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18 November 2015

Mr Yunus Ismail Carrim, MP
The Chairpeson
Standing Committee on Finance
Parliament of the Republic of South Africa
3rd Floor
90 Plein Street
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Via electronic mail: awicomb@parliament.gov.za

Dear Mr Carrim

COMMENTS ON THE FINANCIAL INTELLIGENCE CENTRE AMENDMENT BILL, 2015

We refer to previous correspondence on the subject and transmit herewith our comments on the Financial Intelligence Centre Amendment Bill, 2015 ("**the Bill**") as previously agreed.

We respectfully request an opportunity to make an oral presentation of our comments on the Bill to the Standing Committee on Finance ("**the Committee**") at a mutually convenient date and time.

We trust that the attached comments will be accepted in the constructive spirit in which they have been compiled and furnished; and will prove to be of assistance in the further consideration of the Bill by the Committee.

We also trust that the above is in order. However, should there be any queries in this regard, please do not hesitate to contact us.

Casino Association
of South Africa

Kindly acknowledge receipt hereof in writing.

Yours faithfully;

ADV. THEMBA NGOBESE
CHIEF EXECUTIVE OFFICER

casa
Casino Association of South Africa

COMMENTS ON THE FINANCIAL INTELLIGENCE CENTRE AMENDMENT BILL, 2015 ("THE BILL")

Introduction

At the outset, we wish to emphasize that the casino industry welcomes positive and practical amendments to the Financial Intelligence Centre Act, No 38 of 2001 (as amended) ("**FICA**" or "**FIC Act**"). The industry has evaluated the impact of the proposed amendments and hereby wishes to provide constructive comments so as to enable the National Treasury Department ("**the Department**") and the Financial Intelligence Centre ("**the FIC**" or "**the Centre**") to provide a risk-based legal framework within which casinos will be able to effectively contribute towards the country's efforts in combating anti-money laundering ("**AML**") and combating of financing of terrorism ("**CFT**").

Notwithstanding any of the above, we highlight concerns that certain amendments portray a rules-based approach as opposed to a risk-based approach ("**RBA**") which was recommended by the Financial Action Task Force ("**FAFT**"). In this regard, we support the corresponding concerns raised by the Banking Association South Africa. The concerns are founded especially in terms of single transactions and business relationships in the context of casino operations.

Background

Urbanised legal casinos in South Africa are land based modern entertainment venues that offer their customers highly regulated gaming in conjunction with a plethora of non-gaming attractions that fall into the categories of dining options, events and live performances. In addition, casinos ("**the Secondary Accountable Institution**") offer a limited number of basic services to facilitate certain banking products for example, credit/debit cards and cheques transactions, to enable the vast majority of casino customers to engage in legitimate gaming activity. These transactions accord with the limits imposed by and authorisation of the respective banking institutions ("**the Primary Accountable Institution**") for their own assurances.

Prior to enabling the above banking products, the Primary Accountable Institutions ensure that their clients comply with local and international AML/CFT controls. Over and above South African AML/CTF legislation, banks also subscribe to other AML/CFT controls such as the Wolfsberg AML Principles, Basel Committee on Banking Supervision and quite often the AML/CFT policies of their holding companies, if such companies are regulated by AML/CFT legislation in the countries where they are located.

Differentiation between Casinos and other Financial and Non-financial Accountable Institutions

The financial and non-financial AIs ("**Other AIs**"), set out in Schedule 1 of the FICA, process volumes of documentation containing detailed personal information which are inherent to their various products and services, for example, legal arrangements, accounts, credit limits, insurance policies, purchase of assets, investments etcetera. Historically, the afore-going process was used to determine business risks that the institutions would be exposed to. Now Other AIs use this intricate process to comply with AML/CFT obligations.

Gambling, however, is a highly regulated form of entertainment, which is absent of lengthy documentation processes and it is dependent on the customer's instant discretion, which warrants casinos to reciprocate immediately in order to stay in business. It is voluntary in nature and the public is not obligated to gamble. On the other hand, clients of Other AIs will most of the time await the outcome of their applications before they can utilise the AIs' product or services. This is due to the nature of those products and services which are tangible and which they need such as houses, motor vehicles etcetera.

