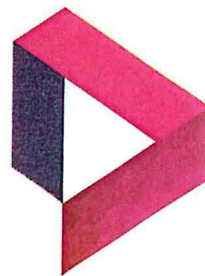


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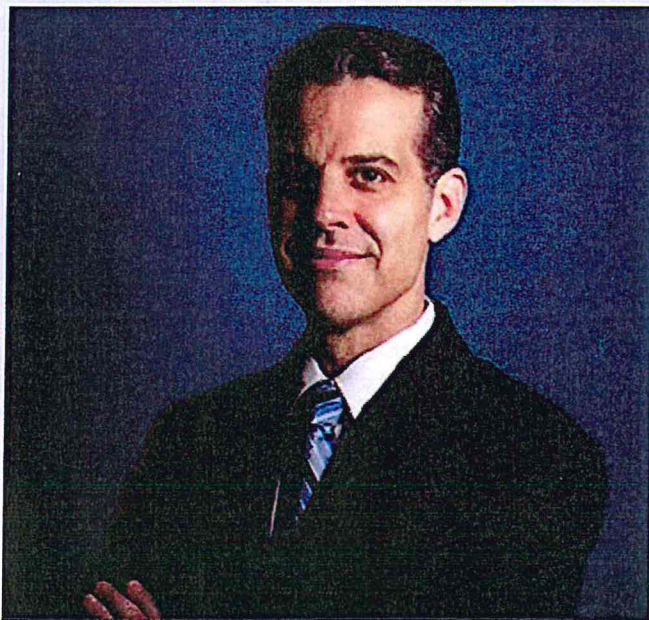
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FEATURE » SURVEILLANCE

A 'ghost' speaks

Eric O'Neill lived in the shadows. Working for the FBI, he spent his days observing the lives of suspects in detail, without being seen. Until, that is, he was called to serve in a special role at head office – and stepped into the glare of a now notorious spy case. He tells his story – which featured in the movie *Breach* – and lessons learned across his investigative and security career.

On a cold February 2001 evening in Vienna Virginia, just outside of Washington DC, a man walks alone into a wooded suburban park. The bare trees around him form a dense filigree against the dying light of the sky; the only sounds are the soft crunch made by his feet and the murmur of the stream that runs through the park. At a footbridge, he glances around and steps off the



path. He takes a package wrapped in plastic from his jacket and slides it underneath the structure of the bridge: after ten years of espionage across a 22-year span, the man described as the most damaging double agent in FBI history has just made his last drop to the Russians.

This secret, lonely life makes a strange contrast to Robert Hanssen's public self. Just that morning the veteran FBI counter-intelligence agent, who was only months away from retirement, enjoyed brunch with his children and grandchildren, then attended church with his family. He played Frisbee with his dog and spent time with his best friend, visiting from Germany. Later that day he drove his friend to the airport and on his way home stopped at Foxstone Park.

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FEATURE ▸ ASSET TRACING

Panama Papers update: progress and impediments

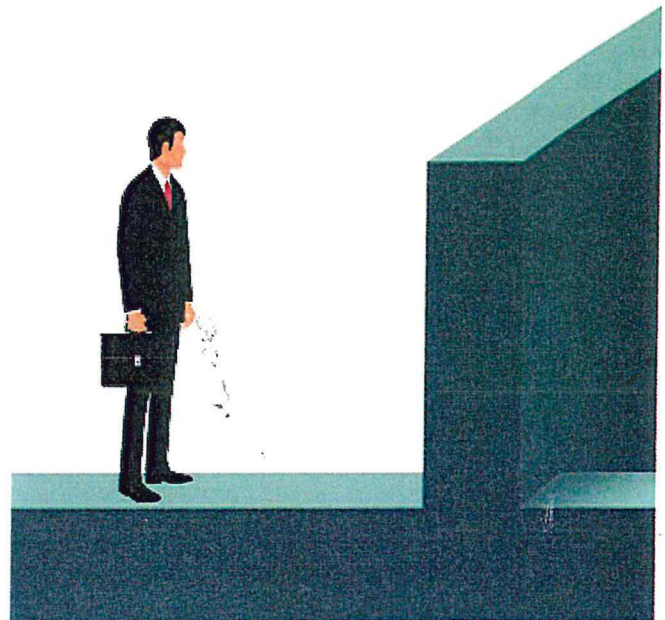
Scandalous revelations of suspicious financial activity exposed by the Panama Papers have toppled political leaders, induced regulatory reforms and prompted greater cooperation from Panama itself towards international efforts to combat tax evasion. But **Edward H Davis Jr** and **Andres H Sandoval** would like to see more headway in the area of asset recovery.

