

# Global Investigations and Compliance Alert

April 19, 2016

## If you read one thing...

- The information disclosed in the “Panama Papers” presents various issues for parties identified as well as their business partners, customers, suppliers and other associated entities.
- Critical risk areas generated by exposed information include tax, government enforcement, congressional investigations, targeted cyber attacks, private litigation and reputational harm.
- Potentially affected companies should implement a corporate process to evaluate vulnerabilities, reduce uncertainty and mitigate risk.



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## The Panama Papers: Managing Corporate Risk and Uncertainty

On April 3, 2016, it became public that an anonymous source had leaked 11 million confidential documents, known as the “Panama Papers,” belonging to the Panama-headquartered international law firm Mossack Fonseca. As more of the Panama Papers become public over the coming months, they will raise a host of issues for parties identified in the papers, as well as the business partners, customers, suppliers and other entities connected to those parties. This alert summarizes key legal issues for consideration as companies attempt to understand, assess and mitigate the potential impact and exposure of the Panama Papers on their business.

### Background

The Panama Papers are said to comprise 4.8 million emails, 3 million database files and 2.1 million PDFs dating as far back as the 1970s and relating to companies incorporated in the British Virgin Islands, Panama, the Bahamas, Seychelles, Niue, Samoa, British Anguilla, Nevada, Hong Kong and other jurisdictions. The anonymous source is reported to have leaked the Panama Papers to German newspaper Sueddeutsche Zeitung, which shared the documents with the Washington, D.C.-based International Consortium of Investigative Journalists (ICIJ). At this point, ICIJ has made a fraction of the Panama Papers available publicly and has given only select media organizations access to the full database of documents.

The Panama Papers have generated considerable media attention because of Mossack Fonseca’s legal specialty and clients. Specifically, Mossack Fonseca assists clients in establishing offshore business entities. According to the documents released so far, its beneficial clients include various heads of government and their close associates, billionaires, celebrities and sports stars. Despite the legitimate uses of offshore companies, media reports have focused on the potential use of these offshore business

entities for illegal purposes, including tax evasion, bribery payments or money laundering, and the political implications of their use by heads of government and their close associates.

Currently available information indicates that Mossack Fonseca has worked directly with 617 entities in the United States to establish offshore business entities, either on behalf of the U.S. entity itself or its clients. While media attention is presently focused on Mossack Fonseca's highest-profile clients, whose names have already been revealed, the ICIJ stated on its website that it plans to publish a full list of companies mentioned in the Panama Papers in early May 2016, and various authorities might obtain access before then, especially given the reported raids of Mossack Fonseca offices by officials in several countries.

## **Key Risk Areas**

### **Tax**

Governments around the world immediately recognized the potential significance of the Panama Papers in several areas of law, and many of them have publicly indicated that they intend to review the Panama Papers for evidence of any violations of law. Global tax evasion is a core issue in the Panama Papers, and many countries have responded rapidly by launching investigations and even conducting raids. In addition, senior tax officials from around the world met on April 13, 2016 in Paris to discuss proposals for a joint international tax investigation based on the Panama Papers. The global initiative is being led by the OECD's Joint International Tax Shelter Information and Collaboration (JITSIC) network of 35 countries including, among others, the United States, the United Kingdom, Australia, China, France, Germany, Greece, Iceland, Ireland, India, Italy, Japan, Korea, Russia, Mexico and Switzerland.

The impact of the Panama Papers on tax enforcement is snowballing, and it is possible for the leaked documents to be translated into powerful tools of tax enforcement for governments around the world. As a point of reference, the 2008 disclosure of information on certain U.S. accountholders of UBS AG catapulted the U.S. government's international tax enforcement efforts and resulted in new, powerful enforcement tools and activities, including the Foreign Account Tax Compliance Act (FATCA), offshore voluntary disclosure programs and the Swiss Bank Program. The last program involved 80 Swiss banks resolving their U.S. criminal tax exposure by disclosing their cross-border activities and detailed information on U.S. taxpayers, paying more than \$1.36 billion in penalties, and agreeing to provide complete assistance as the U.S. government pursues leads (i.e., "follow the money") throughout the world.

