁷⁰

To protect itself against certain abuses, the tax on real property gain also extends to any gain realized on the sale of stock of a real property holding company.⁷⁷¹ A holding company is any domestic corporation whose assets are comprised of at least fifty percent real property in the United States.⁷⁷² The tax on a foreign shareholder is based on a portion of the property's value in

⁷⁶⁴ Treas. Reg. § 1.897-1(d).

⁷⁶⁵ I.R.C. § 897(a)(1).

⁷⁶⁶ I.R.C. § 1001.

⁷⁶⁷ I.R.C. § 1011.

⁷⁶⁸ *Id.*

⁷⁶⁹ I.R.C. § 1001.

⁷⁷⁰ I.R.C. § 1(h).

⁷⁷¹ I.R.C. § 897(c)(1)(A)(ii).

⁷⁷² I.R.C. §§ 897(c)(2) and (4).

proportion to the shareholder's stake in the company and in proportion to the company's U.S. real property over its worldwide property holdings.

Calculating the share of a company's assets that are U.S. real property is somewhat complex. Each asset's value is the price it would be if currently sold. If the company is a fifty-percent shareholder or more of another corporation, then a proportional share of subsidiary corporation's assets is included in the parent corporation's assets instead of the value of the parent's stock in the subsidiary.⁷⁷³ If the company owns any interest in a partnership, trust or estate, then a proportionate share of the partnership's assets is also included in the total calculation.⁷⁷⁴ Other assets which are included in the calculation are any foreign real property directly held by the company and any assets used by the company in its trade or business.⁷⁷⁵ So, the value of a company's securities portfolio is not included. In addition to U.S. real property that is directly owned by the company, a company's real property holding also includes any interests in a foreign corporation if it cannot establish that the foreign corporation is not a U.S. real property holding company.⁷⁷⁶

An exception to the holding company rule is applied where the stock of the corporation is sold on an established stock exchange, and the taxpayer never held at least five percent of the corporation's stock in the last five years.⁷⁷⁷ Similarly, if a nonresident alien owns an interest in a partnership, each partner is deemed to own a ratable share of each real property. So, a sale of an individual's partnership interest is considered a sale of a portion of the partnership's real property in proportion to the partner's interest in the partnership.⁷⁷⁸

⁷⁷³ I.R.C. § 897(c)(5)(A).

⁷⁷⁴ Treas. Reg. § 1.897-2(d)(4).

⁷⁷⁵ Treas. Reg. §§ 1.897-1(d)(2) and (3).

⁷⁷⁶ Treas. Reg. § 1.897-2(a).

⁷⁷⁷ I.R.C. § 897(c)(3).

⁷⁷⁸ I.R.C. § 897(c)(4)(b).

7.5. Foreign Tax Credit

The United States generally allows U.S. citizens to reduce their tax liability by amounts that are paid as taxes to foreign countries. Some nonresident aliens are also allowed to take the credit on their effectively connected income in limited circumstances. A nonresident alien is only allowed to take claim of the tax credit if the person pays taxes to the United States on income effectively connected to a U.S. trade or business and that person is taxed on the same effectively connected income by a foreign country that is not the nonresident's home country.⁷⁷⁹ With technology boosting global commerce, it is not uncommon for individuals to be engaged in business in the multitude of countries required for a nonresident alien to take advantage of this credit.

The amount of the credit allowed has limitations. The credit must be in proportion to the income sourced to the non-home foreign country when compared to the taxpayer's total effectively connected income.⁷⁸⁰ For example, if 20% of a nonresident alien's effectively connected income is also taxed by a country that is not the alien's home country, and that person paid \$200 of tax on that income to the third country, then a \$40 credit, or 20% of \$200, will be allowed to reduce that person's U.S. tax liability. Also, the foreign tax credit may be denied where the country whose taxes would be offset have severed ties with the United States, does not conduct foreign relations with the U.S., or repeatedly provides support for acts of international terrorism.⁷⁸¹

7.6. Fixed or Determinable Annual or Periodic Income

When a nonresident alien receives income from a U.S. source other than the nonresident's U.S. trade or business, it is taxable by the United States as fixed or determinable annual or periodic income, or FDAP income. Taxpayers must be careful though, the term "fixed and determinable annual or periodic" is merely a description and gain or income is still taxable under these sections

⁷⁷⁹ I.R.C. § 906(a).

⁷⁸⁰ I.R.C. § 906(b)(2).

⁷⁸¹ I.R.C. § 901(j).

whether the payments are periodic or received once.⁷⁸² Sourcing rules for FDAP income depends on the type of income it is. FDAP income is taxed at a flat rate of thirty percent.⁷⁸³ Unlike income from a U.S. trade or business, deductions for expenses incurred are not allowed. As the taxpayer may not be subject to U.S. jurisdiction, the tax is collected by imposing a withholding system on the payor of the income.

7.6.1. Interest

Interest income is generally sourced from the residence of the payor. However, even a foreign corporation may be deemed a U.S. source of interest if it engages in a U.S. trade or business.⁷⁸⁴ So, if nonresident has lent money to a U.S. borrower, the interest that the borrower pays to the nonresident is deemed to come from the borrower's domicile, the United States. However, if the interest is paid from the foreign branch of a U.S. bank on a foreign deposit, then the interest will be deemed from a foreign source. A partnership which pays interest is considered to be a U.S. source if it engages in a U.S. trade or business at any time during the tax year.

The definition of interest is broad and includes unstated interest on installment sales and original issue discounts.⁷⁸⁵ The tax on a nonresident's interest income is typically withheld when the interest is paid. With original issue discounts, a debt instrument that is purchased at a discount and later sold for its "original" value after a set holding period, the interest is considered received when the full value of the note is redeemed.⁷⁸⁶

Exceptions are made for portfolio interest and interest on bank deposits.⁷⁸⁷ Portfolio interest is a payment transferred to an individual on a registered debt instrument whose beneficial

⁷⁸² Treas. Reg. § 1.1441-2(b)(1)(2).

⁷⁸³ I.R.C. § 871(a)(1).

⁷⁸⁴ I.R.C. § 884(f).

⁷⁸⁵ I.R.C. § 483.

⁷⁸⁶ I.R.C. §§ 871(a)(1)(C), 881(a)(3).

⁷⁸⁷ I.R.C. § 871(h) and (i).

owner is an unrelated nonresident alien.⁷⁸⁸ The portfolio interest exception does not apply to any interest paid by a foreign bank,⁷⁸⁹ earned by a ten percent owner of a beneficial owner,⁷⁹⁰ or contingent on the debtor's annual income, change in value or other similar specified measures related to the financial health of the debtor.⁷⁹¹

7.6.2. Dividends

A dividend is taxable to a nonresident alien individual if the payor is a U.S. corporation.⁷⁹² Taxable dividends include cash or property paid from a corporation's earnings and profits⁷⁹³ and also "dividend equivalents" paid pursuant to securities lending or sale-repurchase transactions.⁷⁹⁴ Dividends paid by a foreign corporation are expressly not taxable, even if the foreign corporation derives income from a U.S. source.⁷⁹⁵

A very narrow exception exists for dividends received by an "existing 80/20 company."⁷⁹⁶ Before 2011, individuals who received dividends from corporations whose earnings were at least eighty percent from foreign sources could exempt a portion of their dividend that corresponded to its foreign sourced income.⁷⁹⁶ This split exemption no longer applies. However, companies that qualified for the 80/20 rule before 2011 are effectively grandfathered into current tax years if the corporation continues to meet the eighty percent requirement and there has not been a significant line of business added since 2010.⁷⁹⁷

⁷⁸⁸ I.R.C. § 871(h)(2).

⁷⁸⁹ I.R.C. § 881(c)(3).

⁷⁹⁰ I.R.C. § 871(h)(3).

⁷⁹¹ I.R.C. § 871(h)(4).

⁷⁹² I.R.C. §§ 861(a)(2) and 871(a)(1)(A).

⁷⁹³ I.R.C. § 316.

⁷⁹⁴ I.R.C. § 871(m).

⁷⁹⁵ I.R.C. § 871(i)(2)(D).

⁷⁹⁶ I.R.C. § 871(i)(2)(B).

⁷⁹⁷ I.R.C. § 871(l).

7.6.3. Rents or Royalties

Rents are payments collected in exchange for the use of property. This rental income is subject to the FDAP tax if the property is located or used in the United States.⁷⁹⁸ However, in many cases, the activity of managing rental property is considered a U.S. trade or business, and the income is therefore taxed as effectively connected income instead of as FDAP. Even if the activity is passive, an individual may elect to treat it as a U.S. trade or business to take advantage of the graduated tax rates and applicable deductions.⁷⁹⁹

Royalties, for tax purposes, encompasses any income received in exchange for the use of another's rights, regardless if received periodically based on the amount of use or as a lump sum.⁸⁰⁰ Royalties are sourced from the United States if the property is used in the United States.⁸⁰¹ Often, intellectual property is transferred to another as a sale, which would normally be sourced according to the location of the seller.⁸⁰² However, if the amount in the exchange is contingent on future productivity, use or sales from exploiting the intellectual rights, or if less than the entire bundle of rights to the property are transferred, then the proceeds are classified as royalties.⁸⁰³

7.6.4. Capital Gains

Capital gains and losses refers to the amount of money that a person profits from or loses on the disposition of property, whether it is real property, personal property, or intangible rights. An item of property is assigned a value basis that incorporates how much the property cost the taxpayer. The final sale proceeds, or "amount realized," is compared to the property's basis to determine whether money was gained or lost on the disposition. This difference is the capital gain

⁷⁹⁸ I.R.C. §§ 861(a)(4) and 871(a)(1)(A).

⁷⁹⁹ I.R.C. § 871(d).

⁸⁰⁰ Treas. Reg. § 1.1441-2(b)(1)(ii).

⁸⁰¹ I.R.C. § 861(a)(4).

⁸⁰² I.R.C. § 865(a).

⁸⁰³ I.R.C. § 871(a)(1)(D); *Commissioner v. Wodehouse*, 337 U.S. 369 (1949).

or loss. Generally, nonresident aliens are not taxed on their capital gains and losses, but there are a few exceptions.

One exception, discussed above, occurs where an intangible right is sold, but the sale does not transfer the entire bundle of rights, or the sale price is contingent on future productivity, use or sales.⁸⁰⁴ Then the transfer is considered a royalty, and not a disposition that is subject to capital gains. Thus, the exclusion of this income as capital gain does not apply.

A second exception applies for a nonresident alien that is present in the United States for 183 days or more in one year. A nonresident alien that is present for a total of 183 days pays a thirty percent tax on any capital gains which are sourced from the United States for that year. However, any nonresident who passes that test also passes the substantial presence test and will be taxed as a resident. For most nonresidents that are subject to Section 871 for capital gains, the substantial presence test negates the thirty-percent FDAP tax and they are taxed the same as U.S. citizens at a lower capital gains rate. However, the various exceptions that apply to the substantial presence test, such as for commuters or students, do not apply to Section 871 and their presence in the United States subjects their dispositions to the thirty percent capital gains tax of Section 871 if the income is from a domestic source.

