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TO: CHIEF ELECTORAL OFFICER: ELECTORAL COMMISSION
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**PROPOSED REGULATIONS REGARDING REPRESENTED POLITICAL PARTY FUNDING IN
TERMS OF SECTION 24(2) OF THE POLITICAL PARTY FUNDING ACT 6 OF 2018:
SUPPLEMENTARY SUBMISSION BY MEDIA MONITORING AFRICA**

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INTRODUCTION

1. Media Monitoring Africa (MMA) provides this supplementary submission to the Electoral Commission of South Africa (the Commission) on the proposed Regulations Regarding Represented Political Party Funding (the Proposed Regulations) published in terms of section 24(2) of the Political Party Funding Act 6 of 2018 (the Act). This follows MMA having provided a written submission to the Commission in March 2019, and thereafter having presented at the oral hearings in August 2019. During the oral hearings, MMA was requested to provide further information on the matters set out below in order to assist the Commission in its deliberations:
 - 1.1. The provision regarding donations received from the proceeds of unlawful activity (section 3(4) of the Act and regulation 4(1)(a) of the Proposed Regulations); and
 - 1.2. The importance of disclosures regarding political advertising, particularly political advertising online (sections 11, 12 and 14(2)(a) of the Act, read with regulation 11 of the Proposed Regulations).
2. We deal with each of these aspects in turn below, which should be read in the context of the previous submissions made by MMA. In this regard, we emphasise that this submission is underpinned by a recognition of the importance of promoting the free flow of information, transparency and accountability in the electoral processes.

DONATIONS RECEIVED FROM THE PROCEEDS OF UNLAWFUL ACTIVITY

3. In our earlier written submission, MMA stressed that donations received from the proceeds of unlawful activity, which give rise to blatant criminal conduct, should not be treated in the same way as the prohibition on receiving donations from the other listed entities – namely, an organ of state, a state owned enterprise, or a foreign government or foreign government agency. It is true that it is likely improper and undesirable for a represented political party to receive a donation from an organ of state, state owned enterprise, foreign government or foreign government agency; as such, it would be appropriate to return such donation to avoid any undue influence or impropriety. However, proceeds of unlawful activity go further than this, and is more egregious: it gives rise to blatant criminal conduct. To allow such criminality to continue by allowing the funds to be returned to the wrongdoer would be inimical to the principle of the rule of law.
4. Accordingly, MMA submits that in circumstances where the Commission suspects, believes or has reason to believe that the source of the donation is from the proceeds of any unlawful activity:
 - 4.1. Such donation should not be returned to the contributor who is suspected of having committed the unlawful activity, as this would facilitate a continuation of the unlawful activity.

- 4.2. The Commission should be required to report this to the relevant authorities, including in accordance with the duties contained in the Prevention and Combating of Corrupt Activities Act 12 of 2004 (Corruption Act) and the Prevention of Organised Crime Act 121 of 1998 (Organised Crime Act).¹
- 4.3. The Commission should engage with the Directorate for Priority Crime Investigation (DPCI) and the Asset Forfeiture Unit (AFU) in order to ensure that the matter is appropriately investigated and the donation appropriately allocated depending on the outcome of the investigation.
5. Accordingly, we submit that regulation 4(1)(a) of the Proposed Regulations should be dealt with as a self-standing provision, recognising that where there is a suspicion, belief or reasonable belief that the source of the donation is from the proceeds of any unlawful activity, this must be reported in accordance with the relevant statutory obligations and good practice, referred to the relevant authorities for investigation, and not returned to the contributor pending the determination of the investigation.
6. During the oral hearings, the Commission requested further clarity on the practical implementation of this submission. In particular, the Commission requested the following: how should this be reported and regulated; what would become of the donation received; to whom should the money be paid; and how should the money be used and to whose benefit.
7. We submit that there are already well-established mechanisms within the state structures to deal with such matter: in particular, the AFU, established in 1999 in the Office of the National Director of Public Prosecutions (NDPP). The AFU focuses on the implementation of chapters 5 and 6 of the Organised Crime Act – which deals specifically with the proceeds of unlawful activities – to ensure that the powers in the Organised Crime Act to seize criminal assets would be used to their maximum effect in the fight against crime, particularly organised crime.
8. Chapters 5 and 6 of the Organised Crime Act set out various orders can be sought when dealing with the proceeds of unlawful activities, including confiscation orders and restraint orders. This falls squarely within the purview of the AFU, which within its mandate would be in a position to undertake the necessary steps for confiscation and the realisation of such proceeds.

¹ In particular, section 34 of the Corruption Act provides for a duty to report corrupt offences, stating in subsection (1) that:

“Any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed –

(a) an offence under Part 1, 2, 3 or 4, or section 20 or 21 (insofar as it relates to the aforementioned offences) of Chapter 2; or

(b) the offence of theft, fraud, extortion, forgery or uttering a forged document, involving an amount of R100 000 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official.”

