

THE RISE OF SKILL-BASED GAMING REGULATION

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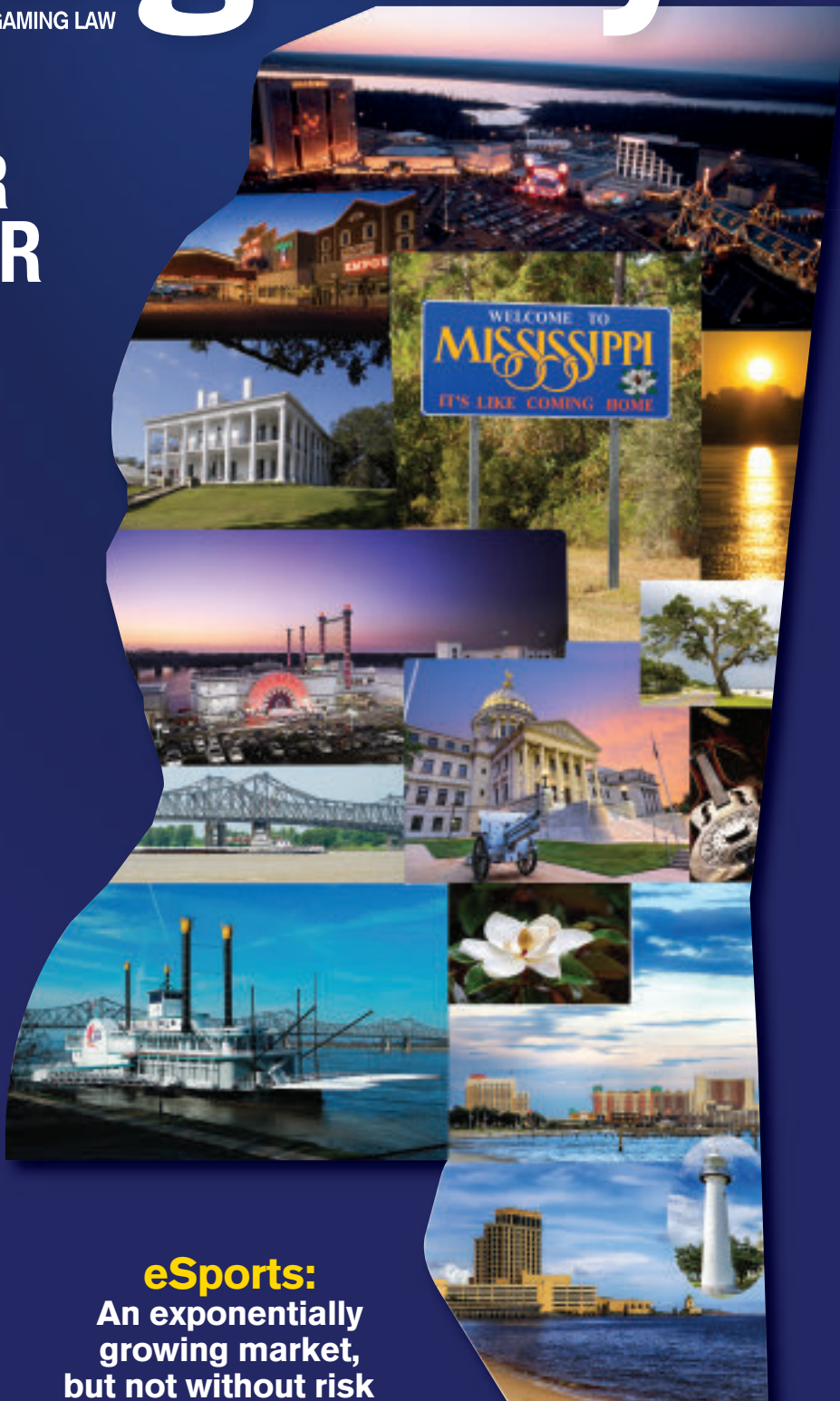
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GAMING LAW & POLICY

**Don't Gamble on
Anti-Money Laundering
Compliance**

**The Preservation
of Privilege**



eSports:
An exponentially
growing market,
but not without risk

U.S. Department of the Treasury,
Washington DC



DON'T GAMBLE ON ANTI-MONEY LAUNDERING COMPLIANCE

Government enforcement actions could target individuals

By Stephen Schrier, Eric Fikry, Stephanie Chomentowski
& Lauren O'Donnell

In August 2014, the U.S. Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") issued an advisory urging leadership within all U.S. financial institutions to actively promote a culture of compliance with respect to Bank Secrecy Act ("BSA") and anti-money laundering ("AML") requirements. Since the advisory, FinCEN has focused a great deal of attention on AML enforcement in casinos, as evidenced by the fact that there have been no fewer than five civil monetary penalties assessed against gaming operators within the past two years.

