

Culture of COMPLIANCE

By Jeffrey R. Rodefer

*"I know it
when I see it."*

former United States
Supreme Court Justice, Potter Stewart

A "Culture of Compliance" is an axiom that has become apart of our everyday language the past few years, especially as FinCEN has demanded more robust compliance programs to address anti-money laundering prevention efforts that are focused more on the analytics of detecting suspicious activity rather than merely on the process of reporting large cash transactions.¹ In actuality, any gaming lawyer can tell you this terminology has been in Nevada's vernacular since at least the late 1990s when the Nevada Gaming Control Board and the Nevada Gaming Commission began requiring gaming compliance programs for public companies.²

So exactly what is a Culture of Compliance? The question was posed to Jim Dowling, founder and owner of the Dowling Advisory Group, which provides expertise to the gaming industry on independent testing of Title 31, risk assessments and related programs. Given that he is also a former Special Agent for the Internal Revenue Service (IRS) Criminal Division, served as an AML advisor to the White House's Drug Policy Office and is a member of FinCEN's Bank Secrecy Act Advisory Group, who better to ask? Jim responded by quoting former United States Supreme Court Justice, Potter Stewart, who in concurring in the court's 1964 ruling in *Jacobellis v. Ohio* with regard to the difficulty in determining the test for obscenity, said "I know it when I see it."³

Well, okay. Let's start with what it is not. A "Culture of Compliance" is not a catch phrase or buzzwords uttered by compliance personnel, in-house counsel or company executives in an attempt to impress, satisfy or assuage state or federal regulatory concerns that a gaming licensee takes compliance with all applicable laws and regulations seriously. It is not lip service or window dressing. Make no mistake such attempted deception is easy to spot. Nor, is it compliance in a vacuum (*i.e.*, establishing written plans and internal controls without developing meaningful educational programs, securing appropriate resources and having support from management). Or, stated more concisely, it is not a paper-only program. Such an imprudent approach to compliance will be quickly exposed in a regulatory audit. One need only review FinCEN's⁴ or the Nevada Gaming Control Board's⁵ websites to ascertain the costs of noncompliance. They are substantial. As Thomson Reuters succinctly notes, "a culture of compliance goes beyond once-a-year mandated



training. It embeds compliance into everyday workflow and sets the foundation and expectations for individual behavior across the organization.”⁶

In 2014, in response to a series of civil and criminal enforcement actions, FinCEN issued an Advisory on “Promoting a Culture of Compliance.”⁷ The Advisory sets forth some general principals that have a thread of commonality woven through most of the recent enforcement actions. These ideas, although fundamental are not revolutionary in their concept. In order to create a Culture of Compliance, FinCEN asserts that: (1) the company’s leadership must be engaged and actively support the compliance program; (2) revenue interests should not comprise compliance efforts to mitigate risks; (3) information throughout the organization must be shared with the compliance department; and (4) the company should dedicate adequate human and technological resources in furtherance of its compliance objectives.⁸

Even the U.S. Federal Sentencing Guidelines, which the Federal judiciary must consider when imposing criminal sentences, will exam an organization’s

compliance program. Specifically, the Guidelines direct judges to assess, among other matters, if there is a “culture that encourages ethical conduct and a commitment to compliance with the law.”⁹ The existence of such a program may prompt a reduction in the potential sentence.

As the American Gaming Association noted in its 2015 *Best Practices for Anti-Money Laundering Compliance*, “to promote and foster a culture of compliance . . . requires adequate resources”¹⁰ In 2016, the American Gaming Association and Ernst & Young commissioned a research study to examine the gaming industry’s pledge to invest more capital to prevent money laundering and terrorist financing activities.¹¹ Not surprisingly, the study concluded that the gaming industry is spending significantly more since 2011 on AML compliance, including human resources, training, regulatory reporting, patron due diligence and transaction monitoring.¹²

Last year, Thomas Ott, Associate Director of Enforcement for FinCEN stated in prepared remarks at the *National Title 31 Suspicious Activity & Risk*

Assessment Conference and Expo in Las Vegas that the systemic failure to establish a culture of compliance will be found where management repeatedly ignores its compliance officer.¹³

Therefore, a “Culture of Compliance” should, at a minimum, involve a commitment from the company’s management to support compliance endeavors, education of employees to ensure information is



shared with compliance personnel, a proper balancing of prudent business decisions that seek to maximize revenue interests in light of compliance goals and not to the detriment of the latter, and an allocation of applicable resources to address the risks that a particular licensee is exposed to. So, that’s the easy part--identifying the elements. A simple Google or Yahoo search of “Culture of Compliance” yields a list of articles all providing some variation of these fundamental notions to define this oft-used phrase. Since any successful compliance program consists of a top-down organizational approach, how would a diligent compliance officer or general counsel implement such a culture? Executing these principals to develop the type of organizational customs that regulators expect of your company is an entirely different matter and a much more arduous task than merely attaching some connotation to this in vogue expression.