In terms of section 34(2), any person who fails to comply with this duty is guilty of an offence. Further, section 34(4) sets out the persons who would be considered as holding a position of authority, which includes any public officer in the senior management service of a public body.

9. As such, in direct response to the questions raised by the Commission during the oral hearing, we submit as follows:
 - 9.1. Where the Commission has a reasonable belief or suspicion that the source of any donation made to the Multi-Party Democracy Fund is from the proceeds of unlawful activity, the Commission should immediately notify the relevant authorities, including the AFU.
 - 9.2. The donation should then be transferred to the AFU to hold in trust pending the determination of all investigations into the source of the donation.
 - 9.3. In the event that the investigations conclude that the source of the donation is indeed from the proceeds of unlawful activity, this should then be seized by the AFU to use within their mandate to combat organised crime and corruption.
 - 9.4. If, however, the investigations conclude that the source of the donation is not from the proceeds of unlawful activity, this should be transferred from the AFU back to the Multi-Party Democracy Fund.
 - 9.5. The Commission should seek to engage with the AFU in this regard to determine the precise modalities that would need to be established.
10. In terms of the reporting procedure to be followed by the Commission, a similar model to that followed in respect of section 34 of the Corruption Act may be considered. In this regard, as required by section 34(3)(b) of the Corruption Act, the National Commissioner has published specific directions to give effect to the duty to report corrupt transactions.² This includes, for instance, the following stipulations:
 - 10.1. A requirement that a designated member of the DPCI must take down the report in accordance with the form set out in Annexure A of the DPCI Directions, register the report on the system provided for, and provide an acknowledgement of receipt to the person who made the report.
 - 10.2. After the report has been taken down, it must without delay be reported to the Central Reporting Office within the DPCI. The Central Reporting Office must then ensure that a designated member of the DPCI contacts the relevant persons necessary to conduct an investigation.

² Department of Police, 'Directions by the National Head of the Directorate for Priority Crime Investigation within the South Africa Police Service in terms of section 34(3)(a) of the Prevention and Combating of Corrupt Activities Act, 2004' (DPCI Directions), 7 December 2012, accessible here: <https://www.saps.gov.za/dpci/downloads/gg35949.pdf>.

11. While the specific details of the cooperation among the Commission, the DPCI and the AFU would be for the relevant entities to determine in light of their given experience and mandate, we submit that the existing models for dealing with the proceeds of unlawful activities – particularly in the context of corruption and organised crime – are already well-established and are mechanisms on which the Commission could rely. Essentially, at the crux of our submission, we submit that it would be inimical to the principles of justice for the Commission to return a donation received from the proceeds of unlawful activity to the donor, as this would result in the continuation of the unlawful activity.
12. We submit that the model proposed above, drawing on aspects of the DPCI and the AFU as appropriate, would be beneficial for the Commission to follow for several reasons:
 - 12.1. First, the procedure set out in section 34 of the Corruption Act, together with the DPCI Directions, is one that facilitates a clear procedure for reporting which pays due regard to confidentiality, integrity of the information received and accountability to the complainant.
 - 12.2. Second, it appropriately treats the issue of donations suspected of being the proceeds of unlawful activity as a priority crime, and facilitates speedy investigation and resolution of the matter in line with the constitutionally mandated level of independence that is required of the offices of the DPCI and the NDPP.
 - 12.3. Third, it does not overburden the Commission, and rather places the responsibility for the handling of the donation, the investigation and any seizure upon determination of the investigation within the remit of the appropriate functionaries with the appropriate expertise and authority to undertake these tasks.
 - 12.4. Lastly, in the event that the donation is found to be the proceeds of unlawful activity, the procedure within the AFU is precisely geared towards dealing with such funds, and applying the proceeds from unlawful activities to combat corruption and organised crime. Again, this will avoid placing an undue burden on the Commission, and safeguard against there being a continuation of the unlawful activity.
13. **As such, we submit that regulation 4(1)(a) of the Proposed Regulation should be amended to a self-standing provision in the following terms:**
 - (1) Where the Commission is of the belief, or has reason to believe, or suspect, or has reason to suspect, that the source of any Donation made to the Multi-Party Democracy Fund is from the proceeds of any unlawful activity, the following steps shall be taken –**
 - (a) The Commission shall immediately notify a designated member of the Directorate for Priority Crime Investigation, who shall record the matter on the prescribed form, register the report, provide an acknowledgement of receipt to the Commission and investigate the matter further.**

- (b) The Commission shall immediately notify a designated member of the Asset Forfeiture Unit, and transfer the Donation for the Asset Forfeiture Unit to hold in trust pending the outcome of the investigation.**
 - (c) If, once the investigation has been finalised, and subject to the conclusion of any court proceedings, it has been concluded that –**
 - i. The Donation is not from the proceeds of any unlawful activity, the Asset Forfeiture Unit shall transfer the Donation back to the Multi-Party Democracy Fund; or**
 - ii. The Donation is from the proceeds of any unlawful activity, the Asset Forfeiture Unit shall seize the donation and apply it, in line with its powers in terms of the Prevention of Organised Crime Act 121 of 1998, to the maximum effect in the fight against crime, particularly organised crime.**
- (2) The Commission shall issue a directive in respect of this process and its engagement with the Directorate for Priority Crime Investigation and the Asset Forfeiture Unit.**
- (3) Nothing in this Regulation places any limitation on the Commission’s obligation to report corrupt activities in terms of section 34 of the Combating of Corrupt Activities Act 12 of 2004, with which the Commission must still comply.**

