

The Anti-Money Laundering Act of 2020: The Remarkable Expansion of the U.S. Government's Subpoena Power Over Foreign Financial Institutions

On New Year's Day 2021, Congress passed the Anti-Money Laundering Act of 2020 (AMLA). As we reported last April, the AMLA 2020 included sweeping reforms aimed at strengthening protections against money laundering, terrorism financing, and other illegal activities. In previous installments to this series, we discussed [new and expansive beneficial ownership requirements](#), [significant enhancements to the Bank Secrecy Act \(BSA\) whistleblower program under AMLA](#), and [expansion of BSA/anti-money laundering \(AML\) obligations to antiquities dealers](#).

In this fourth installment, which has been [published](#) by New York University School of Law's *Program on Corporate Compliance and Enforcement* blog, we examine this remarkable expansion of the U.S. Departments of Justice (DOJ) and the Treasury's (DOT) subpoena authority over foreign financial institutions, which has significant implications for foreign financial institutions maintaining U.S. correspondent accounts.

Prior to the enactment of AMLA, the Patriot Act permitted the DOJ and DOT to issue subpoenas to foreign banks that maintain foreign correspondent accounts in the United States for records related to those correspondent accounts, including records maintained outside of the United States. The AMLA significantly expands the departments' subpoena power to encompass records relating to "any account at the foreign bank, including records maintained outside of the United States." This new power enhances the access U.S. regulators may have to foreign financial records and creates substantial complexity and potential risks for foreign financial institutions, who may face steep consequences for noncompliance. Below we survey the key issues raised by this expansive new subpoena authority.

US Access to All Records of Foreign Banks With US Correspondent Relationships

Subpoenas now extend to *any* records, not just the records of correspondent accounts. The only substantive limitation on this subpoena power is that the subpoena must relate to an investigation into violations of the BSA, a U.S. criminal law, a civil forfeiture action, or an investigation pursuant to 31 U.S.C. § 5318A. In effect, this limitation places little to no restriction on U.S. prosecutors.

Conflicts of Law. The AMLA 2020 explicitly requires that foreign data privacy laws cannot be the sole basis to quash a subpoena issued under this new authority. Consistent with recent guidance issued by the DOJ in the context of other matters, this provision highlights the skeptical posture with which U.S. regulators approach claims that foreign data privacy restrictions may prevent disclosures of documents and information in the context of U.S. enforcement inquiries. The AMLA recognizes that a subpoenaed foreign bank may ask the U.S. federal district court where the action is being investigated to modify or quash the subpoena, but statutorily mandates that foreign data privacy laws "shall not be the sole basis" for quashing or modifying a subpoena. This may raise difficult issues for foreign financial institutions in jurisdictions with onerous data privacy restrictions.

Penalties for Notice to Subpoena Targets. Account holders whose information is subject to an inquiry cannot be notified of any subpoena, or the foreign bank will be subject to civil penalties. Unauthorized disclosures may

result in a civil penalty of double the amount of the suspected criminal proceeds flowing through the U.S. correspondent account of the foreign bank or, if no such proceeds can be identified, up to \$250,000.

Steep Consequences for Noncompliance. Failure to comply with a subpoena may result in termination of U.S. correspondent banking relationships. Under the expanded subpoena authority, a U.S. financial institution is required to terminate any correspondent banking relationships with a foreign bank within 10 days of receiving notice from the U.S. authorities that the foreign bank has failed to comply with the subpoena. Any U.S. bank that does not comply with such a notice may be fined up to \$25,000 per day that the correspondent relationship remains active. Any foreign bank that fails to comply with a subpoena may be subject to civil contempt and a civil penalty of up to \$50,000 per day that the foreign bank fails to comply as well as further penalties, which may be sought in the discretion of the appropriate U.S. district court.

Key Takeaways

The AMLA's expansion of the DOJ and DOT's subpoena power demonstrates the U.S. government's commitment to using access to the U.S. financial system as a gateway to extending U.S. jurisdiction over data and records held outside the United States in support of U.S. law enforcement efforts to curb money laundering, terrorism, and other criminal misconduct involving the global banking system. Given the importance of these provisions to high profile U.S. enforcement priorities, we can expect U.S. regulators to pursue robust enforcement for failure to comply with these provisions, including demands for termination of U.S. correspondent relationships with noncompliant foreign banks. Nearly every large bank in the world that operates across borders (excluding banks based in Office of Foreign Asset Control (OFAC) sanctioned countries) has a U.S. correspondent relationship and is therefore in scope.

Interested parties should consider the potential implications of this expanded subpoena authority. In particular, foreign banks with U.S. correspondent relationships should be examining their procedures for subpoena response to ensure that they are prepared to comply with the new requirements and have mechanisms in place to prevent unlawful disclosures to affected account holders. Foreign institutions should also be considering any potential conflicts with local data privacy laws and any necessary disclosures to customers in relation to the potential for mandatory disclosures to U.S. regulators. Given the potential repercussions of a misstep, banks should consider proactively addressing these issues before they are faced with a conflict of laws offering a choice to either comply with local law or lose their U.S. correspondent status.

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