BEYOND THE SAR-C: BEST PRACTICES FOR GAMING COMPANIES TO "KNOW THEIR CUSTOMER" AND AVOID ORGANIZATIONAL MONEY LAUNDERING LIABILITY IN THE POST-*SANDS* CLIMATE

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Recently, federal prosecutors and law enforcement agents have taken novel and aggressive actions to address the laundering of illicit funds through U.S.-based gaming companies. On the heels of a criminal investigation concerning the Las Vegas Sands Corporation ("Sands"), which operates one of Nevada's largest casino complexes,[1] regulators are urging gaming companies to be more diligent in filing Suspicious Activity Reports for Casinos (SARs or SAR-Cs) with the U.S. Treasury,[2] as federal law requires when patrons engage in suspected money laundering.[3] Regulators and prosecutors, however, have also made clear that merely filing a SAR-C does not necessarily discharge a gaming company's legal responsibilities; nor does it necessarily insulate a company from liability arising from a patron's money laundering activity.[4] In the aftermath of the Sands investigation, federal and state regulators are also encouraging casinos to enhance their anti-money laundering ("AML") controls, to ensure compliance with AML regulations, and to take more proactive steps to "know their customers"—that is, to take measures that give casinos reasonable assurances that their patrons are not gambling with, or engaging in any other transactions with, illegally-acquired money.[5]

Part I of this article summarizes the events giving rise to the *Sands* investigation, the non-prosecution agreement that the Sands Corporation entered into with the government to resolve that matter, and the subsequent statements of prosecutors and regulators concerning their broader AML enforcement efforts. Then, Part II suggests a series of measures gaming companies may consider putting in place, in light of the *Sands* case and other recent developments, in

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[1] State of Nev. Gaming Control Bd., *2014 Listing of Financial Statements Square Footage*, 10 (Jan. 13, 2015, 11:02 AM) http://gaming.nv.gov/modules/showdocument.aspx?documentid=3428.

[2] *See generally* Jennifer Shasky Calvery, Dir., Fin. Crimes Enforcement Network, Prepared Remarks at the Global Gaming Expo (Sept. 24, 2013), *available at* http://www.fincen.gov/news_room/speech/pdf/20130924.pdf.

[3] 31 C.F.R. § 1021.320(a)–(b) (2014).

[4] *See infra* Part I.A.

[5] *See* Shasky Calvery, *supra* note 2, at 2–6; *see also infra* Part I.B.

order to strengthen their compliance efforts and minimize their exposure under the federal money laundering laws.

I. BACKGROUND

A. *Zhenli Ye Gon and the Sands Casinos*

In early 2005, a Mexican national named Zhenli Ye Gon introduced himself to hosts and staff at the Venetian and Palazzo casinos, adjacent properties both indirectly owned and operated by Sands.[6] Ye Gon submitted a credit application to the Venetian, stating that he was in the "chemical business."[7] He passed his credit check and presented a valid form of identification.[8] Casino staff ran Ye Gon's name against the Treasury's Office of Foreign Assets Control (OFAC) "prohibited parties" lists.[9] Because Ye Gon did not appear on any of the lists, the Venetian and Palazzo cleared him to gamble.[10] Each casino recorded and monitored Ye Gon's play in accordance with federal and state regulations.[11] Ye Gon played big.[12]

By late 2006, Ye Gon was the largest "cash up front" gambler the Venetian had ever seen.[13] Between February 2005 and March 2007, Ye Gon wire transferred approximately $45 million to the Venetian and Palazzo, and he deposited an additional $13 million in cashier's checks.[14] By March 2007, Ye Gon had used most of these funds (and additional funds fronted by the casinos) to play table games, including in the Venetian and Palazzo's private gaming rooms.[15] All in all, Ye Gon lost—and Sands gained—over $53 million as a result of his play.[16] This was enough for casino management to take note; in fact, Ye Gon's business was substantial enough to affect the bonuses of Venetian and Sands executives.[17] At operational meetings, "they discussed how Ye Gon had become such a large gambler in a relatively short period of time and discussed the source of his funds."[18] The executives concluded that the Vene-

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[6] Non-Prosecution Agreement Between the Las Vegas Sands Corp. and the U.S. Att'ys Office for the Cent. Dist. of Calif., Attachment A ¶ 10 (Aug. 26, 2013), *reprinted in* 17 GAMING L. REV. & ECON. 584, 586 (2013) [hereinafter Sands Non-Pros. Agreement]; Michael Luo, *Las Vegas Casino Settles in Money-Laundering Inquiry*, N.Y. TIMES, at A16 (Aug. 28, 2013), http://www.nytimes.com/2013/08/28/us/las-vegas-casino-settles-in-money-laundering-inquiry.html?_r=0. *See also* Jorge Carrasco, *Mexico, the DEA, and the Case of Zhenli Ye Gon*, WASH. POST (Oct. 29, 2008, 12:00 AM), http://www.washingtonpost.com/wp-dyn/content/article/2008/10/28/AR2008102801364.html.

[7] Sands Non-Pros. Agreement, *supra* note 6, at 587.

[8] *Id.* at 589.

[9] *Id.*

[10] *Id*.

[11] *See id.*

[12] *Id.* at 587–88.

[13] *Id.* at 587.

