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CONTRIBUTING FIRMS: OLIVÉRIO DAL FABBRO ABID ADVOGADOS (OLIVERIO.COM.BR); BRIGARD URRUTIA (BU.COM.CO); CAREY (CAREY.CL); HUGHES & HUGUES (WWW.HUGHES.COM.UY); BUCKLEY LLP NEW YORK, (BUCKLEYFIRM.COM)

UNITED STATES OF AMERICA

REACHING OVERSEAS: U.S. AML REFORM EXPANDS FOREIGN BANK SUBPOENA POWER

In one of its first acts of 2021, the United States Congress enacted the Anti-Money Laundering Act of 2020 (AMLA), which significantly expands the U.S. government's ability to subpoena records of foreign banks held outside the United States.

Before the enactment of AMLA, the USA PATRIOT Act provided mechanisms for the Departments of Justice (DOJ) and Treasury 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 relating to the deposit of funds into the foreign bank. AMLA expanded this authority to allow DOJ and Treasury to issue subpoenas to the same set of foreign banks, but for records that relate to *any* account at the foreign bank, including those held overseas, whether or not the records are related to the correspondent account. The only limitation is that the subpoena must relate to one of a wide range of matters, including an investigation of a violation of U.S. criminal laws, an investigation into violations of the Bank Secrecy Act (the primary anti-money laundering law of the United States), an investigation into whether impose "special measures," against persons and jurisdictions deemed to be foreign threats to global anti-money laundering efforts, or a forfeiture action. Foreign banks and their U.S. correspondents are prohibited from disclosing any subpoena issued under AMLA, and unauthorized disclosures can result in civil penalties of up to $250,000 or up to double the amount of certain funds identified by the investigation as proceeds of crime.

Foreign banks that receive such a subpoena are likely to face difficult choices. AMLA provides these banks with two options: (1) provide all requested documents; or (2) petition a U.S. District Court to modify or lift the subpoena or the prohibition against disclosure. Because privacy laws in many non-U.S. jurisdictions prohibit banks from providing customer information, many foreign banks may be prohibited from providing a complete response. Although AMLA allows courts to consider foreign bank secrecy laws, it prohibits them from using such laws as the "sole basis" to quash a subpoena. This puts foreign banks in a difficult quandary if the court declines the motion to quash: comply and violate its countries laws, or resist, and risk substantial penalties. A third way could be to seek customer consent in those jurisdictions that permit disclosure upon consent, but it seems unlikely in practice that the foreign bank's customers will readily consent to such disclosures, or that the DOJ would be amenable to potentially tipping off subjects of its investigation.

The potential penalties for failure to comply with these subpoenas were significantly expanded by AMLA. Failure to produce the requested records may result in a $50,000 fine on the foreign bank for each day of noncompliance. Additionally, and perhaps of greater concern, is that the Secretary of Treasury or the Attorney Genera may require the U.S. bank providing the correspondent account to terminate the relationship, and funds held in the account may be seized to satisfy any applicable penalties. Obviously, choosing between violating home-country privacy laws and losing access to the U.S. financial system is untenable for most banks that wish to clear dollars.

There are a couple of bright points. First, forcing this kind of choice on a foreign financial institution will implicate issues of international relations. For that reason, other parts of the U.S. government will be

involved in these decisions, particularly the DOJ's Office of International Affairs (OIA), which handles international requests for DOJ, and also potentially the State Department. Indeed, Patriot Act subpoenas require written approval from OIA before they can be issued, and a fair amount of scrutiny is to be expected. Second, the more limited subpoenas authorized pre-AMLA have, as far as publicly known, been used extremely rarely. It is not yet known whether the expanded authority under AMLA will lead to more frequent use.

In light of the difficult choices, it makes sense for institutions that receive the newly-authorized foreign bank subpoenas to contact DOJ or the Treasury as early as possible to discuss any issues of scope and conflicting laws, and to seek to negotiate the scope of the subpoena—potentially including providing helpful information that could be part of an agreement with the government to avoid the violation of home-country laws. This contact is of course best done through trusted U.S. counsel that maintains good relationships with DOJ and Treasury.

Contributors: Daniel R. Alonso and Benjamin Hutten, Buckley LLP, New York, NY. For further information, please send an e-mail to dalonso@buckleyfirm.com