At the *2015 Bank Secrecy Act Conference*, Jason Carmen, BSA Casino Group Manager for the IRS told the 413 in attendance that it was easy for regulators to dictate the standards. The job of a compliance officer to implement these standards to

meet these regulatory expectations was much more difficult. Having been on both sides of the regulatory fence, a truer statement was never uttered.

Maybe you have attended or participated in seminars in which Culture of Compliance is a standalone topic of discussion or incorporated into the presentation of a related subject. The dialog is largely centered on the elements and very little time spent on the “how to” part of implementation. In turn, during the question and answer period, someone in the audience will undoubtedly present a hypothetical that is probably based, at least in part, upon actual real-world situations. Speakers always state--and it is certainly sound advice--that the compliance officer must document his or her attempts to properly instill an effective compliance program. The type of evidence that clearly demonstrates the compliance officer’s good faith efforts and, thus, laying the blame for any deficiencies in the implementation squarely on the

shoulders of those that impede the compliance mission. As the questions become more difficult, some speakers struggle with providing the guidance that is sought on how to respond to management that is less than enthusiastic about the topic.

At some point, the answers will invariably fall back to a standard response that the compliance officer should simply resign if he or she is unable to develop the type of culture necessary to ensure a viable and useful compliance program. Such an answer is easy to express from the moral high ground and safety of a dais. The reality is quitting is not a decision that is made so lightly and should be an action of last resort.

As anyone who toils away at some aspect of compliance for a career, he or she can tell you it can



be, at times, thankless work. Operations or development departments can be single minded in their pursuit of the next deal, transaction or new revenue source and may find compliance inquires to be nothing more than an annoyance. Generally speaking, organizations will never view the compliance department as a revenue center on the balance sheet. Yet, the failure to properly discharge the required state and federal obligations will carry with it the potential risk of civil and, sometimes for willful and repeated failures, criminal penalties. When the dust settles from a disciplinary action, the company is still left with the expense of executing the program that should have been implemented initially, not to mention a stained reputation that will be scrutinized more closely by regulators on a going forward basis.

Merriam-Webster's Dictionary defines "compliance," in part, as "the act or process of complying to a desire, demand, proposal, or regimen or to coercion."¹⁴ For those who find compliance programs to be a burden that interferes with day-to-day gaming operations or an unnecessary diversion of limited resources, I would imagine "compliance" is synonymous with the term "coercion" in the eyes of such an organization. Developing an intelligent framework can be an extreme departure from the way some companies traditionally view compliance--albeit an archaic view, but given the state and federal enforcement actions the past few years, it is a view that unfortunately still exists. Juxtapose this position to that of a company that has adopted a top-down commitment to ensuring it complies with all applicable laws to avoid unsuitable situations or detecting and preventing criminal activity, a compliance program is a valued management tool. It is a business asset.

Implementing a Culture of Compliance should start with the potential compliance officer's job interview. Having done the necessary research on the company, the applicant should be proactive in his or her questions. Who are the members of the management team and what are their respective backgrounds? What are their views on compliance? Do they understand the importance of being committed to implementing compliance in all aspects of the organization? Are they willing to provide the proper level of human and technological resources to this endeavor? Does management participate in spearheading the message of compliance to its team

members or employees? Are employees incentivized to carryout the compliance program's goals? Does the company have a claw back policy regarding employees who participate in the bonus program, but are later determined to have failed to properly discharge their compliance responsibilities? Does management include compliance personnel in strategy meetings to ensure business decisions consider compliance implications? If the compliance department makes a recommendation to change a business practice or association, will management follow the recommendation? If the company has a history of noncompliance, what remedial measures were imposed and have there been changes in personnel including management? Does the company understand the foreseeable consequences and penalties for failing to implement the required state and federal regulatory requirements?

Assuming the candidate has received satisfactory responses to his or her inquiries and becomes the company's compliance officer, the key to implementation then turns to education and documentation. It is critical that the organization as a whole, including management have a fundamental understanding of the compliance program being rolled out, the benefits to the company and the ramifications for noncompliance, as well as how information is gathered and used in furtherance of these goals. By now this culture should have evolved into a "commitment" from the top-down to deploy the kind of program that ensures the soundness of the company's business practices and associations. Throughout the implementation process and going forward, the compliance officer should keep a written record of his or her efforts. Where there is resistance to abide by recommendations, refusal to follow the compliance plan and related internal controls, failure to implement corrective action (whether recommended by compliance personnel or by way of



an independent audit, or as may be mandated by regulators), rejected requests for the necessary human or technological resources, or where revenue interests rebuff or ignore compliance considerations, the compliance officer must thoroughly document these items and pursue an “up-the-ladder” reporting approach to resolve these issues similar to SEC’s rule to implement Section 307¹⁵ of the Sarbanes-Oxley Act of 2002 regarding professional conduct for lawyers representing public companies. Although the SEC also permits lawyers, under certain circumstances, to make a “noisy withdrawal” of his or her representation by notifying the SEC,¹⁶ neither the Nevada Gaming Control Board nor FinCEN have promulgated such standards for a compliance officer.