[14] *Id.* at 586.

[15] *Id.* at 588–89.

[16] *Id.* at 588.

[17] *Id.*

[18] *Id.* at 590.

tian's continued business with Ye Gon "was very good financially," and proactively cultivated the relationship.[19]

This outlook changed abruptly on March 15, 2007, when Mexican authorities executed a search on Ye Gon's Mexico City home, seizing seven weapons and more than $207 million worth of U.S. currency.[20] Within several months, Ye Gon was arrested in Maryland and charged in the District of Columbia with conspiracy to import methamphetamine into the United States.[21] A Drug Enforcement Administration agent's affidavit, filed in support of Ye Gon's arrest warrant, confirmed that Ye Gon was in the pharmaceutical business, but it stated that in 2005, he began supplying methamphetamine ingredients to drug dealers.[22] According to the DEA affidavit, "a Mexican organized crime group . . . . wanted to store cash at Ye Gon's residence in Mexico City," and ultimately "wanted Ye Gon to launder their money" in Las Vegas.[23] Together with the U.S. currency, guns, and various other items seized from his home, authorities found Ye Gon's "player's club" cards from Las Vegas casinos.[24]

Prior to the March 2007 search of Ye Gon's home, Sands had not reported any of his gambling activity as suspicious.[25] Sands had, however, filed numerous Currency Transaction Reports (CTRs) with the Treasury's Financial Crimes Enforcement Network (FinCEN).[26] But only once, on April 18, 2007, did the company file a SAR-C,[27] which is required for any transaction of at least $5,000 where a casino "knows, suspects, or has reason to suspect that the transaction . . . [i]nvolves funds derived from illegal activity."[28] The U.S. Attorney's Office for the Central District of California found this SAR-C lacking, both because it was late and because prosecutors deemed Sands' disclosures to be insufficient.[29] Prosecutors described that, in their view, Venetian and Palazzo personnel disregarded a series of "red flags" that were raised while their top "cash up front" client gambled and lost unprecedented amounts of money at their casinos.[30] For example:

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[19] *Id.*; *see also* Mark Stevenson & Michael Rubinkam, *Drug Suspect Accuses Mexican Official*, WASH. POST (July 3, 2007, 12:27 AM), http://www.washington post.com/wpdyn/content/article/2007/07/02/AR2007070200157_pf.html ("He was such a treasured customer that the Venetian Resort Hotel Casino gave him a Rolls-Royce.").

[20] Sands Non-Pros. Agreement, *supra* note 6, at 588; Chavez Affidavit in Support of Complaint & Arrest Warrant for Zhenli Ye Gon at ¶¶ 10, 20–21, United States v. Ye Gon, No. 1:07-cr-00181-EGS (D.D.C. June 15, 2007), *available at* http://ia600407.us.archive.org/21/items/gov.uscourts.dcd.126720/gov.uscourts.dcd.126720.1.0.pdf.

[21] Carrasco, *supra* note 6; Indictment as to Zhenli Ye Gon at 1–2, United States v. Ye Gon, No. 1:07-cr-00181-EGS (D.D.C. July 26, 2007), *available at* http://ia600407.us.archive.org/21/items/gov.uscourts.dcd.126720/gov.uscourts.dcd.126720.3.0.pdf.

[22] Chavez Affidavit, *supra* note 20, at ¶¶ 5, 11, 24.

[23] *Id.* at ¶¶ 25–26 (emphasis of party names omitted).

[24] *Id.* at ¶¶ 21.

[25] Sands Non-Pros. Agreement, *supra* note 6, at 591.

[26] *Id*.

[27] *Id.*

[28] Suspicious Transaction Reports Rule, 31 C.F.R. § 1021.320(a)(2)(i) (2014).

[29] *See* Sands Non-Pros. Agreement, *supra* note 6, at 586–87, 591; *see also* Steve Kanigher, *Las Vegas Sands Agrees to Return Money to U.S. Government*, 8NEWSNOW (Aug. 27, 2013, 4:24 PM), http://www.8newsnow.com/story/23271739/las-vegas-sands-agrees-to-return-money-to-us-government (discussing the contents of the non-prosecution agreement).

[30] *See* Sands Non-Pros. Agreement, *supra* note 6, at 587.

- Ye Gon wired money to the Venetian and Palazzo from nine different financial institutions in total, all located in Mexico: two banks and seven "casas de cambio."[31] Ye Gon would send funds from various different financial institutions during the course of a single trip, sometimes even in a single day.[32] The government deemed the use of so many financial institutions in quick succession a red flag—particularly since casas de cambios had been the subject of a previous FinCEN money laundering advisory.[33]
- Ye Gon sent at least three of these wire transfers (totaling over $1.5 million) to a Sands subsidiary in Hong Kong, rather than to Las Vegas directly, leading prosecutors to infer that Ye Gon sought to avoid the more stringent reporting requirements of U.S.-based casinos.[34]
- Ye Gon wired certain amounts from the same institutions in successive days, appearing to break large transfers into smaller, less conspicuous transactions.[35] When casino staff asked him to make larger wire transfers—because keeping up with the incremental wires was quite burdensome—Ye Gon declined.[36] According to one witness, "Ye Gon stated that he preferred to wire the money incrementally because he did not want the government to know about these transfers."[37]
- Ye Gon identified at least seven different originators for his wire transfers.[38] That is, he told casino staff that his funds were coming from accounts in the name of five distinct entities, as well as from two individuals.[39] In the prosecutors' view, the fact that Ye Gon was receiving funds from accounts not in his own name raised suspicion, because—due to the high number of wire transfer originators—casino staff could only link Ye Gon to two of the originating entities through public record searches, and the staff could not determine any of the entities' ownership.[40] Further, the two individuals referenced in the wire transfers appeared not to be related either to Ye Gon or to each other.[41]