The general sourcing rule for dispositions of personal property is that the income is sourced according to the seller's domicile, and is therefore necessarily a non-U.S. source for nonresidents.

⁸⁰⁵ Most likely, nonresident aliens will not pay tax on their capital gains. There are a few exceptions to the sourcing rules. Inventory property that is purchased from outside of the United States and later sold within the United States is therefore sourced from within the United States.⁸⁰⁶ Sales of depreciable personal property is sourced partially from within the United States for any

⁸⁰⁴ I.R.C. 865(d).

⁸⁰⁵ I.R.C. § 865(a).

⁸⁰⁶ I.R.C. § 861(a)(6).

amount of depreciation deduction taken on previous U.S. tax returns with respect to the property.⁸⁰⁷ As alluded to above, there are also specific situations where an alien is a nonresident for the purpose of the substantial presence test, but will be present in the United States for 183 days to satisfy the capital gains rule, and then also have a tax home with the United States for sourcing purposes.⁸⁰⁸ In these rare cases, a nonresident will be subject to a thirty percent tax on capital gains for sales of personal property. For these nonresident aliens in these specific instances, a capital loss carryover that U.S. citizens often take advantage of does not apply.

7.6.5. Other Fixed or Determinable Annual or Periodic Income

Other types of income may not fall into the categories already discussed, however, all income with a U.S. source should be assumed to be taxable unless there is an exception. Gambling winnings are generally taxable as FDAP income. However, certain types of gambling are exempt. Specifically, a nonresident's winnings from blackjack, baccarat, craps, roulette, and big-6 wheel are expressly exempt from taxation.⁸⁰⁹ Also, any income from legal wagering transactions on U.S. horse or dog racing that takes place outside the United States in a parimutuel pool is exempt.⁸¹⁰ In addition, alimony, commissions, prizes, and life insurance proceeds have also been deemed to be FDAP income.⁸¹¹

7.7. Tax Treaties

To reduce double taxation of the same income by two countries, the United States has entered into treaties with more than sixty other countries that affect the way each other's citizens are taxed by the other country. Often, the treaties may reduce the thirty percent tax rate on FDAP income, or exempt certain types of income, such as royalties or interest.⁸¹² The tax treatment of

⁸⁰⁷ I.R.C. § 865(c).

⁸⁰⁸ Bittker, *supra* at 67-54.

⁸⁰⁹ I.R.C. § 871(j).

⁸¹⁰ I.R.C. § 872 (b)(5).

⁸¹¹ See *Howkins v. Commissioner*, 49 T.C. 689 (1968), *Barba v. U.S.*, 2 Cl. Ct. 674, 83-1 U.S.T.C. (1983).

⁸¹² Bittker, *supra* at 67-6.

each nonresident individual depends on the treaty in place with specific country of residence. If there is no treaty in place between the nonresident individual's resident country and the United States, then the individual must pay all taxes according to the Internal Revenue Code. Similarly, if a treaty is in place between the U.S. and the individual's resident country, but the treaty is silent on the treatment of a certain type of income, then the individual must pay taxes on that income according to the Internal Revenue Code.

A nonresident must be a resident of the treaty country, or "contracting state," to take advantage of the benefits of the country's treaty with the United States.⁸¹³ The U.S. has invariably included a term for its tax treaties to prevent residents of third-party countries from abusing the benefits of another country's tax treaty. With that said, residency requirements may differ between countries.

To determine the true effect of a treaty on an individual's taxes, each treaty must be explored individually and each individual's facts and circumstances will need to be applied. While it is difficult to generalize on the effect of tax treaties, there are a few principles that provide guidance. There may be common trends that the U.S. has followed in their treaties with other countries. Also, the United States Treasury and the Organization for Economic Co-operation and Development, or "OECD," published Model Tax Treaties with suggested treatment of taxes. The United States typically uses the Treasury's Model Treaty as a starting point for negotiations.⁸¹⁴ Many European countries will use the OECD's Model Treaty as their starting point.⁸¹⁵

While the Treasury's and the OECD's treaties are similar in many respects, there are a few key differences. The United States tends to include a "savings clause" from the U.S. Model Treaty

⁸¹³ U.S. Model Income Tax Convention art. 22 (November 15, 2006) ("U.S. Model Treaty").

⁸¹⁴ Richard L. Doernberg, *International Taxation in a Nutshell* 125(9th Ed. 2012).

⁸¹⁵ *Id.*

in which it reserves the right to tax its citizens regardless of where they are residing.⁸¹⁶ This clause references the infamous taxation by the U.S. of its citizen's "worldwide" income. Also, the U.S. Model tends to provide tax credits to directly reduce double taxation, where the OECD Model prefers to use exemptions from income as well.⁸¹⁷ Again, while these model treaties will invariably differ from the actual treaties in place, they are a great way to understand the trends that have appeared and the U.S.'s philosophy towards different types of income.

The general rule for income effectively connected to a U.S. trade or business is that the United States may only tax the income attributable to a permanent establishment of a resident of a treaty partner.⁸¹⁸ A permanent establishment is defined as "a fixed place business through which the business of an enterprise is wholly or partly carried on."⁸¹⁹ A foreign parent corporation which merely has a subsidiary in the U.S. does not necessarily mean that the foreign parent has a permanent establishment. Only where the subsidiary acts as an agent of the parent will a permanent establishment exist. A permanent establishment of a partnership or any of its partner is attributed to all of its partners.⁸²⁰

Generally, nonresidents are not exempt from tax on FDAP dividends from domestic corporations⁸²¹ or real estate rental income.⁸²² On the other hand, the United States generally exempts FDAP income from pension plans or other deferred compensation,⁸²³ royalties,⁸²⁴ capital gains and losses,⁸²⁵ and miscellaneous FDAP sources, like gambling.⁸²⁶ The United States

⁸¹⁶ *Id.* at 126.

⁸¹⁷ *Id.*

⁸¹⁸ Bittker, *supra* at 67-192, citing U.S. Model Treaty art. 7(1) and OECD Commission on Fiscal Affairs, Model Tax Convention on income and on Capital, art. 7(1) (1998) ("OECD Model Treaty").

⁸¹⁹ U.S. Model Treaty art. 5(1); OECD Model Treaty art. 5(1).

⁸²⁰ Doernberg, *supra* at 140.

⁸²¹ Bittker, *supra* at 67-38.

⁸²² Bittker, *supra* at 67-41.

⁸²³ Bittker, *supra* at 67-45.

⁸²⁴ Bittker, *supra* at 67-49, citing U.S. Model Treaty art. 12.

⁸²⁵ Bittker, *supra* at 67-55, citing U.S. Model Treaty art. 13(6) and OECD Model Treaty art. 13(5).

⁸²⁶ Bittker, *supra* at 67-53, citing U.S. Model Treaty art. 21 and OECD Model Treaty art. 21.

generally does not tax income from personal property rentals unless it is attributable to a permanent establishment in the United States.⁸²⁷

For FDAP interest income, the U.S. Model Treaty generally assigns the individual's country of residence the authority to tax most all types of the individual's interest income. The OECD Model treaty reduces the tax rate on interest to ten percent. The United States has generally reduced the tax rate for residents of their treaty counterparts. However, the treaty exemption does not apply if the interest is related to personal services performed through a fixed U.S. office, which is taxed as business income.⁸²⁸

For FDAP personal services income, employee compensation is generally exempt from the tax if the individual is present in the U.S. for less than 183 days, the employer is not a U.S. resident, and the income does not come through a permanent establishment or fixed office of the employer.

⁸²⁹ Nonresident entertainers and athletes are generally not exempt from income earned in the United States.⁸³⁰ The U.S. Model treaty, however, exempts nonresident entertainers and athletes if the income does not exceed \$20,000.⁸³¹

7.8. Withholding

The thirty percent tax on FDAP income is collected through withholding at the source of the income. Any U.S. person that pays or has control over taxable income under Section 871 must withhold the tax due.⁸³² Usually the last U.S. resident which holds the payment, and therefore has more knowledge that payment is going to a foreign recipient, is the “withholding agent” that

⁸²⁷ Bittker, *supra* at 67-41.

⁸²⁸ Bittker, *supra* at 67-24.

⁸²⁹ Bittker, *supra* at 67-43.

⁸³⁰ OECD Model Treaty art. 17(1).

⁸³¹ U.S. Model Treaty art. 16.

⁸³² I.R.C. §§ 1441(a) and 1442(a).

withholds the tax.⁸³³ Even if the foreign recipient is not the beneficial owner of the amount, the U.S. payor is still obligated because it is likely the last chance the U.S. will have control to tax a payment to the eventual nonresident taxpayer.⁸³⁴ Further, if a payor is making a payment to a U.S. resident and the payor has actual knowledge the recipient is an agent of a nonresident, then this payor must withhold the tax, unless the recipient is a financial institution and the payor has no reason to believe the financial institution will not comply with withholding laws.⁸³⁵ On the other hand, the U.S. payor is not obligated to withhold if the beneficial owner is a U.S. resident or the foreign payee is a qualified intermediary or other specified entity who has taken the primary responsibility of withholding the taxes for the U.S. government and the U.S. payor has received certification of the intermediary status.⁸³⁶

A foreign recipient of the payment, either as beneficial owner or foreign payee, is obligated to file a Form 8233 or Form W-8 with the U.S. payor to certify his or her status as a nonresident.⁸³⁷ Nonresidents may use these forms to claim exemptions of applicable tax treaties. If a proper form is not filed by the nonresident and the payor does not have actual knowledge or a reason to know that a payee is domestic, the payor may choose to withhold the tax for a grace period of ninety days and await proper documentation.⁸³⁸ If documentation is still not provided after a grace period or the payor chose not to use the grace period, then the payee is presumed to be a U.S. resident.⁸³⁹

The amount used to calculate the thirty percent withholding is generally the amount of gross income, without any allowance of deductions.⁸⁴⁰ If the exact amount of tax owed cannot be determined at the time of payment, then the withholding agent must withhold an amount “necessary

⁸³³ Bittker, *supra* at 67-100.

⁸³⁴ Treas. Reg. 1.1441-1T(b)(2)(i).

⁸³⁵ Treas. Reg. 1.1441-1(b)(2)(ii).

⁸³⁶ Treas. Reg. § 1.1441-1T(b)(1).

⁸³⁷ Treas. Reg. § 1.1441-1T(b)(i).

⁸³⁸ Treas. Reg. § 1.1441-1T(b)(3).

⁸³⁹ Treas. Reg. §§ 1.1441-1T(b)(3)(iii) and (iv).