The above distinction clearly sets apart casinos' operations from the Other AIs to the extent that exemptions are paramount for the industry to actively participate in the country's efforts to combat AML/CFT crimes.

AML/CFT risk at Casinos

Casinos in South Africa pose a relatively low risk for money-laundering and terror-financing, mainly because of the following:

- Firstly, the vast majority of buy-in transactions at the Cashdesk (which is the point of transactions) involve the withdrawal of money from either a bank-issued debit or credit card. In the circumstances the relevant banking institution, being an AI itself, would have satisfied itself as to the source of funds available for any withdrawal on the debit/credit card. For the casinos' purposes the source of funds is the banking institutions concerned.

- Secondly, any cash transaction over R25 000 is reported to the FIC, who has the means and ability to better determine the source of funds.

- Lastly, casinos only issue winner's cheques or other proof of winnings after having conducted extensive internal checks to ensure that it represents true winnings.

Notwithstanding any of the above, it must be mentioned that Recommendations made by the FAFT was in respect examples of transactions concluded by casinos located outside of the Republic ("**Foreign Gambling Jurisdictions**").

In this regard, we wish to draw attention to the fact that gambling regulators from Foreign Gambling Jurisdictions have been engaging South African gambling regulators from time to time for guidance in developing their own regulatory regimes. This is largely due to the robust gambling regulatory regime in the Republic.

To possibly compound the matter further, the FAFT Recommendations categorizes casinos to include land-based casinos, internet and ship-based casinos which may distort the Recommendations made in respect of land-based casinos that are represented by CASA. Furthermore, in many instances casinos are not regulated in some sub-Saharan regions, yet the examples provided by the FAFT are used to extrapolate scenarios, that in the context of highly regulated and legal South African casinos, would in many incidents not be possible due to the gambling regulatory regime.

Exemptions granted to the Casino Industry

Given the above, and the fact that it was impossible for casinos (entertainment venues) to comply with impractical, yet onerous requirements of FICA since its inception, the casino industry collaborated with the FIC to navigate through these impossibilities, the efforts of which culminated in the granting of reasonable exemptions to the industry as set out in Part 6 of the Exemptions published in GNR1596 of 20 December 2002 ("**the Current Exemptions**"). In essence the Current Exemptions made it possible for casinos to comply with legislation that was mainly designed to regulate financial AIs.

For your ease of reference, the above impossibilities arose, amongst other things, from the fact that casinos process high volumes of transactions on a high frequency basis, operate certain games manually and maintain the high game speeds in line with international standards.

To date, the Current Exemptions provided the means necessary for casinos to contribute effectively towards the country's robust AML/CFT controls.

In view of the above, the Current Exemptions and future exemptions are paramount to enable the casino industry to comply with FICA (inclusive of the amendments).

Furthermore, we cannot over-emphasize that our comments in respect of the Bill, are made with the view that the Current Exemptions will remain in force, and where necessary, further exemptions will be granted. The absence or curtailing of exemptions will have far reaching consequences for casinos in that casinos would be obligated to comply with more stringent, onerous, impractical, and in certain cases impossible requirements. These include but are not limited to requirements for on-going due diligence ("**ODD**"), establishment of source of wealth and funds, conclusion of foreign prominent public official ("**FPPO**") and domestic prominent influential person ("**DPIP**") transactions, and the obligation to keep extensive records in terms of single transactions of miniscule values.

To the extent that exemptions for casinos are absolutely necessary, we highlight that the RBA for casinos can only be effective if exemptions remain, and further exemptions granted. In essence, a RBA is based on reasonable and practical measures (i.e. a reasonable person test). This is not the case in the proposed Bill, which outlines absolute steps to be complied with hence the Bill presupposes a rules-based approach as opposed to RBA – contrary to the FAFT Recommendations.

In addition, it would be reasonable for the casino industry to be granted exemptions for single transactions to be at a threshold exceeding USD3000, as recommended by the FATF. This in itself will to a degree alleviate some of the consequences that will be faced by casinos.