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[31] *See id.* Casas de cambio, or "money exchange houses," are relatively lightly regulated and pose a problem for Anti-Money Laundering enforcement agencies. Chavez Affidavit, *supra* note 20, at n.2; *see also* FIN. ACTION TASK FORCE, MUTUAL EVALUATION REPORT—ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM: MEXICO, 48 (2008), *available at* http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20Mexico%20ful.pdf.

[32] Sands Non-Pros. Agreement, *supra* note 6, at 588.

[33] *Id.* at 587–88; *see also* Chavez Affidavit, *supra* note 20, at n.2 (discussing casas de cambios and how Ye Gon utilized them for his wire transfers).

[34] *See* Sands Non-Pros. Agreement, *supra* note 6, at 587.

[35] *Id.* at 587, 590.

[36] *Id.* at 590.

[37] *Id.* Another casino executive recalled the circumstances differently, saying that Ye Gon declined to combine his wire transfers because he "was superstitious about sending large amounts of money to the Venetian at one time for fear of losing all the money at once." *Id.*

[38] *Id.* at 587, 590.

[39] *Id.* at 587.

[40] *Id.* at 587, 589–90.

[41] *See id.* at 590–91.

- The paperwork for many of Ye Gon's wire transfers failed to designate him as the beneficiary of the transactions.[42] Because Ye Gon was not obviously linked to any one of his originators, the government saw this as further cause for suspicion.[43] One wire designated the Venetian-Palazzo as the beneficiary, and only designated Ye Gon upon follow-up inquiry.[44] On other occasions where no beneficiary was listed, the Venetian failed to make any follow-up inquiry, even though it was casino policy to do so.[45]
- Finally, Ye Gon requested that, for "privacy" reasons, the Venetian receive funds into an account not bearing the name of a casino.[46] After consulting its in-house counsel and compliance officers, Sands agreed to receive funds from Ye Gon into an account held in the name of "Interface Employee Leasing"—an account used to pay pilots operating the company's private jets that had never before been used to receive wire transfers from casino patrons.[47] Although counsel authorized Ye Gon to use the Interface Employee Leasing account only "one time," Ye Gon sent fifteen wire transfers to this account, totaling approximately $5.2 million.[48]

In the view of the U.S. Attorney's Office ("USAO"), the above irregularities—Zhenli Ye Gon's use of different financial accounts, held in different, seemingly unrelated names; his tendency to break wire transfers up in to smaller tranches, without a coherent, legitimate explanation; his failure to designate himself as a wire transfer beneficiary; his routing of wire transfers through foreign jurisdictions; and perhaps most significantly, his insistence on the use of a name-neutral account to receive the funds—required a more timely and robust response from Sands.[49] Deeming Sands complicit in Ye Gon's money laundering and in his evasion of financial reporting requirements, the USAO pursued a criminal investigation against the corporation.[50]

On August 26, 2013, Sands and the USAO entered into a non-prosecution agreement, effectively resolving the criminal investigation.[51] Under this deal, the USAO agreed to not prosecute Sands on charges of conspiracy (in violation of 18 U.S.C. § 371) or willful failure to file a SAR-C (in violation of 31 U.S.C. §§ 5318(a) and 5322(a)), or on any other "related" charges.[52] In exchange, Sands agreed to forfeit to the government $47,400,300 of the funds received

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[42] *Id.* at 587.

[43] *Id.*

[44] *Id.* at 589.

[45] *Id.* at 590.

[46] *Id.* at 588.

[47] *Id.*

[48] *Id.* at 590.

[49] *Id.* at 586–87, 591.

[50] Press Release, U.S. Att'y's Office for the Cent. Dist. of Cal., Operator of Venetian Resort in Las Vegas Agrees to Return Over $47 Million After Receiving Money Under Suspicious Circumstances (Aug. 27, 2013), http://www.justice.gov/usao/cac/Pressroom/2013/110.html [hereinafter *Sands Press Release*].

[51] Sands Non-Pros. Agreement, *supra* note 6, at 584.

