European GamingLawyer

US Department of Justice targets gaming: beyond the Las Vegas Sands FCPA disclosure

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DUE to the recent expansion of gambling, through the internet and into foreign jurisdictions, such as Macau and the Isle of Man, regulation and scrutiny by US enforcement officials has grown.

With the increase in regulation, licensing and other restrictions, along with an increasingly competitive global gaming market, more opportunities exist for an unscrupulous rogue employee to engage in conduct to gain an unfair competitive advantage in navigating the maze of regulations. Such employees are often the first to become "whistleblowers" to mitigate their own wrongdoing and take advantage of any potential reward related to reporting potential violations of anti-corruption acts.

One such incident that may implicate the parent company of the Las Vegas Sands Corp ("Sands") has now put the gaming industry on notice of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, *et seq* ("FCPA"). On Friday March 1, 2013, Sands reported in a filing to the Securities and Exchange Commission ("SEC") that the company may have violated the "books and records and internal control provisions" of the FCPA. In a subsequent release, Sands reiterated that it only failed to properly track expenditures as required by the FCPA's "accounting" provision and that its agents did not bribe foreign officials.

Media reports have linked the possible SEC and Department of Justice ("DOJ") investigations to a wrongful termination lawsuit by a former employee. Regardless, the Sands disclosure and related government investigation will have ripple effects throughout the international gaming industry. The Sands report provides an all-too-familiar case study in regard to FCPA and international trade law compliance that is especially relevant in the current wave of global gaming expansion.

The gaming industry is already required to comply with the most onerous and extensive statutory and regulatory regimen for almost any industry. This includes close scrutiny by local municipal authorities, state agencies, tribal councils, federal investigators and auditors, and foreign governments. Thus, well before the "internationalisation" of anti-corruption legislation, the gaming industry has always been under close review to avoid corruption, through such acts as the UK Bribery Act and China's Interim Rules of the State Administration for Industry and Commerce on Prohibition of Commercial Bribery.

Background on the FCPA

The FCPA was passed in 1977 in response to voluntary disclosures by multiple large US companies that had made questionable or illegal payments to foreign government officials, politicians, or political parties. The Act was passed in the wake of the Watergate scandal and the disclosure of rampant unlawful payments to politicians and political parties within the United States.

The FCPA contains two major parts: the "bribery" provision and the "accounting" provisions. The anti-bribery provision prohibits any offer, payment, promise to pay, or authorisation to pay any money, gift, or anything of value to any foreign official, foreign political party, or candidate for (i) influencing any act, or failure to act, in the official capacity of that foreign official or party, or (ii) inducing the foreign official or party to use influence to affect a decision of foreign government or agency, in order to obtain or retain business for anyone, or direct business to anyone.

The FCPA is not only about bribing foreign officials. It imposes arduous accounting and recordkeeping requirements on publicly traded companies. These requirements state that US public companies and their subsidiaries abroad must maintain a recordkeeping and accounting system that is

sufficient to provide reasonable assurances that all transactions are authorised. These requirements apply to all of a company's foreign and domestic activities, including its payments, transactions and disposition of assets.

There are many ways that FCPA investigations are initiated and the Sands case underscores the differences in FCPA violations. One of the most frequent is in regard to disgruntled former employees who hope to leverage a possible whistleblower action into a significant financial gain. In addition to whistleblowers, other sources that initiate FCPA investigations include competitors and elaborate sting operations. From media reports, it appears that the Sands investigation was a result of an allegation made in a wrongful termination lawsuit initiated by a former CEO of Sands' operations in Macau, China. The recent Sands investigation will only bring further attention to the gaming industry, one of the most heavily regulated industries regardless of the FCPA.

Lessons for the gaming industry from the Sands disclosure

For the past several years, the DOJ and SEC have constantly reiterated that enforcement of the FCPA and other international trade laws is a top priority. The DOJ investigations of Sands may only be the beginning of the government's inspection of the entire gaming market sector. And failing to plan is planning to fail.