COMMENTS ON THE BILL

Clause 5: Repeal of Chapter 2 of Act 38 of 2001

We are respectfully of the view that the Counter Money Laundering Advisory Council ("**the Council**") has played a crucial role to date, especially since AIs used this platform to formally consult with the Centre.

If the Council is dismantled, then legislation should make provision for a mechanism to address participation and consultation with the private sector by formalising links with the structures contemplated in paragraph 2.2.4 of the Memorandum on the objects of the Bill.

In this regard, we are particularly concerned that it is not a requirement that AIs must be consulted when exemptions are amended or removed. The only current requirement in this regard is that the Centre must be consulted, and the exemption Regulations made in this regard must be tabled in Parliament. Our concerns will be laid to rest should Section 74(2) of the Act be amended to provide for consultation with AIs before any amendment or withdrawal of any existing exemption.

Clause 8: Insertion of Section 20A of Act 38 of 2001

We wish to note that casinos, as a result of the unique circumstances of gaming transactions in a casino (as opposed to transactions with banking institutions and other AIs) have Current Exemptions in respect of single transactions, and have designed their systems accordingly since the commencement of FICA. If these exemptions remain in force, then casinos would be able to comply with this section in respect of single transactions.

However, due to the nature of casino operations, and although single transactions are conducted at a Cash Desk, we may not always interact with all clients prior to them commencing the gambling activity. Therefore the insertion of this section, in the absence of current or future exemptions, will give rise to requirements that are impossible to comply with.

Clause 10: 21F - Foreign prominent public official

Entertainment venues (casinos) will faced with extremely onerous and practical difficulties to identify the individuals concerned as the source of information will not be readily available to them, this against the backdrop of the serious consequences for failure to identify these individuals. Also, there is no legislation that authorizes information sharing between AIs and other authorities, similar to Section 314(b) of the USA Patriot Act, to enable casinos to comply.

Notwithstanding any of the above, our respectful submission is that certain categories of public officials should be referenced more narrowly in the definitions (i.e. equivalent senior politician, senior judicial official, high ranking member of the military). In the current form, the categories concerned are subjective, extremely onerous and impractical for casinos to determine, using minimal resources to determine which persons would constitute FPPO or their equivalents against limited knowledge of what these categories entail in the Republic. To compound the matter, casino employees would be required to make this determination on the spot in an environment where high-paced transactions are concluded on an ongoing basis.

To amplify the impracticalities, there is no dedicated repository that could be readily accessed by casinos to enable them to make the determination concerned, this in the face of the fact that the Bill obligates casinos to obtain senior management approval when it wishes to enter into a single transaction with a prospective client. Furthermore, the Bill makes the presupposition that a FPPO determination must be made before or at the time of the conclusion of single transactions. This requirement is impractical, if not impossible, and extremely onerous for casinos to comply with given the above.

In addition, as casinos are entertainment venues, it will not readily have available to it the relevant documents, records or other resources to determine the source of wealth or source of funds for FPPO when positive determinations are made. If the determinations concerned are not met at the instant of a FPPO wishing to entertain him/herself, then casinos will suffer financially by not being able to transact with such persons.

It is most likely that any reasonable steps taken by casinos to give effect to identifying FPPOs could only be taken after the transaction was concluded.

Also it is uncertain as to whether or not South African citizens or South African state employees of influential statuses, who are located abroad in official capacities, are FPPOs.

Given the above, we propose that the legislation be amended to include for reasonable steps to be taken by AIs either before (where possible) or after the conclusion of single transactions to determine if prospective clients are FPPOs. Also, for practical reasons, all Current Exemptions would need to apply in respect of FPPOs.

Notwithstanding any of the above, casinos file threshold and other reports with the FIC, which will include sufficient details of individuals who may be FPPOs which the FIC could profile against databases held by it and other authorities both foreign and domestic. As the FIC has access to the various authorities and institutions, it has a bird's eye view of FPPOs and is better placed to establishing source of funds and wealth. To compound the problem of source of funds and wealth, many FPPOs may also own businesses, making it impossible to determine the income received from these businesses.

Clause 10: 21G - Domestic prominent influential person

Please refer to our comments above for FPPOs for the corresponding instances that would create similar (if not the same) onerous and impractical or impossible requirements for casinos to comply with in respect of DPIP.

