

THE BROAD-BASED BLACK ECONOMIC EMPOWERMENT

PRACTICE GUIDE 01 of 2016

THE RECOGNITION OF THIRD PARTY PROCUREMENT SPEND

1. The Broad Based Black Economic Empowerment Commission ("B-BBEE Commission") is an entity established by the Broad-Based Black Economic Empowerment Act 53 of 2003 as amended by Act 46 of 2013 ("the Act"), to oversee the implementation of the Act, which includes provision of explanatory notices, non-binding advisory opinions and clarification services to improve the understanding of the Act.
2. This Practice Guide is issued as a non-binding guide purely to assist with the interpretation to ensure consistency in the application of the Act. Should this Practice Guide not be clearly applicable to your specific set of facts at any given time, you are advised to approach the B-BBEE Commission for a non-binding advisory opinion, which will be more specific to your set of facts.
3. This Practice Guide does not constitute a legal document or a ruling of the B-BBEE Commission on the issue concerned. Further, although this Practice Guide is not binding on the B-BBEE Commission, it does set out the approach that the B-BBEE Commission is likely to take on any matter relating to the recognition of third party procurement spend for consistency.
4. Section 9 (1) of the Act empowers Minister of Trade and Industry to issue Codes of Good Practice ("the Codes") on broad based black economic empowerment ("B-BBEE") to promote the purposes of the Act. The Codes as amended are underpinned by the need to drive inclusive economy, and must at all times be interpreted and applied in a manner that is consistent with the objectives and purposes of the Act, and in compliance with the Constitution.

5. The preferential procurement criteria in Code Series 400, is one of the instruments used to drive economic transformation throughout the economy, by encouraging procurement only from suppliers that are compliant with the B-BBEE scorecard. The instruments also provide for third party procurement spend.
6. In keeping with Code Series 400, and after carefully considering the current practice on the treatment of third party procurement spend, the B-BBEE Commission deems it necessary to provide a clarification on the recognition of third party procurement spend for the economy to derive the desired benefit for B-BBEE.
7. A third party refers to a middle person who facilitates the provision of goods or services between two entities or parties, such as a travel agent facilitating a booking of air travel between the traveller and preferred or affordable airline and receiving a commission in return for that service. Investopedia defines a third party as “an individual or entity that is involved in a transaction but is not one of the principals”. (www.investopedia.com: 27 July 2016)
8. The following example serves as a guide on the recognition of third party procurement:



- 8.1 Entity A is a car rental provider, Entity B a travel agent, and Entity C the measured entity. The measured entity makes car rental bookings for its officials through Entity B. Entity B hires the rental cars with Entity A for the sum total of R15 000. Upon return of the rented cars, the measured entity pays R15 000 to Entity B. Entity B pays R10 000 to Entity C and retains R5 000 as its commission for the service.
- 8.2 In such a case, this is how the measured entity ought to recognise the third party procurement spend as part of its Total Measurement Procurement Spend (TMPS):
 - 8.2.1 If Entity B's B-BBEE certificate was used, the measured entity cannot claim the full R15 000 as part of its TMPS. The measured entity will only include the R5 000 commission as part of its TMPS as it is the true income Entity B recognised in its financial statements for the service offered to the measured entity.

8.2.2 The sum of R10 000 was paid to Entity A, and that is the amount Entity A will recognise as income in its financial statements. This qualifies as pass-through procurement which is an exclusion from the calculation of TMPS in terms of section 6.3 of Code Series 400.

8.2.3 Therefore, Entity B has the responsibility to provide the measured entity with the breakdown of the spent amount indicating its direct costs from the service offered.

8.2.4 For the measured entity to count R15 000 as part of its TMPS, it should have both Entity A and Entity B's B-BBEE certificates with clear breakdown of how much was directly spent with each supplier.

8.2.5 Alternatively, the measured entity can only claim the full R15 000 against Entity B, if the full amount is recorded as income in Entity B's financial statements.