⁸⁴⁰ Treas. Reg. § 1.1441-3T(a).

to ensure that the tax withheld is not less than thirty percent” of the entire payment. However, the amount withheld should not exceed thirty percent of the payment made.⁸⁴¹ This language may be confusing, so thirty percent is a good rule of thumb.

However, there are some exceptions to the thirty percent rule. The entire amount of interest payments is subject to withholding, with the exact amount owed to be corrected later and the excess refunded.⁸⁴² The entire distribution from a corporation is likewise withheld from its foreign investors.⁸⁴³ Even though part of a distribution may not be taxable as a “return of capital” if the distribution exceeds a corporation’s earnings and profits, the portion of the distribution that is a return of capital, and not a taxable dividend, is not characterized until the end of the corporation’s fiscal year. However, a withholding agent may elect to not withhold the entire distribution if it exceeds a reasonable estimate of the corporation’s expected earnings and profits.⁸⁴⁴

Other types of income are exempt from withholding or withheld at a reduced rate. Some examples of exempt income are discussed above, such as portfolio interest. Income that is effectively connected to a U.S. trade or business which is not subject to withholding the same way that FDAP income is and is generally included in the taxpayer’s gross income.⁸⁴⁵ Compensation for personal services is generally exempt where it is effectively connected to a U.S. trade or business and is subject to wage withholding by the employer.⁸⁴⁶

Tax treaties between the United States and the nonresident’s country of residence may also reduce or eliminate withholding requirements for income. To take advantage of these reductions and exemptions, the nonresident is required to produce proper documentation to the payor.⁸⁴⁷ Each calendar year, the withholding agent files Forms 1042 and 1042-S to report any amounts paid that

⁸⁴¹ Treas. Reg. § 1.1441-3T(d)(1).

⁸⁴² Treas. Reg. §§ 1.1441-1(b)(8).

⁸⁴³ Treas. Reg. § 1.1441-3(c)(1).

⁸⁴⁴ Treas. Reg. § 1.1441-3(c)(2)(i).

⁸⁴⁵ I.R.C. § 1441(c)(1).

⁸⁴⁶ Treas. Reg. § 1.1441-4(b).

⁸⁴⁷ Treas. Reg. § 1.1441-1(b)(4)(xv).

were subject to withholding. The withholding agent is personally liable to the U.S. for any amounts that were required to be withheld.⁸⁴⁸ The withholding agent then corrects any overwithholding by paying the beneficial owner of the payment. For underwithholding, where the withholding agent pays more tax than it withheld, it may reimburse itself by reducing future payments or withholding deposits.⁸⁴⁹

7.9. Foreign Trusts

A trust is a legal entity that is created when a grantor transfers property to a trustee who holds and invests the property and distributes the principal property and its income to designated beneficiaries in a manner specified by the trust agreement. The laws and benefits of a trust are numerous and beyond the scope of this writing. Trusts can potentially be very complex, and the complexity of the tax rules for a trust will likely mirror the level of complexity of the trust. Nonresident aliens should nevertheless be aware of basic trust and tax policies in case they choose to create one.

Trusts are most often used by U.S. citizens as a way to protect property from creditors or as a way to bypass expensive probate court proceedings when passing an estate to one's beneficiaries. In pre-immigration planning, trusts are often used to displace an immigrant's property so that the individual is not subject to tax on the property's income after the immigrant becomes a U.S. resident. In fact, foreign trusts were such a vehicle for tax avoidance that the rules were changed substantially in 1996.⁸⁵⁰

Within the United States, the transfer of property to a trust is tax free, but once the trust is created the government may tax the income of domestic trusts and the distributions to its U.S. beneficiaries. The trust, as its own entity, files its own tax return, pays tax on its income similarly

⁸⁴⁸ I.R.C. § 1461.

⁸⁴⁹ Treas. Reg. § 1.1461-2T(a)(2).

⁸⁵⁰ Lincoln Stone, *Immigration Options for Investors & Entrepreneurs* 384 (2d Ed. 2010).

to the taxation of an individual taxpayer.⁸⁵¹ A foreign trust can be beneficial because as an entity, it is not subject to U.S. jurisdiction. A trust is designated as foreign when a U.S. court cannot exercise primary supervision over its administration.⁸⁵² A foreign trust is classified as a nonresident alien and generally outside of the authority of the U.S. taxation, but taxes may reach the trust depending on whether its grantor, its income, or its beneficiaries are subject to taxation.

In trust law, the same individual may hold multiple roles. It is not uncommon for a grantor to also be the trustee and a beneficiary. In such a scheme, an individual makes a fictional transfer of her property to herself to hold as trustee, with restrictions set in a trust agreement on how she may invest the trust property. The grantor also lists herself as the beneficiary so that she may take advantage of the income that the property creates and finally receive the principal property back once the trust dispatches it. There are a variety of ways that the grantor may retain or relinquish control over the trust property.

The Internal Revenue Code is especially concerned with such trusts, known as “grantor trusts.” In grantor trusts, the grantor or the grantor’s spouse retains some level of control over the property, either by being a trustee or beneficiary, by retaining the right to revoke the trust and recall the property, or by implementing some other method to control the beneficial enjoyment of the trust.⁸⁵³ Grantor trusts are taxed as if the grantor directly owns the trust property, and therefore any trust income is included in the grantor’s gross income, not the trust’s.⁸⁵⁴ On the other hand, a non-grantor trust is taxed as a separate entity in a way similar to that of U.S. resident individuals.

If a grantor trust is created by a U.S. resident, then regardless if the trust is domestic or foreign, the U.S. government taxes the U.S. resident grantor as the owner of the property in the trust

⁸⁵¹ I.R.C. § 641.

⁸⁵² I.R.C. § 7701(a)(30)(E).

⁸⁵³ I.R.C. §§ 674 and 677.

⁸⁵⁴ I.R.C. § 671.

and the U.S. owner is taxed accordingly.⁸⁵⁵ If a foreign grantor trust is created by a nonresident alien, then the foreign grantor and foreign trust are outside of U.S. taxation. But if an alien becomes a U.S. resident within five years of transferring property to a foreign trust, then the foreign trust will be treated as though the property was transferred by the alien as a U.S. resident.⁸⁵⁶ The new U.S. resident is treated as the owner of the trust property as if it was transferred at the start of the U.S. residency.⁸⁵⁷ Thus, the new resident must include the trust activity when calculating gross income. However, if the grantor is a nonresident alien, transfers property to a foreign trust, and continues to be a nonresident alien for five years, then neither the foreign trust nor the foreign grantor is taxed on the property. Overall, a nonresident alien that creates a trust, whether in the United States or elsewhere, is not treated as the owner of the property.⁸⁵⁸

Foreign non-grantor trusts are treated as nonresident aliens and are therefore taxed on FDAP income from U.S. sources and income effectively connected with a U.S. trade or business.⁸⁵⁹ The foreign trust must file and pay taxes on its distributable net income, or “DNI.” The non-grantor trust must file a Form 1040NR if it was engaged in a trade or business, regardless of whether income was earned, or if the trust has other income in the tax year.⁸⁶⁰ If the trust has a U.S. office, the 1040NR is due on April 15. If not, the tax return is due June 15.⁸⁶¹ A non-grantor trust may deduct any distributions of its DNI to beneficiaries to the extent that it is associated with its effectively connected income.⁸⁶²

A U.S. Beneficiary which receives a distribution from a foreign trust must file Form 3520 for the year that the distribution is received.⁸⁶³ A foreign beneficiary that may eventually become a

⁸⁵⁵ *Id.*

⁸⁵⁶ I.R.C. § 679(a)(4).

⁸⁵⁷ I.R.C. § 679(a)(4).

⁸⁵⁸ Treas. Reg. § 1.672(f)-1(a).

⁸⁵⁹ *B.W. Jones Trust v. Commissioner*, 132 F.2d 914 (4th Cir. 1943).

⁸⁶⁰ Treas. Reg. § 1.6012-1(b).

⁸⁶¹ Treas. Reg. § 1.6072-1.

⁸⁶² I.R.C. § 661.

⁸⁶³ I.R.C. § 6048(c)(1).

U.S. resident is ignored for trusts with U.S. grantors unless the beneficiary actually becomes a resident within five years of the grant.⁸⁶⁴ However, a U.S. beneficiary will still have to pay tax.⁸⁶⁵ If any of the trust's DNI is not distributed to its beneficiaries, the income "accumulates" in the trust. Accordingly, any distribution is treated as though it was distributed in the year it was earned by the trust.⁸⁶⁶ Further, interest will be imputed over the amount of time the income went untaxed.⁸⁶⁷

Trusts have been used in many ways to take advantage of tax rules. Examples include intentionally defective grantor trusts and irrevocable life insurance trusts.⁸⁶⁸ However, the potential for fraudulent tax avoidance through the use of trusts is very apparent to the IRS, so individuals must be careful to use the benefits of the trust as intended by the Internal Revenue Code. The United States has long held that the economic substance of the transaction rules over its form, and the IRS can collapse fraudulent evasion schemes if they are abusive.⁸⁶⁹

7.10. Transfer Taxes

Transfers of property, including transfers of cash, from one party to another may be taxed as income tax or as a transfer tax. The burden of income tax falls on the recipient, whereas the burden of transfer tax falls on the transferor. For most gifts or transfers of an estate, the recipients are not taxed on the income.⁸⁷⁰

Some transfers are specifically not taxable or not "recognized" regardless of whether the transferor or the recipient are nonresidents. Gain or loss on transfers of property or cash to fund a corporation is not recognized if it is in exchange only for stock of the corporation and the total amount of stock exchanged during the transaction to all parties is for at least eighty percent control

⁸⁶⁴ I.R.C. § 679(c)(3); Treas. Reg. § 1.679-2(a)(3)(i).

⁸⁶⁵ I.R.C. § 61(a)(15).

⁸⁶⁶ I.R.C. § 666.

⁸⁶⁷ I.R.C. § 667(a)(3).

⁸⁶⁸ Wolfe, *supra* at 51-56.

⁸⁶⁹ *Gregory v. Helvering*, 293 U.S. 465 (1935).

⁸⁷⁰ I.R.C. § 102.

of the corporation.⁸⁷¹ Similarly, gain or loss on transfers of property or cash to partnership in exchange for partnership interest is also not recognized.⁸⁷² In such transfers, the tax basis is preserved in the hands of the new owner so that any gain or loss is eventually recognized.⁸⁷³

The primary transfer taxes are on the transfer of a decedent's estate after death, and gratuitous transfers, or gifts. For these transfers, the donor or decedent is responsible for paying the tax. People are subject to transfer taxes depending on whether they are domiciled in the United States at the time of their death, for estate taxes, or at the time of the gift, for gift tax.