To date, FinCEN's gaming industry enforcement decisions have identified shortcomings in compliance programs at the company level. Efforts to ensure that compliance obligations are met should not stop at the company level, however. Enforcement actions against individual employees responsible for AML compliance may be the next phase of FinCEN's efforts to ensure BSA/AML compliance within the gaming industry.

Recent Enforcement Actions Underscore FinCEN's Impact and Reach

FinCEN's latest decisions imposing penalties on gaming operators illustrate that simply establishing a compliance program is not sufficient to avoid compliance charges. The casino must encourage and empower its employees responsible for regulatory compliance in a way that ensures and demonstrates that AML compliance is truly a part of the company's concern and culture. In addition, it must effectively implement and continually improve its compliance processes in the same way it does marketing and other business processes.

FinCEN's most recent gaming industry enforcement actions demonstrate these points quite dramatically. Hawaiian Gardens Casino, Inc., which operates The Gardens Casino in California, agreed in July to a \$2.8 million civil penalty for an ongoing failure to develop and implement an AML program to ensure BSA compliance. The Gardens failed to implement procedures for securing customer identification and for ensuring that currency transaction and suspicious activity reporting requirements were satisfied, but most striking was the lengthy history of non-compliance. Many of the deficiencies in The Gardens' compliance measures were initially uncovered by IRS examiners in 2011 and again by an independent consultant hired by the card club in 2013, but nevertheless, many of the same internal control violations were still evident during a subsequent exam in 2014.

In addition, FinCEN noted that The Gardens' leadership did not take an active role in promoting a strong culture of compliance, citing the BSA committee's failure to meet quarterly as required and failure to have a qualified person responsible for BSA compliance on a day to day basis. Based on the lengthy history of non-compliance, FinCEN imposed a significant monetary penalty, and The Gardens consented to undergo a new risk assessment within 90 days, and to engage and retain an independent external auditor to examine and perform a series of tests of the card club's BSA/AML program.

Sparks Nugget, Inc., a casino located in Nevada, agreed in April 2016 to pay \$1 million



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for its lack of AML controls. The consent decree which Sparks Nugget agreed to notes that merely having an employee responsible for managing the casino's BSA compliance was not enough, as the employee in that role for Sparks Nugget was routinely disregarded by her managers. Thus, FinCEN concluded that the casino's culture and the interactions among its employees undermined the casino's compliance efforts.

Also critical was the fact that while Sparks Nugget was collecting a warehouse of data on its customers for the purposes of delivering better gaming experience, it did nothing with this data for AML purposes:

As is typical within the casino industry, Sparks Nugget harnessed its software systems and its own employees to gather large amounts of information about its customers. The Casino used this information to provide better and more personalized customer service to its patrons and to minimize the business risk associated with running a casino. Yet, Sparks Nugget failed to use this same information to develop risk-based policies and procedures to assess and minimize AML risks.

The consent decree further provided that Sparks Nugget's "poor compliance culture" combined with a "blatant disregard for AML compliance" "permeated all levels of Sparks Nugget." Sparks Nugget filed very few Suspicious Activity Reports ("SARs") and Currency Transaction Reports ("CTRs"), both BSA obligations, and also made a host of other record-

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In September 2015, Desert Palace, Inc. d/b/a Caesars Palace (“Caesars”), agreed to an \$8 million penalty for having “allowed a blind spot to exist in its compliance program—private gaming salons—enabling some of the most lucrative, and riskiest, financial transactions to avoid the scrutiny of Caesars’ compliance program.”