9 The example above is given to illustrate the importance of and the need to clarify and provide guidance on this issue, as highlighted below:

9.1 If the amount of R15 000 recorded as expenditure in the measured entity's financial statements is not recorded as income in either Entity A or Entity B's financial statements, it will nullify the B-BBEE certificate the measured entity used to recognise the procurement spend.

9.2 If the measured entity recognises the full amount as the expenditure against Entity B, this will affect Entity B's classification as an EME, QSE or Large Entity. Reason being that Entity B may regard itself as an EME or QSE because it only recognises a certain percentage as income from the R15 000 amount. But if the full amount is recognised, the measured entity's financial statements may reflect Entity B as a Large Entity and thereby requiring a generic certificate and not an EME or QSE certificate, as the case may be.

9.3 This could be regarded as a misrepresentation of Entity B's B-BBEE status which is an offence in terms of section 130 (1) (a) of the Act.

9.4 The measured entity can also be seen to be committing a fronting practice by submitting false information regarding its TMPS during verification, and such would constitute an offence in terms of section 130 (1) (b) of the Act.

- 10 All verification professionals have a responsibility and duty to provide entities with proper advice and guidance, including the implementation of this guide for the determination of the B-BBEE status of entities.
- 11 In terms of section 13O (2) a verification professional, procurement officer or any official of an organ of state or public entity who becomes aware of the commission of, or attempt to commit, any offence referred to under section 13O (1) and fails to report it, is guilty of an offence.
- 12 In terms of section 13F (1) (d) read with section 13J of the Act, the B-BBEE Commission has the power to investigate, either on its own initiative or in response to a complaint received, any matter concerning B-BBEE.
- 13 If an entity is found to have violated the Act, an entity could be fined up to 10% of its annual turnover, and individuals involved could be imprisoned for up to 10 years, and or fined. Specifically, an offence under section 13O (2) could lead to imprisonment of up to 12 months, or a fine, or both the fine and imprisonment.
- 14 This Practice Guide is issued as a guide purely to assist with the interpretation and application of Code Series 400 with regard to third party procurement spend, and as indicated, it does not constitute a legal document or ruling of the B-BBEE Commission.
- 15 This Practice Guide may be updated anytime by the B-BBEE Commission if there are any material changes arising from developments in the application of Code Series 400. In such an instance, an amended version will be published to replace this one.
- 16 For any queries or further clarity on this Practice Guide, kindly feel free to contact us at the following contact details:

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Issued by the B-BBEE Commission

29 July 2016

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Wanting to lodge a complaint with the B-BBEE Commission?

Who is the B-BBEE Commission?

The Broad-Based Black Economic Empowerment Commission ("B-BBEE Commission") is established as an entity within the administration of the Department of Trade and Industry ("the dti") by the Broad-Based Black Economic Empowerment Act 53 of 2003, as amended by Act 46 of 2013 ("the Act") to oversee the implementation of the Act, which includes investigations on any matter arising from the applications of Act, such as fronting.

How far does B-BBEE Commission mandate go?

We are a regulatory entity with jurisdiction throughout the South Africa, entrusted by law to act with impartiality and perform functions without fear, favour or prejudice. It does not matter where the complaint comes from for as long as it is within South Africa.

We look at violations that occurred after 24 October 2014, but where a violation occurred before this date, and the conduct, licence, agreement, is still running, we have powers to deal with such a violation.

Who can lodge a complaint?

Any person who suspects or is aware of the violation of the Act, such as where black people are used as fronts to achieve B-BBEE points, may lodge a complaint with us.

For an example, employees in an entity may be aware that the entity is practicing fronting or tokenism by presenting black people as shareholders or as executives in the entity, when such is not the case.

It is an offence to try to improperly influence our officials or obstruct us during the exercise of the powers and performance of duties under the Act.

What sort of issues can you complain about?

