

“The ‘Panama Papers’ – What are they, what do they mean and will they make a difference!”

By: Paul Richard Brown, Neal Levin and Edward H. Davis, Jr.

In early April, the International Center for Investigative Journalism (“ICIJ”) rocked the offshore world when it announced that it possessed over 11.5 million pages of either “leaked” or “hacked” (it is not clear yet) documents from the Panama-based law firm Mossack Fonseca*. Mossack Fonseca was one of the world’s five largest providers of offshore services and has 40 offices world-wide). Simultaneously, an orchestrated crescendo of articles hit the press written by a limited group of investigative reporters that had been given exclusive access to the documents over the preceding 10 months. More articles continue to be published as more investigative journalists gained access to the documents and they worked their way through the mountain of data. Enough time has passed now to allow some initial perspectives on the possible impact of the so-called “Panama Papers.” These are the first impressions of the authors, all members of the NAFER International Committee.

First, despite much initial confusion, let’s define the so-called “Panama Papers”:

1. The documents were originally released to the German newspaper *Suddeutsche Zeitung*, which then shared them with the ICIJ by an unknown source. The identity of this source is only known to the reporters. This could have implications for the legal use of the documents down the road.
2. There are approximately 11.5 million pages comprising over 3 million records relating to upwards of 200,000 offshore companies (roughly 10 percent of the total number of offshore companies known to exist) used by over 14,000 clients of Mossack Fonseca.
3. The documents are allegedly 2.6 terrabytes of data. To put this in perspective, the *Guardian* reports that this this leak is one of the largest in history, even larger than the 2010 WikiLeaks leak of US diplomatic cables (1.7 gigabytes), the so-called Offshore Leaks in 2013 (260 gigabytes) or the 2014 European tax files (4.4 gigabytes), the HSBC files in 2015 (3.3 gigabytes) or even the secret intelligence documents released by Edward Snowden in 2013.
4. Only a portion of the data relates to Panamanian companies which suggests that the name of these papers might have more accurately been “the Mossack Fonseca Papers.” The papers relate to corporate formation services provided in such diverse places as the United States (Florida, Nevada, etc.), Switzerland and the British Crown Dependencies of Guernsey, Jersey and the Isle of Man in Europe, Cyprus in the Mediterranean, the Bahamas and the British Virgin Islands in the Caribbean, Hong Kong in the Far East, the Seychelles in Africa, Nieu and Samoa in Oceania, to name a few, in addition to Panama.
5. The data contains corporate formation documents, client identification (e.g., passports), payment details and, most importantly, e-mails and other communications between UBO’s (Ultimate Beneficial Owners) of the companies and their agents to and from Mossack Fonseca employees.

6. The documents are only available for inspection by a select group of almost 400 investigative journalists vetted by the ICIJ. The list has been expanded, although in May the ICIJ released extracts and links from the database in a separate database hosted by the ICIJ and available to the general public on its website at <https://panamapapers.icij.org>. It is definitely worth taking a look at this limited database for links to targets involved in your cases.

Next, what has the release of the Panama Papers meant so far?

1. First and foremost, the mask has now been ripped off how the offshore world actually works. Make no mistake, there are dozens more “Mossack FONSECAS” still facilitating the formation of opaque, layered structures and the movement and hiding of funds offshore. What will be the next revelation?
2. *The Guardian* and other newspaper reports indicate that 12 national leaders including those from Pakistan, Iraq, China, Ukraine and Egypt are among 143 politicians, their families and close associates from around the world who have been using offshore tax havens through the auspices of Mossack Fonseca. This list allegedly includes Vladimir Putin by implication through linkage to his alleged close associate and cellist Sergei Roldugin, reported to be at the center of a money laundering scheme.
3. British Prime Minister David Cameron has had to answer questions about his link to offshore corporations linked to his family. (Please note: Neither Prime Minister Cameron nor his family were linked to any illegal activity; however, the disclosure of a secret bank account was considered politically embarrassing).
4. The Prime Minister of Iceland, Sigmundur Davio Gunnlaugsson, has resigned due to revelations of linkage to an offshore structure allegedly involved in fraud or insider dealing.
5. It is yet unknown what level of “know your customer” investigation was done by Mossack Fonseca and what documents were obtained to verify the sources of funds used by these offshore structures prior to their use. That remains to be seen.
6. Recently, a motion for sanctions was filed against Mossack Fonseca and its Nevada affiliate MF Nevada for being “... actively engaged in the concealment and destruction of evidence responsive to NML’s subpoena, and that MF Nevada and Mossack Fonseca knowingly proffered false evidence to the Court.” This will bring to the forefront the type of conduct that simply can’t be tolerated in our Courts. Should sanctions result they will serve as a warning to anyone other offshore facilitator that they will be eventually be held accountable by the Courts.