[52] *Id.*; *Sands Press Release*, *supra* note 50.

from or on behalf of Ye Gon.[53] The company also made detailed public disclosures about its relationship with Ye Gon and agreed to enhance its AML procedures, for instance by adjusting the compensation incentives of casino employees and forbidding the use of name-neutral bank accounts.[54] Finally, Sands agreed to enhanced reporting requirements for a two-year period, with the understanding that if the company failed to make these required reports (or otherwise was deemed to breach the agreement), prosecution on the foregone charges might be initiated.[55]

As the USAO intimated in its accompanying press release, the "related" criminal charges referenced in the Sands non-prosecution agreement include the federal criminal code's far-reaching money laundering provisions.[56] Among these are:

- **18 U.S.C. § 1956(a)(1)**, which makes it a felony to knowingly conduct a transaction with the proceeds of certain unlawful activities for the purpose of promoting the unlawful activity, violating tax laws, concealing the source or owner of the funds, or evading state or federal reporting requirements;[57] and
- **18 U.S.C. § 1957(a)**, which makes it a felony to knowingly conduct a transaction in property derived from certain unlawful activities, regardless of specific purpose, so long as the property in question exceeds $10,000 in value.[58]

The federal criminal case against Ye Gon, interestingly, did not include charges of money laundering.[59] In fact, in a strange twist, the Department of Justice's Criminal Division moved to dismiss Ye Gon's indictment in June 2009 so that he could be extradited to Mexico to face money laundering and related charges *there*.[60] But this is of small solace to Sands, as the developments in Ye Gon's personal criminal proceedings obviously did not deter the USAO for the Central District of California, or its cooperating federal law enforcement agencies, from investigating the events at the Venetian and Palazzo. Indeed, these agencies view the *Sands* case as part of their broader efforts to improve AML compliance and, in particular, to change the culture among Las Vegas-based gaming companies.[61] As U.S. Attorney Andre Birotte Jr. put it:

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[53] *Sands Press Release*, *supra* note 50.

[54] Sands Non-Pros. Agreement, *supra* note 6, at 591–92.

[55] *Id.* at 585, 592.

[56] *Sands Press Release*, *supra* note 50.

[57] Laundering of Monetary Instruments, 18 U.S.C. § 1956 (2012).

[58] Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity, 18 U.S.C. § 1957 (2012). Sections 1956 and 1957 both target, primarily, the proceeds of "specified unlawful activity," including, *inter alia*, illegal drug sales. 18 U.S.C. §§ 1956(c)(7)(B)(i), 1957(f)(3). However, while the funds must in actuality pertain to *specified* illegal activity, a defendant need only be aware of a general criminal connection in order to be found liable. 18 U.S.C. §§ 1956(a)(1), 1957(a).

[59] Indictment, *supra* note 21, at 1–2.

[60] Mot. to Dismiss at 2–4, United States v. Ye Gon, No. 1:07-cr-00181-EGS (D.D.C. Jun. 22, 2009); *see also* Gon v. Holt, 774 F.3d 207, 209 (4th Cir. 2014) (affirming extradition of Ye Gon to Mexico).

[61] *See Sands Press Release*, *supra* note 50.

> What happens in Vegas no longer stays in Vegas . . . . For the first time, a casino has faced the very real possibility of a federal criminal case for failing to properly report suspicious funds received from a gambler. This is also the first time a casino has agreed to return those funds to the government. All companies, especially casinos, are now on notice that America's anti-money laundering laws apply to all people and every corporation, even if that company risks losing its most profitable customer.[62]

B. Additional Developments

Of course, the *Sands* case was not worked up in a vacuum. At this point, there is at least a decade-long history of the federal government pursuing criminal investigations against corporations only to ultimately negotiate non- or deferred prosecution agreements that include expansive corporate cooperation, monitoring, and institutional reform provisions.[63] Though the actual prosecution of large business entities to date has been relatively rare, the risks for a criminally targeted corporation are obviously enormous—enough so that many companies faced with a credible prosecution threat will readily agree instead to bear the (sometimes quite onerous) burdens of cooperation, monitoring, and reform, in addition to fines and other monetary penalties.[64] And the government, for its part, has come to rely on corporate cooperation as a means of amplifying and projecting its power, deterring and incapacitating would-be individual criminals, and supporting the investigation and prosecution of individual targets and defendants.[65] Questions have certainly been raised—and likely will continue to be raised—regarding the fairness and constitutionality of the government effectively "deputizing" private companies to assist in law enforcement.[66] Still, though the rules have been tweaked around the edges,[67] the government can be expected to continue its efforts to leverage organizations' regulatory, civil, and criminal exposure into institutional reforms designed to enhance compliance.

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[62] *Id*.

[63] *See generally, e.g.*, Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 888–90 (2007) (detailing the emergence of the "pre-trial diversion agreements" that are now regularly used by the Department of Justice).

[64] *See id*. at 855, 890; Susan B. Heyman, *Bottoms–Up: An Alternative Approach for Investigating Corporate Malfeasance*, 37 AM. J. CRIM. L. 163, 166 (2010).

[65] *See* Heyman, *supra* note 64, at 166–67; Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions*, 89 N.C. L. REV. 23, 2831, 45–49 (2010).

[66] *See, e.g.*, Garrett, *supra* note 63, at 856–57; Heyman, *supra* note 64, at 166; *see generally* Miriam H. Baer, *Organizational Liability and the Tension Between Corporate and Criminal Law*, 19 J. L. & POL'Y 1, 12–14 (2010) (discussing corporate governance and the tensions between corporate law and criminal investigations).

[67] *See, e.g.*, Memorandum from Paul J. McNulty, Deputy Att'y Gen., to Heads of Dep't. Components and U.S. Att'ys (Dec. 12, 2006), http://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf (directing that federal prosecutors, except in unusual cases, are precluded from requiring corporations to waive privileges or forego paying employees' legal fees as a condition of a non- or deferred prosecution agreement).