Any person can complain about fronting practices, which are defined in the Act to mean those practices that undermine or frustrate the objectives of the Act, or impede the implementation of any of the provisions of the Act. So a violation of any provision of the Act can be reported to us.

Fronting practices generally take the form where black people are presented as directors, shareholders or beneficiaries in an entity for the entity to look like it has proper B-BBEE status.

Entities often do this to get higher points to qualify for a government tender or a license that they need to get to operate in sectors such as mining. Also they apply for government funding or incentives, they may put black people in the front to give the impression that the entity is empowering black people, when it is not so.

These practices come in many forms and shapes, and become creative every day. So indicators are used to detect such practices, such as where a technician is an entity is put on its structure as a shareholder or manager in the entity, but still earning his salary as a technician only, or where a black person is made a CEO decisions being taken by other persons below him in the entity.

What are the powers of the B-BBEE Commission?

We have the power to receive and act on complaints we receive from the public, or to initiate investigations on our own initiative, and thereafter make findings and recommendations.

We have the power to issue summons and question any person relevant to the investigation, as well as to obtain documents or information relevant to the case. We can also approach the court for an interdict or an order on any aspects, where necessary.

Where we find that a complaint we have investigated involves a commission of a criminal offence, we are required to refer the matter for prosecution to the National Prosecution Authority or the appropriate division of the South African Police Services.

Once investigations are completed, our findings or recommendations will be published, including on the website.

What are consequences of violating the Act?

The findings of the B-BBEE Commission can lead to cancellation of contracts that the entity investigated has with government or government entities.

Parties found guilty could be fined up to 10% of their annual turnover if they are juristic persons or imprisoned for up to ten (10) years if they are natural persons.

Parties can also be excluded from doing business with government or any government entity for a period of up to ten (10) years.

Parties who violate the Act also risk serious damage to their reputation and image, which could affect their standing and ability to attract investments or contracts, as well as legal exposure from being sued by others.

How to complain to the B-BBEE Commission?

Any person can lodge a complaint with us by submitting a completed FORM B-BBEE 7 and state the nature of the complaint.

Specifically, a person is required to provide the following information on the Form:

- a description of the conduct or practice alleged to be in contravention of the Act;
- particulars of a person, sphere of government, entity or organ of state alleged to be in contravention with the Act;
- name and contact details of any person that may provide information that is relevant to the complaint to the Commission;
- information on measures taken by the complainant to attempt to resolve the complaint, including alternative dispute resolution measures, prior to lodging the complaint; and
- the way in which the alleged contravention may in the opinion of the complainant be addressed

In submitting the Form, the complainant is requested to attach any relevant information such as shareholders' contracts, B-BBEE Certificates and company registration certificates to assist us to better understand your complaint.

On receipt of the complaint, we will acknowledge receipt and issue a case number to the complainant within five (5) days. We may request further information by issuing FORM B-

BBEE 8. In terms of section 13L, a person may claim that all or part of that information is confidential and the claim must be supported by a written statement explaining why the information is confidential.

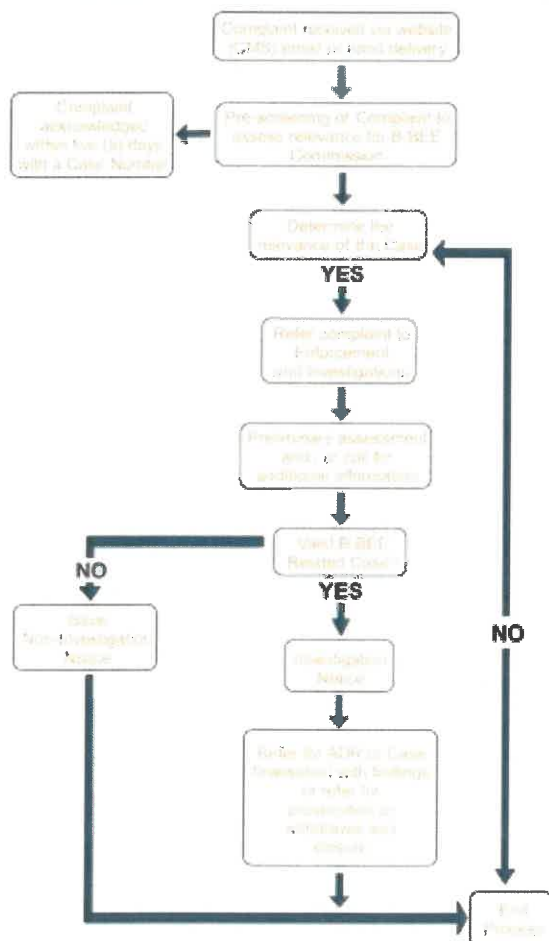
What can be the outcome of the complaint?

