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# Fallout from the 'Panama Papers'

*Coming to a  
Courthouse Near You?*

*Part One of a  
Two-Part Article*

**By Stanley S. Arkin  
and Robert C. Angelillo**

Among the first things we learn as defense attorneys is to keep informed and alert about events that may spawn or affect actions taken by prosecutors. We discuss herein an event, somewhat understated in this country, which, in our view, could lead to a host of criminal cases, both state and federal. This article sets forth an example of how one stays sensitive to what may be happening in the closed venues of prosecutors' offices.

## **THE 'PANAMA PAPERS'**

When the "Panama Papers" story burst onto the scene last spring, it sent shock waves through the halls of power in more than one country and international institution. Numerous resignations and prosecutions of foreign leaders and dignitaries resulted from the revelations in the Panama Papers. But is that the end of the story? Has the damage been contained? Not in the least. The fallout may just be beginning, and it may well land in a courthouse near you.

The "Panama Papers" is the name given to an investigation of more than 11.5 million documents that were released by a whistleblower to the German Newspaper *Süddeutsche Zeitung* (SZ) last spring. The released documents contained confidential financial and legal documents maintained by the Panamanian law firm Mossack Fonseca. That firm had long specialized in the creation of offshore entities and

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accounts for its largely international clientèle. The Panama Papers document dump contained information concerning no less than hundreds of thousands of offshore entities that the law firm had created on behalf of its clients over the years, no doubt including many United States citizens.

According to published reports, the Panama Papers documents were received by SZ in 2015, but SZ was overwhelmed by the sheer size of the production. Accordingly, to assist it in analyzing what it had been given, SZ distributed the documents to an organization known as the International Consortium of Investigative Journalists (the ICIJ), which examined the documents to determine the identity of those clients. The ICIJ is a collection of more than 150 investigative journalists from around the world whose stated mission is to expose international crime and corruption, including, but not limited to, corruption by the world's ruling elite. The ICIJ studied the Panama Papers and determined the identity of many of the firm's wealthy clients, who had created offshore accounts.

## **STAGE 1: FALLOUT — PUBLIC DISGRACE AND RESIGNATION OF FOREIGN PUBLIC OFFICIALS**

As has been well-reported, some of the initial fallout from the Panama Papers revelation was the public disgrace and resignation of a number of foreign government officials and prominent persons. For example, the Icelandic Prime Minister Sigmundur David Gunnlaugsson was pressured to resign after it was revealed that he and his wife had set up a shell company in the British Virgin Islands, which led to allegations of conflict of interest and tax evasion. Shortly thereafter, the Spanish Industry Minister, José Manuel Soria, was also forced to resign after the revelation from the Panama Papers investigation that he kept some of his money in a secret offshore account in the Bahamas.

## **STAGE 2: FALLOUT — TAX AVOIDANCE INVESTIGATIONS**

One of the primary goals of establishing an offshore account of this

nature is domestic tax avoidance. Offshore companies can be opened and operated in "tax havens," such as the British Virgin Islands and the Cayman Islands, and can be a vehicle to hide assets from, among others, the taxing authorities.

Although "tax haven" is not a strictly defined term, in general a "tax haven" is a jurisdiction where banks and financial institutions are permitted to operate with few (if any) questions from the authorities concerning the source of the depositor's money. Those banks' customer bases are usually from outside of the jurisdiction, and the jurisdiction itself usually provides for a low tax rate.

Since the "tax haven" banks are permitted to keep customer accounts shrouded in mystery, these accounts are ideal places to park money outside the view and reach of the taxing authorities of the depositor's home countries. Not surprisingly, in the wake of the release of the Panama Papers, many countries, including Australia, Argentina and the United Kingdom, announced that they were opening tax avoidance investigations. Those investigations are ongoing and likely will be for some time.

Shortly after the release of the Panama Papers, the United States Attorney for the Southern District of New York opened its own investigation of the reportedly more than 240 U.S. citizens who were identified in the papers for potential tax avoidance, a small percentage of the hundreds of thousands of Mossack Fonseca clients noted by the ICIJ. The precise subject of this investigation has not been fully disclosed, but, as discussed below, there may be issues other than tax avoidance under investigation.

Contributing to the absence of a large spate of United States tax avoidance prosecutions is the application of the United States' Foreign Account Tax Compliance Act (FATCA) of 2010. That law, passed in 2010 as part of the Hiring Incentives to Restore Employment (HIRE)

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## ***Panama Papers***

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Act, includes numerous requirements designed to reduce tax evasion by U.S. citizens and companies and has been effective in building a wall around U.S. citizens attempting to avoid U.S. taxes.

Under FATCA, certain U.S. taxpayers holding financial assets outside the United States must report those assets to the IRS on Form 8938, Statement of Specified Foreign Financial Assets. There are serious penalties for not reporting these financial assets (as described herein). This FATCA requirement

is in addition to the long-standing requirement to report foreign financial accounts on FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR) (formerly TD F 90-22.1). <http://bit.ly/2h3uzCT>.

Further, FATCA contains the reciprocal requirement for the foreign banks:

FATCA will also require certain foreign financial institutions to report directly to the IRS information about financial accounts held by U.S. taxpayers or by foreign entities in which U.S. taxpayers hold a substantial ownership interest. The reporting

institutions will include not only banks, but also other financial institutions, such as investment entities, brokers, and certain insurance companies. Some non-financial foreign entities will also have to report certain of their U.S. owners.

*Id.*

We will discuss further potential consequences of the Panama Papers in next month's newsletter.

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