



What Does Your

COMPLIANCE

Culture Mean When Enforcers Come Knocking?

By Gregory Lisa and Jim Dowling¹

Nearly three years ago, the Financial Crimes Enforcement Network (FinCEN) issued an advisory on “Promoting a Culture of Compliance.”² At the time, FinCEN explained that the advisory was issued in response to findings made in the course of anti-money laundering (AML) enforcement actions, which had confirmed the critical importance of a “compliance culture.” In the years since the FinCEN advisory was issued, much has been written about what a compliance culture looks like and how compliance officers and corporate executives should go about building one.

Changing a corporate culture remains a challenge and your efforts to build a compliance culture will no doubt be enhanced by a thorough understanding of what is expected by government enforcement agencies. In addition, you should understand how findings about

your company’s culture will impact the resolution of any future AML investigation, as this understanding will enable you to build the case for corporate investment in a compliance culture.

Below, we focus on how evidence of a compliance culture—or lack thereof—shapes the course of an enforcement investigation, the size of the penalties assessed, and other relief imposed. We look first to guidance provided by FinCEN and the U.S. Department of Justice (DOJ) on this topic. We then examine the outcomes of several recent AML investigations in the casino industry and the role the organizational culture played in those resolutions.

“Culture of Compliance” for a financial institution is perhaps a nebulous term. And to be sure, there is no “failure to have a culture of compliance” violation in

Title 31 or elsewhere. The standards were not developed by legislation, judicial precedent, or notice-and-comment rulemaking. But civil and criminal law enforcement agencies have made it very clear that these expectations are very real, and that failure to maintain a robust compliance culture risks consequences that are equally real. FinCEN’s advisory on the topic identifies six indicators or cornerstones of a strong compliance culture. The cornerstones are: “(1) its leadership actively supports and understands compliance efforts; (2) efforts to manage and mitigate [Bank Secrecy Act (BSA)]/AML deficiencies and risks are not compromised by revenue interests; (3) relevant information from the various departments within the organization is shared with compliance staff to further BSA/AML efforts; (4) the institution devotes adequate resources to its compliance function; (5) the compliance program is effective by, among other things, ensuring that it is tested by an independent and competent party; and (6) its leadership and staff understand the purpose of its BSA/AML efforts and how its reporting is used.”³



Factors Considered When FinCEN Assesses Civil Monetary Penalties

In a 2016 speech, FinCEN’s Associate Director of Enforcement, Thomas Ott, explained in an address to the casino and card club industries that FinCEN considers a number of factors when determining the appropriate penalty for an AML violation.⁴ Key among these are whether the identified failure to comply with the BSA was willful and whether it was promptly remediated. Associate Director Ott further noted that most of the factors FinCEN considers “lead back to one single point of failure—a failed compliance culture.”

With regard to willfulness, FinCEN has made it clear that companies that recklessly fail to comply with the BSA or ignore red flags—including compliance deficiencies identified by IRS examiners—“will be considered to have acted willfully for the resulting violations.”⁵ Whether willful or not, deficiencies or illegal activities that are discovered only through an IRS examination or law enforcement investigation are likely to result in a higher penalty than those that are discovered and self-disclosed by the corporation. This is because timely self-disclosure may indicate a willingness to accept responsibility and suggests a stronger likelihood of future compliance.⁶

As for remediation, Associate Director Ott noted that FinCEN may consider assessing a lower penalty where a company takes effective, immediate remedial action after a violation is revealed. However, remedial measures alone may not warrant a reduced penalty. This is particularly the case if regulators determine that “an entity had disregarded its compliance program, caused significant violations, and then seeks to offset its penalty payments with compliance expenditures it should have made at the outset.”⁷ Thus, only a commitment to a thorough, effective compliance program *before* a problem is identified will result in lower penalties. FinCEN’s position that remediation alone may not warrant a penalty reduction recognizes that institutions must be incentivized to invest in compliance: if an institution were able to forgo robust compliance measures (which can be expensive), and then wait for an enforcement action to arrive, and then offset the fine to pay for the compliance measures, why would an institution ever pay for them in the first place?





At DOJ, a Compliance Culture Affects Charging Decisions As Well As Penalty Levels

In the event that BSA violations prompt a criminal investigation, your company's compliance culture may affect not only the penalty and other relief required to resolve the investigation, but also whether criminal charges are brought at all.

