

## **New AML Subpoena Power over Foreign Bank Records and New Enforcement Standards of the Anti-Money Laundering Act of 2020**

On January 1, 2021, Congress enacted the Anti-Money Laundering Act of 2020 (the “AML Act”).<sup>1</sup> Part of the National Defense Authorization Act for Fiscal Year 2021, the AML Act creates a broad range of new anti-money laundering obligations for banks, other financial institutions, and certain private investment structures, and expands the extra-territorial reach of U.S. regulators. More than 85 pages long, the AML Act contains a number of significant new provisions and changes to prior law. Although many of the new provisions, including those creating a federal beneficial ownership registry, call for implementing regulations that will have to be promulgated, other provisions, including new criminal offenses and new subpoena authority over foreign banks with U.S. correspondent accounts, take effect immediately. This alert will discuss the new subpoena power over foreign banks, and the new enforcement standards.

### **Subpoena Power Over Foreign Banks Records**

Section 6308 of the AML Act permits the U.S. Department of Justice (“DOJ”) and the U.S. Department of the Treasury (“Treasury”) to subpoena foreign bank records if the foreign bank maintains a U.S. correspondent account, and to request “any records relating to the correspondent account or any account at the foreign bank,” including records maintained outside of the United States.<sup>2</sup> This is the most significant amendment of the Bank Secrecy Act (“BSA”) and related anti-money laundering laws since 2001.

The new authority may be exercised in any investigation of a violation of federal criminal law, in any civil asset forfeiture proceeding, and in any investigation conducted under the BSA and anti-money laundering laws and regulations. This is regardless of whether the correspondent account was used in connection with the potential violation of U.S. law. The subpoena power is no longer limited to records related to the correspondent account, a limitation that existed previously. Rather, the subpoena can request records related to any account at the foreign bank, including records maintained outside of the United States. A non-U.S. bank may petition the appropriate U.S. district court to modify or quash the subpoena on specified grounds. The AML Act, however, prohibits courts from quashing or modifying a subpoena solely on the ground that compliance would conflict with foreign bank secrecy or confidentiality laws.

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<sup>1</sup> Public Law No.: 116-283, §§ 6001-6511

<sup>2</sup> *Id.* § 6308

Failure to comply with a subpoena could result in termination of correspondent privileges, as well as fines and penalties for noncompliance. Foreign banks may be liable for a civil penalty up to \$50,000 for each day that they fail to comply with a subpoena, and there may be additional penalties if the foreign bank fails to comply for more than 60 days. Furthermore, the Treasury and the DOJ may require U.S. financial institutions to terminate correspondent relationships with a foreign bank that fails to comply with a subpoena.

Section 6308's expansion of the subpoena power strengthens the ability of the Treasury and the DOJ to conduct investigations involving foreign banks and to pursue enforcement actions, as they will now have an easier path to the access and use of documents that previously were difficult to obtain.

### **New Enforcement Standards**

The AML Act also includes other provisions that may affect the investigation and enforcement of potential BSA violations. For instance, the AML Act:

- Requires an assessment of whether the Treasury should formalize the process for issuance of no-action letters;<sup>3</sup>
- Provides harsher penalties for repeat violators (an additional civil penalty not more than the greater of three times the profit gained or loss avoided by the person, or two times the maximum penalty for such violations);<sup>4</sup>
- Provides that if a violator is a director, officer, partner, or employee of a U.S. financial institution at the time the violation occurred, such person must repay any bonus paid out during the calendar year in which the violation occurred or the following calendar year;<sup>5</sup> and
- Expands congressional oversight over deferred and non-prosecution agreements related to BSA violations, requiring the Attorney General to submit annual reports on the justification for and factors considered when entering into each deferred and non-prosecution agreement.<sup>6</sup>

### **Takeaways**

The AML Act is the most significant overhaul of U.S. AML laws in decades. It has significant implications for foreign banks that maintain correspondent bank accounts at

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<sup>3</sup> *Id.* § 6305

<sup>4</sup> *Id.* § 6309

<sup>5</sup> *Id.* § 6312

<sup>6</sup> *Id.* § 6311

financial institutions in the United States. Financial institutions should review and understand the expanded subpoena powers and other changes wrought by the AML Act, to ensure that they are adequately prepared for the changes. The AML Act will affect many aspects of how financial institutions interact with regulators, enforcement agencies, other financial institutions, and account holders, and how they comply with U.S. anti-money laundering laws and regulations. Attorneys at Curtis Mallet-Prevost Colt Mosle LLP are fully equipped and prepared to advise clients on these provisions, and to make sure they are prepared for their implementation.

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