### **Government Enforcement of Other Laws**

Over the past several years, U.S. and foreign governments have been aggressively pursuing civil and criminal enforcement involving anti-money laundering (AML), anticorruption and economic sanctions laws. Enforcement actions have yielded penalties in the billions of dollars in the most extreme cases. In early April, the U.S. Department of Justice highlighted in its public enforcement plan and guidance that it is further intensifying its investigative and prosecutorial efforts in the Foreign Corrupt Practices Act (FCPA) area and its coordination with foreign governments on enforcement cases.

The Panama Papers' revelations of previously non-public business relationships, including the beneficial ownership of entities, the structure of transactions and business organizations, and the indirect beneficiaries of transactions, will be of keen interest to watchful and highly active enforcement officials and regulators in these areas. For example, the information in the Panama Papers could reveal that transactions involve Specially Designated Nationals (SDNs) or embargoed countries. Additionally, the information could reveal transactions, reporting obligations and other suspicious monetary activities that were not apparent or suspicious before the Panama Papers were released.

Enforcement interest will not necessarily be limited to sanctions, anticorruption and AML. For example, there are numerous agencies within the U.S. government which rely on the accuracy of information provided by, or impose requirements on, parties engaged in various activities involving U.S. and international goods, technology, services and commerce. As a consequence, it is possible to envision a wide variety of scenarios that involve other U.S. regulatory agencies with their own civil and/or criminal enforcement power over other laws (i.e., export controls, data privacy, cybersecurity, government contracts, consumer protection) becoming involved in an investigation, depending on what is revealed through the Panama Papers.

The extent and scope of potential government enforcement efforts, focus and coordination beyond the tax realm remain to be seen, but government investigations seem likely. Such investigations invariably are disruptive to business, cause a massive drain on resources, and divert the attention of corporate officers, management and staff. The possible consequences of such an investigation counsel in favor of preparatory action by potentially affected parties, as discussed in more detail below.

### **Congressional Investigations**

It should be anticipated, given the current political climate and the bipartisan concerns that have been voiced in the past regarding offshore structures, that this issue will be the topic of multiple congressional investigations. Members of the U.S. Congress have already written to the Treasury Department, demanding an investigation into whether U.S. banks, companies and individuals had ties to Mossack Fonseca. Additionally, the Senate Finance Committee's top-ranking Democrat, Sen. Ron Wyden (D-OR), said on April 8, 2016 that he is going to initiate an inquiry into potential tax evasion implicated by the leaked information. If Congress expands its inquiry into the Panama Papers, companies with such ties may be subject to congressional investigations and hearings—even where there is no specific allegation of any wrongdoing. The highly public nature of congressional investigations, and the fact that they can spur action by executive branch enforcement agencies, makes this a highly risky area for companies with connections to entities in the Panama Papers.

### **Private Litigation**

Third-party intermediaries, acting on behalf of Mossack Fonseca's beneficial clients, often interacted directly with Mossack Fonseca. These third-party intermediaries include banks, law firms, incorporators of companies, and foundations and trusts working for clients incorporating or transacting with offshore entities. The ultimate beneficial clients may have entrusted confidential information to the third-party intermediaries that then shared it with Mossack Fonseca. Depending upon the terms of the agreement

governing the relationship between a beneficial client and a third-party intermediary, one should consider the potential liability of the intermediary in respect of the indirect leak of confidential information.

Companies may also want to consider whether, in addition to possible liability, they might have possible claims as a result of the Panama Papers. As an example, creditors in a bankruptcy should consider whether it is possible that the debtor used an offshore company to hide any assets that were not disclosed during a bankruptcy filing.

### **Reputational Protection and Recovery**

The leak of the Panama Papers is not the first mass disclosure of private financial information and will surely not be the last. While the ICIJ is the frontrunner among media organizations that are “making news” in this arena, any article that leads with a reference to exposure of the offshore corporate and banking worlds will receive immediate attention. Individuals and organizations that are targets of such mass media leaks risk serious reputational harm. The fact that a client’s use of private banking or other offshore facilities violates no law or tax treaty will make little difference—if media reports suggest links to controversial politicians, criminal networks or worse.

The tools available to protect reputation when facing a mass disclosure of private information can be very effective—but timing is critical. A rapid pre-publication response, utilizing a time-tested legal approach, cross-border practice and sophisticated investigative methods will often keep a client’s name and details from publication—even as the story goes forward with thousands of other names and records. If the information has already been published, the same tools can be effectively brought to bear in minimizing the harm to a client’s good name and speeding the process of reputational recovery.

