



CREATING AND IMPLEMENTING AN EFFECTIVE GAMING COMPLIANCE PROGRAM

By Jeff Rodefer

Gaming compliance programs, I suspect, will never be a conversation starter at any social function that you attend. Equally, I would not imagine anything written on the subject to make a best seller or must read list. Nor, am I deluded into thinking this was the first article you turned to in this year's *Nevada Gaming Lawyer*. And, you are probably saying to yourself right about now "well, certainly not the best introduction I've read." True. I suppose I could have led with something like, "Gaming compliance programs, please address your hate mail to former Nevada Gaming Control Board (Board) Chairman, Steve DuCharme." But, I like Steve and that would not be fair. To be honest, Steve should be receiving thank you notes since he created a lot of jobs in the industry and forced companies to take a more proactive role in looking at their business practices.

May be you received your first exposure to compliance programs when the Nevada Gaming Commission (Commission) placed a condition on your company's license or, more likely, a provision in your company or client's order of registration. You thought...compliance program? What? Where do I start?

Over the years, I have received more than a few telephone calls or visits from private attorneys representing a newly licensed company, general counsels and compliance officers wanting some sort of Cliff Notes on developing a compliance program. No doubt, Mike LaBadie, Chief of the Board's

Investigations Division, has received significantly more inquiries about what to do. He would tell you there is no magic formula for creating a compliance program. Each should be tailored to the unique needs and size of each registrant/licensee. Obviously, the areas of exposure for casino operators and manufacturers of gaming devices are different and, as such, your plan should reflect that. Before looking at some of the key elements common to any successful program, it is important to understand how compliance programs came about.

Background.

Compliance programs gained greater significance in the wake of the Nevada Legislature repealing the licensing process for Nevada companies to be involved in foreign gaming operations. Prior to this Legislative change in 1993 (A.B. 470), a Nevada company who wanted to be involved in gaming operations in another jurisdiction had to file an application with the Board, go through a formal investigation lasting several months and then ultimately onto a public agenda for a Board recommendation and then the Commission's approval. See Act of April 8, 1993, ch. 175, § 1-6, 1993 Nev. Stat. 302-304. Many of the companies that obtained such an approval for their foreign gaming ventures were required to establish and maintain a compliance program. The Legislature recognized that this practice clearly put Nevada licensees at a distinct disadvantage when trying to compete with non-Nevada companies for the limited number of gaming licenses available outside of our

state. This uneven playing field hampered the ability of Nevada companies to grow revenues, especially at a time when gaming saw tremendous expansion across the country and around the world.



Without the ability to effectively increase revenues, our licensees would have found making further capital investment in Nevada difficult. In the end, the process was replaced by the informational filing requirements currently found in the foreign gaming reporting statutes, codified at NRS 463.680-463.720.

As Nevada companies began to move into these new and, in many cases, emerging jurisdictions, who had yet to fully develop their regulatory frameworks, Nevada regulators demanded our licensees to conduct their foreign operations with the same strict regulatory expectations as if operating on Nevada soil. In 1991, the Commission adopted Regulation 5.045 that provided a broad outline for when a compliance program would be imposed and what it should cover. For several years, compliance programs were discretionary with the Commission when circumstances dictated that additional management oversight was required by an applicant/company. During this time period, the Commission generally saw fit to require compliance programs for most manufacturers and distributors. In 1999, Chairman DuCharme recommended and the Commission agreed to make gaming compliance programs mandatory for all public companies through a provision in each company's order of registration. NRS 463.635(1)(c) (orders can be viewed at http://gaming.nv.gov/corpsec_orders.htm). As a result, gaming companies were no longer expected to merely comply with statutes, regulations and minimum internal controls, but they were also forced take on a significant role in self-regulating their business practices and who they did business with.

Creating a Compliance Program.

Compliance Plan. A compliance program starts with your company's gaming compliance and reporting plan. It is a written document setting forth the company's commitment to and guidelines for regulatory and legal compliance. The plan will generally cover, as applicable, the following areas:

- Sales and distributions of gaming devices;
- Material transactions;
- Suppliers of goods or services (vendors);
- Changes in officers, directors and key gaming employees;
- Lobbyists and consultants;
- Material financings;
- Material litigation;
- Junket representatives/independent agents;
- Compliance with the laws;
- Acts of wrongdoing (by both employees and the company or its affiliates);
- Review of substantial shareholders (5% or greater); and
- Lessees and tenants.

Although every compliance plan may address many of the same areas outlined above, the specific terms of your plan can and should be negotiated with the Board to ensure the document best serves the individual needs of your company. Areas that you should consider looking at when developing your plan:

- Monetary thresholds for vendors, consultants, tenants, key gaming employees, material transactions, material financings and material litigation;
- Whether to review political contributions; and
- Carve-outs from due diligence reviews for individuals and companies holding gaming licenses or other gaming related approvals, as well as limited reviews for, among others, publicly traded companies, foreign public companies and federally registered banks.