DISCLOSURES REGARDING POLITICAL ADVERTISING

14. As previously indicated, MMA submits that the Proposed Regulations should be amended to include specific provision for disclosures regarding political advertising, including political advertising online, to increase transparency in line with the objectives of the Act and the Proposed Regulations. Of particular concern is that although regulation 11 of the Regulations on Political Party Funding, 2018 (2018 Regulations) includes a category for “promotions and publications”, MMA submits that this is too vague. As such, this provision as it is currently framed will not enable the Commission or the public to meaningfully discern the import and implications of the disclosures made.
15. MMA notes that disclosures about political advertising is an issue which various countries around the world are grappling with, given the importance that this has for transparency, accountability and credibility. This information is patently relevant to voters in the exercise of their political rights.
16. As such, MMA submits that an additional regulation should be inserted in terms of section 12(2)(d)(i) and/or section 14(2)(a) of the Act, which will specifically deal with political advertising. We submit that the Code of Practice on Disinformation, published by the European Commission, offers useful guidance in this regard.³

³ European Commission, ‘Code of Practice on Disinformation’, 28 September 2018, accessible at <https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation>.

17. In particular, we submit that key tenets in this regard would include the following:
 - 17.1. A suggested definition of ‘political advertising’ is any advertisement advocating for or against the election of a party or candidate or outcome, that is published directly or indirectly as part of an election or campaign.
 - 17.2. The disclosures in this regard should include the actual sponsor identity (including name and address), the amounts spent, and to whom such payments were made.
 - 17.3. All political advertisements should be clearly distinguishable from editorial content, regardless of the form or medium used. Further, when an advertisement appears in a medium containing news or editorial content, it should be presented in a way that is readily recognisable as paid-for content and labelled as such.
 - 17.4. Transparency should also be ensured with a view to enabling users to understand why they have been targeted by a given advertisement.
18. **As such, we submit that a new regulation should be inserted in the following terms:**
 - (1) To ensure transparency, all Represented Political Parties must –**
 - (a) Keep a record of all political advertisements, regardless of the form or medium used, including the actual identity of the sponsor with relevant details such as the name and address, the amounts spent, to whom the payments were made, and how users were targeted.**
 - (b) Provide the Commission with a copy of this record, under oath, on a quarterly basis or as may be requested by the Commission.**
 - (c) Ensure that all political advertisements are clearly labelled as such, including the actual identity of the sponsor with relevant details, and be clearly identifiable as paid-for content.**
 - (2) For the purpose of these Regulations, ‘political advertisement’ shall refer to any advertisement advocating for or against the election of a party or candidate or outcome, that is published directly or indirectly as part of an election or campaign.**
19. In terms of section 14(2)(a) of the Act, the Commission may also consider inserting a further regulation setting out disclosures that it may seek from other categories of stakeholders. Such information would be intended to serve a dual purpose of being relevant in itself, as well as serving as a way for the Commission to check the veracity of the information being provided to it by the Represented Political Parties.
20. In order to facilitate this transparency, we submit that an advertising repository be established in order for members of the public, including the media and other interested stakeholders, to access the relevant information on political advertising. This is in line with the Political Advertising Repository (PAdRe), an initiative that MMA undertook with the Commission during

the 2019 General Election,⁴ as well as the African Commission Guidelines on Access to Information and Elections. An online repository such as this would serve to ensure transparency and accountability in respect of the disclosures made about political advertising, and thereby ensure that the information is indeed accessible to the electorate for whom the information is most directly relevant.

21. Lastly in this regard, we note that the Commission may also consider it prudent to supplement the Proposed Regulations with an additional code issued by the Commission in terms of section 99(2) of the Electoral Act 73 of 1998, which can set out the more detailed disclosure requirements regarding political advertising.

CONCLUDING REMARKS

22. MMA reiterates our appreciation for the opportunity to participate in this process, including by providing this supplementary submission. This Proposed Regulations are central to ensuring that the Commission is able to exercise oversight over represented political parties and that the public is able to make informed political choices. It is therefore critical that the Proposed Regulations are finalised and implemented in advance of the 2021 Local Election in order to give effect to the rights to freedom of expression (section 16), political choice (section 19) and access to information (section 32) contained in the Constitution.
23. MMA remains available and willing to provide any additional assistance to the Commission going forward. Kindly confirm receipt of this supplementary submission.

MEDIA MONITORING AFRICA
Johannesburg, 19 August 2019

⁴ Accessible here: <https://padre.org.za/>.