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The 'Panama Papers' And You

Part Two of a Two-Part Article

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Editor's Note: Last month (see http://bit.ly/2igUT0m), the authors began a discussion of the legal consequences of the release of the so-called "Panama Papers," a trove of more than 11.5 million documents a whistleblower gave to a reporter at the German newspaper Süddeutsche Zeitung (SZ) in Spring 2016. The documents detail how certain wealthy people — including foreign government leaders — hid assets in offsore entities created by Panamanian law firm Mossack Fonesca for clients allegedly seeking to avoid taxation in their home countries. Since the release of the Panama Papers, several consequences have ensued, including, as discussed last month, 1) the public disgrace and resignation of foreign public officials and 2) the commencement of tax avoidance investigations. Additionally, the U.S. Attorney for the Southern District of New York has opened an investigation into the finances of the reported 240 U.S. citizens identified in some way with the firm and its scheme. The subject of this inquiry has not been fully disclosed, but it may be that tax avoidance is just one of the subjects the government

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is interested in investigating. The authors conclude their analysis of the fallout accompanying the release of the Panama Papers herein.

Stage 3: Fallout: SEC Investigation

Is the Panama Papers story predominantly a foreign one, and we here in the United States have heard the last of it? Not necessarily.

We expect that the Panama Papers will also reveal evidence of securities violations, as it may well be that domestic companies that hide income in these offshore accounts not only do so to avoid taxes, but also to potentially deceive investors or other creditors in a manner that may result in misrepresentations in SEC filings and other public statements. This eventuality has not been lost on the SEC or the DOJ.

In May 2016, the SEC made it known that it was scrutinizing the Panama Papers for evidence of violations of the anti-bribery provisions of the FCPA. According to published sources, the DOJ is also investigating these issues.

Although little detail was given as to the nature of the investigation, the impetus behind the investigation is the obvious circumstance that, any time there are large amounts of shrouded money, there is apt to be illegal activity afoot, including, but not limited to, tax evasion, bribery or some other category of fraud or theft. This is the precise type of activity the FCPA is designed to prevent.

As set forth on the DOJ Website:

> The [FCPA] was enacted for the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business. Specifically, the anti-bribery provisions of the FCPA prohibit the willful use of the mails or any means of instrumentality of interstate commerce corruptly in furtherance of any offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person, while knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to a foreign official to influence the foreign official in his or her official capacity, induce the foreign official to do or omit to do an act in violation of his or her lawful duty, or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person.

It is likely that we will see an increase in FCPA securities violation, corruption and bribery cases instituted by the U.S. government related to the information contained in the Panama Papers. In addition, now that the government is actively investigating individuals caught up in the Panama Papers, it may also be a boon to whistleblowers. There may very well be corporate insiders with intricate knowledge of the shadowy world of the offshore financial system who are interested in receiving a percentage of the government's recovery in some of these cases.

Fallout Stage 4: A Change In the Law?

In addition to the potential criminal actions arising from the Panama Papers revelations noted above, there is the related issue of private actions for fraud and securities violations. In this regard, it may be that the Panama Papers are apt to spawn a change more profound and broad than the likely institution of SEC and/or DOJ actions or litigations, and may be the impetus for new anti-bribery, anti-corruption and securities laws.

In an anomaly in the law, the anti-bribery provisions of the FCPA do not currently provide for a "private right of action," which would permit individuals or businesses that are harmed by violations to bring their own case. While there did appear to be an intent in the legislative history of the House bill to provide such a private right of action, it did not make it into the Senate version or, ultimately, text of the law itself. In view of the Panama Papers revelation, there are, once again, rumblings in the U.S. Congress about changing that.

In particular, in June 2016, Rep. Edwin Perlmutter (D-CA) proposed a new law called the Foreign Business Bribery Prohibition Act, which would specifically amend the FCPA to create a private right of action under FCPA. The proposed amendment would also call for treble damages and an award of attorney fees.

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This is not Rep. Perlmutter's first attempt to have the FCPA amended to create a private right of action, as he previously attempted to do so in 2009 and 2011. However, of note here is that the Panama Papers were specifically referred to as a spark that reignited his efforts. In particular, in a press release concerning his proposal, the Congressman stated, "Recent reports of high profile corruption, such as the Panama Papers … allege financial kickbacks and monetary payments to government officials in return for contracts or favors. Under current law, only the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) are allowed to bring enforcement actions under the FCPA. These recent examples highlight the need for greater focus on the FCPA."

Commentators note that it is not likely that this bill will "make it out of committee," let alone be enacted. However, it does show that the Panama Papers issue has reignited discussion of a law change that could have profound impact on the financial and legal communities down the road. If the DOJ or the SEC investigations currently underway lead to prosecutions, and rampant corruption is unearthed, it may well result in a groundswell of support for a law change by the victims of those crimes, which just might change the thought processes of some in Congress.

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CONCLUSION

Keeping up with events like the Panama Papers and considering whether, and how, they may affect the enforcement of law, and the existence of new law, is part and parcel of a healthy legal practice. We use this example to underscore that point.

So, for now, here in the United States, the Panama Papers have led to bemused interest in the downfall of some foreign dignitaries, along with a number of fairly quiet Federal investigations. However, if those investigations unearth substantial illegal activity, the Panama Papers just might lead to a law change that, in turn, could lead to private actions under the FCPA landing in a courthouse near you.

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