In April 2016 the *Süddeutsche Zeitung* released the ground-breaking publication covering the 'Panama Papers' — a massive leak of 11.5 million documents from the Panamanian Mossack Fonseca firm and its affiliates, formerly the world's fourth-largest provider of offshore incorporation services. Shortly thereafter, due largely to the efforts of the International Consortium of Investigative Journalists (ICIJ), limited information extracted from the Panama Papers was digitised and disseminated to the public in the searchable Offshore Leaks Database maintained on the ICIJ's website. [1] The impact of the Panama Papers leak in the political, journalistic, investigative and financial arenas is plain to see. However, well over a year later, the Panama Papers fervour is only now creeping into the asset recovery arena. That it has taken this long to arrive is frustrating, but perhaps predictable in light of evidentiary concerns and the inherent difficulty in commencing litigation. Regardless, this signals the next step in combating tax evasion, corruption, fraud and money laundering in the wake of the historic leak.

Facts and figures

The global effect and pervasiveness of the Panama Papers leak is unrivalled. The 11.5 million leaked documents, dating back nearly 40 years, contain information on more than 214,000 offshore entities, in more than 200 jurisdictions, created by Mossack Fonseca. Major financial institutions alone drove the creation of nearly 15,600 offshore entities. Of these financial institutions, HSBC and its affiliates were responsible for the creation of more than 2,300 offshore corporate vehicles. Others, such as Banque J Safra, UBS AG and Société Générale, were not far behind.

The Panama Papers also exposed 140 politicians from over 50 countries to charges of bribery and corruption for allegedly improper ties to offshore corporate vehicles in no fewer than 21 financial havens. As a result, 14 current and former heads of state as well as over 30 current and former politicians or public figures have come under scrutiny by governmental bodies. Several top government and corporate officials have cracked under the pressure, including, notably, the former Prime Minister of Iceland, Sigmundur Davíð Gunnlaugsson, who resigned just days



after the initial media coverage of the Panama Papers leak. Other political figures have been faced with high-profile investigations, including Argentina's Mauricio Macri, Ukraine's Petro Poroshenko and Pakistan's former Prime Minister, Nawaz Sharif.

These investigations are bearing fruit. In late July 2017, Pakistan's Supreme Court deemed Sharif unfit to be a member of parliament for reasons of dishonesty and corruption. The Supreme Court's decision is the culmination of months of proceedings sparked by the Panama Papers leak, which linked Sharif's family members to purchases of luxury real estate in London through offshore corporate vehicles. Further, on 31 July 2017, the National Accountability Bureau, Pakistan's top anti-corruption unit, announced it would file formal corruption charges against Sharif, his children, son-in-law and the former Pakistani Finance Minister, Ishaq Dar.

Beneficial effects

Among the seemingly more positive effects, the Panama Papers leak has fuelled a global push towards transparency and accessibility of information regarding the ultimate beneficial owners (UBOs) of opaque offshore entities and accounts. Just weeks after the leak, the United States executive administration under former President Barack Obama announced it would implement regulatory reform to increase financial transparency and combat tax evasion, corruption and money laundering. Among

the various measures, in May 2016, the US Treasury Department's Financial Crimes Enforcement Network (FinCEN) promulgated new rules on customer due diligence requirements, which require financial institutions to identify any natural person beneficially owning more than 25% of, or otherwise controlling, the institution's legal entity customers. Similar initiatives are being pushed in the United Kingdom, Germany and others in the G20 group. Only time will tell if these initiatives prove to be effective or are just window dressing.

