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Anti-Money Laundering Act of 2020 Significantly Expands Reach of Subpoenas of Non-U.S. Banks That Have U.S. Correspondent Accounts

Non-U.S. banks that maintain correspondent accounts in the United States face the prospect of significantly broader subpoenas from the Department of Justice ("DOJ") and the Department of Treasury ("Treasury") as a result of the newly passed Anti-Money Laundering Act of 2020 ("AMLA").[1] The AMLA became law on January 1, 2021 as part of the National Defense Authorization Act of 2021 ("NDAA").[2] Among its many changes to existing law, the AMLA allows the DOJ and Treasury to subpoena non-U.S. banks that have U.S. correspondent accounts for records relating to any account held at the bank, including records maintained outside of the United States that do not relate to the U.S. correspondent account.[3] The DOJ and Treasury can issue these subpoenas not just in money laundering investigations but in any criminal investigation or civil forfeiture action.

These new subpoenas represent a major expansion of the DOJ and Treasury's investigative reach, but they are not without limitations. We examine below the expanded subpoena authority under the AMLA, as well as potential ways in which non-U.S. banks can seek to limit or quash these subpoenas.

Background

Correspondent accounts are accounts established by U.S. financial institutions for non-U.S. banks to receive deposits from, make payments on behalf of, or handle other financial transactions related to the non-U.S. bank.[4] Correspondent accounts enable non-U.S. banks to conduct business in the United States even if they have no physical presence in the United States. This allows the non-U.S. bank's customers to receive many of the same services offered by a U.S. bank without becoming a direct client of the U.S. bank.

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[1] *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. Law No. 116-283 [H.R. 6395], Jan. 1, 2021, 134 Stat 3388, § 6308.

[2] *Id.* The full text of the NDAA is available at https://www.govinfo.gov/content/pkg/BILLS-116hr6395enr/pdf/BILLS-116hr6395enr.pdf. The AMLA is Division F of the NDAA.

[3] The AMLA also contains the Corporate Transparency Act, which requires millions of domestic and foreign businesses to disclose information about their beneficial owners to the federal government. Details about the Corporate Transparency Act can be found in our January 4, 2021 alert, "Pulling Back the Curtain: Congress Establishes a Beneficial Ownership Registry for U.S. and Foreign Businesses," available at https://www.cohengresser.com/app/uploads/2021/01/Pulling-Back-the-Curtain-Congress-Establishes-a-Beneficial-Ownership-Registry-for-U.S.-and-Foreign-Businesses.pdf.

[4] 31 CFR § 1010.605(c).

Correspondent banking relationships have long been thought to carry significant money laundering risks. In enacting the USA Patriot Act of 2001, Congress identified correspondent accounts as "susceptible in some circumstances to manipulation by foreign banks to permit the laundering of funds by hiding the identity of real parties in interest to financial transactions."[5] Indeed, the use of correspondent accounts to hide illicit sources of funds is often a central aspect of money laundering and other white collar enforcement investigations.

Under the Patriot Act, the DOJ and Treasury could issue subpoenas to non-U.S. banks with correspondent accounts in the United States, but only for "records related to such correspondent account, including records maintained outside of the United States relating to the deposit of funds into the foreign bank."[6] However, the DOJ and Treasury could *not* subpoena records relating to the non-U.S. bank's other accounts.

Expanded Subpoena Authority Under the AMLA

The AMLA significantly expands the reach of Patriot Act subpoenas to include not just records of the correspondent account, but records of "*any* account at the foreign bank, including records maintained outside of the United States."[7] The only limitation on the face of the statute is that the records subpoenaed must be the subject of an investigation into violations of the Bank Secrecy Act or any U.S. criminal law, a civil forfeiture action, or an investigation pursuant to 31 U.S.C. § 5318A (which pertains to jurisdictions, financial institutions, accounts, and transactions "of primary money laundering concern").[8]

In addition, the AMLA expressly prohibits non-U.S. banks and their agents and employees from notifying the non-U.S. banks' customer or any person named in a subpoena about the subpoena's existence or contents.[9] Violations of this prohibition are subject to steep penalties of double the amount of "suspected criminal proceeds sent through the correspondent account" or, if no suspected criminal proceeds can be identified, up to $250,000.[10] Subpoenaed banks may seek relief from this prohibition on disclosure from the U.S. district court in the district in which the investigation is proceeding.[11]

