

ALERT

Panama Papers Takeaway for Financial Institutions: Check Your D&O and E&O Insurance

By Finley T. Harckham, Marshall N. Gilinsky and Peter A. Halprin

This month, The International Consortium of Investigative Journalists began reporting on their review of over 11.5 million documents, the private client files of a Panamanian law firm that specialized in trust services, covering a 40-year span.¹ Among other things, the ICIJ “Panama Papers” documents reveal:

- Offshore holdings of 140 politicians and public officials from around the world, including the (now former) prime minister of Iceland, the president of Ukraine, and the king of Saudi Arabia.
- More than 214,000 offshore entities connected to people in more than 200 countries and territories.
- Major banks’ central role in the creation of hard-to-trace companies in offshore havens.

The outrage generated by the release of the Panama Papers has caught on with regulators. On April 20, 2016, Preet Bharara, U.S. Attorney for the Southern District of New York, wrote to the ICIJ to seek assistance, as his office is investigating “matters to which the Panama Papers are relevant.”² This is on the heels of inquiries started by regulatory authorities including those in Britain, France, Australia, New Zealand, Austria, Sweden and the Netherlands.³ French Finance Minister Michel Sapin is on record saying he questioned the head of Societe Generale about its record creating shell companies and opening client accounts in Panama.

Although U.S. Attorney Bharara was not specific as to the target of his investigation, reports suggest that regulators may pursue financial institutions for aiding and abetting tax evasion and other tax crimes, aiding and abetting money laundering, or even facilitating criminal activity.

Given the coming regulatory scrutiny, it is important for financial institutions affected by the Panama Papers to carefully review their existing insurance policies, particularly D&O and E&O, for potential coverage.

D&O policies typically cover directors and officers of corporations against claims arising out of their status or conduct as directors or officers. Some D&O policies also provide coverage for the corporate entity with respect to claims alleging violations of securities law. D&O policies there-

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fore will likely provide financial institutions and their individual directors and officers with coverage in the event of securities-related claims or shareholder derivative suits.

E&O policies generally cover companies and individuals against loss resulting from acts, errors or omissions in their performance of professional duties. These policies may provide coverage for regulatory investigations.

Policyholders should carefully review the timing and trigger of coverage under such policies. Critically, the amount of coverage available to a policyholder in the face of a government investigation may depend on the breadth of the definition of the term "claim" in a given policy.

Government investigations into a company's business and accounting practices are covered under many D&O and E&O policies. Such policies typically include "investigations by a governmental entity into possible violation of law" in the definition of a claim. In addition, the policies normally cover "defense costs" incurred responding to such regulatory inquiries. However, the coverage grants can vary from policy to policy, and insurance companies often argue that an informal document request by government regulators, as compared to a formal investigation with the exercise of subpoena power, will not be considered a claim as defined by their D&O and E&O policies.

Courts have found coverage for informal document requests by government regulators under policy language defining "securities claim" as "a formal or informal administrative or regulatory proceeding or inquiry commenced by the filing of a notice of charges, formal or informal investigative order or similar document. . . ." See *MBIA, Inc. v. Federal Ins. Co.*, No. 08-cv-4313, 2009 WL 6635307 (S.D.N.Y. Dec. 30, 2009), *aff'd in part, rev'd in part on other grounds*, 652 F.3d 152 (2d Cir. 2011) (reversed denial of Policyholder's claim for costs associated with independent consultant). Indeed, courts throughout the country have found coverage for subpoenas and oral requests for documents. See, e.g., *Polychron v. Crum & Forster Ins. Cos.*, 916 F.2d 461 (8th Cir. 1990) ("The function of a subpoena is to command a party to produce certain documents and therefore constitutes a 'claim' against a party. . . . The documents demanded (not merely requested, as defendants would have it) related to the plaintiff's conduct as a bank official"); *ACE Am. Ins. Co. v. Ascend One Corp.*, 570 F.Supp.2d 789 (D.Md. 2008); *Minuteman Int'l, Inc. v. Great Am. Ins. Co.*, No. 03C6067, 2004 WL 603482 (N.D. Ill. Mar. 22, 2004); *Syracuse Univ. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2012EF63, 2013 N.Y. Misc. LEXIS 2753, at *10 (Sup. Ct. Onondaga Cnty March 7, 2013) ("We reject the insurers' crabbed view of the nature of a subpoena as a 'mere discovery device' that is not even 'similar' to an investigative order."), *aff'd*, 976 N.Y.S.2d 921 (4th Dep't 2013).

In addition, to the extent a policyholder is incurring costs in conjunction with a government investigation while at the same time defending a civil lawsuit, the costs of investigation may be reasonably related to the defense of those claims and could therefore be covered.



The protection afforded by policies that provide coverage for informal regulatory investigations is exceedingly valuable to any financial institution. Negotiating and working with government regulators when investigations are informal is critical to an early and less public resolution of any changes. It can also be expensive. While the associated defense costs may be significant, the facts developed in responding to such an investigation are commonly used to convince the government that formal charges are not appropriate. Accordingly, coverage for defense costs at the informal stage will not only reduce the direct costs, but will also be critical in heading off a formal investigation and perhaps even significant fines.

Thus, companies that may be subjected to formal or informal investigations should carefully analyze their D&O and E&O coverage. Focusing on this insurance at the earliest scope of a potential problem is critically important to preserve and maximize coverage. ▲

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- 1 <https://panamapapers.icij.org/20160403-panama-papers-global-overview.html>
 - 2 <http://www.theguardian.com/business/2016/apr/19/panama-papers-us-justice-department-investigation-tax-avoidance>
 - 3 <http://www.reuters.com/article/us-panama-tax-idUSKCN0X10C2>



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