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Promoting human rights and democracy through the media since 1993

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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:
WRITTEN SUBMISSION BY MEDIA MONITORING AFRICA**

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INTRODUCTION

1. Media Monitoring Africa (MMA) provides this 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).
2. MMA welcomes the opportunity to provide this submission, and to work towards securing openness, accountability and transparency in the electoral process in line with the vision contained in the Constitution of the Republic of South Africa, 1996 (the Constitution), including in sections 1 and 19 thereof. As the Constitutional Court noted in **My Vote Counts NPC v Minister of Justice and Correctional Services and Another**:¹

“The right to vote derives its fundamentality from the central role voting plays in the establishment, functionality and vibrancy of a constitutional democracy. It is a pre-requisite for the very existence of the Legislature and the Executive at all levels of the State. And the proper exercise of that right is so critical to the coming into being of our political arms of the State and the effective and efficient functioning of the entire State machinery that the need for transparency and accountability from those seeking public office is self-evidently more pronounced. **The future of the nation largely stands or falls on how elections are conducted, who gets elected into public office, how and why they get voted in. Only when transparency and accountability occupy centre stage before, during and after the elections may hope for a better tomorrow be realistically entertained.**

This case is after all about establishing a principle-based system that will objectively facilitate the meaningful exercise of the right to vote, regard being had to its veritable significance. The system’s inbuilt capacity to sift the corrupt from the ethically upright is an indispensable requirement. **For this reason, any information that completes the picture of a political party or an independent candidate in relation to who they really are or could be influenced by, in what way and to what extent, is essential for the proper exercise of the voter’s “will” on which our government is constitutionally required to be based. An environment must thus be created for the public to know more than what is said in manifestos or during campaign trails.** As will become apparent below, what is implicitly envisioned by section 19 [of the Constitution] is an informed exercise of the right to vote.”

3. Of particular importance, it is clear from the **My Vote Counts decision** that the purpose of the Act, and consequently the Proposed Regulations, is not only to enable the Commission to exercise oversight over represented political parties, but also to enable the public to make informed political decisions. Central to this is the ability of the media, civil society organisations and watchdogs to be able to access relevant information made available through the Act and the Proposed Regulations, distil that information and share it with the broader public and the electorate. Without this

¹ [2018] ZACC 17; 2018 (8) BCLR 893 (CC); 2018 (5) SA 380 (CC) (**My Vote Counts decision**) at paras 32-33. Emphasis added.

ability, the purpose and objectives of the Act and the Proposed Regulations would be severely undermined. This is the underlying rationale for the submissions below.

4. In providing these submissions, MMA has had regard to comparative, regional and international good practices that we submit can contribute meaningfully to the South African dispensation. The Proposed Regulations provide an important opportunity for the Commission, political parties, candidates and the broader public to secure effective accountability.
5. Our submissions deal with the following aspects:
 - 5.1. **First**, an overview of MMA.
 - 5.2. **Second**, the need for a rights-based approach to the Proposed Regulations.
 - 5.3. **Third**, the definition of 'entity' and 'juristic person'.
 - 5.4. **Fourth**, donations received from the proceeds of unlawful activity.
 - 5.5. **Fifth**, the prohibited use of funds.
 - 5.6. **Sixth**, prohibited donations.
 - 5.7. **Seventh**, the disclosure of donations by political parties.
 - 5.8. **Eighth**, documents and disclosures to be made to the Commission.
 - 5.9. **Ninth**, the enforcement powers of the Commission.
 - 5.10. **Lastly**, the need for clarity regarding the reporting by the Commission and the need to update the Commission's manual in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA).
6. This is dealt with in turn below. MMA remains available to provide any additional assistance to the Commission in giving effect to these submissions, including assisting with proposed textual insertions or amendments to the Proposed Regulations in line with the research that has been undertaken in drafting these submissions.

