Republic of the Philippines
Department of Finance
Securities and Exchange Commission
SEC Building, EDSA, Greenhills, Mandaluyong City

Office of the General Counsel

06 September 2012
SEC-OGC Opinion No. 12-17
Re: Registration under the
Foreign Investments Act
of 1991

Atty. Ma. Adelina S. Gatdula
Picazo Buyco Tan Fider & Santos
17th, 18th, & 19th Floors, Liberty Center
104 H.V. dela Costa Street
Salcedo Village, Makati City

Dear Atty. Gatdula:

This refers to your request for confirmation of your belief that there is no legal basis for: a) requiring your client, Philam Insurance Company, Inc. (Philam) to register with the Commission under the Foreign Investments Act of 1991 (FIA)[1] and 2) imposing a penalty on Philam for failure to register under the same, as required by SEC Memorandum Circular No. 08-98.[2]

Background:

In your letter you state that Philam is a domestic corporation incorporated on 21 February 1961, with SEC Registration No. 18389. Philam has been wholly-owned by the Philippine American Life and General Insurance Company (Philamlife), a corporation organized under Philippine laws ninety-nine and seventy-eight percent (99.78%) of whose capital is owned by Amercian Life Insurance Company, a foreign corporation. Thus, when the FIA was enacted, Philam was already one hundred percent (100%) foreign-owned.

---

[1] Republic Act No. 7042 approved 13 June 1991, amended March 28, 1996.
[2] Penalties For Increase Of Foreign Equity Without Prior Compliance With The Foreign Investments Act approved 08-10-1998 .

Discussion:

On 13 June 1991, thirty years after the registration of Philam with the Commission, the FIA was approved, which provides in Section 5, that upon registration with the Commission, a non- Philippine national can do business in the Philippines or invest in a domestic enterprise up to one hundred percent (100%) of its capital. Section 5 of FIA provides:

> **"Section 5. *Registration of Investments of Non-Philippine Nationals.* - Without need of prior approval, a non-Philippine national, as that term is defined in Section 3 a),** [3] **and not otherwise disqualified by law may <u>upon registration</u> with the Securities and Exchange Commission (SEC),** or with the Bureau of Trade Regulation and Consumer Protection (BTRCP) of the Department of Trade and Industry in the case of single proprietorships, do business as defined in Section 3 (d) of this Act or **invest in a domestic enterprise up to one hundred percent (100%) of its capital**, unless participation of non-Philippine nationals in the enterprise is prohibited or limited to a smaller percentage by existing law and/or limited to a smaller percentage by existing law and/or under the provisions of this Act. The SEC or BTRCP, as the case may be, shall not impose any limitations on the extent of foreign ownership in an enterprise additional to those provided in this Act: Provided, however, That any enterprise seeking to avail of incentives under the Omnibus Investment Code of 1987 must apply for registration with the Board of Investments (BOI), which shall process such application for registration in accordance with the criteria for evaluation prescribed in said Code: Provided, finally, That a non-Philippine national intending to engage in the same line of business as an existing joint venture in his application for registration with SEC. During the transitory period as provided in Section 15 hereof, SEC shall disallow registration of the applying non-Philippine national if the existing joint venture enterprise, particularly the Filipino partners therein, can reasonably prove they are capable to make the investment needed for they are competing applicant. Upon effectivity of this Act,

---

[3] **Section 3. *Definitions.*** - As used in this Act:
a) The term "Philippine national" shall mean a citizen of the Philippines or a domestic partnership or association wholly owned by citizens of the Philippines; or a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines; or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty (60%) of the fund will accrue to the benefit of the Philippine nationals: Provided, That where a corporation and its non-Filipino stockholders own stocks in a Securities and Exchange Commission (SEC) registered enterprise, at least sixty percent (60%) of the capital stocks outstanding and entitled to vote of both corporations must be owned and held by citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of both corporations must be citizens of the Philippines, in order that the corporations shall be considered a Philippine national; xxxxxx

SEC shall effect registration of any enterprise applying under this Act within fifteen (15) days upon submission of completed requirements." (Emphasis ours)

Pursuant to this, the FIA Implementing Rules and Regulations (FIA-IRR) provides that existing foreign-owned corporations, which intend to increase the percentage share of foreign equity participation beyond the current equity holdings, may be allowed if the investment area is not in the Foreign Investment Negative List ("FINL"):

"Rule IV Registration Of Investments Of Non-Philippine Nationals

Section 1. *Qualifications.* –

a. Any non-Philippine national may do business or invest in a domestic enterprise up to one hundred percent [100%] of its capital provided:

