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The DOJ's Expanded Subpoena Powers Are Not Without Limits

By **Lanier Saperstein**

And **Samuel Hickey**

Congress enacted the Anti-Money Laundering Act of 2020 (AMLA) in January of this year, and much has been written about how it constitutes the most significant change to the U.S. anti-money laundering regime since the passage of the USA PATRIOT Act almost 20 years ago. However, one provision of the AMLA was added with little fanfare and minimal discussion, yet it could have a significant impact on foreign financial institutions doing business in the United States.

Section 6308 of the AMLA expands the authority of the Departments of Treasury and Justice to seek and obtain banking records located abroad, while limiting the ability of foreign financial institutions to oppose production of those documents based on prohibitions under local banking laws and regulations. An open issue, however, is whether §6308 was intended to upend traditional processes designed to respect the sovereignty of foreign nations. We think it does not—and should not—and we discuss our reasons here.

LANIER SAPERSTEIN *is a partner at Jones Day.* SAMUEL HICKEY *is an associate at the firm. The views set forth in this article are the personal views of the authors.*

The USA PATRIOT Act

Section 5318 of the USA PATRIOT Act, enacted in the wake of the 9/11 attacks, granted the Treasury and DOJ the power to subpoena any foreign bank that maintains a correspondent account in the United States and to request records "related to such correspondent account," including records maintained abroad. The foreign bank recipient of a subpoena under §5318 could, in response, move to quash the subpoena by arguing that compliance with it would violate the law of the jurisdiction from which the documents were sought.

Section 6308 of the AMLA replaced §5318, and it marks an expansion of an already broad government power. The new provision extends the authority of Treasury and the DOJ to seek any records relating to the correspondent account or, and this is the key new language, "any account at the foreign bank," including records maintained outside the United States, so long as they are subject to several enumerated categories. Further, while the bank recipient may still move to quash the subpoena, §6308 states that the "sole basis" can no longer be that compliance with the subpoena would conflict with a provision of foreign secrecy or confidentiality law.

Section 6308 also recognizes the government's power to compel compliance through contempt

proceedings in federal courts. Foreign banks face penalties of up to $50,000 per day for each day of non-compliance (provided that the bank has not moved to quash the subpoena). Those penalties can be satisfied with funds from the correspondent account. The government can even order a domestic bank to terminate a correspondent banking relationship with the foreign bank. Penalties of $25,000 per day can be sought against a domestic bank that violates a termination order.

The Importance of MLAT Procedures

Section 6308 is silent on the interplay between the government's expanded subpoena powers and its obligations under various Mutual Legal Assistance Treaties (MLATs). MLATs provide a procedure for U.S. regulatory agencies to request assistance from foreign governments for the purpose of obtaining evidence. MLATs are important. They promote international comity, ensure consistent outcomes with regard to requests for evidence in transnational regulatory efforts, and offer a level of protection for foreign financial institutions that run the risk of being whipsawed by competing requirements of two different jurisdictions.

Recognizing the important comity considerations underpinning MLATs, the DOJ Manual, §9-13.525, provides that the DOJ first attempt to obtain evidence through applicable MLATs before resorting to issuing a subpoena: "U.S. law, in the form of mutual legal assistance treaties, requires that the United States attempt to obtain records using the mutual legal assistance process prior to resorting to unilateral compulsory measures."

So what is the interplay between §6308 and the various MLATs currently in place? The legislative history is sparse. Rep. Blaine Luetkemeyer, a congressman from Missouri, was the sole representative to discuss §6308. He stated on the floor of the House that §6308 created "a secondary mechanism for seeking discovery from foreign banks separate from the Mutual Legal Assistance Treaties (MLATs) or other multilateral or bilateral agreements the United States currently maintains with many foreign governments for this purpose." Luetkemeyer's use of "secondary" suggests that, as far as the statute's supporters were concerned, the United States should first try to employ MLAT procedures before resorting to issuing subpoenas.

Luetkemeyer continued, encouraging the DOJ "only to use" its new authority "where a foreign bank operates in a jurisdiction as to which no MLAT or other information-sharing agreement exists or where the relevant foreign government has not satisfied its obligations under an MLAT or other information- sharing agreement." He also encouraged Treasury and DOJ to issue regulations establishing protocols to "ensure that the authority granted under §6308 does not supersede or supplant existing MLATs or other multilateral or bilateral agreements" between the United States and the relevant foreign government available for obtaining records from a foreign bank.

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Luetkemeyer's view holds an obvious appeal: it is consistent with the DOJ's own Manual, while reflecting important comity considerations.

DOJ's Selective Account of Cooperation in Cross-Border Evidence Sharing

The DOJ may well respond that MLAT procedures do not work or take too long, at least for certain jurisdictions, and therefore they must resort to unilateral subpoena powers. For example, the DOJ argued in a recent case that the

U.S.-China MLAT was largely ineffective because the Chinese government, in the DOJ's view, tended to be unresponsive to the requests by U.S. agencies.

It is difficult to evaluate that argument, as many MLAT requests are confidential. To the extent the U.S. government provides aggregate data regarding any specific country, it is challenging, if not impossible, to assess what information was actually provided in response to the MLAT requests, how long each response took, and how many MLAT requests the United States granted from that country in comparison.

To try to get a better understanding, we mined the publicly available data relating to requests for information from China under the Hague Evidence Convention. Analyzing that data, it appears that China is on par with the United States in terms of how quickly and how many Hague Evidence Convention requests it grants. The most current information is from the *Synopsis of Responses to the Questionnaire of November 2013 Relating to the Hague Convention*, Hague Convention Conference on Private International Law (May 2014).

We recognize that the data is imperfect—it is not a direct comparison, it is several years old and it relates to civil, not law enforcement proceedings—but it does nonetheless provide some useful insights and is more helpful than discussing the issue in a vacuum. Here is what we culled from the data:

- China executed 42.8% of all requests, similar to the United States, which executed 44.7%;
- China executed the requests more quickly than the United States, executing 77.8% of the requests it approved within 6-12 months, compared to the United States's 51.7% within 6-12 months; and
- China rejected requests at a higher rate than the United States (30.9% vs. 20.5%), but it had, as of the date of the report, a lower percentage of pending requests than the United States (26.2% vs. 34.8%), suggesting the rejection rates might be closer if and when the United States cleared its backlog of requests.

The DOJ may complain that MLAT procedures can be lengthy and do not always result in the production of information. That may be correct, but it appears countries like China are at least as good as, or better than, the United States in terms of executing Hague Evidence Convention requests.

Further, it is unclear whether issuing subpoenas would result in more information, more quickly, than going through MLAT procedures. Judging by U.S. standards, it can take months or even years to obtain records via subpoena. We ought not fall prey to the Nirvana Fallacy, a term coined by the leading economist Harold Demsetz, for comparing an ideal norm to that of an existing "imperfect" arrangement. Litigators do not deal with ideal situations; they often have to manage imperfect arrangements. While the MLAT procedure may be imperfect, it is better than the alternative: a unilateral approach to gathering evidence—that is not especially quick either—that potentially offends the sovereignty of other countries, putting subpoena recipients in the invidious position of being trapped between two competing and potentially conflicting jurisdictions.

Following MLAT procedures, at least in the first instance, may not be Nirvana, but it is consistent with the DOJ manual and the legislative history of §6308. It also is, in our view, the best option for the United States to balance the need for information and the sovereignty of nations, while managing the difficulties faced by subpoena recipients, who all too often simply are caught in the middle.