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keeping errors and failures. FinCEN viewed the assertions of certain Sparks Nugget employees that the absence of any such filings was due to a lack of suspicious activity with skepticism, particularly since a county official had been convicted for having gambled embezzled funds at the casino and the casino’s former general counsel had pleaded guilty for having embezzled \$3 million from the casino.

The Hawaiian Garden and Sparks Nugget consent agreements were preceded by a string of other FinCEN penalties aimed at encouraging casino AML compliance.

In December 2015, FinCEN levied a \$650,000 penalty against Oaks Club Room d/b/a Oaks Card Club (“Oaks”), located in California. FinCEN’s investigation was triggered by prosecutions against individuals for conducting illegal loan-sharking at the casino. FinCEN found that while Oaks had established AML procedures, they had not been updated in six years and contained numerous inaccuracies and misstatements. Oaks also failed to conduct sufficient independent testing or employee training and failed to file a SAR on at least nine instances, including a circumstance where one \$9,900 transaction was logged at 9:52 a.m. and a subsequent transaction for the same amount

was logged one minute later, with the same customer and same cashier.

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Having no AML procedures in place in the private gaming salons allowed individuals to gamble in an environment where BSA recordkeeping and reporting were absent, resulting in “a significantly higher level of money laundering risk than ordinary gaming areas.” This same “blind spot” extended to Caesars’ branch offices in Hong Kong, Singapore, Tokyo, and Monterey Park, California, where Caesars would promote its salons. Not only did this result in a “failure

to file a large number of SARs,” but, even in locations where Caesars had procedures to detect and report suspicious activity, it failed to follow them. There was also a conspicuous failure of testing and training, causing fundamental misunderstandings of what transactions are considered suspicious. In addition to the \$8 million penalty, Caesars agreed to retain



A \$10 million fine was levied against Trump Taj Mahal Associates, LLC d/b/a Trump Taj Mahal Casino Resort (“Trump”), located in New Jersey (while in bankruptcy for a third time) in March 2015.

an auditor to examine and test its compliance program; report to FinCEN on the implementation of its compliance and training programs; and file or amend SARs based on a review of two years of past branch office transactions.

A \$10 million fine was levied against Trump Taj Mahal Associates, LLC d/b/a Trump Taj Mahal Casino Resort ("Trump"), located in New Jersey (while in bankruptcy for a third time) in March 2015. Along with other violations, Trump was found to have a 56% and 44% failure rate in filing SARs during two time periods of 2010 and 2012. Trump also had no policies or procedures to monitor several areas of the casino, including cage marker and front money transactions and data from slot machines. Even though Trump had been on notice of these failures as early as 2007, adequate action was not taken to comply with reporting requirements. FinCEN also required Trump to retain an independent, external auditor to review and evaluate its BSA compliance program.

The largest fine FinCEN had ever imposed on a casino—and the fourth largest in the agency's history—was levied in June 2015 against Hong Kong Entertainment (Overseas) Investments, Ltd. d/b/a Tinian Dynasty Hotel & Casino ("Tinian Dynasty"), located in the Commonwealth of the Northern Mariana Islands. Tinian Dynasty agreed to pay a \$75 million penalty for having no AML program whatsoever. There was no compliance officer, no testing or training, and no internal policies or controls.

These failures primarily came to light as a result of an undercover investigation. One casino executive admitted to an undercover agent that should the agent's client, a fictitious Russian businessman, come to Tinian Dynasty, he "could bring large amounts of currency" and Tinian Dynasty "would not file reports related to" his gaming activity. Several other undercover efforts are detailed where agents conducted transactions at the casino that should have triggered the filing of reports, but none were filed. In one undercover effort, Tinian Dynasty counseled the agent on how to avoid BSA scrutiny at the casino.

“The sizable monetary penalties imposed by FinCEN coupled with the public disclosure of the failures which give rise to same should prompt gaming companies to regularly examine compliance procedures to ensure that they are meeting their BSA obligations.”

What the Bank Secrecy Act Requires

The sizable monetary penalties imposed by FinCEN coupled with the public disclosure of the failures which give rise to same should prompt gaming companies to regularly examine compliance procedures to ensure that they are meeting their BSA obligations. The main obligations of the BSA and its regulations are outlined below.