OVERVIEW OF MEDIA MONITORING AFRICA

7. MMA is a not-for-profit entity that has been monitoring the media since 1993. We aim to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent. The three key areas that MMA seeks to address through a human rights-based approach are, media ethics, media quality and media freedom.
8. In the last 25 years, we have conducted over 200 different media monitoring projects – all of which relate to key human rights issues, and at the same time to issues of media quality. MMA continues to challenge media on a range of issues, always with the overt objective of promoting human rights and democracy through the media. In this time, MMA has consistently sought to deepen democracy and hold media accountable through engagement in policy and law-making processes.
9. MMA has made submissions relating to public broadcasting, online content regulation, cybercrimes, data protection and various other matters relevant to the exercise of freedom of expression and other information rights, both on- and offline. In this regard, MMA has presented on a number of occasions to the National Assembly and the National Council of Provinces. In addition, MMA has made submissions to broadcasters, the Press Council, the South African Human Rights Commission and ICASA. MMA has also provided submissions to the African Commission on Human and Peoples' Rights regarding the Guidelines on Access to Information and Elections (ACHPR Guidelines).
10. MMA is currently working with the Commission and other stakeholders on various initiatives in respect of the upcoming General Elections in South Africa. This includes work with the Commission to develop strategies to address disinformation in the upcoming elections, and in respect of media training on various aspects.
11. For more about MMA and our work, please visit: www.mediamonitoringafrika.org.

THE NEED FOR A RIGHTS-BASED APPROACH

12. The Act, as well as the Proposed Regulations, are crucial developments in the deepening and strengthening of democracy in South Africa. It is critical, in our view, that the common point of departure for any law should be the Constitution and the rights enshrined therein. Indeed, if we are to develop and build the society set out in our Constitution, it is not only logical but essential that we ensure that our laws and policies are framed within those constitutional precepts.

13. While this is, to some extent, acknowledged in the preamble to the Act, MMA is concerned that this is not expressly stated in the substantive provisions of the Act or the Proposed Regulations. In particular, in addition to the importance of political rights, MMA submits that the rights to receive and impart information (section 16 of the Constitution) and to access information (section 32 of the Constitution) should be made clear as a central focus and point of departure. It should further be acknowledged that these rights are equally applicable online as they are offline, a position that has been affirmed by both the United Nations Human Rights Council and the African Commission on Human and Peoples' Rights.²
14. **Accordingly, MMA submits that an additional sub-section should be inserted in regulation 3, along the following lines:**

"Interpretation

...

- (4) In undertaking any measure in terms of these Regulations, the rights contained in the Constitution must at all times be respected, protected, promoted and fulfilled, both online and offline, including the rights to freedom of expression and access to information, and nothing in these Regulations should be interpreted or relied up to unjustifiably infringe the free flow of information."**

DEFINITION OF 'ENTITY' AND 'JURISTIC PERSON'

15. Currently, regulation 2 of the Proposed Regulations includes *inter alia* the following definitions:
 - 15.1. 'Entity' means a Juristic Person.
 - 15.2. 'Foreign Agency' means a Foreign Entity.
 - 15.3. 'Foreign Entity' means an Entity incorporated and registered outside of the Republic.
 - 15.4. 'Juristic Person' means a juristic person as defined in terms of the Companies Act No. 71 of 2008, but not include any Foreign Entity.

² United Nations Human Rights Council Resolution 38/35 (July 2018); African Commission on Human and Peoples' Rights Resolution 362(LIX) (November 2016).

16. MMA submits that the overlap in use between the terms 'entity' and 'juristic person' creates confusion, both in the definitions and more broadly through the provisions of the Proposed Regulations. This is compounded by the references to 'foreign entity' and 'foreign government entity', which are sometimes excluded from the reference to 'juristic person'. This potential for confusion needs to be addressed.
17. **To avoid confusion, MMA submits that the term 'juristic person' should be used consistently, and the term 'entity' should only be used when qualified by a preceding notation, such as 'foreign entity' or 'foreign government entity'.**

DONATIONS RECEIVED FROM THE PROCEEDS OF UNLAWFUL ACTIVITY

18. Section 3(4) of the Act provides that the Commission may not accept money received in terms of sub-section (3) from any of the following: (i) organ of state; (ii) state owned enterprise; or (iii) foreign government or foreign government agency. Regulation 4(1) of the Proposed Regulations seeks to give effect to this provision in providing for the Commission to have the right to return certain donations.
19. However, in addition to the three categories referred to in section 3(4) of the Act, regulation 4(1)(a) of the Proposed Regulations also refers to the instance where the source of the money relating to the donation is from "[t]he proceeds of any unlawful activity".
20. MMA supports the position that donations received from the proceeds of unlawful activity should be addressed in the Proposed Regulations. However, we stress that this should not be treated in the same way as donations received from the other listed parties. Rather, 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:
 - 20.1. 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.
 - 20.2. The Commission should be required to report this to the relevant authorities, including in accordance with the duty to report corrupt transactions contained in section 34 of the Prevention and Combating of Corrupt Activities Act 12 of 2004.

