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Anti-money laundering law reform in the United States: Swiss banks caught between a rock and a hard place

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Under the new U.S. Anti-Money Laundering Act of 2020, US criminal investigative authorities can demand from Swiss banks to disclose a wide range of client documents.

Invoking banking secrecy is no valid defence even if complying results in breaching Swiss criminal law. US authorities may send a subpoena to a Swiss bank or its US representative, if any, and can impose heavy sanctions if the Swiss bank refuses to co-operate.

Swiss law does not provide for a ready-made solution to fully protect Swiss banks. Swiss banks are well advised to adjust their internal procedures and to have a "road map" ready for the day they receive a subpoena in the mail.

Deadlines for document disclosure are likely to be short and so Swiss banks must be ready to react.

1. Background

Originally passed by the U.S. Senate on 11 December 2020, the National Defense Authorization Act for Fiscal Year 2021 was enacted on 1 January 2021 after overriding the Presidential veto of the bill.

One of its core features that is highly relevant from a non-U.S. perspective is its Division F, also known as the U.S. Anti-Money Laundering Act of 2020 ("**AML Act**"). This statute enacts a long-anticipated update of AML/CFT rules and is described as historic legislation or a sweeping reform to the Bank Secrecy Act and other anti-money laundering rules, designed to modernize and strengthen the United States financial crime monitoring system.

More specifically, the AML Act broadens the pre-existing authority under the Section 5318(k) of Title 31 (Money and Finance) of the United States Code, governing bank records related to Anti-Money Laundering Programs. It allows the Secretary of the Treasury or the Attorney General to subpoena financial records of **non-U.S. resident banks that hold correspondent accounts with U.S. financial institutions**. This applies to all Swiss banks.

This is in furtherance of the special investigatory tools already given to the Attorney General and the Treasury Secretary under the Patriot Act of 2001 in respect of U.S. correspondent bank accounts. The authority has thus been expanded to include **any (rather than only correspondent) account of the foreign bank, including records maintained outside the United States** for the purposes of any investigation of a violation of a criminal law of the United States, other investigations or a civil forfeiture action.

In short, the AML Act largely expands the scope of documents that a Swiss bank may be compelled to disclose. Furthermore, the legal threshold for issuing a subpoena is low.

2. What are the sanctions for non-compliance with a subpoena?

The AML Act contains a full arsenal of sanctions against a non-complying bank:

a) **Court contempt**: First, if a foreign bank fails to obey a subpoena, the Attorney General may invoke the aid of the district court to enforce the same.

   The latter may issue an order requiring the non-U.S. bank to appear before the Secretary of the Treasury or the Attorney General to produce certified records or testimony regarding the production of the certified records; and punish any failure to obey with such order as contempt of court.

b) **Termination of the correspondent relationship**: the Secretary of the Treasury or the Attorney General may give a 10-days' notice to the respective U.S. financial institution and order the latter to terminate any correspondent relationship with the non-compliant foreign bank. Without going into specifics, such notice may be served in case of (i) non-compliance with a subpoena or (ii) unsuccessful challenge of the subpoena in a U.S. court.

c) **Civil penalties**: the non-U.S. bank may incur substantial civil penalties (up to $50,000 for each day) and additional penalties for failure to obey a subpoena. The amount of the penalties may be seized directly from the non-U.S. bank's correspondent account held in the United States.

3. An Swiss bank's risk analysis

In view of the heavy sanctions, Swiss banks may want to comply. Besides, Swiss banking secrecy will not shield them from disclosure since pursuant to the AML Act, a conflict with foreign secrecy or confidentiality is no valid defense.

However, a Swiss bank that chooses to comply with the subpoena, may fall afoul of Swiss criminal law standard and arguably commit the criminal office of unlawful activities on behalf of a foreign state (Article 271 of the Swiss Criminal Code). This so-called "blocking" provision of Swiss law prohibits any unauthorized exercise or facilitation of activities in favor of a foreign state on the Swiss territory that fall within the competence of a public authority. Acts performed in favor of a foreign public authority are prohibited unless authorized by a competent Swiss authority, subject to the fulfillment of requirements for granting international mutual assistance. This is also enforced and the Swiss Federal tribunal condemned an overly compliant wealth manager who exchanged client data against a non-prosecution agreement with the DOJ, notwithstanding a Swiss legal opinion holding that the wealth manager's course of action was legal[1].