1. it is investing in a domestic market enterprise in areas outside the FINL; or
2. it is investing in an export enterprise whose products and services do not fall within Lists A and B [except for defense-related activities, which may be approved pursuant to Section 8(b)(1) of the Act] of the FINL.

b. xxxxxx

c. **Existing enterprises, which are non-Philippine nationals at the time of effectivity of the Act and which intend to increase the percentage of foreign equity participation under the Act, beyond that previously authorized by SEC, shall be governed by the qualifications in item (a) above. Thus, existing enterprises shall be allowed to increase the percentage share of foreign equity participation beyond current equity holdings only if their existing investment area is not in the FINL.** (Emphasis ours)

Similarly, existing enterprises engaged in more than one (1) investment area shall be allowed to increase percentage of foreign equity participation if none of the investment areas they are engaged in is in the FINL.

Existing foreign corporations shall be allowed to increase capital even if their existing investment area is in the FINL.

Transfer of ownership from one foreign company to another shall be allowed even if the enterprise is engaged in an area in the FINL as long as there is the percentage share of foreign equity."

The Transitory Provisions[4] of the FIA do not altogether preclude the registration of increase in foreign participation. Section 1 (c) in relation to 1 (a) of Rule IV of the FIA-IRR implicitly requires that even existing non-Philippine nationals or enterprises which intend to increase foreign equity participation should register with the Commission. Hence, once the FIA-IRR becomes effective, even existing enterprises should now register any increase in its foreign equity. Accordingly, we previously opined[5] that corporations with more than forty per cent (40%) foreign equity participation, whether new or existing, [6] are required to register under the FIA in order to do business in the country, as defined under FIA, Sec. 3 (d)[7]

SEC Memorandum Circular No. 08-98 issued on 10 August 1998 entitled, "Penalties for Increase of Foreign Equity without Prior Compliance with the Foreign Investments Act" applies to cases where registration with the SEC of foreign investment is required. It provides for the penalties to be imposed on corporations and partnerships which increased the percentage of their foreign equity without first complying with the provisions of the Foreign Investments Act of 1991, as amended.

In consideration of your representation that Philam was already 100% foreign-owned when FIA was enacted in 1991 up to the present, there can be no further increase in foreign equity that would require registration with the Commission. It goes

---

[4] **Section 15. *Transitory Provisions.*** - Prior to effectivity of the implementing rules and regulations of this Act, the provisions of Book II of Executive Order 226 and its implementing rules and regulations shall remain in force. (**Note:** Book II of Executive Order 226 (Omnibus Investment Code of 1987) refers to Foreign Investments Without Incentives)

[5] SEC-OGC Opinion No. 11-28 dated 07 June 2011 addressed to Factoran and Associates.

[6] Except export-oriented corporations with certificates from the Philippine Economic Zone Authority (PEZA) and similar zones, Subic Bay Metropolitan Authority (SBMA) and Clark Development Corporation (CDC).

[7] Sec. 3 Definitions-As used in this Act: xxx d) The praise "doing business" shall include soliciting orders, service contracts, opening offices, whether called "liaison" offices or branches; appointing representatives or distributors domiciled in the Philippines or who in any calendar year stay in the country for a period or periods totalling one hundred eighty (180) days or more; participating in the management, supervision or control of any domestic business, firm, entity or corporation in the Philippines; and any other act or acts that imply a continuity of commercial dealings or arrangements, and contemplate to that extent the performance of acts or works, or the exercise of some of the functions normally incident to, and in progressive prosecution of, commercial gain or of the purpose and object of the business organization: Provided, however, That the phrase "doing business: shall not be deemed to include mere investment as a shareholder by a foreign entity in domestic corporations duly registered to do business, and/or the exercise of rights as such investor; nor having a nominee director or officer to represent its interests in such corporation; nor appointing a representative or distributor domiciled in the Philippines which transacts business in its own name and for its own account;

without saying that Philam cannot be the subject of a penalty under SEC Memorandum Circular No. 08-98 since there is no increase of foreign equity to register.

It shall be understood, however, that the foregoing opinion is rendered based solely on the facts and circumstances disclosed and relevant solely to the particular issues raised therein and shall not be used in the nature of a standing rule binding upon the Commission in other cases or upon the courts whether of similar or dissimilar circumstances.[8] If, upon further inquiry and investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered void.

Please be guided accordingly.

Very truly yours,

CAMILO S. CORREA
General Counsel

[8] Paragraph 7, SEC Memorandum Circular No. 15, Series of 2003.