21. **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 statutory obligations, referred to the relevant authorities for investigation, and not returned to the contributor pending the determination of the investigation.**

REQUESTS FOR NON-DISCLOSURE

22. Section 3(5) of the Act provides that any contributor contemplated in sub-section (3)(a) may request the Commission not to disclose their identity or the amount of the contribution, which regulation 4 of the Proposed Regulations seeks to give effect to. MMA has several submissions in relation to this.
23. First, MMA submits that the request for non-disclosure, made on PPR1 as contemplated in regulation 4(2) of the Proposed Regulations, should be required to be made under oath in accordance with the Justices of the Peace and Commissioners of Oaths Act 16 of 1963. This provides an added safeguard that the information provided is true, as section 9 of the Justices of the Peace and Commissioners of Oaths Act renders a person guilty of the offence of perjury for making a knowingly false statement under oath.
24. Second, MMA is concerned at the narrow list of factors set out in regulation 4(3) of the Proposed Regulations that the Commission must take into account in determining whether or not to grant the request for non-disclosure. In particular, MMA's concern is that the list as it currently reads does not adequately consider the public interest considerations that may arise in the information being made publicly available, including for journalistic purposes. An additional consideration should be provided that, in determining the request, the Commission must take into consideration whether there are any countervailing public interest considerations in the disclosure of the information.
25. Third, regulation 4(5)(a) of the Proposed Regulations provides that the Commission must decline a request made for non-disclosure if there is reason to believe that "any provision of the Act or any other legislation has been contravened by the Contributor". In this regard, MMA submits that this provisions should be amended to provide that the request must be refused if there is reason to believe that there is a contravention of any law – not just legislation – to broaden the ambit to include common law offences that are not contained in legislation. Furthermore, MMA proposes deleting the word "contributor", to recognise that in circumstances where there has been a contravention of the law, the request for non-disclosure should be refused regardless of who the perpetrator may be.

26. Lastly, MMA submits that the Commission should provide a report and statistical information of the number of requests received for non-disclosure, the number of requests granted and refused, and a summary of the reasons provided for the requests. This information is manifestly in the public interest.
27. MMA submits that these safeguards are critical. Requests for non-disclosure manifestly seek to subvert the objects of the Act and the Proposed Regulations. It is imperative that the Commission has the relevant information to be able to make an informed decision in line with the objectives of the Act, and that the public receives the relevant information to interrogate the requests and decision-making information, including the right of the media to report thereon. The Proposed Regulations should make clear that disclosure is the point of departure, with requests for non-disclosure only being granted in exceptional circumstances where there compelling reasons to do so and there are no countervailing public interest considerations that would support disclosure.
28. **In sum, therefore, MMA submits the following:**
 - 28.1. **Requests for non-disclosure made on PPR1 should be made under oath in accordance with the Justices of the Peace and Commissioners of Oaths Act.**
 - 28.2. **The list of relevant factors set out in regulation 4(3) should be broadened to ensure that the Commission adequately considers any countervailing public interest considerations that may arise in the information being made publicly available, including for journalistic purposes.**
 - 28.3. **Regulation 4(5)(a) should be amended to provide that the Commission must decline a request made for non-disclosure if there is reason to believe that “any provision of the Act or any other law has been contravened.” The reference to the contributor should be deleted.**
 - 28.4. **The Proposed Regulations should require that the Commission provide a report and statistical information of the number of requests received for non-disclosure, the number of requests granted and refused, and a summary of the reasons provided for the requests.**
 - 28.5. **The Proposed Regulations should make clear that disclosure is the point of departure, with requests for non-disclosure only being granted in exceptional circumstances where there compelling reasons to do so and there are no countervailing public interest considerations that would support disclosure.**

PROHIBITED USE OF FUNDS

29. Regulation 7(1) of the Proposed Regulations provides that no payments may be received by represented political parties for any purposes which contravene the provisions of the Constitution or any of the legislative provisions listed therein. However, in addition to the stipulated provisions, there should be no circumstances where other contraventions of the law may take place and it would be permitted for represented political parties to accept such a donation. The provision should be broadened to make clear that no contravention of the law should be permitted.
30. **Accordingly, MMA submits that this provision should be amended to make clear that no payments may be received by represented political parties “for any purpose which contravenes the law”.**