Indeed, the government has been especially assertive in the AML context. Notably, on December 11, 2012, the Department of Justice entered into a deferred prosecution agreement with HSBC Bank USA ("HSBC"), wherein the bank admitted to violating parts of the Bank Secrecy Act[68] by "willfully failing maintain an effective anti-money laundering (AML) program [and] willfully failing to conduct due diligence on its foreign correspondent affiliates."[69] Like Sands, HSBC admitted that it ignored "evidence of serious money laundering risks associated with doing business in Mexico"; and like Sands, HSBC agreed to beef up its AML compliance structures and cooperate with the government, and consented to substantial forfeitures in order to avoid prosecution.[70] Prosecutors fielded some public criticism that the HSBC deferred prosecution agreement was too lenient,[71] but in approving the agreement, the district court concluded that it "imposes upon HSBC significant, and in some respect extraordinary" remedial measures.[72]

With respect to the gaming industry in particular, prosecutors and regulators have indicated that enhanced AML measures are warranted in the aftermath of *Sands*. FinCEN's recently appointed director, Jennifer Shasky Calvery—formerly the chief of DOJ's Asset Forfeiture and Money Laundering Section[73]—told a Las Vegas gaming convention in September 2013 that the industry needed to "make a cultural change":[74]

> When some casinos say that they are in the gaming business and not really in the business of providing financial services, I get the impression that they are saying that they should not have as much responsibility [as banks] in the AML context . . . . I fear there may be a culture within some pockets of the industry of reluctant compliance with the bare minimum, if not less . . . .
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> But whether a company is in the business of helping people invest and protect their money, or using that money for the purpose of entertainment, both are at risk. Both can serve as the vehicle for the use and movement of ill-gotten gains. And just like everyone else, casinos are responsible for reporting suspicious activity when they suspect that the money being brought to them for gaming derives from an illegal source.[75]

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[68] 31 U.S.C. §§ 5311–5324 (2012).

[69] Press Release, Dep't of Just., Bank Agrees to Enhanced Compliance Obligations, Oversight by Monitor in Connection with Five-year Agreement (Dec. 11, 2012), http://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations [hereinafter *HSBC Press Release*].

[70] *Id*.

[71] United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 WL 3306161, at *7 (E.D.N.Y. July 1, 2013) (memorandum and order granting deferred prosecution agreement).

[72] *Id.* at *11.

[73] *See* Biography of Jennifer Shasky Calvery, FIN. CRIMES ENFORCEMENT NETWORK, http://www.fincen.gov/about_fincen/pdf/bio_director.pdf (last visited Jan. 31, 2015).

[74] John L. Smith, *Reluctant Casinos Get Clear Warning*, LAS VEGAS REV.–J. (Sept. 29, 2013, 12:12 AM), http://www.reviewjournal.com/columns-blogs/john-l-smith/reluctant-casinos-get-clear-warning.

[75] Shasky Calvery, *supra* note 2, at 2–3.

Kevin Rosenberg, the Assistant U.S. Attorney who prosecuted *Sands*, was even more blunt than Ms. Shasky Calvery: "We're not going to hesitate to go where the evidence takes us and where the money is, so if it happens to be other casinos, then so be it."[76] In fact, in fall 2013, a second gaming company, Caesars Entertainment Corporation, disclosed that it was under grand jury investigation regarding potential money laundering offenses.[77] FinCEN stated that it was determining "whether it [was] appropriate to assess a civil penalty and/or take additional enforcement action against Caesars Palace."[78] The chairman of the Nevada Gaming Control Board added that, "[i]f federal laws have been violated, that could very well lead to disciplinary action based upon Nevada gaming laws."[79]

In sum, the post-*Sands* climate seems to be a perilous one for gaming companies. The confluence of several factors—a national-headline-grabbing case, an expansive AML regulatory regime, the ascendance of a core group of aggressive government officials, and broader trends in corporate criminal prosecution (not to mention the potential for sizable asset forfeitures that can flow into budget-strapped agency coffers)[80]—has elevated money laundering crimes to the top tier of various law enforcement agencies' priorities and placed the gaming industry squarely in the crosshairs.

In order to withstand the elevated scrutiny from federal and local agencies, and ultimately to avoid organizational money laundering liability, the government has urged casinos to review their internal controls and to enhance their AML compliance processes. What follows are several suggestions for strengthening AML compliance.[81]

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[76] Alexandra Berzon, *Casinos Heed U.S. Reporting Warning*, WALL ST. J. (Sept. 2, 2013, 7:04 PM), http://www.wsj.com/articles/SB10001424127887324324404579043891355927758.

[77] Howard Stutz, *Caesars Palace under Investigation for Possible Money Laundering*, LAS VEGAS REV.–J. (last updated Oct. 21, 2013, 4:50 PM), http://www.reviewjournal.com/business/caesars-palace-under-investigation-possible-money-laundering.

[78] *Id*.

[79] Christopher Palmeri, *Caesars under Pressure as Officials Probe Activities*, BLOOMBERG (Oct. 22, 2013, 7:40 AM), http://www.bloomberg.com/news/2013-10-22/caesars-under-pressure-as-officials-probe-activities.html.