7.10.1. Domiciliary

Transfers are generally taxable if the donor or decedent is “domiciled” in the United States at the time of the gift or time of death.⁸⁷⁴ Domiciliary depends more on the intent to establish permanent residency than on the instantaneous physical presence of the donor at the time of the transfer. This emphasis on the person's intended permanence highlights the tax's context as a tax on the transmission of personal wealth over the lifetime of the individual.⁸⁷⁵ EB-5 and green card holder may be subject to income tax rules automatically, but may not be considered domiciled for the purpose of transfer taxes. Domicile can be established by an individual's permanent residence regardless of whether the individual was residing in the United States illegally.⁸⁷⁶

A person is considered domiciled in the U.S. if he or she lives in the U.S. with no definite present intention of moving away, or in other words, with the intention of living there indefinitely.⁸⁷⁷ The intention to change domicile will not be effective until an actual permanent move is actually effectuated.⁸⁷⁸ The intent to reside in the country is hard for the IRS to establish

⁸⁷¹ I.R.C. § 351.

⁸⁷² I.R.C. § 721.

⁸⁷³ I.R.C. §§ 362 and 722.

⁸⁷⁴ I.R.C. § 2001(a).

⁸⁷⁵ Bittker, *supra* at 134-4.

⁸⁷⁶ Rev. Rul. 80-209, 1980-2 CB 248, 249.

⁸⁷⁷ Treas. Reg. § 20.0-1(b)(1).

⁸⁷⁸ Treas. Reg. § 20.0-1(b)(1).

once a person is deceased, and a court will use certain factors to determine whether the intent existed. These factors include: the location, value, and size of the decedent's residences; the location of family and friends; the location of personal possessions; the location of their businesses; whether they are licensed to drive; whether they are registered to vote; the location of any religious or social affiliations; the location of burial plots; terms of immigration status; whether they declared residency in a will or trust.⁸⁷⁹ If an immigrant plans to spend some time in the United States but does not intend to establish domicile there, it would be prudent to take these factors into consideration and take action to ensure that their intent is clear. Some actions may include: purchasing a principal residence and spending as much time there as possible, purchasing foreign burial plots, and engaging with political, social, or religious organizations.⁸⁸⁰

7.11. Estate Tax

The general rule is that a person is subject to the United States estate tax if that person is domiciled in the U.S. at the time of death. However, there are certain situations in which a non-domiciled alien may be subject to estate tax, which is determined on where the property being transferred is situated, or its "situs."

7.11.1. Estate Tax for Non-Domiciled Aliens

A nonresident alien's gross estate is taxed to the extent that it contains property located in the United States.⁸⁸¹ The "entire gross estate" of a nonresident alien decedent is determined in the same way that a U.S. citizen's gross estate is calculated. This may include tangible and intangible property owned at death, property transferred during life, or life insurance proceeds,⁸⁸² and is

⁸⁷⁹ Wolfe, *supra* at 13-14.

⁸⁸⁰ Wolfe, *supra* at 14.

⁸⁸¹ I.R.C. § 2103.

⁸⁸² I.R.C. § 2031; Treas. Reg. § 20.2031-1.

included in the gross estate property regardless of its location. However, only the portion of the decedent's estate that is "situated" in the United States is included in the taxable estate.⁸⁸³

Property that is expressly situated in the United States is real property located in the United States, tangible personal property located in the United States, stock of U.S. corporation, interest in domestic partnerships, and the debt obligation owed by a United States person.⁸⁸⁴ Determining the situs of real estate and stock issued by domestic corporations is straightforward. If the corporation is incorporated in the United States, its stock has a U.S. situs. If real property is located in the United States, it has a U.S. situs. An interest in a partnership is situated in the United States if the partnership conducts business in the United States.⁸⁸⁵ For tangible personal property to be situated in the United States, mere presence at the time of death is likely not sufficient and some degree of permanence is required.⁸⁸⁶ Debt obligations are situated in the United States if the obligor is a U.S. citizen or resident, a domestic corporation, a domestic partnership, the United States government, a U.S. state, or the District of Columbia or other political subdivision.⁸⁸⁷ Bank deposits are situated inside the United States if made with the U.S. branch of a foreign corporation or partnership engaged in commercial banking.⁸⁸⁸ Conversely, a deposit is situated outside of U.S. if it is made with the foreign branch of a U.S. corporation or partnership engaged in commercial banking.⁸⁸⁹

Proceeds from a life insurance policy on the decedent's life are expressly situated outside of the United States.⁸⁹⁰ If the decedent has an interest in a trust as a beneficiary, the situs of the property depends on the underlying property in the trust.⁸⁹¹ The situs of intangible personal property, such as intellectual property rights, depends on whether the rights can be enforced against

⁸⁸³ I.R.C. § 2106(a).

⁸⁸⁴ Treas. Reg. § 20.2104(a).

⁸⁸⁵ Rev. Rul. 55-701, 1955-2 C.B. 836.

⁸⁸⁶ Bittker, *supra* at 134-11, citing *Delany v. Murchie*, 177 F.2d 444, 448 (1st Cir. 1949).

⁸⁸⁷ I.R.C. § 2104(c); Treas. Reg. § 20.2104-1(a)(7).

⁸⁸⁸ Treas. Reg. § 20.2104(a)(8).

⁸⁸⁹ Treas. Reg. § 20.2105(j).

⁸⁹⁰ Treas. Reg. § 20.2105(g).

⁸⁹¹ *Commissioner v. Nevius*, 76 F.2d 109 (2d. Cir), cert. denied, 298 U.S. 591 (1935).

a resident of the United States, a domestic corporation, or government agency.⁸⁹² If so, then it is situated in the United States.

Once the portion of gross estate that is situated in the United States has been identified, then deductions may be applied to the estate to determine the taxable estate. In general, most of the deductions that can be taken by U.S. citizens and residents may also be taken by nonresident alien decedents. Funeral expenses, administrative expenses, debt claims against the estate, mortgages on estate property, and casualty losses are deductible against the estate.⁸⁹³ However, these deductions are only allowed in proportion of the estate situated in the U.S. to the entire, world-wide gross estate.⁸⁹⁴

Also, charitable contributions may be deducted if made to U.S. government bodies, domestic corporations that qualify for tax-exempt status under Section 501(c)(3), or trustees and fraternal societies that are within the United States.⁸⁹⁵ As long as the charitable corporation that receives the donation is organized in the United States, the donation may be used toward a benefit in any location.⁸⁹⁶

Lastly, deductions are allowed for the value of property that is gifted to the decedent's surviving spouse if the spouse is a U.S. citizen.⁸⁹⁷ If the surviving spouse is not a U.S. citizen, then the deduction is only allowed if the gift is made through a qualified domestic trust or the surviving spouse places the property in a qualified domestic trust shortly after the death.⁸⁹⁸ A qualified domestic trust is properly established if it has a U.S. trustee and is obliged to pay U.S. estate taxes upon the distribution of the principal, the termination or disqualification of the trust, or the death of

⁸⁹² Treas. Reg. § 20.2104(a)(4).

⁸⁹³ I.R.C. §§ 2053(a), 2054, and 2106(a)(1) and (4).

⁸⁹⁴ I.R.C. § 2106(a)(1).

⁸⁹⁵ I.R.C. § 2106(a)(2).

⁸⁹⁶ Bittker, *supra* at 134-19.

⁸⁹⁷ I.R.C. § 2106(a)(3).

⁸⁹⁸ I.R.C. § 2056(d).

the surviving spouse.⁸⁹⁹ Also, if a noncitizen surviving spouse was a resident at the time of death and the spouse becomes a U.S. citizen before the estate tax return is filed, then the spouse may claim the deduction without the use of a trust.⁹⁰⁰

Once deductions are applied to the portion of the gross estate that is situated in the U.S., the tax is calculated based on the remaining taxable estate. This tax is calculated for nonresidents in essentially the same fashion as for U.S. citizens, and refers to a bracketed rate schedule based on the total value of the taxable estate.⁹⁰¹ The tax on the estate of nonresident aliens receives a “unified credit” of \$13,000.⁹⁰² Because this credit is a dollar-for-dollar reduction of taxes owed, this credit potentially covers \$60,000 worth of one’s estate.⁹⁰³ If the nonresident decedent previously used any unified credit for gifts, this credit would reduce the unified credit.⁹⁰⁴ However, only a U.S. resident would be eligible to use the unified credit towards gifts, so this only applies in the limited case where a decedent was a U.S. resident for at least one year during his or her life and later died as a nonresident. An additional state death tax credit may be claimed if the entire gross estate is subject to state death taxes.⁹⁰⁵

7.11.2. Estate Tax for Domiciled Persons

For people that are domiciled in the United States, their estate is taxed the same whether they are citizens or not. The decedent’s gross estate encompasses all the decedent’s property, regardless of whether the property is situated in the United States or elsewhere.⁹⁰⁶ Further, different countries may have conflicting rules that may subject some of the decedent’s property to double taxation.⁹⁰⁷ Because of this, it is important for those considering immigrating to the United

⁸⁹⁹ I.R.C. §§ 2056A(a) and (b)(1), (4), and (5).

⁹⁰⁰ I.R.C. § 2056(d)(4).

⁹⁰¹ I.R.C. § 2101.

⁹⁰² I.R.C. § 2102(c).

⁹⁰³ Wolfe, *supra* at 10.

⁹⁰⁴ I.R.C. 2101(b)(3)(B).

⁹⁰⁵ I.R.C. § 2106(a)(4).

⁹⁰⁶ I.R.C. § 2031.

⁹⁰⁷ Stone, *supra* at 390.

States to investigate their own country's tax laws so that they can plan transfers of their property accordingly, and limit the total estate tax. Opportunities for wealth management may exist in the creation of a trust as mentioned above, or by making gifts of property to intended beneficiaries before establishing domicile in the U.S.

Of course, each situation should be determined on its own merits. U.S. citizens benefit from a "unified credit" that can be used over the lifetime of an individual to offset both estate and gift taxes.⁹⁰⁸ The credit is expressed as a function of the "basic exclusion" of an estate, which is published every year by the IRS.⁹⁰⁹ For 2015, the basic exclusion for U.S. citizens is \$5,430,000 and therefore the unified credit would be a dollar-for-dollar tax credit that would exempt that amount of the estate.⁹¹⁰ The benefit of the additional unified credit that is allowed to domiciled persons may negate any benefit of pre-immigration transfers.

7.12. Gift Tax

In general, nonresident aliens are subject to the U.S. gift tax when the gift property is situated in the United States at the time of the transfer.⁹¹¹ Conversely, a non-domiciled person may gift foreign-situs property without any U.S. tax implications.⁹¹² The rules that determine where property is situated are generally the same for gift and estate taxes. However, because of the difficulty enforcing situs rules on intangible property, an exception applies for intangible property that is transferred by a nonresident alien.⁹¹³ Also, because stock in U.S. corporations are considered intangible property here, gifts of such stock are not subject to the gift tax.⁹¹⁴ Also, different rules may apply where the nonresident is a U.S. expatriate.