We assess all complaints we receive, and will issue a notice of non-investigation to the complainant in FORM B-BBEE 11, if we are of the view that (a) we have no jurisdiction to look into the matter; or (b) a complaint does not warrant an investigation.

Where there is jurisdiction and the complaint warrants an investigation, a Notice of Investigation will be issued. The investigation can include summons and formal hearings.

Findings and recommendations will be made. Prosecution will therefore be pursued where determined.

The Lodge a Complaint Process – using B-BBEE Form 7



How to contact us?

You may write, e-mail, phone, visit our offices or complete the complaint form online on the website.

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Reporting Duties?

The Broad-Based Black Economic Empowerment (B-BBEE) Commission is established as an entity within the administration of the Department of Trade and Industry (“the dti”) by the Broad-Based Black Economic Empowerment Act 53 of 2003 (as amended by Act 46 of 2013) (“the Act”) to oversee the implementation of the Act, which includes to receive and analyse reports as prescribed concerning B-BBEE compliance of organs of state, public entities and private sector enterprises.

Who can you report to?

The B-BBEE Commission:

has jurisdiction throughout the Republic entrusted by law to act with impartiality and perform its functions without fear, favour or prejudice and must exercise the functions assigned to it in terms of the Act and exercise such powers which are not in conflict with the Act as may be conferred in writing by the Minister.

What are the powers of the B-BBEE Commission?

It has the power to:

Accept the report, reject the report, initiate an investigation and refer matters to other regulatory and enforcement entities.

Who must report to the B-BBEE Commission?

1. A sphere of government, public entity or an organ of state must file the audited annual financial statements and annual report compiled in terms of section 13G (1) of the Act annually to the B-BBEE Commission in the prescribed **FORM B-BBEE 1**, within (thirty) 30 days of the approval of such audited financial statements and annual report.
2. A public company listed on the Johannesburg Stock Exchange must submit a compliance report required to be included annually in terms of section 13G (2) of the Act annually to the B-BBEE Commission in the prescribed **FORM B-BBEE 1**, within 30 days of the approval of the audited financial statements and annual report **OR** ninety (90) days at the end of the financial year.
3. A Sectoral Education Training Authority (SETA) must submit a report required in terms of section 13G (3) of the Act annually to the Commission, on the skills development spending and programmes in the prescribed **FORM B-BBEE 2**, within 30 days of the approval of the audited financial statements and annual report **OR** 90 days at the end of the financial year.

4. The Minister of Trade and Industry must within 30 days of receipt of reports by Sector Charter Councils in terms of section 10(4) of the Act, submit such sector report to the B-BBEE Commission for consideration.

What is the Process?