Cleaning the backyard

The Panama Papers leak has also exerted pressure on countries previously resistant to increased financial transparency — namely, Panama. In 2016, Panama's Vice President Isabel de Saint Malo pledged Panama's willingness to sign the Convention on Mutual Administrative Assistance in Tax Matters — an agreement developed jointly by the Organisation for Economic Co-Operation and Development (OECD) and the Council of Europe to combat tax evasion through the automatic sharing of residents' financial information. Holding fast to that pledge, on 3 March 2017, Panama deposited with the OECD its instrument of ratification of the Convention, which came into force in Panama on 1 July 2017. Panama has also signed an information-sharing treaty with Mexico and continues its negotiation of similar agreements with Spain, Italy, Germany, the UK and Switzerland. As of 12 June 2017, the OECD reports 112 jurisdictions currently participating in the Convention.

Delayed recovery

Where the Panama Papers have had much less impact than was originally hoped for is in the asset recovery arena. Following the leak, early commentators predicated litigation in the financial havens themselves, such as the British Virgin Islands, Jersey, Hong Kong and Panama, as well as financial centres that may house assets or UBOs, such as Switzerland, the UK and the US. However, now over one year later, this litigation has largely yet to be seen. This is disappointing in light of estimates that as much as 8% of the world's financial wealth (approximately US\$7.6 trillion) is held in financial havens. Further, according to Gabriel Zucman, economist, professor and author of *The Hidden Wealth of Nations*, as much as 80% of that hidden wealth is not reported to the tax authorities of any country. Equally astounding, the Stolen Asset Recovery (StAR) Initiative — a partnership between the World Bank Group and the United Nations Office on Drugs and Crime (UNODC) to promote international efforts to end financial havens for corrupt funds and prevent the laundering of the proceedings of corruption — estimates that up to US\$40 billion per year is stolen by corrupt public officials around the world.

Those most affected by this hidden wealth are the citizens of the governments susceptible to tax evasion,

corruption and the illicit diversion of funds, as well as the victims of fraud where the opaque corporate structures are used to hide the proceeds of these crimes. As a result, these jurisdictions often suffer from undeveloped infrastructure, failing health facilities and inadequate educational institutions. While it may be no less important to investigate and expose the corrupt actors that prey on these governments, there must also be a focus on and concerted effort to recover the value that has been secreted in financial havens and often elsewhere.

A start

There may be signs of change, however. On 14 July 2017, the US Department of Justice commenced a civil forfeiture proceeding against approximately US\$144 million in assets — primarily, a luxury yacht and Manhattan real estate — allegedly representing the proceeds of corruption, bribery and money laundering. The allegations concern prominent Nigerian businessmen Kolawole Akanni Aluko and Olajide Omokore, and Nigeria's former Minister for Petroleum Resources, Diezani Alison-Madueke. The US alleges in part that Aluko and Omokore purchased luxury real estate in London and high-end furniture for Alison-Madueke's benefit and, in return, Alison-Madueke used her influence to steer lucrative state oil contracts to companies ultimately owned or controlled by Aluko and Omokore. The ICIJ's Will Fitzgibbon first reported in July 2016 on the links between Aluko, Omokore and Alison-Madueke as detailed in the Panama Papers. This led to investigations in Nigeria, the UK and elsewhere.

Evidence and privilege concerns

So, what is the reason for the tardy arrival of the Panama Papers' impact in the asset recovery arena? Firstly, a lack of competent evidence. The ICIJ's Offshore Leaks Database largely, if not entirely, lacks source documentation. The same is true of the ICIJ's database for the 'Swiss Leaks' and the 'Luxembourg Leaks' in previous years (other than documents expressly approved by Luxembourg authorities). Similarly, it is unclear to what extent, if at all, the Panamanian authorities have disseminated to the public or shared with authorities of other countries the documents seized from Mossack Fonseca's offices following the initial leak. While there may be legitimate reasons for restricting the disclosure of source documentation, the availability of only extracted and secondary information poses hearsay, trustworthiness and other evidentiary problems for authorities, asset recovery professionals and victims in constructing asset recovery cases. More must be done to allow access to this critical information.