⁹⁰⁸ I.R.C. §§ 2010 and 2505.

⁹⁰⁹ I.R.C. § 2010(c).

⁹¹⁰ Rev. Proc. 2014-61.

⁹¹¹ I.R.C. § 2511(a).

⁹¹² Wolfe, *supra* at 13.

⁹¹³ I.R.C. § 2501(a)(2).

⁹¹⁴ I.R.C. § 2501(a)(5)(i).

U.S. persons are required to report the receipt of gifts from foreign trusts or other foreign sources when the aggregate value is in excess of a certain exclusion amount.⁹¹⁵ For 2015, that amount is \$15,601.⁹¹⁶ Recipients must file form 3520 for any year in which they received a foreign gift.

If the gift is subject to gift tax, then other gift tax rules, such as the annual exclusion, deductions, and the generation skipping rules, also apply. An annual exclusion may be deducted from the gross value of gifts made each year.⁹¹⁷ In 2015, the amount of this exclusion was \$14,000.⁹¹⁸ A marital deduction is also available where the recipient spouse is a U.S. resident.⁹¹⁹ Charitable contributions are deductible if the recipient is either a domestic charitable, educational, religious, or other similar corporation; a trust, community chest, fund, foundation, or fraternal society that uses the gift within the United States; or a veterans group organized in the United States.⁹²⁰ The entire amount of the gifts is deductible for the marital and charitable contribution deductions.

Additional generation-skipping taxes apply where a direct gift or a taxable trust distribution is made to a recipient that is two or more generations younger than the donor.⁹²¹ It also applies where a termination in a trust interest results in skipped generations as the sole beneficiaries of a trust.⁹²² In general, generation skipping transfers are taxed at the highest estate tax rate, which is currently 55 percent.⁹²³ However, there is also an exemption for each donor's generation-skipping transfers that is the same amount as the basic exclusion for estates (\$5,430,000 for 2015).⁹²⁴

⁹¹⁵ I.R.C. 6039F.

⁹¹⁶ Rev. Proc 14-61.

⁹¹⁷ I.R.C. § 2503.

⁹¹⁸ Rev. Proc. 2014-61.

⁹¹⁹ I.R.C. 2523(i).

⁹²⁰ I.R.C. 2522.

⁹²¹ I.R.C. §§ 2611 and 2612(b) and (c).

⁹²² I.R.C. § 2612(a).

⁹²³ I.R.C. § 2641.

⁹²⁴ I.R.C. §§ 2631.

7.13. Foreign Account Tax Compliance Act

7.13.1. Introduction

Subtitle A, Chapter 4 of the Hiring Incentives to Restore Employment (HIRE) Act of 2010 introduced the Foreign Account Tax Compliance Act (FATCA) on March 18, 2010 as a revenue-raising proposition to the job stimulus bill.⁹²⁵ FATCA seeks to curtail offshore tax evasion and fraud by inducing foreign financial institutions (FFIs) to report on U.S. account holders in exchange for information about offshore accounts in the U.S. held by their own residents. Individual accounts with \$50,000 or less are exempt from FATCA review. Should an FFI refuse to submit information on individual U.S. accounts valued at more than \$50,000, they may be subject to a hefty 30% withholding tax on any payments related to interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, profits or income, or gross proceeds from the sale or other disposition of any property that could produce U.S.-source interest or dividends.⁹²⁶ The U.S. is the world's only industrialized country to tax its citizens and residents living abroad even if those individuals earn income in their new domicile and never return to the U.S.⁹²⁷

While some countries may hold privacy concerns related to disclosing account holders' financial information, most countries have adopted FATCA in order to avoid the punitive withholding tax. The Philippines, China, and Vietnam are three countries worthy of closer examination as they are on different levels of FATCA compliance. The Philippines is the most advanced of the three in terms of its intergovernmental agreement (IGA) being in effect to implement FATCA. China has had an IGA in substance as of June 30, 2014, but it has yet to formally sign an IGA. Vietnam will likely seek an extension to have a formally recognized IGA in place.

⁹²⁵ Treas. Reg. § 1.6038D (2010).

⁹²⁶ Treas. Reg. §§ 1.1471-74 (2012).

⁹²⁷ Helena Bachmann, *Mister Taxman: Why Some Americans Working Abroad Are Ditching Their Citizenship*, TIME Jan. 31, 2013.

7.13.2. IGA Models

The U.S. Department of the Treasury developed IGAs to lay out the reporting requirements for FFIs to relay critical information about offshore U.S. accounts. Foreign financial institutions may choose from two models of the IGAs: Model 1 requires FFIs to relay U.S. account holder information to their domestic government agencies who will then submit that information to the Internal Revenue Service (IRS); Model 2 has the FFIs reporting information directly to the IRS. Like the great majority of countries, both the Philippines and China have opted for Model 1. In total, there were only 14 countries preferring Model 2. As of October 16, 2015, there are 76 FATCA IGAs signed and in effect, with another 36 IGAs agreed to in substance which are treated as FATCA-compliant and will not incur any penalties while they work to finalize a formal IGA for ratification.⁹²⁸

7.13.3. The Philippines: IGA In Effect As of July 13, 2015

The Philippines signed a formal Model 1 IGA as of July 13, 2015. Given the sustained history of strong American-Philippine ties since the time of American colonial rule from 1898–1946⁹²⁹, U.S. military base operations from 1947 to 1991⁹³⁰, and even after military base closures that led to the broadening of economic ties, it is not surprising to find the Philippines at the vanguard of FATCA adoption. This tight bilateral relationship is made especially more significant now with the hotly contested claims over the Spratly Islands in the middle of the South China Sea involving China, Taiwan, Malaysia, Brunei, the Philippines, and Vietnam, as well as the disputed Senkaku Islands claimed by both Japan and China.⁹³¹

With China aggressively laying stake to this small archipelago of islands, valuable not only because of its proximity to key shipping lanes, but also because of the potential for oil and gas

⁹²⁸ FATCA – Archive, U.S. DEPARTMENT OF THE TREASURY, Oct. 16, 2015.

⁹²⁹ Gina Apostol, *In the Philippines, Haunted by History*, N.Y. TIMES, Apr. 28, 2012.

⁹³⁰ Andrew I. Yeo, *Security, Sovereignty, and Justice in U.S. Overseas Military Presence*, 19 GEO. MASON U. INT'L J. OF PEACE STUD., 43, 49 (Winter 2014).

⁹³¹ Barbara Demick, *In a Disputed Reef, Philippines Sees Face of Chinese Domination*, L.A. TIMES, May 14, 2013.

reserves under its waters, the U.S. feels a sense of urgency to maintain a close presence in this volatile region. This is made even more pressing because the provisions of the 1960 Treaty of Mutual Cooperation and Security between the U.S. and Japan obligates the U.S. to defend Japan in the event of armed attacks.⁹³² Thus, the restoration of U.S. military presence in the Philippines may have been inevitable.

The latest news has the Philippine Bureau of Internal Revenue (BIR) postponing its financial information reporting, which was originally scheduled to begin on September 30, 2015 to actually start in the second quarter of 2016.⁹³³ Part of this postponement is due to the fact that the Philippine Senate has yet to ratify FATCA.⁹³⁴

The Agreement between the Government of the United States of America and the Government of the Republic of the Philippines to Improve International Tax Compliance and to Implement FATCA was enacted to “improve international tax compliance through mutual assistance in tax matters based on an effective infrastructure for the automatic exchange of information.”⁹³⁵ Article 26 of the Convention between the U.S. and the Philippines implemented on October 1, 1976 (the “Convention”) authorized a bilateral exchange of tax information on an automatic basis.⁹³⁶ The major elements of the Agreement include:

- Philippine financial institutions may not be able to comply with certain aspects of FATCA due to domestic legal impediments;

⁹³² Treaty of Mutual Cooperation and Security between the U.S. and Japan, Jan. 19, 1960, 11 U.S.T. 1632.

⁹³³ Press Release, Bureau of Internal Revenue, Republic of the Philippines, FATCA Advisory (Sep. 8, 2015) (on file with author).

⁹³⁴ *Id.*

⁹³⁵ Agreement between the Government of the United States of America and the Government of the Republic of the Philippines to Improve International Tax Compliance and to Implement FATCA, U.S.-Phil., Jul. 13, 2015, T.D. 9610, 2013 IRB LEXIS 223 [hereinafter FATCA Agreement].

⁹³⁶ *Id.*

- [The U.S.] Exchanging such information with the Government of the Republic of the Philippines and pursuing equivalent levels of exchange, provided that the appropriate safeguards and infrastructure for an effective exchange relationship are in place;
- An intergovernmental approach to FATCA implementation would address legal impediments and reduce burdens for Philippine financial institutions;
- Improve international tax compliance and provide for the implementation of FATCA based on domestic reporting and reciprocal automatic exchange pursuant to the Convention, and subject to the confidentiality and other protections provided for therein, including the provisions limiting the use of the information exchanged under the Convention.⁹³⁷

The agreement between the U.S. and the Philippines makes the mutual exchange of information possible as long as there are protections and the necessary infrastructure in place to ensure the secure transmission of data as well as the absence of any legal hurdles preventing FATCA's ratification in the Philippines. The Philippine Senate is currently reviewing the law to determine its potential domestic impact as well as the benefits of receiving financial data reciprocity on Filipino residents living in the U.S.

Article 1 of the Agreement specifies the financial institutions referred to as (1) custodial institutions, (2) depository institutions, (3) investment entities, and (4) specified insurance companies. Article 1 goes on to define "Custodial Institution" as:

Any Entity that holds, as a substantial portion of its business, financial assets for the account of others. An entity holds financial assets for the account of others as a substantial portion of its business if the entity's gross income attributable to the holding of financial assets and related financial services equals or exceeds 20 percent of the entity's gross income during the shorter of: (i) the three-year period that ends on December 31 (or the final day of a non-calendar year accounting period) prior to the year

⁹³⁷ *Id.*

in which the determination is being made; or (ii) the period during which the entity has been in existence.⁹³⁸

Thus, if at least 20 percent of a custodial institution's gross income is derived from managing the financial assets of others' accounts, then it is considered a financial institution under FATCA. "Depository Institution" means "any Entity that accepts deposits in the ordinary course of a banking or similar business."⁹³⁹ "Investment Entity" is defined as an entity trading in money market, exchange, securities, or commodities; managing a portfolio; or otherwise investing, administering, or managing other people's funds.⁹⁴⁰

"Specified Insurance Company" is "any Entity that is an insurance company (or the holding company of an insurance company) that issues, or is obligated to make payments with respect to, a Cash Value Insurance Contract or an Annuity Contract."⁹⁴¹ Thus, financial institutions assume the expected role associated with money management, investment portfolio administration, and funds exchange responsibilities common to American financial institutions. FATCA is meant to capture all types of companies that maintain fiduciary responsibilities for itself or for others, even if that supervisory role only accounts for 20 percent of a company's gross income.