The compliance measures in place at a corporation have always been among the several factors listed in the U.S. Attorneys' Manual for prosecutors to consider in making charging decisions.⁸ However, until recently, questions of compliance primarily affected investigations at the resolution stage, shaping the size of criminal penalties and the other commitments a corporation was required to make to resolve the investigation. In recent years, prosecutors are reportedly considering the compliance context within which a particular violation developed, not only to determine how an investigation should be resolved, but also in the course of making charging decisions.⁹ Prosecutors are "increasingly asking, 'did you let that misconduct happen, and why,' with the answer constituting a considerable aggravating or mitigating factor in determining whether a company should be charged."¹⁰

Corporations that are able to convincingly argue that criminal conduct "slipped through" a compliance program that was not only well-designed, but was functioning well within a culture of compliance, are in a strong position to convince prosecutors that their compliance program should be considered a mitigating factor when prosecutors make a charging decision

and/or decide how an investigation should be resolved. After all, AML is meant to be a net (albeit a robust net), not a wall. Indeed, even before FinCEN's Culture of Compliance Advisory was issued, then-Director Jennifer Shasky Calvery stressed that BSA/AML compliance is not expected to "eliminate all risk."¹¹

DOJ and FinCEN are hardly alone in their focus on a culture of compliance. The New York State Department of Financial Services (NYDFS)--which has had the most significant fines in the AML space over the past year--has paid particular attention to such concerns. Last year, NYDFS finalized regulations relating to anti-money laundering and sanctions requirements, citing "shortcomings" in the transaction monitoring and filtering program requirements of its regulated institutions, and such shortcomings being "attributable to a lack of robust governance, oversight, and accountability at senior levels."¹² And in its \$425 million dollar enforcement action against Deutsche Bank in January 2017, NYDFS opens its enforcement action with a section entitled "The Culture of Compliance in the Age of Risk."¹³ Outside of the anti-money laundering space, in the wake of its enforcement action against Wells Fargo, the Consumer Financial Protection Bureau has frequently commented on corporate culture issues as an underlying source of substantive violations.

Lessons About a Compliance Culture from Recent Enforcement Actions

Both DOJ and FinCEN have clearly indicated that a strong compliance culture may be a significant mitigating factor in the event that violations occur. FinCEN has been purposefully transparent about its rationale for assessing fines for BSA violations and



publicly reports the facts discovered in the course of its investigations that justify its penalty assessments. The facts summarized in recent FinCEN assessments against casinos identify a number of characteristics of a corporate culture as inconsistent with a strong compliance culture. Summaries do not always specifically refer to “culture of compliance” (though they sometimes do), but they nonetheless make it clear that key indicators of such a culture were missing--or that there was a clear culture of noncompliance--at these casinos. As we review each enforcement action below, consider how many of these indicators were missing in each action:



- ✓ Leadership actively supports and understands BSA/AML efforts
- ✓ BSA/AML deficiencies and efforts to mitigate risks are not compromised by revenue
- ✓ Relevant information is shared freely and openly with compliance
- ✓ Compliance department has adequate resources to effectively carry out their duties
- ✓ Robust independent testing is conducted at a level commensurate with the risks
- ✓ Leadership and compliance personnel know and understand the purpose of BSA and how the information is used

Las Vegas Sands - Venetian and the Palazzo

The watershed moment for the gaming industry came on August 26, 2013, with a non-prosecution agreement (NPA) between the Department of Justice and the Las Vegas Sands’ casinos Venetian and the Palazzo. In the NPA, the Las Vegas Sands admitted to not filing appropriate suspicious activity reports (SARs) on \$45 million of wire transfers and deposits of more than \$13 million in cashier’s checks from Zhenli Ye Gon (“Ye Gon”). In that agreement, the U.S. Attorney’s Office stated that the Sands failed to adequately investigate and report suspicious activity on the part of Ye Gon. Ye Gon used multiple third parties and money exchange businesses to transfer money into the casino on his behalf. These wire transfers became so convoluted that the finance department was unable to reconcile millions of dollars in wire transfers. Ye Gon at times even wired money from Mexico through Hong Kong into the Las Vegas casinos. Although the casino did conduct a background investigation on Ye Gon, they were

unable to associate him with many of the companies from which he was receiving payments.

Senior executives and even compliance personnel enjoyed substantial bonuses as a result of Ye Gon’s gambling activity, while not heeding the warnings from other casino employees about the risks associated with Ye Gon. After the raid, the casino’s inside counsel contacted the Nevada Gaming Control Board and the Drug Enforcement Administration to advise them of Ye Gon’s gaming activity.

Although the NPA does not specifically mention a “culture of compliance,” the facts presented can be directly tied to the six cornerstones identified by the FinCEN director a year later in the advisory issued to all financial institutions.