Secondly, it is an open issue as to whether information taken from the Panama Papers is privileged or protected. Additionally, the issue is complicated by the possible application of foreign law, making it difficult to know which privilege rules apply. Though exceptions to privilege may exist, such as the crime-fraud exception under US

law or the iniquity exception under English law, this issue must be weighed carefully.

Rather, a best practice would be to treat the Offshore Leaks Database as an important tool in the investigative toolbox and a springboard to pursue additional disclosure in the appropriate jurisdiction. In this respect, emerging asset tracing techniques in recent years can assist greatly in closing the fence around intricate offshore structures. With respect to the US, these techniques include pursuing disclosure proceedings in aid of foreign litigation under 28 USC § 1782, the subpoenaing of information from banks in order to trace the flow of monies through different jurisdictions, and seeking recognition of foreign bankruptcy proceedings under the UNCITRAL Model Law on Cross-Border Insolvency. By using the Model Law, foreign bankruptcy trustees can gain access to US-style discovery and broad turnover powers of assets within the territorial jurisdiction of the United States.

Whatever the reason for the delay, the fervour to see positive change prompted by the Panama Papers must now

enter the next phase: concerted efforts to pursue — on behalf of the victims of tax evasion, corruption, fraud and money laundering — the vast hidden wealth that has been secreted through the use of opaque offshore corporate vehicles. Such efforts are long overdue.

Note

1. <https://panamapapers.icij.org/>

■ **Edward H Davis Jr** (+1 305 372 8282, Ext. 228, edavis@sequorlaw.com) is a founding shareholder of Sequor Law. Davis was recognised as the Asset Recovery Lawyer of the Year by Who's Who Legal in 2013, 2014, 2015 and 2016. With nearly 30 years of experience, he focuses his practice on asset recovery, financial fraud and the pursuit of misappropriated assets throughout the world on behalf of the victims of fraud. Davis is also a leading member of the ICC Commercial Crimes Services FraudNet Network. **Andres H Sandoval** (+1 305 372 8282, Ext. 234, asandoval@sequorlaw.com) is a member of Sequor Law's asset recovery and financial fraud group. Sandoval focuses his practice on asset recovery, financial fraud and creditors' rights litigation, as well as cross-border insolvencies.

FEATURE ► PREVENTION

Humanitarian aid – a victim of fraud and corruption?

The challenges associated with dispensing humanitarian aid in fragile and hostile environments mean the risk of fraud is always high. **Sophie Brown** and **John Baker** of Moore Stephens LLP's Governance Risk & Assurance team outline these hazards and argue that efforts to reduce fraudulent losses are worthwhile.

Given the ongoing tragic events in Syria, Yemen and Somaliland (to name but a few), and with an estimated 152 million people in desperate need of assistance [1], the provision of humanitarian aid and funding is much needed across the globe. Unfortunately, and all too often, the countries and regions in which agencies operate are fragile, riddled with corruption and/or war-torn, leading to challenging environments for donors, governments, non-government organisations (NGOs) and beneficiaries. Governance structures are often weak or lacking, while levels of transparency and monitoring are poor.

Multiple challenges

There will always be a risk of fraud, corruption and theft when attempting to deliver aid in such dangerous and chaotic conditions. Typical challenges and problem areas include:

- lack of documentation;
- inadequate procurement standards;
- inadequate monitoring;
- inadequate time records - charging for inflated staffing costs or hours;
- poor processes around conflicts of interest;



- commingling of funds;
- unallowable activities/costs (e.g. charging personal expenses as business expenses);
- poor cash management;
- inadequate equipment and property management practices;
- expending funds outside of the period of availability of funds;
- untimely and inaccurate reporting;
- false information on grant applications, progress reports, etc.;
- falsified evidence of completion (photographs/reports, etc.); and
- extortion.