The types of financial accounts affected by this agreement include:

- (1) In the case of an Entity that is a Financial Institution solely because it is an Investment Entity, any equity or debt interest (other than interests that are regularly traded on established securities market) in the Financial Institution;
- (2) In the case of a Financial Institution not described in [] (1) [above], any equity or debt interest in the Financial Institution (other than interests that are regularly traded on established securities market), if (i) the value of the debt or equity interest is determined, directly or indirectly,

⁹³⁸ *Id.* at 2.

⁹³⁹ *Id.*

⁹⁴⁰ *Id.* at 3.

⁹⁴¹ *Id.*

primarily by reference to assets that give rise to U.S. Source Withholdable Payments, and (ii) the class of interests was established with a purpose of avoiding reporting in accordance with this Agreement; and

- (3) Any Cash Value Insurance Contract and any Annuity Contract issued or maintained by a Financial Institution, other than a noninvestment-linked, nontransferable immediate life annuity that is issued to an individual and monetizes a pension or disability benefit provided under an account that is excluded from the definition of Financial Account in Annex II.⁹⁴²

Under this classification, financial accounts are those encompassing any type of equity or debt interests, or insurance or life annuity contracts originating from the U.S. for its source payments. Thus, FATCA is meant to cover a wide breadth of accounts linking the financial institution to the U.S. through the regular exchange of funds.

A Philippine FFI is obligated to provide financial details on any “U.S. Reportable Account” if it is a financial account held or controlled by a “Specified U.S. Person.” In this case, a “Specified U.S. Person” is limited to an individual and not a corporation, agency or instrumentality of a corporation, a tax-exempt organization, an individual retirement plan, a bank, a real estate investment trust, a regulated investment company, a common or tax-exempt trust fund, a securities, commodities, or derivative dealer, or a broker.⁹⁴³ Thus, the Philippine FFIs are required to pass along all relevant account information on individuals as long as the U.S. Person does not fall into any of the above exceptions meant for institutional entities which the U.S. Tax Code already accounts for by using different reporting standards from those imposed on individuals.

Article 2 stipulates the information to be exchanged between the U.S. and the Philippine FFIs includes:

⁹⁴² *Id.* at 4.

⁹⁴³ *Id.* at 7-8.

(1) the name, address, and U.S. TIN of each Specified U.S. Person that is an Account Holder of such account and, in the case of a Non-U.S. Entity that, after application of the due diligence procedures set forth in Annex I, is identified as having one or more Controlling Persons that is a Specified U.S. Person, the name, address, and U.S. TIN (if any) of such entity and each such Specified U.S. Person;

(2) the account number (or functional equivalent in the absence of an account number);

(3) the name and identifying number of the Reporting Philippine Financial Institution;

(4) the account balance or value (including, in the case of a Cash Value Insurance Contract or Annuity Contract, the Cash Value or surrender value) as of the end of the relevant calendar year or other appropriate reporting period or, if the account was closed during such year, immediately before closure;

(5) in the case of any Custodial Account:

(A) the total gross amount of interest, the total gross amount of dividends, and the total gross amount of other income generated with respect to the assets held in the account, in each case paid or credited to the account (or with respect to the account) during the calendar year or other appropriate reporting period; and

(B) the total gross proceeds from the sale or redemption of property paid or credited to the account during the calendar year or other appropriate reporting period with respect to which the Reporting Philippine Financial Institution acted as a custodian, broker, nominee, or otherwise as an agent for the Account Holder;

(6) in the case of any Depository Account, the total gross amount of interest paid or credited to the account during the calendar year or other appropriate reporting period; and

(7) in the case of any account not described in subparagraph 2(a)(5) or 2(a)(6) of this Article, the total gross amount paid or credited to the Account Holder with respect to the account during the

calendar year or other appropriate reporting period with respect to which the Reporting Philippine Financial Institution is the obligor or debtor, including the aggregate amount of any redemption payments made to the Account Holder during the calendar year or other appropriate reporting period.⁹⁴⁴

Depending on the type of reportable account, there are slightly different disclosure requirements, but the general information sought is the name, contact information, U.S. tax identification number (TIN), account number, FFI identification information and the account balance. In return, the U.S. will provide the same type of information to its Filipino counterpart.

Article 3 of the Agreement specifies the annual information exchange shall occur within nine months after the end of the calendar year to which the information pertains.⁹⁴⁵ Other details concerning procedures for automatic exchange may be negotiated between the respective parties, and the parties' obligations to collect and exchange the pertinent information shall commence upon mutual satisfaction that the necessary infrastructure and security protocols are in place to ensure the accurate, timely and confidential exchange of information using effective and reliable channels.⁹⁴⁶

Article 4 includes provisions for exempting FFIs from the 30% withholding tax as long as they comply with Articles 2 and 3 of this Agreement; provide the names of Nonparticipating Financial Institutions to which the FFIs have made payments and the amounts of those payments; meet the online registration requirements on the IRS FATCA website; withhold the necessary 30% of U.S. Source Withholdable Payment to any Nonparticipating Financial Institution; and provide the necessary withholding and reporting requirements to any payor of U.S. Source Withholdable Payments.⁹⁴⁷

⁹⁴⁴ *Id.* at 9-10.

⁹⁴⁵ *Id.* at 11.

⁹⁴⁶ *Id.* at 10-12.

⁹⁴⁷ *Id.* at 13.

Philippine retirement plans, as specified in Annex II (to be described later), shall be treated like FFI-compliant or exempt beneficial owners. Philippine retirement plans are those “operated to provide pension or retirement benefits or earn income for providing such benefits under the laws of the Republic of the Philippines and regulated with respect to contributions, distributions, reporting, sponsorship, and taxation.”⁹⁴⁸

If a Philippine financial institution has a Related Entity or a branch that is precluded from participating or being deemed FATCA-compliant, or is treated as a Nonparticipating Financial Institution, that financial institution may still be treated as deemed-compliant provided that: (1) the Philippine FFI corroborates each Related Entity’s or branch’s self-identification as a separate Nonparticipating Financial Institution; (2) each Related Entity or a branch adheres to the reporting requirements under section 1471 of the U.S. Internal Revenue Code; and (3) the Related Entity or branch does not solicit U.S. accounts held by persons not residing in the jurisdiction where the Related Entity or branch is located.⁹⁴⁹

Therefore, as long as the Philippine FFI makes a good faith effort to treat its Related Entity or branch as a separate Nonparticipating Financial Institution and the Related Entity or branch also distinguishes itself as a Nonparticipating Financial Institution for withholding purposes; each Related Entity or branch identifies all its U.S. accounts; and each Related Entity or branch does not solicit U.S. accounts held by non-residents of the jurisdiction in which it operates, then the Philippine FFI may still be deemed compliant or exempt.

Article 5 of the Agreement requires administrative or other minor errors be timely reported so the affected Party can apply its domestic law to correct or resolve any potential infringements

⁹⁴⁸ *Id.* at 14.

⁹⁴⁹ *Id.* at 14-15.

caused by the error(s).⁹⁵⁰ Errors are meant to be sorted out as quickly and efficiently as possible by applying the laws of the home country.

Article 6 of the Agreement reaffirms the U.S. and the Philippines's mutual commitment to the Agreement's goals of improving transparency and automatic information exchange between the countries.⁹⁵¹

Article 7 of the Agreement ensures the Philippines is accorded the same benefits and any more favorable terms afforded to any other Partner Jurisdiction only if the Philippines undertakes the same obligations the other Partner Jurisdiction commits to, unless the Philippines declines in writing to be bound to the new obligations. The U.S. shall thus notify the Philippines of any more favorable terms which shall apply automatically under this Agreement and be effective as of the date of the Agreement's original signing.⁹⁵²

Article 8 of the Agreement allows either Party to request consultations to ensure the Agreement's enactment and makes concessions for amendments possible upon written mutual agreement of the Parties.⁹⁵³

Article 9 of the Agreement formally includes Annexes as an integral part of the Agreement. There are two Annexes currently.⁹⁵⁴

Article 10 of the Agreement specifies the date of this Agreement's enforcement as beginning on the date of the Philippines's written notification to the U.S. that it has completed all the necessary internal procedures to ensure compliance with the Agreement's terms. It also grants either Party the right to terminate the Agreement upon written notice of termination that shall

⁹⁵⁰ *Id.* at 15.

⁹⁵¹ *Id.* at 16.

⁹⁵² *Id.* at 17.

⁹⁵³ *Id.*

⁹⁵⁴ *Id.*

become effective on the first day of the month following a 12-month expiration period after the date of the termination notification.⁹⁵⁵

ANNEX I of the Agreement concerns the due diligence obligations for identifying and reporting on U.S. Reportable Accounts and payments to Nonparticipating Financial Institutions. Reporting FFIs are granted the choice of relying on the procedures described in the Annex or relying on the procedures described in relevant U.S. Treasury Regulations. The Annex also specifies the characteristics of Preexisting Individual Accounts that are not required to be reviewed, identified or reported as a U.S. Reportable Account—those having a balance or value not exceeding \$50,000, a Cash Value Insurance Contract or Annuity Contract with a balance or value not exceeding \$250,000 or those FFIs lacking the required registration under U.S. law to sell Cash Value Insurance Contracts or Annuity Contracts to U.S. residents.⁹⁵⁶

Annex I holds FFIs responsible for conducting electronic record searches on Preexisting Individual Accounts with a balance or value exceeding \$50,000 but not exceeding \$1,000,000 for any of the following U.S. indicia:

- a) Identification of the Account Holder as a U.S. citizen or resident;
- b) Unambiguous indication of a U.S. place of birth;
- c) Current U.S. mailing or residence address (including a U.S. post office box);
- d) Current U.S. telephone number;
- e) Standing instructions to transfer funds to an account maintained in the United States;
- f) Currently effective power of attorney or signatory authority granted to a person with a U.S. address; or
- g) An “in-care-of” or “hold mail” address that is the sole address the Reporting Philippine Financial Institution has on file for the Account Holder. In the case of a Preexisting Individual Account that is

⁹⁵⁵ *Id.* at 17-18.