What is the purpose of the plan? It is a management tool to assist the registrant/licensee in avoiding unsuitable situations that could bring discredit to our industry or state and potentially result in a disciplinary action that could include revocation of a particular license, approval or finding of suitability. NRS 463.310(4); Nev. Gaming Comm'n Reg. 5.011. Unsuitable situations are generally defined in every plan as engaging in

business with an unsuitable person, failing to comply with the laws and regulations of a gaming jurisdiction, a material violation of your compliance and reporting plan, or any situation deemed unsuitable by your company's compliance committee.

Typically, an unsuitable person is someone who has had his or her gaming application denied by a gaming authority, had his or her license revoked by a gaming authority, a person that a gaming authority deems to be unsuitable for

association with a licensed gaming establishment and your company or client has notice of the gaming authority's denial, revocation or unsuitable finding. In Nevada, the latter notice requirements would encompass anyone on the List of Excluded Persons or in the Blackbook (http://gaming.nv.gov/loep_main.htm) set forth in NRS 463.151 *et seq.*, including the List of Denials and Findings of Unsuitability, more commonly known as the Gray List (http://www.gaming.nv.gov/documents/pdf/denials_revocations_list.pdf) as established by NRS 463.165(8). Finally, an unsuitable person can also be anyone that your company determines to be unqualified to do business with due to their past activities, reputation, antecedents, associations or financial practices. Once the terms of your plan have been agreed to, the Chairman of the Board will administratively approve the plan and any subsequent revisions thereto.

Internal Reporting System.

Following the Chairman's approval of your compliance plan, you will want to establish a written internal reporting system (IRS). This document will specifically detail how information in each area of the plan will be gathered and disseminated. For example, if your plan requires due diligence to be performed on any vendor that the company had aggregate expenditures with in the prior year of more than \$500,000, then the IRS needs to address how this information will be transmitted to the compliance officer. If your company operates multiple casinos, then the IRS should require a reporting line from each property,

as well as the corporate purchasing department to the compliance officer to ensure all vendors meeting this threshold requirement are captured for review.

Compliance Committee and Compliance Officer.

Similar to the compliance plan, the Board Chairman will administratively approve the members of your compliance committee and the person appointed to serve in the role of compliance officer. The makeup of a compliance committee can vary. Usually, the plan will require at least one member to be independent. Although most companies follow this model,

some have chosen to have a majority of their members be independent or, in the case of MGM Resorts International, all of its members are independent. See Bryan L. Wright, *Taking Compliance to the Next Level: The New MGM Mirage Compliance Plan*, Nevada Gaming Lawyer 18 (September 2007). Per Regulation 5.045(5), at



least one member of the compliance committee must be "knowledgeable of the provisions of the Nevada Gaming Control Act and the regulations of the commission."

Implementation.**Key Elements.**

All successful compliance programs share these common elements:

- **Support of Senior Management.** The program has to be fully supported by senior management of your company. Senior management cannot view the program as a nuisance or merely window dressing to appease regulators. Senior management must understand the importance of a compliance program as a legitimate management tool.
- **Education.** The compliance officer must educate everyone from senior management to property level personnel about compliance generally and, more specifically, why your company has a compliance program, as well as the particular areas covered by the plan. Your compliance program will only be as good as the people who carry it out on a daily basis. If no one is thinking about compliance or keeping it in the forefront of their thought process, your program will have no value.
- **Electronic Record Retention and Management System.** Your company must establish an electronic record retention and management system that is secure and confidential. The failure to establish such an

e-filing database is as negligent as the lawyer who refuses to use WestLaw, LexisNexis or some other online system to conduct legal research and relies on the old method of pulling books off the shelf. Without an electronic database, the compliance officer cannot hope to stay on top of the voluminous amount of records that your compliance program will generate over time.

- **Good Working Relationship With Regulators.** The compliance officer should have a good working relationship with your regulators, who can assist with the various questions and issues that will undoubtedly arise.

Education. In looking at a couple of these elements more closely, education is critical. The burden is upon the compliance officer to effectively communicate the compliance program to all whose job function requires some knowledge of compliance. This can be accomplished through informal and periodic educational seminars for property personnel and corporate departments every 12-24 months. You may find developing a PowerPoint that attendees can follow during the seminar and can access online later to be valuable. The training should address everything from what a compliance plan is, why it exists, to the areas covered under your company's plan, how information is gathered, what the compliance officer does with the information, how and when due diligence is performed, how the information is transmitted to the compliance committee for review, how the committee's decisions especially denials are disseminated or posted and what the consequences are for failing to follow the plan.

