

FinCEN's culture focus in Sparks Nugget penalty paves way for safe haven for compliance officers

Apr 25 2016 Robert M Axelrod

The U.S. Financial Crimes Enforcement Network's recent \$1 million civil penalty (PDF) against the now-defunct Sparks Nugget casino set a significant precedent for its emphasis on compliance culture. First, it did not blame Nugget's compliance officer for the serious anti-money laundering (AML) violations it found, focusing instead on the firm's poor governance. Second, it constructively operationalized FinCEN's August 2014 advisory on promoting a culture of compliance (PDF).



Management interference

Sparks Nugget's numerous Bank Secrecy Act (BSA) violations—failure to report suspicious activity and failure to operate and appropriately resource an effective compliance program—constitute the kind of charges that make for a significant BSA enforcement action. In this case, however, FinCEN found that Sparks Nugget under-resourced and ignored their un-named compliance officer, while instructing her not to communicate with an on-site Internal Revenue Service (IRS) examiner who had asked to speak with her.

With BSA compliance officer sensitivity to personal accountability so prominent at this time throughout the financial services industry, and concerns that limitations on authority and resources make the putative role of BSA insurer incompatible with compliance officer realities, having an enforcement action that details a fact pattern involving the compliance officer, but which resulted in no personal liability, is a light at the end of the tunnel.

The enforcement is not perfect, however. Given the obstructive role allegedly played by the casino's leadership, one might have expected FinCEN to find other ways of relieving compliance officer liability, such as identifying other accountable parties. Nonetheless, FinCEN appears to have drawn, for compliance officers, the beginnings of a safe haven, which may eventually be filled out further.

Compliance culture advisory

Equally important is FinCEN's use of the penalty to give operational meaning to its August 2014 compliance culture advisory (PDF). The terms "culture" and "culture of compliance" have been used for years by regulators, but without the kind of definition that would be as effective as this enforcement. The cultural notion of compliance is supposed to inform a dialog within institutions and empower compliance officers by creating a framework for them to identify deficiencies with heightened regulatory aspects.

This is first instance of FinCEN, the U.S. Treasury's anti-money laundering unit, using the culture framework in a way traceable to the advisory to compose an enforcement action. Since the advisory was issued, FinCEN has twice created a remediation requirement for firms to enhance their culture of compliance, but it has not clearly defined BSA violations in that regard.

The advisory noted six substantive factors that contributed to sound compliance culture:

- 1) Leadership must support compliance efforts;
- 2) Revenue interests must not supersede compliance functions;
- 3) Gathering and integrating information across the firm for BSA compliance purposes;
- 4) Adequate resources;
- 5) Focus on program effectiveness, including independent testing; and
- 6) Leadership and staff understanding of the role and importance of BSA reporting.

Five of these six principles are clearly present in the Sparks Nugget enforcement:

- The casino's managers (leadership) routinely disregarded the BSA compliance officer (1).
- Information was available to identify BSA issues, but was instead used exclusively for commercial purposes (3).
- The compliance officer was under-resourced by having no supportive staff (4).
- The compliance program was weak enough to miss multiple suspicious transactions, along with other egregious deficiencies, such as the SAR committee's failure to meet even once. Independent testing would likely have revealed these failures, but was never ordered by management (5).
- Leadership did not understand the value of suspicious activity monitoring and reporting. It failed to file SARs under egregious circumstances, such as their own general counsel embezzling money

from Sparks and a corrupt official passing embezzled money through the firm (6).

The compromise of compliance with revenue production is the one (of six) FinCEN compliance culture advisory issues not represented here.

Conclusion

FinCEN has identified a situation at Sparks Nugget where a BSA compliance officer was spared liability for AML violations, because they were overwhelmed by management. This rendition should be helpful to compliance officers considering their own efforts and obstacles, and how these may or may not add up to accountability in their own particular situations.

The aid to compliance officers is all the more useful in that it comes in the form of a transparent overlay of the recent penalty with the compliance culture advisory. It may therefore help the advisory improve both internal and external dialogues regarding the health of BSA compliance programs.

One would expect the approach taken here to be attractive to other regulators and initiators of enforcement actions, particularly after FinCEN has demonstrated the rhetorical benefits of framing BSA violations in this way.

With this penalty, FinCEN is building a better understanding of its culture advisory and creating a more complete context for accountability considerations.

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