Caesars Palace

In September 2015, Desert Palace, Inc. (d/b/a/ Caesars Palace), settled a FinCEN investigation and

agreed to pay an \$8 million civil monetary penalty (the company paid an additional \$1.5 million dollars to Nevada regulators). Caesars admitted to willfully violating (through reckless disregard or willful blindness) the BSA's requirement to develop and implement a reasonably designed AML program and to report suspicious activity. In addition to paying the penalty, Caesars agreed to take a number of costly remedial actions, including engaging an independent external reviewer to test Caesars' BSA compliance program, adopting a rigorous training regimen, and engaging in a "look-back" analysis to identify past suspicious transactions that warrant SAR filings.¹⁴

The assessment indicates that the violations at Caesars occurred in the midst of "systemic and severe" AML compliance deficiencies. Specifically, Caesars failed to maintain sufficient compliance policies and procedures for its "private gaming salons." FinCEN noted that these private salons are reserved for the wealthiest clientele and that the lack of an adequate compliance program for these salons enabled "some of the most lucrative, and riskiest, financial transactions to avoid the scrutiny of Caesar's compliance program."¹⁵ The private gaming salons were marketed through branch offices in the U.S. and in Asia, and employees of those offices routinely accepted deposits from foreign patrons but "lacked a basic understanding of the types of activity that should be considered suspicious."¹⁶ As a result, Caesars did not consistently monitor the activities of these branch offices for suspicious activity. The branch offices rarely, if ever, referred suspicious activity to the compliance team.

Sparks Nugget, Inc.

In April 2016, FinCEN assessed a \$1 million penalty against Sparks Nugget, Inc., after determining that Sparks Nugget failed to establish and implement an effective AML program and failed to report suspicious activity and maintain certain records as required by law.¹⁷ In the course of its investigation,

FinCEN found that Sparks Nugget "lacked a culture of compliance."¹⁸ Specifically, FinCEN noted that the employee responsible for BSA compliance was "routinely disregarded by her managers" who ignored many of the SARs she prepared and submitted for approval before filing. The BSA compliance officer also raised concerns—which were not addressed—that the casino was failing to collect information necessary to comply with the BSA. Moreover, she was prevented from speaking to IRS examiners during a 2010 IRS exam and Sparks Nugget management refused to discuss the exam results with her.

FinCEN characterized Sparks Nugget as having a "blatant disregard" for AML compliance that permeated "all levels" of the casino. In addition to the above problems, this disregard was evidenced in 2010 when Sparks Nugget employees told IRS examiners that they did not need to monitor for suspicious activity because nothing suspicious ever happened at the casino.¹⁹ In another instance, a committee tasked with determining when a SAR should be filed took no action after an employee reported potentially suspicious activity. In fact, the committee "never held a single meeting and some of its members were not even aware that they were on the Committee."²⁰ Finally, although an IRS examiner identified a number of problems in a 2010 exam, by 2013, the casino had still not taken action to address many of the identified failures.²¹



Hawaiian Gardens Casino

In July 2016, FinCEN assessed a \$2.8 million penalty on Hawaiian Garden Casino, Inc.,²² after finding a number of violations and noting problems with the casino's compliance culture. Hawaiian

Gardens also agreed to engage an external independent reviewer to conduct three annual tests of remedial steps taken to address the problems FinCEN

identified. FinCEN noted a number of problems in the casino's compliance culture.

In this case, as in others, recidivism clearly mattered. IRS examiners had first identified deficiencies in the casino's BSA internal controls in 2011, and the independent consultant hired by Hawaiian Gardens again identified many of the same problems in 2013. And importantly, many of those same problems that were noted in 2011 by the IRS, and then continued in 2013, remained uncorrected at the time of a 2014 examination. In addition, FinCEN found that Hawaiian Gardens lacked sufficient policies and procedures regarding customer identification. Specifically, the company had no policy in place to address patrons who refused to provide information required for BSA compliance. As a result, the club allowed patrons to continue to game despite refusals to provide information needed to file suspicious activity reports.

FinCEN concluded that these deficiencies were a reflection of an inadequately committed and ill-prepared compliance team. Although the casino's BSA committee was required by its charter to meet every three months, it only met once during the year of 2013. This committee was required to discuss SARs that involved employees or customers that are "well known to the casino." Thus, its failure to meet regularly "likely prevented the timely reporting of any suspicious activity involving employees or well-known



customers."²³ In addition, FinCEN noted that Hawaiian Gardens did not have a qualified BSA compliance officer. The employee tasked with BSA compliance had no prior relevant experience and admitted to IRS examiners that he was "trying to learn BSA regulations and requirements while on the job."