All participants in the international gaming industry should understand each and every facet of the company's correspondences and relationships with foreign officials. Gaming companies should consider taking this opportunity to review their own policies and procedures and audit past transactions to ensure compliance or the necessity of a voluntary self-disclosure. As a part of the review, a gaming company should consider reviewing the overlapping and intertwining jurisdictions. For example, if there is a transaction between the US parent company and a Chinese subsidiary, the US parent company should also consider the UK Bribery Act if the US parent company is conducting transactions in the UK. This may be necessary even though the UK has absolutely no involvement in the US/China transaction. This extra-territoriality of many countries' anti-corruption laws is only increased and leads to investigations in multiple jurisdictions.

The gaming industry should also take a close look at how it complies with other export compliance laws. For example, to the extent that a gaming company is exporting sophisticated encryption software or high technology hardware, it should consider whether there are specific export and import classifications, duties, and other restrictions or approvals that are necessary. An FCPA investigation may lead into other potential violations involving the Export Administration Regulations, Customs, and the Census Bureau. Furthermore, a company's foreign transaction policy should include screening against the various denied, debarred, or prohibited parties lists maintained by the US, foreign governments, and international organisations (such as Interpol and the United Nations). This early due diligence is important to avoiding lengthy investigations, significant civil fines, and/or criminal penalties.

A company should take any allegation of a possible FCPA violation seriously and consider initiating an internal investigation. Public companies, like Sands, must also ensure that its accounting system is able to properly "catch" any possible violations. As repeatedly recognised, it is much easier for the government to substantiate cases related to a failure to comply with the accounting provisions of the FCPA. Companies should, therefore, ensure that their compliance policies and procedures are not just properly in place, but also being adhered to by the various internal (and external) stakeholders.

The Sands case brings to light the cross-border co-operation amongst governments when it comes to anti-corruption investigations. According to media reports, Chinese authorities are also investigating Sands and co-operating with the DOJ in its investigation. Most foreign countries do not recognise the "due process" or "search and seizure" requirements afforded in the US. As such, the foundation for DOJ and SEC investigations is first developed through legwork done in foreign countries. A company should not wait until an allegation of wrong is formally filed. Rather, the company should have a plan in place of what action is necessary if the company discovers directly or indirectly that it is the subject of governmental investigation. Indeed, Sands may also face further investigations by other jurisdictions, including the Nevada Gaming Control Board.

In addition to the internal review, a gaming company should consider incorporating a training program among its employees and foreign representatives in regard to FCPA and international trade law compliance. In an effort to make a deal, some employees follow the outdated maxim, "when in Rome, do as the Romans do." In today's environment, the new maxim is, "when in Rome, do as the British do," since the UK Bribery Act is considered one of the most stringent in the world. This important compliance requirement can only be achieved through an effective training program.

Finally, in addition to good policies, procedures, and training, a gaming company should review its agreements to ensure that the proper mitigating clauses are inserted. By placing the company's anti-corruption policy and standards of conduct into the agreement, third parties are placed on notice that they are not allowed to act as the company's agent in breaking any applicable laws. A company should follow up the language in the agreements by sending annual notifications to long-term, third-party representations reiterating the expected standards of conduct. Through these efforts, a gaming company may be able to mitigate its civil and criminal liability if a "rogue agent" violates the FCPA or other anti-corruption laws.

Conclusion

It is clear that the DOJ and SEC will continue to vigorously investigate and enforce possible violations of the FCPA. In addition, the British government will continue to increase its investigation and enforcement of the UK Bribery Act. The Sands case has an important lesson for every company conducting business in the international gaming markets: an ounce of prevention is worth a pound of cure. Every gaming company should perform a candid review of their activities in foreign jurisdictions to mitigate enforcement risks presented by the FCPA and other anti-corruption statutes.

On November 18, 2012, the DOJ and SEC issued a written guide in regard to compliance of the Foreign Corrupt Practices Act, A Resource Guide to the U.S. Foreign Corrupt Practices Act ("Guide"). Upon request, Snell & Wilmer will provide you a bound copy of the DOJ and SEC Guide, which includes a copy of the FCPA statute, the British guidance in regard to compliance with the UK Bribery Act, and the firm's recent FCPA and UK Bribery Act enforcement articles from its experienced team of former US attorneys, federal and state prosecutors, and military prosecutors. The Guide is a valuable resource that should be a part of any legal, compliance, or accounting department of a company doing business internationally. If you are interested in receiving a free copy of the bound Guide with additional reference material, please contact Brett Johnson at bwjohnson@swlaw.com.