5. The B-BBEE Commission will in writing within five (5) days acknowledge receipt of the report.
6. The B-BBEE Commission has 90 days to consider the report, and respond to the person who filed in respect of the state of compliance with the Act.
7. The B-BBEE Commission may conduct site visits to verify the correctness of the information submitted in the report or initiate an investigation in terms of the Act.
8. In the case of non-compliance with the Act, the B-BBEE Commission may notify the sphere of government, public entity, organ state, listed company or SETA by issuing the prescribed **FORM B-BBEE 3** of the apparent non-compliance and require the entity to correct the report within 30 days.
 - i. The B-BBEE Commission may hold with the affected entity a closed or open meeting to respond to the questions raised by the B-BBEE Commission in relation to the report.
 - ii. If the entity fails to comply within the 30 days timeframe the B-BBEE Commission must reject the report by issuing the prescribed **FORM B-BBEE 4** with reasons.
9. If the B-BBEE Commission is satisfied that the report complies with the Act, the B-BBEE Commission will notify the entity concerned in a prescribed **FORM B-BBEE 5**.
10. In terms of section 13L of the Act, when submitting information to the B-BBEE Commission, a person may claim that all or part of that information is confidential and the claim must be supported by a written statement explaining why the information is confidential.
11. The B-BBEE Commission may publish the reports in a manner that it deems appropriate.

Conclusion

12. The B-BBEE Commission offers advice to any entity that wishes to clarify the process. Should you wish to obtain advice, please submit clarification. The B-BBEE Commission encourages all entities to take up this service where they are unclear.

Schematic Reporting Process Flow



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Who is eligible to be a Qualifying Small Enterprise (QSE)?

In terms of the amended Codes of Good Practice of the B-BBEE Act that came into effect on 1st of May 2015, a QSE is a Measured Entity with an annual Total Revenue of between R10 million and less than R50 million.

Categories of QSEs

- **Generic QSEs**
- **Sector-based QSEs**

Generic QSEs

A QSE that is 100% black-owned will automatically have a level 1 rating and a QSE that is 51% black-owned will automatically have a level 2 rating on their B-BBEE status.

A Measured Entity that falls under this category, must comply with at least two of the priority elements in the B-BBEE Generic Scorecard:

- Ownership is compulsory; and either
- Enterprise & Supplier Development or Skills Development

QSEs that are at least 100% or 51% black-owned must use a sworn affidavit template available on the Department of Trade and Industry's (the dti's) website

www.thedti.gov.za or a Companies and Intellectual Property Commission (CIPC) certificate on an annual basis.

The purpose of this intervention is to reduce the cost of compliance and the cost of doing business for small and medium businesses in South Africa.

Generic QSEs that are not at least 100% or 51% black-owned must be verified using the QSE scorecard and obtain a valid B-BBEE certificate from a South African National Accredited System (SANAS) accredited Verification Professional on an annual basis.

Sector-based QSEs

The eligibility of an entity that falls under a specific sector to qualify as a QSE is set by the Sector Charter in which it operates in. The following are the gazetted sector Charters:

- Agri-BEE Charter
- Financial Sector Charter
- Information and Communication Technology (ICT) Charter
- Property Sector Charter Turnover
- Chartered Accountancy Sector Code
- Integrated Transport Sector Codes
- Forest Sector Code
- Marketing, Advertising and Communication (MAC) Sector Code
- Tourism Sector Code

The above listed Sector Code Charters can be accessed on **the dti's** website, which indicate the qualification criterion for QSEs for a particular sector-based entity.

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What is an Exempted Micro-Enterprise?

An enterprise with an annual Total Revenue of R10 Million or less qualifies as an Exempted Micro-Enterprise (EME).

Eligibility as an Exempted Micro-Enterprise

An EME is deemed to have a B-BBEE Status of "Level Four Contributor" having a B-BBEE recognition level of 100%.

Despite the above, the amended Codes of Good Practice have provided for enhanced B-BBEE recognition level for an EME where:

- An EME, which is at least 100% black owned qualifies for elevation to "Level One Contributor" having a B-BBEE recognition level of 135%.
- An EME, which is at least 51% Black owned qualifies for elevation to "Level Two Contributor" having a B-BBEE recognition level of 125%

However, an EME is allowed to be measured in terms of the Qualifying Small Enterprise scorecard if it wishes to maximise its points and move to a higher level.

What are the requirements for an Exempted Micro Enterprise?

An EME does not need to be verified, either by an accounting officer or verification professional.

