

## THE US ANTI-MONEY LAUNDERING ACT 2020 AND ITS IMPLICATIONS FOR SWISS BANKS

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### OVERVIEW AND KEY TAKE-AWAYS

- 1 The U.S. Anti-Money Laundering Act 2020 ("AMLA") expands the ability of U.S. Authorities to request information from **Swiss banks that use U.S. correspondent banks**. The information may be requested in respect of **any bank account of the foreign bank that is related to a pertinent U.S. investigation**.
- 2 The **Swiss banking secrecy and criminal and civil blocking statutes** would most likely put Swiss banks confronted with subpoenas under the AMLA between a rock and a hard place. The **obligation of confidentiality regarding subpoenas** can also put Swiss banks in a difficult situation.
- 3 It can be assumed that the U.S. Department of Justice and the U.S. Treasury will issue some **guidance** regarding the application of the AMLA 2020.
- 4 Swiss banks should assure themselves of the **effectiveness of their internal control systems**, in particular their AML systems, and **banks that maintain U.S. correspondent accounts** should anticipate and treat the **risk of subpoenas from U.S. Authorities for records related to any of the banks' accounts**.
- 5 Swiss banks would also be well advised to review their **standard terms and conditions** to ensure that they are **authorized to comply** with the AMLA and any subpoena issued thereunder, should the need arise.

## INTRODUCTION

- 6 On 1 January 2021, the U.S. Congress enacted the AMLA as part of the National Defense Authorization Act for Fiscal Year 2021.<sup>1</sup> The AMLA includes significant amendments that may have important implications for the Swiss financial market, especially Swiss banks.

## SUBPOENA OF FOREIGN BANKS

- 7 Section 6308 AMLA expands the authority of the U.S. Secretary of the Treasury and the U.S. Attorney General ("U.S. Authorities") to issue subpoenas to *any foreign bank that maintains a correspondent account in the United States* and to request *any records*, including those maintained outside of the United States, relating not solely to the correspondent account but any other accounts at the foreign bank that are *subject of any related investigation of, inter alia, a violation of U.S. criminal law, the AMLA or a civil forfeiture action*.<sup>2</sup> In simple terms, if a foreign bank maintains a correspondent account in the U.S., the amended AMLA empowers the U.S. Authorities to issue a subpoena on that bank for records related to any accounts at that foreign bank in order to assist their investigation regarding a possible violation of US law.
- 8 A foreign bank on which a subpoena is served is not permitted to directly or indirectly notify any account holder or person named in the subpoena about the existence or content of the subpoena.<sup>3</sup>

## POSSIBLE LIMITATIONS

- 9 While the foreign bank may challenge the subpoena before the competent U.S. district court, according to AMLA, *solely* asserting that compliance with a subpoena would conflict with foreign secrecy or confidentiality laws (and presumably blocking statutes), would not be a sufficient basis for quashing or modifying the subpoena.<sup>4</sup> However, the use of "sole" in the respective AMLA provision implies that bank secrecy may nonetheless (to a certain extent) be considered along with other factors. While not

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<sup>1</sup> Available at: <https://www.congress.gov/bill/116th-congress/house-bill/6395/text>.

<sup>2</sup> AMLA section 6308(a)(3)(A)(i).

<sup>3</sup> AMLA section 6308(a)(3)(C)(i).

<sup>4</sup> AMLA section 6308(a)(3)(A)(iv)(II).

determinative, conflicting foreign law should be a significant consideration in the court's analysis of whether the subpoena should be enforced in light of international comity grounds.<sup>5</sup>

- 10 Further, banks could try to challenge the subpoena for being vague, overbroad or overly burdensome. In addition, banks with no U.S. operations could assert lack of jurisdiction.

#### **ENFORCEMENT AND FAILURE TO COMPLY**

- 11 Should a foreign bank fail to obey a subpoena issued under the AMLA, the competent district court may (i) compel compliance with the subpoena and (ii) issue an order requiring the foreign bank to appear before the U.S. Authorities to produce certified records or testimony regarding the production of the requested records.<sup>6</sup> Foreign banks that do not comply with an order from the district court may be punished for contempt of court.<sup>7</sup>
- 12 In addition, a foreign bank that fails to comply with a subpoena may also be subject to a civil penalty assessed by the U.S. Authorities of up to USD 50,000 for each day that it fails to comply with the terms of the respective subpoena.<sup>8</sup>
- 13 Finally, the U.S. Authorities may force a correspondent bank to terminate any correspondent relationship with the foreign bank if the U.S. Authorities determine that the latter has failed to comply with a subpoena.<sup>9</sup> Such a result would *prevent the foreign bank from processing international U.S. dollar transactions*.

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<sup>5</sup> 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, 73 (D.D.C. 2019).

<sup>6</sup> AMLA section 6308(a)(3)(D).

<sup>7</sup> AMLA section 6308(a)(3)(D)(ii)(II).

<sup>8</sup> AMLA section 6308(a)(3)(E)(iii)(II)(aa).

<sup>9</sup> AMLA section 6308(a)(3)(E)(i)(I).

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