[80] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-736, JUSTICE ASSETS FORFEITURE FUND: TRANSPARENCY OF BALANCES AND CONTROLS OVER EQUITABLE SHARING SHOULD BE IMPROVED 2 (2012) ("All federal law enforcement agencies within DOJ participate in the Asset Forfeiture Program . . . as well as other agencies not part of DOJ . . . . Often, state and local law enforcement agencies participate in joint investigations with DOJ's law enforcement agencies . . . . [and] can receive a portion of the proceeds of forfeited assets resulting from these investigations in the form of cash or property through DOJ's equitable sharing program."); *see also id*. at 10 (providing examples of how forfeitures may arise in money laundering cases).

[81] *Editor's Note:* On December 4, 2014, the American Gaming Association released their "Best Practices for Anti-Money Laundering Compliance." The best practices set forth in that document in some ways mirror the suggestions presented here, however gaming companies would still be wise to consider the suggestions in this article in conjunction with those set out by the AGA. *See generally American Gaming Association Best Practices for Anti-Money Laundering Compliance*, AM. GAMING ASS'N (Dec. 2014), http://www.americangaming.org/sites/default/files/aga-best-practices-re-aml-compliance-122014.pdf.

II. Compliance Recommendations

First, several caveats should be noted: there are no hard-and-fast formulas or algorithms for detecting potential money laundering. As detailed below, quantitative analysis can be invaluable, but it is probably not sufficient; there are simply too many ways to conceal or mislead as to the source and nature of funds, and they cannot all be distilled into a computer program or employee handbook. Moreover, in some circumstances, there are going to be legal or operational complications that may inform a particular company's AML policies. For example, U.S. companies operating casinos abroad may not be allowed or able to obtain certain information from patrons.[82] Or, counsel may have to reconcile the implementation of financial incentives and disciplinary policies with obligations under employment contracts. And of course, in all events, the particular directives and guidance of regulators and law enforcement should feature prominently in constructing AML procedures. Ultimately, at the granular level, there are few if any "one size fits all" rules.

It is therefore apt to think in terms of "guidelines" and institutional structures to: (a) take in information regarding transactions occurring on the premises; (b) make sure that information is transmitted to someone in a position to assess the organization's risks; and (c) react accordingly, weighing the short-term benefits of potential revenue from a patron against the many longer-term risks associated with government scrutiny. In light of *Sands* and other recent money laundering cases, non-compliance risks appear more acute, and a more conservative balancing may thus be warranted. Sands' experiences with Zhenli Ye Gon, and its subsequent non-prosecution agreement, suggest a number of steps that could be taken to improve AML compliance and reduce the risk of liability:

1. Compliance departments should pre-clear certain high-risk customer relationships. Traditionally, casinos have limited the screening of new players to their ability to repay debts.[83] Now, the industry trend seems to be toward a more comprehensive screening for prospective high-volume players—a review assessing not only creditworthiness, but also "suitability."[84] Some preclearance was done even in the case of Ye Gon (he was asked for employment information and checked against OFAC "prohibited parties" lists), but the USAO was hardly sub-

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[82] *See, e.g.*, *A Window on China*, Economist, Dec. 10, 2011, at 69–70, *available at* http://www.economist.com/node/21541417 (discussing Macau's unique set of money laundering issues and concerns, including the semi-state-sanctioned intermediaries known as "junkets" that interact with casinos on behalf of patrons from mainland China).

[83] *See* Mary Jacoby, *Casinos and the Banks Secrecy Act: A Q&A About Anti-Money Laundering Compliance*, Just Anti–Corruption (Jan. 8, 2014, 5:42 PM), http://www.mainjustice.com/justanticorruption/2014/01/08/casinos-and-the-bank-secrecy-act-a-qa-about-anti-money-laundering-compliance/.

[84] *See id*. Casinos are not alone in their increased scrutiny of which customers they do business with. Robin Sidel & Andrew R. Johnson, *U.S. Banks Steer Clear of Sensitive Customers*, Wall St. J. (Jan. 28, 2014, 8:04 PM), http://www.wsj.com/articles/SB10001424052702304856504579342550507179032 (discussing the U.S. banks' increasing hesitation of working with customers and businesses whose activities may bring unwanted government scrutiny).

tle in suggesting that additional steps should have been taken.[85] Where local law permits, casinos can mitigate AML liability risks by insisting on verifiable employment and/or wealth-source information—something that can be checked against public records accessible on the Internet or on proprietary databases—particularly if the patron has played, or proposes to play, with a high volume of cash. In addition, as the USAO suggested in *Sands*, casinos may wish to scrutinize the "footprint" of the patron's purported business or employer.[86] Query, for instance, whether a company identified by the patron has a presence as would be expected in the stated industry or as would appear consistent with its business needs (whether a retailer has a website or brick-and-mortar address, etc.).[87] Finally, if bank accounts held in the name of someone other than the patron are used, similar information should be elicited to confirm the patron's link to the account-holding individual or entity; and the said individual or entity should also be checked against "prohibited parties" lists.[88] Of course, any information obtained from the patron during preclearance should be documented meticulously.