The AML Act provides for three alternative methods of service of the subpoena. In particular, a subpoena may be issued (i) in person, (ii) by mail or fax in the United States if the foreign bank has a (mandatory!) representative in the United States, or (iii) if applicable, in a foreign country under any mutual legal assistance treaty, multilateral agreement, or other request for international legal or law enforcement assistance.

This third method seems to imply that for non-U.S. banks that do not have a representative in the United States (which seems mandatory under the AML Act!), the mutual legal assistance channel shall be followed. However, this may be theoretical because all Swiss banks use a correspondent bank in the US which in turn should hold on record the name of the process agent that may receive subpoena's on behalf of the Swiss bank. So chances are high that the subpoena is served to the correspondent bank, the Swiss bank's local representative or directly to the Swiss bank in Switzerland (in particular if the Swiss bank failed to appoint a US-based process agent).

Also, US courts are not overly enthusiastic about using the mutual legal assistance channel: it should be borne in mind that according to the U.S. Supreme Court, evidence-sharing arrangements set up by international agreements, although often valuable, can also prove unduly time consuming and expensive, as well as less certain than **court-enforced subpoenas to produce needed evidence**[2].

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[1] Decision of the Swiss Federal Court 6B_804/2018 dated 4 December 2018.
[2] Societe Nationale v. District Court, 482 U.S. 542-544.

For example, in 2019, the U.S. Court of Appeals (D.C. Circuit) held that issuing unilateral subpoenas was justified given by the "sluggish" and typically fruitless cooperation in the past. The court rejected the argument that Chinese law prohibits banks from disclosing records to international investigators unless via international legal assistance[3].

In short: Swiss banks must expect to receive a subpoena by mail or by fax directly at their offices in Switzerland or with their correspondent bank (or their mandatory process agent).

4. How should a Swiss bank react when receiving a subpoena?

There exit no "catch-it all" solutions on how to react to a subpoena **without** breaching US and/or Swiss law. A lot depends on the scope of the documents requested as well as the nature of the US criminal proceedings.

A priori, a Swiss bank has the following options:

- comply with the subpoena by relying on certain provisions of the Swiss Financial Supervision Act that allow cooperation with foreign authorities in certain circumstances
- obtain clearance from the Swiss Financial Market Supervisory Authority ("**FINMA**")
- obtain clearance from the Swiss Federal Department of Justice and Police or the Swiss Government
- rely on a waiver signed by the client
- challenge the subpoena before US courts

a) Comply with subpoena and rely on right to collaborate under Swiss Financial Market Supervision Act

The Swiss Financial Market Supervision Act ("**FMSA**") which is the umbrella law for other statutes relating to financial market supervision allows Swiss banks to collaborate directly with foreign authorities without the need to obtain any authorization from a Swiss authority (save for disclosure of important information – see section (b) below). If the collaboration is within in the scope of the FMSA, the Swiss bank would not breach article 271 of the Swiss Criminal Code. This is the crux.

Pursuant to Article 42c of the FMSA, regulated entities (such as banks) may, without breaching article 271 of the Swiss Criminal Code, transmit non-public information provided that:

- this information shall be used exclusively to implement financial market legislation, or shall be forwarded to other authorities, courts or agencies for this purpose,
- the requesting authorities are bound by official or professional secrecy, and
- the rights of clients and third parties are preserved.

Article 42c FMSA also allows transmission to **other foreign authorities**, if such disclosure is required to conduct business activities in compliance with the applicable foreign market supervisory law (i.e. US law).

In either case the clients and any third parties' rights must be safeguarded.

The definition of "*financial market legislation*" under the FMSA includes anti-money laundering laws. As such, it would seem a priori that a request of records under the AML Act would be allowed under the FMSA.

However, there are two obstacles that may be fatal for relying on FMSA:

First, the requirements of safeguarding the "*rights of clients and third parties*" is difficult to accomplish because a Swiss bank that informs the client of the subpoena would breach the AML Act that requires the bank to maintain the disclosure secret.