PROHIBITED DONATIONS

31. Section 8 of the Act provides for prohibited donations, including from the stipulated sources and from a person or entity in excess of the prescribed amount within a financial year. However, MMA is concerned that in circumstances where an attempt is made to undermine the electoral process by attempting to make a prohibited donation, this attempt should be notified and brought to the public attention for proper investigation.
32. **As such, MMA submits that, in the interests of transparency and accountability in line with the objectives of the Act, an additional regulation should be added to the Proposed Regulations should provide for political parties to publicly disclose and report on any instance where a person or entity attempts to make a disclosure in contravention of this section, both to the Commission and the relevant authorities.**

DISCLOSURE OF DONATIONS BY POLITICAL PARTIES

33. Section 9 of the Act provides for the disclosure of donations to political parties, and is expanded upon in regulations 8 and 9 of the Proposed Regulations. Regulation 8(3) and (5) of the Proposed Regulations make reference to a “Person”, while section 9 and other sub-regulations make reference to a “juristic person or entity”. The term “Person” is not defined.
34. MMA submits that the wording in this regard should be streamlined in order to ensure certainty, but also to ensure that the disclosure requirements are as broadly phrased as possible. In the current formulation, it is conceivable that the disclosure requirement

can be obviated by multiple individuals from the same entity making contributions each below the threshold, but with a cumulative effect that the contributions from the individuals within the entity have exceeded the threshold. Furthermore, the provision should also cater for entities that are not juristic persons, such as partnerships and voluntary associations that do not have separate legal status.

35. **As such, MMA submits that regulation 8 of the Proposed Regulations should make clear the disclosure requirements pertain to any person or entity, regardless of juridical status, and includes a requirement for disclosure by multiple persons within the same entity which shall be considered cumulatively.**

PROHIBITION ON DONATIONS TO A MEMBER OF A POLITICAL PARTY

36. Section 10(1) of the Act provides that “[n]o person or entity may deliver a donation to a member of a political party other than for party political purposes”, and section 10(3) of the Act provides that “[n]o person may circumvent subsections (1) or (2), or any of the provisions of this Chapter.” In terms of section 19 of the Act, contravention of section 10 of the Act is an offence.
37. MMA is concerned, however, that section 10 only expressly relates to the offence of delivering a donation, but not the further element of receiving a donation in contravention of section 10(1). Although section 10(3) of the Act is broad enough to include this within its ambit, MMA submits that this should be expressly stated that the offence includes a member of a political party receiving a donation other than for party political purposes. MMA submits that a regulation to this effect should be inserted into Proposed Regulations.
38. Furthermore, MMA submits that any member of a political party to whom an attempt is made to provide a donation in contravention of section 10(1) should be required to report such to the appropriate authorities, including to the Commission for it to determine appropriate recourse. Such reports should be made publicly available at the appropriate time.
39. **As such, MMA submits that a regulation should be inserted into the Proposed Regulations to make clear that the offence in section 10(1), read with section 10(3), pertains to any person who delivers such a donation and to any person who receives such a donation, including any attempt to deliver or receive such a donation. Furthermore, it should be required that any member of a political party to whom an attempt is made in terms of section 10 of the Act must publicly disclose and report on this to the Commission and the relevant authorities.**

DOCUMENTS AND DISCLOSURES TO BE MADE TO THE COMMISSION

40. Sections 11 and 12 of the Act set out the duties of the political parties in terms of the documents and disclosures to be provided to the Commission by political parties. However, MMA is concerned that the current provisions, including in terms of regulations 11 to 13 of the Proposed Regulations, provide for sufficient particularity in order for the Commission and the public to meaningfully discern the import of the disclosures.
41. For instance, regulation 11 of the Regulations on Political Party Funding, 2018 (2018 Regulations) contained in schedule 2 of the Act sets out the descriptive categories in terms of which expenditure must be classified. This includes a category for “promotions and publications”. However, this is too vague to meaningfully discern important information regarding political advertising, for example, and the relevant mediums used. MMA submits that the regulations should be amended to provide further clarity on the disclosures made, and should further be required to be made under oath.
42. **Accordingly, MMA submits that regulation 11 of the Proposed Regulations should be amended to provide for greater specificity in the reporting and disclosure of the information to be provided to the Commission, in order for the Commission and the public to meaningfully discern the import and implications of the disclosures, and that such disclosures should be made under oath.**