An EME is only required to obtain a sworn affidavit (template on www.thedti.gov.za) or Companies and Intellectual Property Commission (CIPC) Certificate on an annual basis, confirming the following:

- Annual Total Revenue of R10 million or less
- Level of Black ownership

Thus, no person, verification professional, agency or auditor has authority under the revised Codes of Good Practice to issue an EME with a B-BBEE certificate as this would be in contravention of the B-BBEE Act and would result in the B-BBEE Commission taking action against these perpetrators of this unauthorised and illegal practice. It is immaterial whether the verification professional or agency accredited by SANAS, no one is permitted to issue such certificate to EMEs.

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GUIDE ON START-UP ENTERPRISES

About the Guide

The guide is developed and distributed by the Broad-Based Black Economic Empowerment Commission ("B-BBEE Commission") with the aim of providing guidance on how Start-up Enterprises are treated with the B-BBEE Codes of Good Practice issued with accordance with the B-BBEE Act.

Start-up Enterprise and B-BBEE

The Codes of Good Practice defines Start-up Enterprises as recently formed or incorporated entities that have been in operation for less than a year, which is a departure from the norm where entities can claim start-up status for three to five years. A Start-up Enterprise does not include any newly constituted or restructured enterprise which is merely a continuation of a pre-existing enterprise or business.

Eligibility as a Start-up Enterprise

In order to qualify as a Start-up Enterprise, the enterprise must provide an independent confirmation in terms of paragraph 4.5 of Codes Series 000. Start-up Enterprises are measured as Exempted Micro-Enterprise (EME) as per Codes Series 000 for the first year following their formation or incorporation.

Exemption from verification process

EMEs are not required to undergo a verification process with verification agencies but only required to obtain sworn affidavits in accordance with the template provided on www.thedti.gov.za confirming the following:

- Details of the deponent
- Whether management accounts and financial are being used;
- Financial year of the financial information;

- Annual Total Revenue of R10 million or less; and
- Level of black ownership of the entity

EMEs can alternatively also obtain a certificate from the Companies and Intellectual Property Commission confirming that they are a start-up and information can be obtained at www.cipc.co.za.

Any misrepresentation of the above information constitutes a criminal offence as set out in the B-BBEE Act.

Automatic level for Start-up as EME

Further to the exemption from the verification process explained above an EME which is at least 51% Black owned qualifies for elevation to “Level Two Contributor” having a B-BBEE recognition level of 125%, An EME, which is at least 100% black owned qualifies for elevation to “Level Two Contributor” having a B-BBEE recognition level of 135%.

Specific requirements for Start-up Enterprise in tenders/contractors/other economic opportunities

In spite of the above-mentioned exemption from verification and enhanced status for EMEs and by extension Start-up Enterprises, Start-up Enterprises must submit a Qualifying Small Enterprise (“QSE”) scorecard when tendering for any contract, or seeking any other economic activity covered in terms of Section 10 (1) of the B-BBEE Act, which have a value higher than R10 million but less than R50 million, and for contracts of R50 million or more they are required to submit a Generic scorecard applicable to large entities.

This means a Start-up Enterprise will require a verification by accredited verification agency in these circumstances and the presentation of such scorecard must be based on annualised data.

Conclusion

The aim is to reduce the regulatory burden and costs for Start-up Enterprises, so it is important that this be applied carefully for the benefits to be enjoyed by Start-up Enterprises. However, new entities established with a view to circumvent the B-BBEE Act, which are clearly a continuing business will not meet the requirements for Start-up Enterprises.

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UNDERSTANDING THE IMPLEMENTATION OF THE YOUTH EMPLOYMENT SERVICE INITIATIVE

What is the Youth Employment Service (YES) initiative?