⁹⁵⁶ FATCA Agreement, Annex I, at 2.

a Lower Value Account, an “in-care-of” address outside the United States or “hold mail” address shall not be treated as U.S. indicia.⁹⁵⁷

If none of the U.S. indicia is discovered through the electronic search, then no further action is required. However, if any of the U.S. indicia is discovered or a change to an account results in its being associated with one or more U.S. indicia, then all affected accounts must be treated as a U.S. Reportable Account unless there is some evidence that the Account Holder is neither a U.S. citizen nor U.S. resident for tax purposes.⁹⁵⁸

For Preexisting Individual Accounts with a balance or value in excess of \$1,000,000, there are enhanced review procedures. If any FFI’s electronically searchable databases do not capture all the U.S. indicia indicated above, then the FFI must conduct a paper record search of the documents associated with a high-value account for the last five years looking for any of the U.S. indicia. The exceptions to this paper document search pertain to those FFIs whose electronically searchable information includes:

- a) The Account Holder’s nationality or residence status;
 - b) The Account Holder’s residence address and mailing address currently on file with the Reporting Philippine Financial Institution;
 - c) The Account Holder’s telephone number(s) currently on file, if any, with the Reporting Philippine Financial Institution;
 - d) Whether there are standing instructions to transfer funds in the account to another account (including an account at another branch of the Reporting Philippine Financial Institution or another Financial Institution);
 - e) Whether there is a current “in-care-of” address or “hold mail” address for the Account Holder;
- and

⁹⁵⁷ *Id.* at 2-3.

⁹⁵⁸ *Id.* at 3-5.

f) Whether there is any power of attorney or signatory authority for the account.⁹⁵⁹

The FFI is also obligated to treat as a U.S. Reportable Account any high-value accounts assigned to a relationship manager if the relationship manager has actual knowledge that the Account Holder is a Specified U.S. Person.⁹⁶⁰

New Individual Accounts whose account balance or value do not exceed \$50,000 do not need to be reviewed, identified or reported as a U.S. Reportable Account. However, FFIs need to obtain self-certifications from New Individual Accounts that can help determine whether the Account Holder is a Specified U.S. Person for tax purposes.⁹⁶¹

A Preexisting Entity Account with an account balance or value that does not exceed \$250,000 is not required to be reviewed, identified or reported as a U.S. Reportable Account until the account balance or value exceeds \$1,000,000. For those Preexisting Entity Accounts that require reporting, the FFI must determine certain aspects of the Preexisting Entity Accounts: (1) determine whether the entity is a Specified U.S. Person; (2) determine whether a non-U.S. entity is an FFI; (3) determine whether an FFI is a Nonparticipating Financial Institution payments to which require reporting; and (4) determine whether a Non-Financial Foreign Entity (NFFE) account is a U.S. Reportable Account.⁹⁶²

A reporting FFI is not required to review, identify or report on any New Entity Account as long as it has policies and procedures in place to prevent an account balance owed to the Account Holder of more than \$50,000.⁹⁶³

Annex I warns against FFIs relying only on self-certification or documentary evidence if the FFI knows or has reason to know that the self-certification or documentary evidence is inaccurate or

⁹⁵⁹ *Id.* at 6.

⁹⁶⁰ *Id.*

⁹⁶¹ *Id.* at 9.

⁹⁶² *Id.* at 10-12.

⁹⁶³ *Id.* at 13.

fraudulent.⁹⁶⁴ Annex I stipulates the Determination Date for the Philippines as November 30, 2014. The Determination Date is the date “on which the Treasury Department determines not to apply withholding under section 1471 of the U.S. Internal Revenue Code to Philippine Financial Institutions.”⁹⁶⁵

ANNEX II details the types of entities that will be treated as exempt beneficial owners: (1) governmental entities; (2) international organizations; (3) legal institutions that issue instruments intended to circulate as currency; (4) certain retirement funds; (5) pension funds of an exempt beneficial owner; and (6) investment entities wholly owned by exempt beneficial owners.⁹⁶⁶

Annex II also specifies the types of entities that will be treated as deemed-compliant FFIs: (1) financial institution with a local client base; (2) local bank; (3) financial institution with only low-value accounts; (4) a Philippine qualified credit card issuer; (5) a Philippine trustee-documented trust; (6) a Philippine sponsored investment entity and controlled foreign corporation; (7) a Philippine sponsored, closely held investment vehicle; (8) an investment advisor or investment manager established in the Philippines; and (9) collective investment vehicles established in the Philippines.⁹⁶⁷

Annex II also excludes certain types of financial accounts from being treated as a U.S. Reportable Account: (1) certain retirement and pension accounts; (2) certain non-retirement savings accounts; (3) certain term life insurance contracts; (4) certain accounts held by an estate; (5) certain escrow accounts; and (6) certain Partner Jurisdiction accounts.⁹⁶⁸

Annex II distinguishes between exempt and deemed-compliant entities, with the former comprising certain types of governmental and international organizations along with certain retirement savings accounts, life insurance contracts, and escrow accounts, and the latter involving

⁹⁶⁴ *Id.* at 14.

⁹⁶⁵ *Id.* at 17.

⁹⁶⁶ FATCA Agreement, Annex II, at 1-3.

⁹⁶⁷ *Id.* at 4-10.

⁹⁶⁸ *Id.* at 11-13.

most local Philippine institutions. These entities likely have to adhere to a different set of regulations pertaining to institutional organizations as distinguished from individuals, or their local connections make it highly improbable they are high-worth accounts that have to be reported.

7.13.4. China: IGA In Substance As Of June 26, 2014

The U.S. and China have agreed to a Model 1 IGA in substance, allowing Chinese FFIs to be exempt from the 30% withholding tax for non-compliance with the FATCA. This is hardly surprising given the astounding volume of Chinese foreign investment in the U.S., which reached \$57.6 billion between 2005 and 2012, or 8.3 percent of a total of \$688.1 billion invested worldwide.⁹⁶⁹ There are two types of people impacted by the enforcement of FATCA: (1) people with U.S. green cards or passports who have not disclosed their financial interests (such as bank accounts, retirement accounts, and life-insurance plans) in China to the IRS; and (2) Chinese citizens hiding their illegal funds from China's authorities and exceeding their country's \$50,000 yearly transfer limits.⁹⁷⁰

There were 71,320 Chinese nationals who became permanent residents in 2013, which was the second-largest group after the Mexicans, and the Chinese represented 80% of the EB-5 investment-for-immigration visas issued that year.⁹⁷¹ Clearly, the Chinese feel a great deal of urgency in emigrating to the U.S., and among the reasons for leaving is the panic they likely feel in being caught profiting from their positions of power. Out of the millions of green card holders throughout the world subject to U.S. taxes, only a fraction of them actually file the requisite tax and disclosure forms, and most, either out of ignorance or willful intent, do not abide by the U.S. tax code. The Chinese will thus be doubly surprised once FATCA is regularly enforced through

⁹⁶⁹ Paul Cochrane, *The Delay to FATCA's Roll Out*, THOMSON REUTERS, Sep. 2013, at 5.

⁹⁷⁰ Wei Gu, *Rich Chinese in Reach of New U.S. Tax Law*, WALL ST. J., July 3, 2014.

⁹⁷¹ *Id.*

automatic withholding, since most Chinese have their income taxes automatically deducted from their paychecks.⁹⁷²

Income taxes in China account for only 6% of the total tax revenue for the government, whereas, in the U.S., income taxes make up 70% of total tax revenues.⁹⁷³ With the dawn of FATCA, U.S. citizens and green card holders hiding their wealth in China are well advised that not properly disclosing their financial holdings could result in monetary penalties up to 50% of the hidden account's value and even possible jail time.⁹⁷⁴

A December 2014 report from Global Financial Integrity titled *Illicit Financial Flows from the Developing World: 2003-2012* finds China is the top exporter of illicit capital, as it shipped out \$1.076 trillion from the country, followed by Russia with \$881 billion exported and Mexico was third with \$462 billion transferred out.⁹⁷⁵ The sheer potential for confiscating such great sums likely influenced the Chinese government in agreeing to an IGA in-substance at the end of June 2014. However, it has yet to ink a formal deal to have it go into effect.

But, as long as China “continues to demonstrate firm resolve to sign the IGA that was agreed in substance on or before June 30, 2014, as soon as possible,” then it will continue to be treated as having an IGA in effect, and thus avoid incurring withholding taxes.⁹⁷⁶ The Treasury Department is supposed to review on a monthly basis IGAs in-substance to see if the country should remain on the approved list or be removed and subject to the 30% withholding tax.⁹⁷⁷ The U.S. is likely to accommodate China's needs to ensure an IGA it likes since Beijing's refusal to sign an

⁹⁷² *Id.*

⁹⁷³ *Id.*

⁹⁷⁴ *Id.*

⁹⁷⁵ Dev Kar and Brian LeBlanc, *Illicit Financial Flows from the Developing World: 2003-2012*, GLOBAL FINANCIAL INTEGRITY (Dec. 2013), at 12.

⁹⁷⁶ Announcement 2014-38, Tara Ferris, Office of Assoc. Chief Counsel, I.R.S. (Dec. 1, 2014) (on file with author).

⁹⁷⁷ *Id.*

IGA could severely damage FATCA's legitimacy in the eyes of other nations and make it difficult for FFIs in China to comply with FATCA for fear of breaching China's data privacy laws.⁹⁷⁸

The benefit of having the U.S. reciprocate by providing financial information on wealthy Chinese residents' U.S. accounts is not lost on the Chinese government, although there is fear among some circles that this net will also implicate corrupt Chinese officials trying to flee China with billions of ill-gotten gains. A June 2011 report conducted by the People's Bank of China, China's central bank, inadvertently disclosed that 18,000 officials in government and state-owned companies from 1995 until 2008 absconded overseas with 800 billion Chinese yuan (or about \$126 billion).⁹⁷⁹ These Chinese officials moved their families to popular U.S. destinations such as Los Angeles, while they continue to work in China and funnel their riches to America surreptitiously.⁹⁸⁰ Thus, while the Chinese government wants to identify and bring to justice those Chinese citizens illegally transferring money out of the country, there are likely some government bureaucrats dragging their feet in fully implementing FATCA given their anxiety over being discovered as one of the perpetrators. Nevertheless, the looming hammer of a 30% withholding tax on any U.S. gains in Chinese investment portfolios, regardless of whether the assets belong to U.S. taxpayers or other nationals, is likely to convince China to ultimately sign the IGA.

7.13.5. Vietnam: Significant Developments

On March 27, 2015, the State Bank of Vietnam (SBV) issued its Official Letter 851/TTGSNH11 advising the country's financial institutions to report to the IRS necessary financial information in accordance with FATCA before June 30, 2015.⁹⁸¹ Prior to the SBV's Official Letter issuance in 2015, on April 24, 2014, SBV's Banking Inspection and Supervision Agency (BIS Agency) issued Official Letter No. 1118/TTGSNH7 which recommended credit institutions and

⁹⁷⁸ Toh Han Shih, *Beijing to Back United States over New FATCA Law Against Tax Evasion*, S. CHINA MORNING POST, June 28, 2014.

⁹⁷⁹ Kazunori Takada and Pete Sweeney, *China Looking into Bank of China Money Laundering Allegations*, REUTERS, July 11, 2014.

⁹⁸⁰ Barbara Demick and David Pierson, *China Steps up Efforts to Keep Officials from Leaving Country*, L.A. TIMES, June 6, 2012.