Finally, what does the existence of the Panama Papers mean going forward and what is the long term impact of the possible release of these secret documents?

1. Confirmation of what has been suspected, namely the sophisticated utilization of offshore jurisdictions and multi-layered shell entities to hide assets. The extent, depth and breadth of the schemes and plans employed remain to be uncovered. Clients and Judges can now take notice of what might have previously been thought to have been fantastical stories by those seeking to penetrate these offshore structures (or, as a judge told one of the authors with a disbelieving tone, “this sounds like a Grisham novel.”). Essentially, it might make obtaining discovery of these structures easier as the patina of legitimacy has been removed from these offshore providers by the release of these papers. All parties and witnesses come to the Court with a presumption they are going to tell the truth. Perhaps some skepticism will be in order when it comes to these offshore providers claims of not having documents or not being involved in the structuring themselves. Our legal system only works when people tell the truth. Now, any offshore provider who thinks they can lie with impunity has to think twice (as do their agents).
2. Momentum exists to possibly limit the use of opaque structures and there is now legislation proposed (again) in the US to force the registration of owners and ultimate beneficial owners of corporate structures formed and based in the U.S. At this point the US risks being seen as hypocritical if it does not seek to force more transparency in US corporate structures while simultaneously demanding the same in offshore jurisdictions.
3. The good news is that it is possible to utilize foreign offshore jurisdiction “rule of law” to strategically select favorable venues, not only from a structuring/formation perspective but also utilizing those jurisdictions that are politically favorable and supportive. Many of these jurisdictions have stringent confidentiality/secretcy rules, but also have other favorable laws that permit asset freezes and repatriation. Ironically, in many of these jurisdictions it may actually be easier to freeze assets than in the US and the revelations of the Panama Papers will only make that easier.
4. While Mossack Fonseca has flatly denied any wrongdoing, the U.S. Justice Department and other law enforcement agencies around the world have indicated they are studying the publicly-available data and attempting to gain access to the database for law enforcement purposes. It was reported in May 2016 at the *Offshore Alert* Conference that the source of the funds has indicated that the documents could be made available to various law enforcement agencies directly as they were to the German newspaper.
5. There is now a platform for the continued revelation of the manner in which seemingly legitimate “front entities” (i.e. law firms, CPA firms, and market makers) are utilized to wash “dirty assets,” or conceal assets from legitimate creditors.

6. Last week, a motion for sanctions was filed against Mossack Fonseca and its Nevada affiliate MF Nevada for being "... actively engaged in the concealment and destruction of evidence responsive to NML Capital, Ltd*.'s subpoena, and that MF Nevada and Mossack Fonseca knowingly proffered false evidence to the Court." In a case in the U.S. District Court for Nevada, in which NML sought to recover \$1.6 million in bonds from Argentina, NML sought sanctions against Mossack Fonesca. NML claimed that two documents contained in the Panama Papers revealed that Mossack Fonesca and an affiliate (MF Corporate Services (Nevada), Ltd., concealed and destroyed evidence responsive to a NML subpoena. This will bring to the forefront the type of conduct that simply can't be tolerated in our Courts. Should sanctions result they will serve as a warning to anyone other offshore facilitator that they will be eventually be held accountable by the Courts.

The reality is that the Panama Papers will only make a long term difference if we find a way to gain access to them and then use them properly. The work of the ICIJ and the various reporters has been tremendous to expose this gray underworld of financial dealings. Organizations like NAFER can make a difference by keeping the pressure on the offshore world through investigations and by using the clout and credibility of the organization to assist in exposing this type of financial dealing. Please feel free to run any questions by the authors. We will report more as this saga unfolds.

**Mossack Fonseca (www.mossfon.com) has prepared a rebuttal / explanation of all of its activities.*

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