FinCEN concluded that as a consequence of these shortcomings, internal control weaknesses and violations were able to persist from 2009 to 2014. The lack of proper internal controls, in turn, caused a failure to file numerous suspicious activity reports and the filing of many reports that contained insufficient information and blank fields.

The Hawaiian Gardens enforcement action described a particularly telling incident of insider misconduct:

In 2009, The Gardens' surveillance video observed a customer structuring transactions with the assistance of employees. The customer attempted to cash out a \$14,833 transaction, then ripped up the required IRS identification form in the presence of the cage cashier when asked to complete it. The customer then went to the Asian VIP section of the Gardens and enlisted the employee listed above, and another employee, to cash out the transaction into \$10,000 and \$4,000 amounts without providing identification information. Despite the employee's complicity in this illegal conduct, the employee remained at The Gardens, which acknowledged the complicity (and reported it on a SAR), but continued to allow the employee to facilitate the transaction, including [another] transaction in 2013 (which did not list the employee as a subject in the SAR).²⁴

Cantor Gaming

In October 2016, FinCEN resolved violations stemming from AML-related deficiencies with CG Technology (f/k/a Cantor Gaming), as part of a global settlement that also resolved criminal charges by the U.S. Attorney's Office for the Eastern District of New York related to illegal gambling and money laundering schemes. For its part, FinCEN alleged that the gaming company failed to develop and

implement a sufficient AML program from the day it opened in March 2009 through September 28, 2015.²⁵ Specifically, FinCEN concluded that Cantor Gaming personnel had failed to identify suspicious activity conducted through its race and sports books. The bureau noted that Cantor Gaming did not file a single SAR in the first 18 months it ran race and sports books. Moreover, its first SAR was only filed after IRS examiners discovered the suspicious activity. FinCEN further found that Cantor Gaming's business compliance procedures were inadequate to monitor and ensure BSA compliance and that the company did not fully implement its AML program. Its failure to implement an adequate compliance system resulted in multiple failures to detect suspicious activity.

In several ways, events at Cantor Gaming between 2010 and 2015 indicate the company lacked a strong compliance culture. First, FinCEN noted that IRS examiners documented the problems in Cantor Gaming's programs in 2010 and advised the company to correct the violations. However, later written versions of Cantor Gaming's AML program indicate that the identified shortcomings continued. These shortcomings included, for example, a lack of any due diligence procedures to address its customers' source of funds. Instead of being enhanced, the AML program was weakened over time when certain provisions from Cantor Gaming's AML program were removed.

FinCEN also found that the scope of Cantor Gaming's independent testing was inadequate to effectively counter the money laundering risks associated with its products and services and that the company had a weak internal audit program. In 2009,

Cantor Gaming hired an independent accounting firm to audit its BSA compliance. But by 2010, the audit function was being conducted in-house on a semi-annual basis. These internal audits relied on samples of data from short periods of time and were not expanded when the samples identified notable failures. Moreover, the failures identified by the internal audits did not cause auditors to examine whether adequate procedures were in place to detect ongoing patterns of suspicious conduct.

Finally, FinCEN investigators determined that Cantor Gaming's training program was not robust. The company reportedly failed to train personnel in identifying, monitoring, and reporting suspicious

activity. "[S]enior members of Cantor Gaming's compliance department, as well as its president and CEO, either received no BSA training or attended only one session from 2010 to 2013."²⁶

Conclusion

FinCEN and DOJ have made it abundantly clear that a compliance culture matters. Evidence of a strong or weak compliance culture could have a direct impact on whether BSA violations give rise to a regulatory investigation, criminal charges, or both. Similarly, your company's compliance culture could significantly shape the penalties and other relief imposed by regulators and/or prosecutors. The facts underlying recent FinCEN investigations of casinos by no means offer a comprehensive guide to creating a culture of compliance. They do, however, identify the following corporate practices as practices FinCEN expects to see in a culture of compliance:

- Provision of adequate training to all relevant employees such that they demonstrate an awareness of compliance programs and issues
- Compliance committees that meet regularly and function appropriately (not just on paper) to facilitate rather than thwart compliance efforts
- Prompt remediation of compliance deficiencies once identified
- A robust compliance audit process conducted by knowledgeable personnel that facilitates the prompt remediation of any deficiencies in an AML compliance program



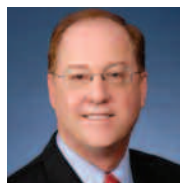
In addition to paying close attention to these and other elements of a compliance culture, compliance professionals should also take steps to document their company's strong compliance culture. This can be done by creating and preserving documentary evidence of: (1) senior executives participating in corporate compliance efforts; (2) robust training programs; (3) thorough compliance audit procedures conducted by knowledgeable specialists; and (4) prompt company action to remedy all compliance deficiencies brought to its attention.