Compliance Program. A casino must develop and implement a written AML program reasonably designed to assure and monitor compliance with the BSA to prevent money laundering and the financing of terrorist activities. At a minimum, a casino's AML program must contain:

- internal controls;
- independent testing;
- training;
- an individual designated to assure day-to-day compliance;
- the use of all available information to
 - (1) identify suspicious transactions;
 - (2) identify certain required records;
 - and (3) determine and verify personal identifying information; and,
- for casinos with automated data processing systems, the use of such systems for compliance.

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Filing SARs. The BSA also requires the filing of Suspicious Activity Reports. This filing requirement is triggered by a “suspicious transaction” that involves or aggregates to at least \$5,000. A transaction is “suspicious” if the transaction: (a) involves funds derived from illegal activity or is conducted to disguise funds or assets derived from illegal activities; (b) is designed to evade any requirement of the BSA or its implementing regulations; (c) has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage; or (d) involves use of the casino to facilitate criminal activity. A transaction must be reported if the casino knows, suspects, or has reason to suspect it is suspicious.

Filing CTRs. Another filing requirement of the BSA is Currency Transaction Reports (“CTRs”). For any transaction that involves either “cash in” or “cash out” of more than \$10,000 during a single gaming day, a CTR must be filed. A casino must treat the transactions as a single transaction if the casino has knowledge that the transactions are conducted by, or on behalf of, the same person.

Other recordkeeping. Finally, the BSA imposes special recordkeeping rules on casinos, which require the maintenance of a separate record containing a list of each transaction involving certain monetary instruments having a face value of \$3,000 or more. The list must contain the following information (with the transactions appearing in chronological order): time, date, and amount of the transaction; the name and permanent address of the customer; the type of instrument; the name of the drawee or issuer of the instrument; all reference numbers and the name or casino license number of the casino employee who conducted the transaction.

Ongoing Warnings to Casinos to Ensure Proper Compliance Efforts

Given this enforcement activity, FinCEN has urged the gaming industry to beef up its compliance efforts. As mentioned previously, in August 2014, FinCEN issued its Advisory on Promoting a Culture of Compliance with BSA and AML requirements. FinCEN explained that compliance programs should include: leadership that actively supports and understands compliance efforts; efforts to manage and mitigate BSA/AML deficiencies uncompromised by revenue interests; relevant information from various organizational departments shared with compliance staff; devotion of adequate resources to compliance; testing by an independent and competent party; and leadership and staff who understand the purpose of its compliance efforts and how its reporting is used. FinCEN also issued a letter in 2014 noting the vulnerabilities and risk exposure posed by sports betting and reminded the gaming

“The memo, now known simply as the Yates Memo, represents a clear warning that the DOJ will seek to hold individuals criminally and civilly responsible for corporate fraud. The memo effectively ensures this outcome by refusing to grant credit to a company for cooperating with a government investigation unless the company provides to DOJ all relevant facts about the individuals involved in corporate misconduct.”

industry of its AML compliance program requirements.

Likely in response to the FinCEN alerts, in December 2014, the American Gaming Association (“AGA”) issued Best Practices for Anti-Money Laundering Compliance. The practices focus on: risk assessments, BSA/AML, officers, employee training, preventive steps, due diligence, transaction monitoring, potential suspicious activity and SAR review procedures, audit procedures, and recordkeeping and retention. The AGA suggested that casinos enhance their compliance programs, which should be specific to each casino, and reconsider their compliance efforts on a regular basis to ensure they account for new risks and emerging patterns of illegal activity.

Based on a recent study by the AGA and Ernst & Young LLP, it appears that casinos and their counsel have begun to receive FinCEN’s message. According to the study, compliance obligations are now embraced company-wide, and certain processes and controls are viewed not only as compliance issues but also sound business practices.

Also according to the study, casino operators have been increasing their AML compliance-related spending over the last several years: almost two-thirds of the respondents reported an average spending increase of 74%. This increase in investment has strengthened compliance programs as casinos are now filing CTRs and SARs in record numbers. The number of SARs filed between 2011 and 2014 increased by 164%.

Efforts by the Department of Justice and the Potential Focus on Individuals

In addition to the recent FinCEN enforcement actions detailed above, the Department of Justice has taken its own recent actions.