⁹⁸¹ FATCA Alert, KPMG Tax and Corporate Services (Apr. 2015) (on file with author).

foreign bank branches in Vietnam (CIs) proactively register for Global Intermediary Identification Number (GIIN) in preparation for FATCA implementation.⁹⁸² Included in this Official Letter was a *FATCA Implementation Assessment Survey* to help the SBV “identify the readiness, progress as well as difficulties, queries encountered during the implementation of FATCA by the credit institutions and foreign bank branches in Vietnam.”⁹⁸³

Part I: General Assessment sought to understand the CIs’ relative preparedness for FATCA and asked questions concerning:

- GIIN registration
- Dedicated FATCA team/group
- Capacity for FATCA implementation
- FATCA training preparation
- Customer communication strategy in support of FATCA⁹⁸⁴

Part II: Technical Questions involved more detailed inquiries about:

- Internal procedures for FATCA implementation
- Electronic search capabilities
- System upgrades to accommodate FATCA data fields
- Potential issues or difficulties identified during the assessment for FATCA implementation⁹⁸⁵

A subsequent Official Letter No. 1882/TTGSN11 two weeks later provided additional instructions for CIs on FATCA implementation.⁹⁸⁶ In this Official Letter, SBV asked all financial institutions to mind the IRS’s deadline extension and provide the relevant files by June 29, 2015.

⁹⁸² Official Letter No. 1567/TTGSNH7, Assessment of FATCA Implementation, State Bank of Vietnam (Jun. 3, 2014) (on file with author).

⁹⁸³ *Id.*

⁹⁸⁴ *Id.*

⁹⁸⁵ *Id.*

⁹⁸⁶ Official Letter No. 1882/TTGSN11, Additional Instructions on FATCA Implementation, State Bank of Vietnam (Jun. 17, 2014) (on file with author).

Financial institutions experiencing difficulties and needing a hardship waiver could file a proper request for extension by August 13, 2015.⁹⁸⁷ The SBV also cautioned foreign bank branches in Vietnam from reporting FATCA-related information to their parent banks or overseas counterparties “unless they obtain approval from the Governor of the State Bank of Vietnam.”⁹⁸⁸

While Vietnam may have some technological and logistical hurdles to overcome on its way to full FATCA compliance, it is likely that Vietnam will support FATCA as its financial institutions seek to increase their stature and competitiveness on the international stage by operating on the same level as their global cohorts. Moreover, Vietnamese financial institutions will do all they can to ensure FATCA implementation so as to avoid the agony of trying to replace the gaping hole left by a punitive 30% withholding tax.

7.13.6. Latest News: Legal Challenges

Senator Rand Paul is one of seven plaintiffs in a lawsuit filed August 12, 2015, accusing the Treasury Department and the IRS of enforcing foreign treaties the Obama administration refers to as IGAs so as to avoid Congressional debate and passage.⁹⁸⁹ The plaintiffs’ legal standing to sue includes alleged violations of the Fourth Amendment’s ban on unreasonable search and seizure and the Eighth Amendment’s ban on cruel and unusual punishments manifested through the sizable financial penalties assessed for noncompliance.

The plaintiffs decry the denial of banking and financial services in the foreign countries where they live and work as many foreign banks opt to simply turn away Americans as clients rather than deal with FATCA rules and reporting requirements. There is an estimated 8.7 million Americans living overseas who could potentially be impacted by FATCA.⁹⁹⁰ The ensuing constitutionality arguments for and against FATCA will make for stimulating exchanges liable to

⁹⁸⁷ *Id.*

⁹⁸⁸ *Id.*

⁹⁸⁹ Ralph Z. Hallow, *Sen. Rand Paul to Sue I.R.S., U.S. Treasury*, WASH. TIMES, June 24, 2015.

⁹⁹⁰ *Id.*

draw financial experts and legal scholars alike. Before FATCA is finalized, it may go through several iterations and could even serve as a presidential campaign issue.

7.13.7. FATCA Conclusion

There is a real fear among most FFI compliance officers, senior management and even its Boards that not complying with FATCA could result in false representation, perjury or being found an accomplice to would-be tax evaders of U.S. tax law which will ultimately compel FFIs to comply with FATCA. However, there are other issues related to data privacy and security that are not detailed within FATCA and give some countries reason for pause in fully getting behind FATCA.

A contrarian report by American Citizens Abroad (ACA) warns that the large cost of observing the legislation could lead many FFIs to proactively close the accounts of U.S. citizens and sell off U.S. holdings rather than complying with FATCA.⁹⁹¹ Some have suggested that this could cause a larger impact on U.S. government revenue than the money raised by FATCA, as disinvestment deteriorates the state of the overall economy.⁹⁹²

Nevertheless, momentum is on the side of FATCA compliance, with many nations having signed IGAs in effect and even China on-board in principle. Thus, most nations will eventually follow suit to implement FATCA since the U.S. has cleverly instituted both a carrot (reciprocity of financial information on a nation's residents having accounts in the U.S.) and a stick (a hefty 30% withholding tax on any U.S.-source payments for non-compliance) that will virtually guarantee FATCA adoption.

⁹⁹¹ Yao Lu, Sondre Solstad and Chet Scheltema, *U.S. Foreign Account Tax Compliance Act in Full Swing*, CHINA BRIEFING, Mar. 7, 2013.

⁹⁹² *Id.*

7.14. Conclusion

The United State tax code is complex. As much as it is far-reaching, there are many exceptions and exclusions that provide for ample tax planning for U.S. citizens as well as nonresident aliens. Nonresident aliens should know about the types of activity they can have with United States citizens and remain outside the purview of the U.S. tax system.

More importantly, they should also be aware of the subtle ways in which they may create a U.S. tax liability for themselves. Once a nonresident begins spending more than three months per year on United States soil, they should begin keeping close watch of their days and activities and be aware of whether they are creating a substantial presence in the United States. They should be aware of relationships that indirect create U.S. income. If they invest in corporations or partnerships, they must keep track of the business's activity. Corporations, real estate holding companies, and trusts and partnerships that engage in a U.S. business or trade expose their shareholders, beneficiaries, and partners to U.S. tax liability.

Also, once a person immigrates and becomes domiciled in the U.S., then their entire estate becomes subject to estate and gift taxes. However, the estate would not include any property which was granted to a trust more than five years earlier or any property that was gifted to foreign relatives before immigration. Hopefully, with proper knowledge of the United States tax system, people will know when they are exposing themselves to its benefits or liability, and through adequate planning, they can be confident that they are making better, informed choices for themselves, their families, their associates, and their estates.

CHAPTER 8 CONCLUSION

Immigrants in the U.S. have proved their economic might and significance in improving local economies despite the hardships they face when immigrating to the U.S. This study offered insight into why immigration policies and laws are one of the most complex legal systems in the U.S. In many cases, U.S. immigration laws are needlessly confusing not only to foreigners, but even to legal practitioners and academics. Nevertheless, there must be political and legal moves towards streamlining the immigration system because of the positive economic impact immigrants provide the U.S.

U.S. immigration law can be unforgiving in the sense that one wrong decision an applicant makes can damage her whole application. This is why foreigners should be educated from the beginning as to their visa options. This study showed the differences among certain employment and investor visas. These are visas many foreign businesspeople should choose from because it matches their goals of being able to work or invest in the U.S. There are distinct advantages and disadvantages to each visa and each foreigner should be aware of such differences. This information should not only help foreigners, but also other legal practitioners and academics. Furthermore, immigrants from different Asian countries should be aware of their distinct issues when immigrating to the U.S.

Chinese are the largest Asian immigrant group in the U.S. who have a long history of immigrating to the U.S. ever since the Gold Rush. They use all kinds of visas from the investor visa to work visas. As a result, there are backlogs on many Chinese visa applications. Nevertheless, Chinese still move to the U.S. because of push and pull factors such as American education, China's pollution, and political instability in China. Thus, Chinese immigrants should not only do research on which visas they should choose, but they should also be aware of backlog issues with certain visas.

Similarly to Chinese immigrants, Filipinos have a long and complex history of immigrating to the U.S. Filipinos have a culture of migration and the U.S. is a prime destination for them because of the connection between the two countries since World War II. For many Filipinos, the U.S. symbolizes a country of economic success and considering many Filipinos come from economic hardships, they see the U.S. as their way to economic prosperity. Many Filipinos speak English quite well and this is one factor why Filipinos are interested in moving to the U.S. They tend not to have major problems transitioning to the new language. However, like Chinese immigrants, there are backlogs Filipinos have to be aware of in many visa categories. Thus, Filipinos have to not only be familiar with U.S. immigration laws, but also Philippine money transfer laws.

Vietnamese immigrants to the U.S. have a unique story of struggle and success. Many Vietnamese who came to the U.S. came as refugees during and right after the Vietnam War. However, many of these immigrants became successful businesspeople and transitioned into American society. With the next few waves of Vietnamese immigrants, their moving to the U.S. was more of an economic choice rather than for personal safety issues. Therefore, the current group of Vietnamese immigrants should be aware of the employment and investor visas available to them and, unlike Filipino and Chinese immigrants, they do not currently have backlogs in these categories. However, all these Asian immigrants discussed should also be aware of the tax implications of moving to the U.S.

The U.S. tax system is arguably even more complicated than the U.S. immigration system. What immigrants tend not to comprehend is that they should be aware of both systems when immigrating to the U.S. This study explained the main issues immigrants should consider when immigrating to the U.S. For example, this study explained what is a “resident” for tax purposes. This study also addressed issues of owning real property abroad and reporting programs like

Foreign Account Tax Compliance Act. Consequently, immigrants have to be well educated as to how their immigrant status affects their tax status.

Considering the many issues immigrants face, more research needs to be done to synthesize and present immigration laws to foreigners. Foreigners not only have to worry about U.S. immigration laws, but also have to consider their own countries' laws regarding money transfer issues, anti-money laundering issues, and bank laws especially if they are investors or obtaining employment visas. There is not enough information that helps foreigners understand the complexities and intricacies of U.S. immigration law. Consequently, there is a need for more research on the driving factors of immigration policies, push and pull factors of immigration, and how foreigners can more smoothly transition to the U.S.

Although there are many difficulties foreigners face when immigrating to the U.S., they still come and there are several reasons why. The U.S. is still widely recognized as the most economically advanced country and many Chinese, Filipino, and Vietnamese immigrants see this as the main reason to move to the U.S. Furthermore, they seek better education for themselves or for their children. The U.S. has world-renowned colleges which attract students from all over the globe. Lastly, the American Dream is still alive and seems more attainable for immigrants from these Asian countries. These immigrants are more and more educated than previous immigrants from such countries and are willing to do what it takes to put themselves in a position to obtain the American Dream. This study shows that while it is an extremely difficult process, immigrating to the U.S. is well worth the struggle and sacrifice.

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