Again, while the phrase "culture of compliance" may not appear in the text of any statute or regulation, those agencies responsible for BSA/AML enforcement have made it quite clear that these issues are often the cause of substantive violations, and will strongly influence the trajectory and the robustness of the enforcement response.



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- ¹ The authors wish to thank Becky Umhofer, a professional support lawyer at Hogan Lovells, for her contributions to this article.
- ² Fin-2014-A007, Advisory to U.S. Financial Institutions on Promoting a Culture of Compliance (August 11, 2014) (<https://www.fincen.gov/sites/default/files/advisory/FIN-2014-A007.pdf>).
- ³ *Id.*
- ⁴ Thomas Ott, Associate Director for Enforcement, Department of the Treasury, Financial Crimes Enforcement Network, Address at the National Title 31 Suspicious Activity & Risk Assessment Conference and Expo (Aug. 17, 2016) (available at <https://www.fincen.gov/news/speeches/prepared-remarks-fincen-associate-director-enforcement-thomas-ott-delivered-national>).
- ⁵ *Id.*
- ⁶ *Id.*
- ⁷ *Id.*
- ⁸ See U.S. Dep't of Justice, United States Attorneys' Manual § 9-28.300. DOJ's Fraud Division recently issued guidance detailing how that division will evaluate corporate compliance programs in order to determine if it is an effective program that may warrant leniency. Although not directly applicable to the enforcement units responsible for AML enforcement, this guidance may enhance your understanding of how enforcement attorneys are likely to evaluate your compliance program. See U.S. Dep't of Justice, Evaluation of Corporate Compliance Programs (available at <https://www.justice.gov/criminal-fraud/page/file/937501/download>).
- ⁹ See Gejaa Gobena, *Ready for Justice Department scrutiny of your compliance program?* Compliance Week (November 29, 2016).
- ¹⁰ *Id.*
- ¹¹ Jennifer Shasky Calvery, Director, Department of the Treasury, Financial Crimes Enforcement Network, Remarks at the 2014 Mid-Atlantic AML Conference (Aug. 12, 2014), (available at <https://www.fincen.gov/news/speeches/remarks-jennifer-shasky-calvery-director-financial-crimes-enforcement-network-10>).
- ¹² New York State Department of Financial Services, Superintendent's Regulations, Banking Division Transaction Monitoring and Filtering Program Requirements and Certifications, § 504.1, <http://www.dfs.ny.gov/legal/regulations/adoptions/dfsp504t.pdf>.
- ¹³ In the Matter of Deutsch Bank AG, New York State Department of Financial Services, Consent Order (Jan. 30, 2017), available at <http://www.dfs.ny.gov/about/ea/ea170130.pdf>.
- ¹⁴ In the Matter of Desert Palace, Number 2015-10, U.S. Department of the Treasury, Financial Crimes Enforcement Network, Assessment of Civil Penalty (Nov. 6, 2015).
- ¹⁵ *Id.* at 3.
- ¹⁶ *Id.* at 6.
- ¹⁷ In the Matter of Sparks Nugget Inc., Number 2016-03, U.S. Department of the Treasury, Financial Crimes Enforcement Network, Assessment of Civil Penalty (April 5, 2016).
- ¹⁸ *Id.* at 2.
- ¹⁹ *Id.* at 4 (noting that this comment was particularly remarkable given two high profile embezzling incidents involving the Casino).
- ²⁰ *Id.*
- ²¹ *Id.*
- ²² In the Matter of Hawaiian Gardens Casino, Inc., Number 2016-04, U.S. Department of the Treasury, Financial Crimes Enforcement Network, Assessment of Civil Penalty (July 15, 2016).
- ²³ *Id.* at 6.
- ²⁴ *Id.* at 12, n.18.
- ²⁵ In the Matter of CG Technology, L.P. No. 2016-05 Number 2016-05 U.S. Department of the Treasury, Financial Crimes Enforcement Network, Assessment of Civil Penalty Statement of Facts (Oct. 3, 2016).
- ²⁶ *Id.* at 7.