In January 2016, Normandie Club agreed to plead guilty to charges that it violated the BSA at its “cardroom” style casino in California. Prosecutors had alleged that Normandie Club would rely upon promoters to steer high-rollers to its cardroom. It would then use the promoter’s name on transactions, fail to record them, and break up large transactions

Department of Justice,
Washington DC



into smaller ones under \$10,000 in order to avoid reporting requirements. The club, which was a partnership, agreed to pay nearly \$2.4 million for two felony offenses, cooperate in ongoing criminal investigations, and create, implement, and maintain an effective AML program.

Justice Department enforcement efforts should raise even more attention to AML compliance because of the new law enforcement priority to seek to hold individuals criminally and civilly responsible for crimes committed by a corporate entity.

In September 2015, Sally Quillian Yates, Deputy Attorney General, issued a widely-read and now very-well-known memo to a number of government officials noting that one of the most effective ways to fight corporate fraud and other misconduct is to seek accountability from the individuals who perpetrated the wrongdoing. The memo, now known simply as the Yates Memo, represents a clear warning that the DOJ will seek to hold individuals criminally and civilly responsible for corporate fraud. The memo effectively ensures this outcome by refusing to grant credit to a company for cooperating with a government investigation unless the company provides to DOJ all relevant facts about the individuals involved in corporate misconduct.

Though this creates a great deal of tension between a company's attorney-client privilege and other employee rights, the DOJ has directed both civil and criminal investigations to focus on individuals from the inception of the investigation and investigators should not consider an individual's ability to pay any potential resulting civil fine.

Likewise, FinCEN has the authority to bring actions against individuals.

The Tinian Dynasty case is notable not just for the size of the penalty imposed; it is significant because FinCEN also penalized an individual for some of the misconduct. The former VIP services manager, George Que, was fined \$5,000 for his admission that the casino would not file reports for the fictitious Russian businessman undercover agents were offering to bring to the casino.

In addition to this FinCEN penalty, Mr. Que was criminally charged with conspiracy and several counts of failure to file a CTR. Mr. Que entered into a deferred prosecution agreement and cooperated with prosecutors, and the charges were ultimately dismissed.

FinCEN's recent consent agreements and penalty assessments contain provisions requiring that the casino, "shall truthfully disclose to FinCEN all factual information not protected by a valid claim of attorney-client privilege or work product doctrine with respect to the conduct of its current or former directors, officers, employees, agents, or others." This language, along with the overall tenor of the Yates Memo, suggests that the focus of FinCEN's future enforcement actions may be directed towards casino employees, particularly those in management or compliance officers, in addition to the entities themselves. This would be a stark change from the civil money penalties described above, which largely focused on wrongdoing by the entities overall.

Similarly, if the Department of Justice were to bring more criminal enforcement actions against casinos, like the Normandie Club case, the Yates Memo requires prosecutors to focus on the individuals from the outset of the investigation.

Indeed, FinCEN Director Jennifer Shasky Calvery acknowledged in comments made during a 2015 Bank Secrecy Act Conference co-sponsored by the American Gaming Association that the BSA provides FinCEN with broad authority to impose civil penalties not only against financial institutions but also against management and employees who participate in misconduct:

We will continue to consider whether to take action against individuals responsible for a financial institution's BSA/AML failures, including, in appropriate cases, barring individuals from working in the industry. And, of course, this includes considering the institution as a whole and holding those on the business side accountable for willful participation in such failures. That being said, we know that the vast majority of financial institutions, and in particular their compliance officers, are working hard to comply with their responsibilities, and are successful at it. We appreciate all you are doing to keep your financial institutions safe from illicit use.

See Remarks of Stephanie Brooker, Associate Director for Enforcement, FinCEN, 2015 Bank Secrecy Act Conference, Las Vegas, Nevada, June 18, 2015, available at: https://www.fincen.gov/news_room/speech/pdf/20150618.pdf.

Given the increasing likelihood that individual employees responsible for developing and implementing casino compliance programs may be subject to heightened scrutiny and even personal liability, efforts to continuously enhance BSA and AML compliance mechanisms should remain a top priority, and those executives with management responsibilities, especially in compliance, should be particularly vigilant in their efforts. ♣