ENFORCEMENT POWERS OF THE COMMISSION

43. Section 14(2)(a) of the Act provides that in order to monitor compliance with the Act or investigate a complaint, the Commission may request any person “to disclose any relevant information”. MMA submits that an additional regulation should be inserted into the Proposed Regulations to give effect to this provision on a more systematic basis, to indicate the categories of information that may be sought and the stakeholders from whom such disclosure may be required.
44. MMA submits that of particular relevance in this regard is in respect of political advertising. Globally, a number of countries are engaging with relevant stakeholders to track and verify the information being provided by political parties in respect of political advertising, both online and offline. For example:

- 44.1. The Honest Ads Bill³ in the United States aims to “enhance transparency and accountability for online political advertisements by requiring those who purchase and publish such ads to disclose information about the advertisements to the public, and for other purposes”. Section 7 sets out specific rules for internet or digital communications, including a requirement that the name of the person who paid for the communication is provided. Section 8 of the Honest Ads Bill goes further to require to maintain and make available for inspection “a complete record of any request to purchase on such online platform a qualified political advertisement which is made by a person whose aggregate requests to purchase qualified political advertisements on such online platform during the calendar year exceeds \$500”.
- 44.2. In Canada, the government has passed Bill C-76,⁴ referred to as the Elections Modernisation Act, which requires online platforms to keep a registry of all political ads they publish directly or indirectly as part of election campaigning. The law establishes spending limits for third parties and political parties during a defined period before the election period of a general election, and establishes measures to increase transparency regarding the participation of third parties in the electoral process.
45. **MMA submits that, in accordance with section 14(2)(a) of the Act, the Commission should insert an additional regulation to the Proposed Regulations to include information regarding political advertising that it would seek from the represented political parties and other stakeholders – including the media, online platforms and telecommunications companies – which information would include all official political advertisements, the amount spent on such advertisements, and the identity of the person or entity responsible for the payment of the spend on such advertisements.**
46. **MMA further submits that with the rise of social media and the ability to tailor adverts on an almost one-to-one basis, it is essential that users and the public are aware that the content is paid for and which party has paid for it. This is a key element of transparency of funding for the public. MMA thus submits that in addition to the information made available to the Commission that all paid political advertisements and content are clearly identified as such on a user basis to ensure that ordinary members of the public are aware that content is paid for. This principle is in line with standard ethical practice across most other media formats, including top and tail disclaimers.**

³ Accessible here: <https://www.congress.gov/bill/115th-congress/senate-bill/1989/text?q=%7B%22search%22%3A%5B%22Honest+Ads+act%22%5D%7D&r=1>.

⁴ Accessible here: <https://openparliament.ca/bills/42-1/C-76/>.

47. MMA would be happy to provide the Commission with more detailed information and research regarding the comparative positions in other jurisdictions, as well as suggested wording for the framing of this suggestion provision.

PROACTIVE VOLUNTARY DISCLOSURES TO THE PUBLIC

48. MMA submits that the Proposed Regulations should be amended to include clarity regarding the content of the information that will be publicly disclosed by the Commission on a voluntary, proactive and systematic basis, and the manner in which this will be done. This is necessary to provide certainty to the public, including the media, regarding what information can be expected and what information would need to be requested. Furthermore, MMA submits that in addition to information being published in the Government Gazette, this should also be made available on the Commission's website to facilitate access.
49. MMA submits that, in giving effect to this, the Commission must have due regard in particular to sections 16 and 32 of the Constitution, the **My Vote Counts decision** and the provisions of PAIA. Furthermore, the Commission's manual published in terms of PAIA should be updated in order to reflect these disclosures.
50. In this regard, MMA would urge the Commission to have regard to the ACHPR Guidelines and the disclosures set out therein as being reflective of good practice in line with the right of access to information and political rights under regional and international law.

CONCLUDING REMARKS

51. MMA appreciates the opportunity to provide these submissions to the Commission. It is imperative to remember that, in addition to the Act and the Proposed Regulations serving to enable the Commission to exercise oversight over represented political parties, it is as important that it serves to enable the public to make informed political choices. The submissions contained above are aimed at ensure that access to relevant information regarding political party funding is made readily available to the public, including to members of the media in fulfilling their duty to inform the public, in accordance with sections 16, 19 and 32 of the Constitution.

52. We note that we are available and willing to provide any additional assistance going forward, including to provide suggested textual insertions or amendments to the Proposed Regulations in line with the submissions above, in order to assist the Commission in the expeditious finalisation of the Proposed Regulations.

MEDIA MONITORING AFRICA
Johannesburg, 22 March 2019

ENDS.