Additionally, you may find development of an online resource center on your company's intranet site useful for compliance and other personnel. The resource center should contain a copy of the plan, the IRS, the historical list of the committee's approved individuals and entities, the historical list of the committee's denied individuals and entities, copies of policies (e.g., background investigation policy, slot distribution policy, code of conduct, etc.) and various forms, including your PowerPoint presentation.



Records Retention and Management. Of no less importance than education is a proper records retention and management system. Developing an electronic database through your IT Department or a third party vendor is vital. The database should be:

- **Secure.** The electronic database will contain an enormous amount of information and much of which will be confidential.
- **Full Cross-Referencing.** The database must have full cross-referencing capability. For instance, if the committee was to deny an individual as a junket representative/independent agent and several years later that individual reappears as one of several principal owners of a vendor, the compliance officer should be able to easily access this fact before presenting his or her final report to the committee on the vendor. The compliance officer, the committee and the program in general will look foolish if the vendor in this example is approved without any discussion about the previously denied principal.
- **e-Filing.** The database should also be a full e-filing system. It should contain all correspondence with vendors, consultants, tenants, etc., copies of completed background investigation consent forms and the related investigative reports. This information is too sensitive to be kept under lock and key in a file cabinet.
- **Produce Reports.** The database should have the ability to print off various types of reports, including a list of individuals and entities who have yet to complete and return their background investigation consent forms, a list of those whose consent forms have been received and their related background investigation is pending, a list of those whose background investigations are completed and are pending consideration by the compliance committee, the historical list of committee's approved individuals and entities, including the committee's historical list of denied individuals and entities.
- **Re-Investigation Notice.** Finally, the database should trigger each year a list of



individuals and entities due for re-investigation. Your compliance committee will want to adopt a re-investigation policy that should be no longer than 5 years.

One significant corollary of an electronic database...it will make audits of the compliance program easier and less time consuming for your regulators.

Minutes. One of the records that must be prepared and maintained is the minutes from the compliance committee's quarterly and special meetings. To be effective, the minutes must be meaningful. More specifically, a person unfamiliar with your compliance program should be able to read the minutes of any meeting and easily determine what issues were discussed and what, if any, action the committee took. If the minutes of your committee's meetings cannot pass this basic test, they are deficient.

Due Diligence. The required due diligence will fall into one of three categories:

- **Licensees.** If the individual or entity subject to review holds a gaming license or other gaming related approval, then the review should be limited to verifying that the particular license or approval is still active and in good standing.
- **Publicly Traded Companies.** If the entity is a publicly traded company, then the review may be limited to the most recent Form 10-Q or 10-K filing, listing information on the NYSE or NASDAQ, Hoover's Online, Yahoo Finance, Google Finance, press releases and the public company's website, among others, to determine if there is any derogatory information that the compliance committee should be aware of.
- **Everyone Else.** However, most investigations will not fall into one of the carve outs listed above. As such, the compliance officer will need to send out to

the entity and its principals the background investigation consent forms to permit the review.

Most gaming companies conduct due diligence in-house through their Risk Management, Emergency Management or Corporate Security Departments. The sources that are typically accessed include:

- LexisNexis;
- Accurate background (for criminal history);
- Various lists of excluded persons;
- Nevada's Gray List;
- Trans Union, Equifax and Experian credit reports;
- Central Credit (Casino Credit System)



- Better Business Bureau;
- Social Security Administration;
- Nevada Gaming Control Board (work cards);
- Employment verification;
- Public databases (secretary of state websites, contractor and engineering boards, professional licensing records, etc.);
- Office of Foreign Assets Control (OFAC), as well as terrorist and various watch lists.

Occasionally, due diligence cannot be performed. For example, a vendor may be the exclusive regional distributor of a product such as, beer. The vendor is a private company and does not hold any gaming license or approval. To complicate the issue, the vendor refuses to complete the necessary consent forms to permit a background review. Your casinos need this product and there is no alternate vendor. What do you do? A good working relationship between your compliance officer

and the Corporate Securities Section of the Board's Investigations Division is critical in resolving this issue...which may involve doing as much of an investigation as possible, albeit limited, using public databases. The report to the compliance committee and the minutes should reflect the vendor's refusal to cooperate in the investigation, the fact that the review was limited and the results of the compliance officer's discussions with the Board.

Additionally, you may find that a specific investigation cannot be conducted in-house due to the individual or entity under review being a foreign resident. In such a case, the company may need to contract with a third party agency to perform the review.

Conclusion.

If your compliance program has the following key elements, it should be an effective management tool:

- Support of senior management;
- Education of key personnel;
- Electronic records retention and management system; and
- Development of a good working relationship with your regulators.

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