The AMLA provides that a non-U.S. bank that does not comply with a subpoena may be liable for a civil penalty of up to $50,000 per day of noncompliance, with additional penalties if noncompliance continues beyond 60 days.[12] In addition, noncompliance may result in the DOJ or Treasury terminating the correspondent banking relationship by written notice to the U.S. bank providing the correspondent banking services.[13]

[5] Pub. Law No. 107-56 §302(a)(6), 115 Stat. 272, 296 (2001).
[6] 31 U.S.C. §5318(k)(3)(a)(1).
[7] AMLA § 6308(a)(2)(3)(A)(i) (emphasis added).
[8] *See* AMLA § 6308(a)(2)(3)(A)(i).
[9] AMLA § 6308(a)(2)(3)(C)(i).
[10] AMLA § 6308(a)(2)(3)(C)(ii).
[11] AMLA § 6308(a)(2)(3)(A)(iv)(I)(bb).
[12] AMLA § 6308(a)(2)(3)(E)(iii).
[13] AMLA § 6308(a)(2)(3)(E)(i).

Limitations on These Subpoenas

While the AMLA greatly expands the DOJ and Treasury's authority to subpoena non-U.S. bank records located abroad, prosecutors do not have *carte-blanche* to use these subpoenas to pursue worldwide fishing expeditions. As an initial matter, the DOJ's use of these subpoenas is subject to institutional checks. The DOJ's Justice Manual requires federal prosecutors to obtain written approval from the Office of International Affairs before issuing subpoenas for records located abroad and before initiating proceedings to enforce the subpoena.[14]

Moreover, these subpoenas are subject to judicial oversight. A non-U.S. bank may seek to quash or limit the subpoena in the federal district court in the district where the investigation is proceeding.[15] Although very few federal courts have addressed the enforcement of these subpoenas prior to the AMLA, case law and principles applicable to enforcement of subpoenas against non-U.S. entities in other contexts suggest the following three grounds for a non-U.S. bank to seek to limit or quash an AMLA subpoena.

1. Undue Burden

The records sought by an AMLA subpoena must be "the subject of" an investigation of criminal law or a civil forfeiture action.[16] Although it remains to be seen how broadly or narrowly courts will construe this language, prior cases have observed that subpoenas that are "too indefinite" or unduly burdensome are subject to limitations.[17]

To be clear, judicial review of administrative subpoenas is deferential to the agency's determination of what is relevant and material to its investigation, and we are not aware of any court that has quashed or limited a Patriot Act subpoena on this ground. But it is possible that subpoenas issued under the AMLA could seek records across multiple foreign jurisdictions and entail exorbitant costs to comply, which might lead a court to impose limitations on the subpoena. In the event that a non-U.S. bank can demonstrate that compliance would impose an unreasonable burden – for example, if the bank lacks a centralized system to access records across branches or multiple jurisdictions such that compliance would be impracticable – a court may narrow the scope of the subpoena.

2. Secrecy, Confidentiality, and Other Obligations of Non-U.S. Bank's Home Country

Under the AMLA, "[a]n assertion that compliance" with a subpoena "would conflict with a provision of foreign secrecy or confidentiality law shall not be a sole basis for quashing or modifying the subpoena."[18] However, this provision does not prohibit a court from weighing the risk that a non-U.S. bank's compliance will expose it to penalties at home. The statutory language appears to codify the approach courts currently take in considering enforcement of subpoenas seeking records from non-U.S. entities where compliance could conflict with local laws or regulations.

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[14] Justice Manual § 9-13.525 (updated April 2018).

[15] AMLA § 6308(a)(2)(3)(A)(iv)(I)(aa).

[16] AMLA § 6308(a)(2)(3)(A)(i).

[17] *See In re Grand Jury Investigation of Possible Violations of 18 U.S.C. § 1956 and 50 U.S.C. § 1705*, 381 F. Supp. 3d 37, 49 (D.D.C. 2019); *U.S. v. Sedaghaty*, CR 05-60008-HO, 2010 WL 11643384, at *2 (D. Or. Feb. 26, 2010).