Most importantly, preclearance should involve personnel who are tasked primarily with compliance, and not simply left to sales and marketing staff—though sales and marketing staff should of course also be trained in compliance procedures and AML risks.[89] Ultimately, as the industry moves toward more robust preclearance for high-volume players (and even periodic "re-clearance" for certain of the highest-risk patrons), the enforcement and regulatory risks of lagging behind magnify; conversely, the competitive downside to mandating preclearance is reduced.

2. Play needs to be monitored responsibly, and "red flags" need to result in SAR-C filings. Needless to say, if SAR-Cs or CTRs are not filed when they should be, then a casino is not going to be deemed AML-compliant.[90] And as the *Sands* investigation shows, when a patron's play exhibits certain irregularities—particularly multiple or repeated irregularities—the government will be extremely skeptical of an "honest mistake" defense and will readily conclude that the failure to file a SAR-C was willful.[91] As alluded to above, the case of Ye Gon is instructive in that it fairly comprehensively illustrates some of the more common "red flags" that casino staff will likely encounter[92]:

- use of another person(s) bank account, without explanation;
- use of a conspicuously large number of banks or bank accounts;
- non-obvious links to such bank accounts;

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[85] Sands Non-Pros. Agreement, *supra* note 6, at 589, 591.
[86] *Id*. at 590.
[87] *Id*.
[88] *See id*. at 591.
[89] AM. GAMING ASS'N, *supra* note 81, at 7.
[90] *See, e.g.*, *Mirage Pays $5 Million Fine for Cash Violations*, LAS VEGAS SUN (June 20, 2003, 10:58 AM), http://www.lasvegassun.com/news/2003/jun/20/mirag-pays-5-million-fine-for-cash-violations/.
[91] *See* Sands Non-Pros. Agreement, *supra* note 6, at 591.
[92] *See supra* Part I.A.

- use of different bank accounts in short succession;
- many small transactions in lieu of a small set of larger ones (*i.e.*, seeming to break up of large transactions into stages);
- use of suspect financial institutions (*e.g.*, casas de cambio, which were the subject of a FinCEN advisory);
- patrons asking to superfluously route financial transactions through foreign countries (in Ye Gon's case, Hong Kong);
- failure to designate the patron as the beneficiary of wire transfers;
- reluctance to designate the casino as the recipient of wire transfers, to the point of requesting use of a name-neutral recipient account;[93]
- refusal to simplify transactions upon casino staff's request;
- strange appeals to superstition (*e.g.*, the patron stating that it is bad luck to simplify financial transactions); or
- repeated requests for privacy and secrecy, particularly from a non-public figure.

The Ye Gon red-flag list is comprehensive, though by no means exhaustive. For example, casino staff should also be mindful of high-volume cash deposits followed by small wagers or hedged bets, as this is a time-honored method of laundering illegally-procured funds.[94] Again, staff training is critical.

3. Casinos should consider re-reviewing SAR-Cs *post-filing* to identify and assess risks in ongoing relationships. The curious case of Zhenli Ye Gon aside, casinos do tend to file SAR-Cs when patrons engage in blatantly suspicious activity. Federal law enforcement officials seem to acknowledge as much, even if in a backhanded way—witness FinCEN Director Shasky Calvery's faint praise (and concern) that most casinos are at least doing the "bare minimum" to combat money laundering, even if they are doing so reluctantly.[95] Law enforcement's real gripe, therefore, is that casinos aren't doing more: the concern is that SAR-Cs are filed with the Treasury and then subsequently ignored, while a blissfully "compliant" casino continues to do lucrative business with the suspect patron. But as *Sands* and *HSBC* suggest, the filing of a SAR-C—even a timely and comprehensive SAR-C—does not necessarily create a safe harbor from money laundering liability.[96] As with HSBC, regulators and prosecutors will require casinos to "maintain an effective anti-money laundering program and to conduct

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[93] *N.B.*: the use of intermediaries and name-neutral accounts may have a tax evasion objective instead of, or in addition to, a pure money laundering goal.

[94] *See, e.g.*, Adam Shapiro, Comment, *Hold 'Em or Fold 'Em: Gambling Laws in Asia*, 29 PENN ST. INT'L L. REV. 385, 403 (2010); Jonathan Gottfried, *The Federal Framework for Internet Gambling*, 10 RICH. J. L. & TECH. 26, ¶¶ 20–21 (2004), *available at* http://jolt.richmond.edu/v10i3/article26.pdf.

[95] Shasky Calvary, *supra* note 2, at 3.

[96] Berzon, *supra* note 76.

appropriate due diligence."[97] Toward this end, SAR-C filings are essential, but they are not in and of themselves sufficient.

Compliance departments can, however, look at previously filed SAR-Cs the way law enforcement agencies do—as a wealth of information and a great resource for detecting patterns of problematic activity. The systematic internal re-review of SAR-Cs could be important in identifying high-risk patron relationships. Where appropriate, this could provide a basis for terminating, declining to expand, or further inquiring into such relationships. In reviewing SAR-Cs filed in connection with a particular patron, it may be helpful to bring in fresh sets of eyes; the perspective of personnel who were not involved in initially generating the report(s) can be quite valuable in assessing prospective risks.