To complicate the matter further, casinos would be required to ascertain whether clients were in acting positions for a period exceeding six months as DPIPs, or have held a prominent function in the Republic at any time within twelve months prior. Aside from the complexity in making a positive determination, casinos are obligated to verify the periods during which office was held. It is virtually impossible for cashiers to make this determination when concluding single transactions.

Clause 10: 21H – Family members and known close associates

Please refer to our comments above for FPPOs and DPIPs for the corresponding instances that would create similar (if not the same) onerous and impractical or impossible requirements for casinos to comply with in respect of family members and known close associates of FPPOs and DPIPs.

Clause 12: Obligation to keep records

We wish to note that casinos have Current Exemptions in respect of single transactions. If these exemptions remain in force, then casinos would be able to comply with this section in respect of single transactions. However, casino cashiering desks do not maintain business correspondence for the purposes of concluding single transactions. By implication thereof, business correspondence will not be available. Casinos would need to be exempted from this provision. Alternatively, the requirement concerned could be remedied by the insertion of the words "*where applicable*" immediately after the words business correspondence.

Clause 14: Records may be kept in electronic form and by third parties and must be kept within the Republic

We respectfully submit that the proposed requirement for electronic records to be kept within the Republic will severely prejudice casinos from utilizing latest cloud computing technology to expand their online gambling operations (for example, online sports betting) into foreign jurisdictions where economies of scale are readily available for a fraction of the costs when compared to South Africa. In addition, certain casino groups have already expanded into foreign jurisdictions and intend using cloud computing to maximize cost, operational and risk efficiencies.

In addition, when online casinos are legalized in South Africa (under consideration) there is certainly a probability that other land-based and online casino operators will consider utilizing cloud computing, possibly outside of the Republic, especially if foreign investors decide to obtain online gambling licences in South Africa.

In view of the above, we propose that cloud computing not be limited to the Republic, but that the information recorded in cloud computing facilities should be readily accessible from within the Republic.

Clause 27: Risk Management and Compliance Programme

Casinos have always approached its AML/CTF controls using a RBA by exercising reasonableness in line with the Current Exemptions to appropriately deal with areas of potential risk. However, the Bill does not support complete RBA in that all references to Risk Management and Compliance Programme ("**RMCP**") are qualified with peremptory requirements that must be addressed. Casinos can only take reasonable steps to give effect to the requirements proposed. In its current form, the RMCP purports that AIs including casinos are to take absolute steps, which is contrary to a RBA (i.e. "must enable the accountable institution to -").

To give full effect to a RBA, the Bill should be amended to include that RMCP is to contain the reasonable measures that will be taken to address the RMCP requirements outlined insofar as the requirements are applicable to the AI. For example, casino clients are natural persons and hence casinos will not be required to provide in their RMCPs for the manner in which or processes by which they will conduct ongoing due diligence measure in respect of legal person, trusts and partnerships.

Further to the above, it is unclear as to the necessity of the implementing RMCPs in casinos' operations in foreign jurisdictions if there is no link between them and their South African sister-companies. Casinos specifically do not have branches unlike financial institutions. It is therefore necessary for the applicable requirement to be amended to allow for RMCPs not to be implemented between South African casino operations and their foreign casino interests where no direct link exists between the two operations (i.e. clients cannot cash their chips or redeem their funds in foreign jurisdictions).

Further to the above, casinos will only be able to implement effective RMCPs if their Current Exemptions remain intact, and if necessary, further exemptions are granted.

Clause 58: Short title

We note that no provision is made for transitional arrangements, or that the amendments will come into operation on a later date after it has been promulgated.

In this regard, we assume that once the amendments have been promulgated, Regulations will have to be drafted/amended before the Act can become operative. Furthermore, Accountable Institutions will have to be given the opportunity to enable them to comply with the new requirements, such as the drafting and implementation of RMCP, training, development of systems and database enhancements. In addition, due to the magnitude of the impact of the proposed amendments on casinos, they would require reasonable time to apply for exemptions and amendments to regulations, where necessary.

Consequently, we support a minimum transition period of 12 to 18 months as proposed by the Banking Association South Africa.