If the compliance officer has documented his or her efforts, including, where possible, employed an up-the-ladder method to remedy these matters with members of management and/or the compliance committee and resolution cannot or will not be achieved, then resignation, as difficult as it may be, will very likely be the only avenue available. Alternatively, regulators may conclude that the compliance officer who does not keep detailed records and report issues is a willing participant in the company’s deficient compliance program. In 2016, the U.S. District Court for the District of Minnesota upheld FinCEN’s authority under 31 U.S.C. § 5321(a)(1) of the Bank Secrecy Act to impose civil penalties against individuals.¹⁷ Likewise, the Nevada Gaming Commission has the power to revoke, suspend, condition or limit the gaming license of an individual, including the imposition of monetary fines.¹⁸

Being a compliance officer today requires not only the ability to tailor a compliance program to meet the organization’s size and its unique set of risks, but the strength of character to carryout the program’s objectives. The compliance officer wears many hats--educator, record keeper, key voice to the management team, crisis manager and government liaison. It is not a role to be taken lightly. Regulatory expectations will undoubtedly become more strenuous with each passing year. The only way one can hope to exceed in this role is with the full cooperation and support of company’s management, the necessary resources to effectively implement both training and technological tools, being included in strategic planning and having the authorized voice to effect change. Anything less and your organization does not have a Culture of Compliance.

- ¹ Prepared Remarks of Jennifer Shasky Calvery, Director of Financial Crimes Enforcement Network, *2014 Bank Secrecy Act Conference* (June 12, 2014). (<https://www.fincen.gov/news/speeches/prepared-remarks-jennifer-shasky-calvery-director-financial-crimes-enforcement-1>).
- ² Jeffrey R. Rodefer, *Creating and Implementing an Effective Gaming Compliance Program*, 2011 Nevada Gaming Lawyer at 30-31 (www.nvbar-d3wqxtsiwb.netdna-ssl.com).
- ³ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).
- ⁴ See e.g., <http://www.fincen.gov/news-room/enforcement-actions>.
- ⁵ See e.g., www.gaming.nv.gov/index.aspx?=107.
- ⁶ *A Culture of Compliance*, Thomson Reuters (<http://risk.thomsonreuters.com/en/resources/infographic/a-culture-of-compliance.html>).
- ⁷ Fin-2004-A007, Advisory to U.S. Financial Institutions on Promoting a Culture of Compliance (August 11, 2014) (<https://www.fincen.gov/sites/default/files/advisory/FIB-2014-A007.pdf>).
- ⁸ See *Id.*
- ⁹ U.S. Federal Sentencing Guidelines, § 8B2.1(2).
- ¹⁰ *Best Practices for Anti-Money Laundering Compliance*, American Gaming Association at 6 (December 2015). (<https://americangaming.org/sites/default/files/AGA%2020Best%20Practices%20for%20AML%20Compliance%20Final.pdf>).
- ¹¹ See e.g., Investing in America’s Financial Security: Casinos’ Commitment to Anti-Money Laundering Compliance, American Gaming Association (January 2016). (<https://www.americangaming.org/sites/default/files/AGA%20AML%20Research%20Report%20Financial%20119.pdf>).
- ¹² See *Id.*
- ¹³ Prepared Remarks of Thomas Ott, Associate Director of Enforcement, FinCEN, *National Title 31 Suspicious Activity & Risk Assessment Conference* (August 17, 2016) (<http://www.fincen.gov/news/speeches/prepared-remarks-fincen-associate-director-enforcement-thomas-ott-delivered-national>).
- ¹⁴ Merriam-Webster’s Dictionary (<https://www.merriam-webster.com/dictionary/compliance>).
- ¹⁵ 116 Stat 745, P. Law 107-204 (July 30, 2004), § 307.
- ¹⁶ See e.g., 17 C.F.R. Part 205.
- ¹⁷ *U.S. Dep’t of Treasury v. Haider*, ___ F.Supp. 3d ___ (D. Minn. 2016), 2016 WL 107940 at 3; see also, Sally Quillian Yates, Deputy Attorney General, U.S. Department of Justice, *Individual Accountability for Corporate Wrongdoing* (September 9, 2016) (<https://www.justice.gov/archives/dag/file/769036/download>).
- ¹⁸ NRS 463.310(4).