## **Companies Should Establish a Corporate Process to Reduce Uncertainty and Mitigate Risk**

### **Review the Names Already Released**

Companies should review the names of the parties already released to the public to determine whether they are on the list or have any ties with those parties. If they have ties to those parties, companies should carefully analyze the nature of those connections to determine whether it poses any risks with respect to the issues and areas discussed above.

### **Identify Any Direct Links to Mossack Fonseca**

Companies should examine whether they have worked with Mossack Fonseca. If they have, the nature and extent of that work should be examined to assess the extent of the risk associated with the interactions against the issues described above. In some instances, companies may have an obligation to disclose information to governments or third parties based on regulatory or contractual requirements. In other instances, they may benefit from voluntary disclosure programs like those associated with the FCPA or U.S. sanctions laws.

### **Establish a Monitoring System to Identify Ties to Entities and Information as It Is Released**

The ICIJ is currently controlling the flow of information to the public related to the Panama Papers. The ICIJ has stated that, in early May 2016, it will release the names of the more than 214,000 offshore entities incorporated by Mossack Fonseca and the people connected to them (as beneficiaries, shareholders or directors). The ICIJ has also stated that it will “continue to mine the full data with its media partners.” As a result, we can expect additional data and information to be released in an iterative process that will take months and perhaps even years.

Companies should review the list in May to identify any connections to those parties. In addition, companies—particularly those with any ties to the 214,000 entities—should continue to closely monitor the information released by the ICIJ and its media partners. It would be useful to identify a person within the corporate organization responsible for coordinating the monitoring and review of this information.

### **Implement or Revise Cybersecurity Framework**

Since sensitive information is potentially in the hands of the attackers and in the public domain, companies and individuals must be concerned about cyber attacks targeted specifically at themselves and/or their businesses. In particular, companies and individuals should be on alert for increased risks of spear-phishing and other fraudulent schemes due to personal information that may have been released. A comprehensive cybersecurity framework must be implemented or revised to ensure that reasonable technical, physical and administrative controls are in place to protect against this heightened risk, in addition to training, monitoring and auditing of key policies and procedures. An incident response plan for cybersecurity that identifies potential threat actors and a designated team and testing of such plan are essential components of this cybersecurity framework.

### **Keep Up on Legal Developments**

In the aftermath of the release of the Panama Papers, regulators may increase their scrutiny of entities involved in establishing offshore accounts or companies. While no immediate rules have been proposed specifically in response to the Panama Papers, companies should monitor the regulatory landscape for any changing or new obligations that they would incur. In fact, in light of the fact that the Panama Papers are reported to have been stolen by a hacker, companies should ensure that they are cognizant of increased cyber risks and regulatory obligations concerning cybersecurity. For example, the SEC, among other regulatory agencies, has issued guidance regarding cybersecurity risks for registered broker-dealers and investment advisers. Other rule changes involving other agencies and areas of law may follow.

### **Have a Response Plan**

It is critical to react quickly to analyze and develop a response if an issue is identified. A good response plan will have considered legal, reputational and business elements—who are the key stakeholders that will have an interest in the information to be revealed and how can they be best engaged; who is leading, coordinating and handling the efforts associated with reputational harm and legal and business risks; what resources are required; how to gather needed information; etc. For example, with respect to

assessing potential reputational harm, companies should proactively work to identify those stakeholders who are most likely to take an interest in any sensitive information revealed by the Panama Papers and develop strategies for responding to their attention. From a substantive legal perspective, the response plan should be tailored to the company's risk profile, but should consider tax, anticorruption, sanctions, AML, third-party litigation and cyber issues at a minimum.

In some cases, it may be worthwhile engaging with stakeholders most likely to be concerned by the revelations to further explain information that may, on its face, appear negative. In others, it may be better for companies to make a tactical choice to proactively disclose problematic information that is likely to be revealed through the leak as part of a larger strategy to mitigate stakeholder concerns. Caught flat-footed, a company could find that it loses control over different dimensions of the process, exacerbating the possibilities of a highly public, costly and lengthy endeavor.

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