[3] In re: Sealed Case, No. 19-5068 (DC Cir. 2019)

The only way to accommodate this would be through up-front waivers signed by the clients when opening the bank account.

Second, the spirit of the FMSA only allows collaboration with authorities for the purpose of supervising financial markets. It is doubtful whether this applies to the U.S. Secretary of the Treasury and the Attorney General, especially if they investigate standalone crimes rather than breaches of regulated markets.

b) Obtain clearance from FINMA

A Swiss Bank may try to obtain clearance from FINMA prior to complying with a subpoena.

Such clearance already exists for the permitted disclosure of so-called "important information"[4], where it is compulsory under Article 42c(3) of the FMSA. If notified, the regulator may choose to interfere and require any request for disclosure to be made under proper international mutual assistance channels and not directly.

In analogy, Swiss banks could seek clearance for a disclosure under a subpoena. Whether FINMA would reply favorably is doubtful.

c) Waiver by client

Swiss banks may obtain an upfront blanket waiver from their clients for any such AML disclosure.

However, Swiss courts have held that the client's consent cannot a priori justify a breach of article 271 of the Swiss Criminal Code because the Swiss bank breaches Swiss sovereignty by complying with the subpoena (unless it is notified via the mutual legal assistance).[5]

So in short, an upfront waiver is unlikely to protect the Swiss bank from breaching Swiss criminal law. However, it may be helpful if disclosure would fall under Article 42c of the FMSA and/or is cleared by FINMA.

d) Authorization of the Federal Justice and Police Department

It is possible to lawfully circumnavigate the prohibition under article 271 of the Swiss Criminal Code by seeking clearance from the competent Swiss authorities prior to the disclosure.

The authority to grant authorization would be either the Swiss Federal Department of Justice and Police[6] or, for cases of major importance, the Federal Government *in corpore*.

The Swiss Federal Department of Justice and Police has published some of its past decisions, including one relating to a request of production of documents under a subpoena issued by a U.S. court, in which the U.S. court had dismissed the problem of conflict with Swiss law, invoked by the Swiss bank, as hypothetical.[7]

e) Challenging the subpoena in U.S. courts

Finally, the AML Act allows the foreign bank on which the subpoena is served to petition the district court of the United States for the judicial district in which the related investigation is proceeding to modify or quash the subpoena.

Since the AML Act is recent, it can be expected that its provisions are yet to be tested in U.S. courts on multiple grounds including, without limitation, the method of service, the principle of comity and the conflict with Swiss law.

In the above-mentioned U.S. case law, the reasoning in favor of compelling compliance with subpoenas, included, in addition to the heightened national interest, the following elements:

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[4] Such as, for instance, information for the purposes of foreign preliminary investigations and proceedings that could lead to sanctions, which in turn could have a significant impact on the risks of the regulated entity (See FINMA Circular 2017/6, nº 49).

5 Decision of the Swiss Federal Criminal Court SK.2017.64 dated 9 May 2018, recital 4.2.10.

6 Basel Commentary Criminal Code – Markus Husmann, Article 271, no 86.

[7] Decision 2016.4 of the Federal Department of Justice and Police dated 12 February 2014 *in* Case law of federal administrative agencies 1/2016, available here.

- futility of the mutual legal assistance process, based on the target country's failure to satisfactorily engage in the process in many other cases over a decade, which would thus result in an inadequate production of documents,
- rare and relative modest nature of penalties at stake.

5. Conclusion

The new AML Act gives broad authority to the U.S. Attorney General and the Secretary of the Treasury to compel production of records maintained by foreign banks outside the United States for the purposes of criminal investigations.

As a result, Swiss banks may start receiving subpoenas directly from the U.S. authorities, facing accordingly the risk of devastating consequences of either being barred from correspondent banking in the U.S. in case of non-compliance (amongst other sanctions) or committing a criminal offence on the Swiss territory in case of compliance.

Pending the issuance of guidance in the U.S. and/or Switzerland, Swiss banks should prepare their strategy, including a possible amendment of their banking conditions, consultations with the bank regulator (FINMA) and the Federal Department of Justice and Police and making preparations for timely action before U.S. courts. In this regard, the importance of proper legal advice and assistance from the outset should not be underestimated.

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