4. Casinos should improve internal information-sharing mechanisms. Like many large operations, casinos have historically had difficulties with the inadvertent "compartmentalization" of risk-related information.[98] The various components of a casino—hosts, marketing staff, floor personnel, compliance departments, and others—have tended to operate in separate spaces, each in pursuit of their own distinct, immediate objectives. As a result, when it comes to assessing patrons' play and financial transactions, the left hand has not always known what the right hand is doing. In no small measure, improving AML compliance is ultimately a matter of improving information-sharing among casino personnel.[99]

In particular, risk assessment has to be integrated into every component's mission, and compliance staff needs to periodically meet with and establish relationships with key operations personnel. Hosts, handlers, and dealers need to be trained to identify suspicious activity, and they need to be conversant in and able to identify breaches in casino rules (such as the Venetian's rules concerning no-beneficiary-designated transfers, which were routinely disregarded when casino personnel dealt with Ye Gon). Casino staff must know to report suspicious activity and rules violations to the pertinent compliance office. Failure to report, particularly a failure to report rules violations, needs to be taken seriously and result in adverse personnel action where appropriate—indeed, if one staff-member *repeatedly* fails-to-report, heightened concern may be warranted, as this may suggest an integrity issue.

Although internal reporting requirements need to be enforced vigorously, reporting itself should be as easy and burden-free as possible. The lower the transaction costs involved in reporting an issue, the more reports compliance departments are likely to receive. This may mean

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[97] *HSBC Press Release*, *supra* note 69.

[98] For a general exposition of this phenomenon in a non-gaming context, see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-471, INFORMATION SHARING: AGENCIES COULD BETTER COORDINATE TO REDUCE OVERLAP IN FIELD-BASED ACTIVITIES (2013).

[99] Shasky Calvery, *supra* note 2, at 4 ("The sharing of information [among the various departments] is especially critical for casinos that develop significant information on their gaming customers. This information would be useful for the compliance department to assist in monitoring customers for suspicious activity.").

setting up a hotline or inbox for reporting suspicious activity, or it may mean setting up a comparable channel for staff members to report an issue to compliance without their peers and/or immediate supervisors necessarily being made aware. Internal reporting mechanisms should be user-friendly. And in no event should a staff member's submission of a *bona fide* report be allowed to result in an adverse personnel consequence of any kind (including assignment to less lucrative shifts, etc.).

5. Casinos should consider adjusting financial incentives so that staff can internalize and address money laundering risks. The "bonus structure" provision of the *Sands* non-prosecution agreement has received some attention; under this provision, Sands agreed to incorporate employees' contributions to AML compliance as a factor in determining bonuses.[100] More strikingly, Sands agreed to "clawback" bonuses for staff-members, including "personnel in casino sales, casino cage, casino credit, and relevant personnel in surveillance, security, compliance, and finance, as well as those with management oversight over the foregoing" who were deemed "to have contributed to compliance failures."[101] The result is a potent carrot-and-stick approach: if a staff-member strengthens the company's AML compliance, she can get a larger bonus; but if she hinders AML compliance, she can lose her bonus altogether. Other casinos may see fit to emulate Sands' approach—though admittedly, the clawback rule can be a harsh one. Perhaps the rule can be tempered in a way that further encourages information sharing. For example, sales bonuses can be subject to clawback in the event of an AML failure, *unless* the staff member timely reported the subject activity to the compliance department.

An additional takeaway from *Sands* concerns the pay of compliance personnel themselves. In the non-prosecution agreement, the USAO noted with disapproval that "individuals involved in compliance" were among the Sands and Venetian employees whose bonuses were impacted by the volume of Ye Gon's play.[102] In order to ensure the integrity of compliance staffers' risk assessments, casinos should take care that the compensation of compliance officers is not in any way significantly affected by a particular patron's play.

6. To the extent possible, temptations to facilitate money laundering should be removed. Ultimately, the Sands Corporation's experiences with Zhenli Ye Gon should counsel a measure of humility in all levels of casino management and compliance departments. In some circumstances, even highly trained, rigorously screened, and well-supervised casino personnel are going to be tempted to assist a high-volume patron engaging in suspicious activity. Therefore, in addition to all of the above recommendations, it is imperative that point-personnel simply be unable to accommodate some of the customer's requests. In this vein, and with the Ye Gon experience fresh in mind, Sands agreed to

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100 Sands Non-Pros. Agreement, *supra* note 6, at 591.

101 *Id*.

102 *Id*. at 588.

prohibit the use of name-neutral company bank accounts.[103] Other casinos should consider renaming such accounts or closing them altogether. Similarly, gaming companies should consider reducing staff members' discretionary power by either prohibiting outright, or mandating management approval for, certain higher-risk activities, such as receiving funds from third-party bank accounts or suspect financial institutions.

Gaming regulators and law enforcement officials have long urged casinos to "know their customers." In the *Sands* case, federal prosecutors emphatically joined the chorus. What this means—from a casino management perspective—is that money laundering risks arising from a patron's play have to be systematically and rigorously assessed. As discussed above, by enhancing its risk-assessment processes, a gaming company not only will ensure compliance going forward, it will show regulators and law enforcement officials that it is operating in good faith. If a casino patron is ultimately deemed to have run afoul of the law, a showing of good faith may be the determining factor as to whether or not the government holds the gaming company responsible as an accomplice to money laundering.

[103] *Id*. at 592.