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THE CHILLING EFFECT OF THE NEW ANTI-MONEY LAUNDERING ACT ON LATIN AMERICAN BANKING

By Alberto de la Portilla

The Anti-Money Laundering Act of 2020, known as AMLA, was signed into law on January 1, 2021, following an overwhelming majority vote by the United States Senate. The law, the largest expansion of the Bank Secrecy Act since the USA PATRIOT Act of 2001, standardizes beneficial ownership reporting requirements, improves cross-border sharing of Suspicious Activity data, increases budgets for whistleblower rewards, and addresses cryptocurrency.

But the part of its expansion that is of most concern is the new enforcement authority permitting the U.S. government to impose additional fines on U.S. banks and allowing subpoena authority over foreign banks that maintain U.S. correspondent accounts.

AMLA's expanded authority comes at a critical point in the precarious world of Latin American correspondent banking. Integro Advisers spoke to legal expert Alcides Avila, a founding partner of Avila Rodriguez Hernandez Mena & Garro LLP, whose firm regularly represents financial industry clients before the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Florida Office of Financial Regulation, and other regulatory agencies.

"I think there are a number of banks that know a little bit about what's involved but don't really truly appreciate the magnitude of the potential problem," says Avila, whose law firm is based in Miami, Florida.

What jumps out of this new law, he says, is that the Department of Justice (DOJ) can now pursue any bank account held in foreign banks if the foreign bank maintains a relationship in the United States.

"U.S. courts may issue pre-trial restraining orders to ensure that any bank account or other property of the defendant, located in the United States, is available to satisfy a judgment," says Avila. "For purposes of a forfeiture - and this is the part that's scary - if funds are deposited into an account at a foreign bank, and that foreign bank has an inter-bank account in the United States, which is a correspondent account with a covered financial institution, the funds shall be deemed to have been deposited in the interbank account and may be seized. In other words, they may be subject to forfeiture."

Avila adds, "It is not necessary for the U.S. government to establish that the funds were directly traceable to the funds that were deposited with the foreign bank because money is deemed to be fungible. That is scary stuff."

Asked to explain the mechanics of this process, he says that the DOJ-issued subpoena would be served on the foreign banks' agent for service of process. "But the subpoena would also be served on the U.S. bank, because that's where the correspondent account is maintained. The U.S. correspondent bank would know that if the foreign bank doesn't comply with the subpoena, then it may be required to close the bank account," says Avila.

"Just think about it, a U.S. correspondent bank may get hit with penalties because their foreign correspondent didn't comply with the subpoena," he says. "That's crazy. You have no control over that."

Indeed, AMLA's expanded subpoena authority could lead to further terminations of correspondent relationships with foreign financial institutions by U.S. banks, and for Latin America, it could not come at a more challenging time.

Years of de-risking in Latin America have strained the banking industry and given an upper hand to larger financial institutions in the region that are better equipped to bear rising compliance and risk mitigation

costs. It also comes as the region continues to struggle with the COVID-19 pandemic and the distribution of vaccines.

In the U.S., while many banks endeavor to manage their correspondent banking risks effectively, the industry now has to adjust to further regulatory compliance pressures and evolving interpretations of risk tolerance from the public sector.

Avila says his firm has already received inquiries from U.S. banks seeking to revise the language in their foreign correspondent bank agreements to contemplate AMLA's scenarios.

But there is another problem.

"I don't know how a foreign bank can comply with a [DOJ] subpoena without violating the [Bank Secrecy] laws of its own country," he says.

It would be illegal for a foreign bank to provide information to U.S. authorities based simply on a subpoena that is issued in the United States without going through a court proceeding in the foreign country.

"If the roles were reversed and it was a foreign government's authority serving a subpoena on the U.S. bank - let's say a Florida bank - for information concerning accounts that customers maintain in Florida, as a result of a law in Colombia that allows them to do that, the Florida bank would be violating the law because Florida law has strict Bank Secrecy provisions," says Avila. "It would be a felony for the U.S. bank to turn that information over."

In the past, mutual legal assistance treaties between nations have assisted with the exchange of information in criminal and related matters. Foreign courts would get involved in the issuance of subpoenas to their own financial institutions to respond to the subpoena request under these treaties.

The situation for banks is tricky under AMLA, asserts Avila. "On the one hand, you want to do the best you can to provide [the DOJ] with information. But you also have to recognize the limitations - that it's extremely unlikely that [foreign banks] can agree to something where they will be violating the laws of their own country."

Is part of AMLA's objective an effort by the U.S. government to circumvent foreign courts and laws as it pursues alleged money launderers and other bad actors? That remains to be seen. Avila considers that the new law, in its current form, is "pretty broad." He is hopeful that when the final rules are issued, these legal concerns will be considered.

Without a doubt, under AMLA, BSA/AML compliance programs in the U.S. will be tested and result in additional scrutiny and pressure on foreign bank customers. Avila agrees. "The U.S. correspondent will say to its customers, 'If I am facing penalties, I want to make sure that your [AML compliance] program is as strong as it possibly can be. We want to see what else you're doing to really know your customer."

"Foreign banks are going to have to increase their level of due diligence on their own customers to really understand the business flowing through their institution, more so than they are now," says Avila.

Asked what he is counseling his Latin American financial institution clients on the expanded subpoena authority, Avila explains they are advising them to insert language in account-opening documentation that states that if the bank is served with any legal process pursuant to any correspondent relationship that it maintains in the U.S., the customer consents that information requested may be turned over.

But he also admits this will be challenging. "The odds of [a customer] actually agreeing to that is pretty crazy," he says.

AMLA's expanded enforcement and subpoena authority is certain to have a substantial, negative impact on Latin American correspondent banking, as foreign financial institutions will be faced with a more limited ability to sustain a banking relationship outside their home country, thereby restricting local customers from participating in the global marketplace, a prospect that while it comes with some risk to banks, also comes with reward in the form of greater prosperity for the region.

"In recent years, some banks were interested in returning to the correspondent banking business," says Avila. "I think that you're going to see a roll back in what had been happening. What you are going to find is that some of those banks that have engaged in this business are suddenly going to become selective as to who they do business with," he says. "Incredibly selective."

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