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New U.S. Law's Impacts on Non-U.S. Financial Institutions

The U.S. Anti-Money Laundering Act of 2020 (AML Act) became law on January 1 when the United States Congress passed the broader National Defense Authorization Act for 2021 over a presidential veto. Although it is a U.S. law, it is critical that non-U.S. financial institutions, particularly those that rely on U.S. correspondent banking relationships or transact in U.S. dollars, understand how the AML Act will impact them —both directly and by shaping U.S. actors' expectations for their foreign partners. In general, the AML Act aims to improve coordination and information sharing; to modernize the U.S. anti-money laundering/combating the financing of terrorism (AML/CFT) regime; to encourage adoption of new compliance technologies; to reinforce the risk-based approach; and to create beneficial ownership reporting requirements to prevent illicit activity and protect U.S. national security.

In the near-term, the AML Act will subject non-U.S. financial institutions to new requirements while presenting them with new opportunities for engagement with U.S. authorities and banks:

- **Expanded subpoena authority**.[1] With the passage of the AML Act, the U.S. Treasury Department or the U.S. Department of Justice may issue a subpoena, in person or otherwise,[2] to any foreign bank that maintains a correspondent account in the United States. The agencies can request certain records[3] relating to the correspondent account or to any account at the foreign bank. This expands previously available subpoena powers that allowed U.S. authorities to request only records directly related to the correspondent account. A non-U.S. bank may petition to modify or nullify the subpoena or the prohibition against disclosure, but if it fails to comply with a subpoena, it may be liable for a civil penalty of up to $50,000 per day of noncompliance. Additionally, the U.S. institution maintaining the correspondent account of a noncompliant foreign bank must terminate the relationship within 10 business days of receiving written notice from U.S. authorities that the foreign bank has failed to comply with a subpoena or to prevail in related court proceedings.
  - Non-U.S. financial institutions should ensure that they are prepared to respond to subpoenas to protect their correspondent relationships and to avoid penalties.

They should be aware that they must petition the U.S. district court for the judicial district in which the related investigation is proceeding, as designated in the subpoena, if they seek relief from obligations. They must do so prior to the return date of the subpoena. It is also critical that non-U.S. financial institutions understand that an "assertion" that their home jurisdiction's secrecy or confidentiality laws conflict with subpoena compliance cannot be a sole basis for nullifying or modifying a subpoena under the new U.S. law.

- **Targeted prohibitions on concealing source or ownership of assets linked to certain politically exposed persons (PEPs) and on concealing source of funds involving an entity of primary money laundering concern**.[4] Beyond any other potentially applicable laws to combat money laundering, fraud, or other crimes, the AML Act places a targeted prohibition and special penalties on any attempt to knowingly conceal, falsify, or misrepresent, from or to a financial institution, a material fact concerning the ownership or control of assets involved in a monetary transaction if (1) the person or entity who owns or controls the assets is a senior foreign political figure or an immediate family member or close associate thereof, and (2) the aggregate value of the assets involved is $1 million or more. Penalties include imprisonment and/or a fine along with forfeiture of property involved in the offense. A similar subsection further prohibits any attempt to conceal, falsify, or misrepresent a material fact concerning the source of funds in a monetary transaction that involves an entity found to be a primary money laundering concern under Section 311 of the USA PATRIOT Act if the transaction also violates certain prohibitions or regulations.[5]
  - The prohibition focused on PEPs means that a non-U.S. bank could violate U.S. law by concealing key information related to PEP ownership or control—even if there is no knowledge of criminal activity (e.g., corruption or bribery) related to the transaction. Non-U.S. financial institutions should ensure that they have in place effective procedures to identify PEPs—including the family members and close associates of senior political figures—to reduce the risk of any violation of this section of the AML Act. Non-U.S. financial institutions should also ensure that compliance personnel understand the U.S. Treasury Department's application of Section 311 due to the additional emphasis placed on entities subject this designation.

- **New pilot program on cross-border information sharing within a financial group**.[6] The AML Act mandates that the U.S. Treasury Department must establish a pilot

program to permit a financial institution with U.S. suspicious activity reporting obligations to share information related to those reports with its foreign branches, subsidiaries, and affiliates to combat illicit finance. Although foreign affiliates would be liable for any information disclosure, the pilot program will also place U.S. confidentiality requirements on information received by U.S. institutions from their foreign affiliates, presumably to encourage non-U.S. branches, subsidiaries, and affiliates, to engage in reciprocal sharing.
    - The new U.S. pilot program represents a key opportunity for non-U.S. financial institutions to distinguish their counter-illicit finance programs. By January 1, 2022, the U.S. Treasury Department is required to issue rules governing the new pilot. Non-U.S. financial institutions with a presence in the United States should use this time to identify and address any barriers that could prevent their participation in the program.

- **Expansion of U.S. Treasury representatives in foreign jurisdictions**.[7] The AML Act creates several new positions within U.S. government agencies, including U.S. Treasury Attachés and Foreign Financial Intelligence Unit (FIU) Liaisons, both of which will be located in U.S. Embassies or similar facilities outside of the United States. Attachés will focus on both licit and illicit financial and macroeconomic topics and maintain relationships with foreign counterparts while conducting outreach to local and foreign financial institutions and businesses. FIU liaisons will execute a similar role, but their background and outreach will be more explicitly focused on AML/CFT issues and the role of the foreign country's FIU.
    - As the U.S. Treasury Department appoints new attachés and FIU liaisons, non-U.S. financial institutions should proactively seek to build relationships with these individuals. The AML Act requires several U.S. regulatory rulemakings and studies that will unfold over years. The attachés and liaisons can clarify evolving requirements and may be open to feedback on how U.S. rules and proposals might affect compliance programs at non-U.S. institutions.