[18] *See* AMLA § 6308(a)(2)(3)(A)(iv)(II).

The U.S. Supreme Court has explained that, while a conflicting foreign statute "do[es] not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute," it is nonetheless significant to the court's analysis of whether to enforce the subpoena as a matter of international comity.[19] On this basis, lower courts routinely consider "the hardship of the party facing conflicting legal obligations" in determining whether to sanction non-compliance with subpoenas seeking records from non-U.S. entities.[20] It is possible, therefore, for a court to quash or modify a subpoena due to a conflict with foreign law in an appropriate case, such as where the non-U.S. bank can demonstrate that compliance will expose it to severe penalties in its home country, and this risk outweighs the significance of the requested records to the government's investigation.[21]

3. Lack of Personal Jurisdiction

A non-U.S. bank may also be able to quash or limit the reach of a subpoena issued under the AMLA based on a lack of personal jurisdiction. Under the Due Process Clause, a federal court may enforce a subpoena on a non-U.S. bank only if the bank has sufficient minimum contacts with the forum to justify the court's exercise of personal jurisdiction over it.[22] As a general matter, a court's exercise of personal jurisdiction over an entity that is domiciled abroad is limited to those matters arising out of or related to the entity's in-forum contacts.

No federal circuit court has yet determined whether a non-U.S bank's mere establishment of a U.S. correspondent account constitutes sufficient minimum contacts and the necessary nexus to allow enforcement of a subpoena for records unrelated to the U.S. correspondent account. But a 2013 decision from the Second Circuit Court of Appeals, *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161 (2d Cir. 2013), contains helpful analysis for a potential future challenge. Although in that case the court upheld the exercise of personal jurisdiction over a non-U.S. bank where "the correspondent account at issue is alleged to have been used as an instrument to achieve the very wrong alleged," the court clarified that its opinion "by no means suggest[s] that a foreign defendant's 'mere maintenance' of a correspondent account in the United States is sufficient to support the constitutional exercise of personal jurisdiction over the account-holder in connection with any controversy."[23]

Thus, while the AMLA authorizes the DOJ or Treasury to seek records relating to "any account" from a non-U.S. bank that has a U.S. correspondent account, the non-U.S. bank may seek to quash the subpoena to the extent it seeks records abroad that are wholly unrelated to the bank's U.S. contacts.

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[19] *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 544 & n.29 (1987).

[20] *Linde v. Arab Bank, PLC*, 706 F.3d 92, 110 (2d Cir. 2013).

[21] *See, e.g.*, *Leibovitch v. Islamic Republic of Iran*, 188 F. Supp. 3d 734, 757 (N.D. Ill. 2016), *aff'd*, 852 F.3d 687 (7th Cir. 2017); *Motorola Credit Corp. v. Uzan*, 73 F. Supp. 3d 397, 404 (S.D.N.Y. 2014); *cf. In re Sealed Case*, 932 F.3d 915, 932-33 (D.C. Cir. 2019) (explaining that "hardships accompanying compliance" under Chinese law that were "both speculative and minimal" did not overcome U.S. interests in enforcing Patriot Act and grand jury subpoenas on Chinese banks to investigate funding of North Korean nuclear project).

[22] *See In re Sealed Case*, 932 F.3d at 922; *Leibovitch*, 852 F.3d at 690.

[23] *Licci*, 732 F.3d at 171; *see also In re Sealed Case*, 932 F.3d at 927 (noting that the parties did not brief on appeal "the district court's conclusion that [the bank's] maintenance of correspondent accounts in the United States supplies the necessary nexus" to support the exercise of personal jurisdiction).

Conclusion

The AMLA gives the DOJ and Treasury a significant new tool that they no doubt will use in numerous criminal investigations, including into money laundering, violations of the Foreign Corrupt Practices Act, and tax offenses. Non-U.S. banks may expect a wave of these subpoenas, many of which are likely to be very broad in their geographic and subject matter reach. It will be up to the courts to determine any limitations.

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