Other sections of the AML Act create potential longer-term impacts on non-U.S. financial institutions and demonstrate how the United States is addressing challenges that it shares with many other jurisdictions. These sections of the law also highlight areas where changing requirements for U.S. financial institutions may translate into heightened expectations for foreign partners, and other areas where U.S. authorities

and banks are now more likely to seek complementary reforms from their foreign counterparts.

- **Beneficial ownership information reporting requirements**.[8] One of the most significant elements of the AML Act is the introduction of a beneficial ownership reporting requirement for many companies. Companies incorporated in or authorized to do business in the United States will be required to report their beneficial owners to the U.S. Financial Crimes Enforcement Network (FinCEN), although there are exemptions for certain kinds of companies.[9] Financial institutions will have access to the data reported to FinCEN, although only with the consent of the reporting entity whose information they are seeking. The exact nature of this access will be specified in future regulations. U.S. financial institutions will continue to have obligations to collect information not included in the FinCEN database.
  - Enhancing beneficial ownership transparency is a critical goal in many countries, including the United States. The AML Act begins U.S. implementation of a model in which the obligation to report beneficial ownership information is placed mostly on covered companies, rather than banks. Its passage could provide new momentum to similar reforms in foreign jurisdictions. Although the U.S. beneficial ownership database that the AML Act establishes will not be publicly available, many international anticorruption and transparency advocates favor public databases.[10]

- **Measures to improve quality and ease of suspicious activity reporting**.[11] The AML Act seeks to improve suspicious activity reporting both by requiring feedback from U.S. government authorities to banks on the usefulness of reports filed and by streamlining the process by which banks submit suspicious activity reports (SARs), including by allowing automation where appropriate.
  - Non-U.S. financial institutions should collaborate with the FIUs in their respective jurisdictions to explore ways that all covered banks can receive useful feedback on their reporting. They may also consider seeking similar changes to streamline submission of SARs, to the extent that onerous submission procedures are currently a hindrance for banks' timely filing.

- **Helping banks enhance transaction monitoring systems**.[12] The AML Act places obligations on U.S. authorities to provide input for configuring and testing banks' transaction monitoring systems. FinCEN must publish threat pattern and trend

information twice per year, including typologies and data that can be adapted by financial institutions into their algorithms, if appropriate. Separately, the U.S. Treasury Department must issue standards by which financial institutions are to test their compliance technologies, including with respect to machine learning and enhanced data analytics.

- Non-U.S. financial institutions may consider working with authorities in their jurisdictions to facilitate new forms of data sharing and shared analytics to enhance transaction monitoring and enable more dynamic public-private discovery of risks. The AML Act's requirement that authorities share algorithm-ready typologies and data is one example of such facilitation. Non-U.S. financial institutions and supervisors should also consider transformative transaction monitoring approaches based on new technologies. For example, financial institutions can employ federated analytic models to use artificial intelligence and machine learning to derive risk insights using data from across the sector—without pooling individual institutions' data in a way that would raise data privacy or competitive concerns. As advanced analytic approaches to transaction monitoring are deployed more frequently, non-U.S. financial institutions should also support the development of uniform standards by which financial institutions should test those new technologies—beyond the periodic, independent validation of monitoring systems typically required by law—to ease adoption and increase effectiveness.

Endnotes

[1] Section 6308, Anti-Money Laundering Act of 2020 [AML Act], Division F of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, https://www.congress.gov/bill/116th-congress/house-bill/6395/text.

[2] The subpoena may be served (1) in person; (2) by mail or fax in the United States if the foreign bank has a representative in the United States; or (3) if applicable, in a foreign country under an mutual legal assistance treaty, multilateral agreement, or other request for international legal or law enforcement assistance.

[3] Records within scope of this authority are those that are the subject of (1) any investigation of a violation of U.S. criminal law; (2) any investigation of a violation of 31 U.S. Code Subchapter II – Records and Reports on Monetary Instruments Transactions; (3) a civil forfeiture action; or (4) an investigation pursuant to section 5318A of the subchapter. They include those records maintained outside of the United States.

[4] Section 6313, AML Act.

[5] Specifically, the prohibition applies if the transaction also violates the prohibitions or conditions prescribed under section 5318A(b)(5) or regulations promulgated under title 31 of U.S. Code.

[6] Section 6212, AML Act.

[7] Sections 6106 and 6108, AML Act.

[8] Section 6403, AML Act.

[9] For instance, companies such as highly regulated institutions—including financial institutions and utilities—nonprofit organizations, inactive companies, and companies with at least 20 employees and $5 million in revenue are exempt from the reporting requirement.

[10] See, for instance, Ann Marlowe, "Time for a Free Public Registry of Corporate Beneficial Ownership in the U.S.," Organized Crime and Corruption Reporting Project, Jan. 26, 2021, https://www.occrp.org/en/37-ccblog/ccblog/13722-opinion-time-for-a-free-public-registry-of-corporate-beneficial-ownership-in-the-u-s and Amy Mackinnon, "The U.S. Is a Haven for Money Laundering. That Might Be About to Change," Foreign Policy, Jul. 31, 2020, https://foreignpolicy.com/2020/07/31/us-money-laundering-shell-company-new-law/.

[11] Sections 6202 through 6205, AML Act.

[12] Sections 6206 and 6209, AML Act.