The YES initiative was gazetted under Code Series 000 of Statement 000 of the amended Codes of Good Practice (“the Codes”) of the Broad-Based Black Economic Empowerment Act 53 of 2003 as amended by B-BBEE Act 46 of 2013. The YES initiative came into effect on 28 August 2018 and its aim is to advance job creation for unemployed black youth and provide elevated B-BBEE status for YES Measured Entities.

What are the Key Measurement Principles?

The following must be achieved in order for a YES Measured Entity to receive recognition:

- (a) Registration with the YES Non-Profit Company in order to participate within the YES and entities cannot be recognised for B-BBEE if not registered.
- (b) Sub-minimums for priority elements for YES Measured Entities that are governed by a Sector Code will be calculated as per the principles within that Sector Code to qualify under the YES Initiative.
- (c) YES Measured Entities need to maintain the previous B-BBEE Status Level before participating in YES (i.e. Level 4, Level 5, etc.). Where entities do not maintain their previous B-BBEE Status Level due to any factor(s) and wish to participate within the YES Initiative, they may engage with the dti B-BBEE Policy Unit with justifiable evidence for participation. Factors may include, but not limited to:
 - Termination of an ownership deal;

- Sector Codes amendments which led in a drop in BBBEE Status Level;
- (d) Absorption can only take place after the 12-month completion of the workplace experience and the target is based on the YES Targets for YES Measured Entities. Where absorption is identified at the time of B-BBEE Verification, B-BBEE Recognition will be awarded.
- (e) The 12-month workplace experience is not a learnership, internship or apprenticeship programme.
- (f) Exempt Micro Enterprises (EMEs) and at least 51% and 100% black owned Qualifying Small Enterprises (QSEs) that participate within the YES Initiative will be verified against the applicable QSE Scorecard and the B-BBEE Certificate will be issued by an Accredited SANAS B-BBEE Verification Agency.
- (g) B-BBEE Recognition will only be applicable for the creation of jobs under the YES Initiative for Eligible Employees who are unemployed at the time of registering with the YES Initiative.

Which entities are eligible to partake in the YES initiative?

Generic entities that have an annual turnover of R50 million and above must achieve at least 40% sub minimum on the priority elements on the generic B-BBEE scorecard of the Codes. Alternatively, the said entities must achieve an average of 50% across the three priority elements identified in the Codes.

AND

QSEs which are entities that have an annual turnover of between R10 million and R50 million must achieve at least 40% sub minimum on two of the three priority elements of which Ownership is compulsory. Alternatively, a QSE must achieve an average of 40% across two of the priority elements of which Ownership is compulsory.

AND

EMEs which are entities with an annual turnover of between R0 to R10million and require no additional requirements

AND

YES Measured Entities must ensure that they maintain or improve the B-BBEE Status Level and performance against the Targets of the overall Scorecard obtained in the previous year before participating in the YES initiative.

Which employees are eligible to participate in the YES initiative?

The following persons are eligible to participate in the YES initiative:

- they must be between the ages of 18 and 35; and
- meet the definition of “Black People” as defined in the B-BBEE Act.

What are the YES Targets?

The YES Targets are dependent on the size of the YES Measured Entity, the following are applicable to the various YES Measured Entities:

Generic entities	YES Targets
A	1.5% of the YES Measured Entity's headcount in the preceding year;
OR (B)	1.5% of the YES Measured Entity's average Net Profit After Tax (NPAT) from South African operations in the immediately preceding three years, converted to a headcount number by dividing that NPAT number by R55,000;
OR (C)	Total revenue band and minimum black you jobs created (more information can be obtained from the B-BBEE Commission or YES NPO).

QSEs and EMEs

QSEs and EMEs targets per annum are based on headcount numbers (more information can be obtained from the B-BBEE Commission or YES NPO).

Recognition levels

YES Measured Entities can enhance their overall B-BBEE status by two (2) levels as illustrated in the table below:

Recognition groups	YES target achievements	B-BBEE Recognition levels obtained
Group 1	Achieve 100% YES target and 2.5% absorption	Move 1 B-BBEE recognition level up on the B-BBEE scorecard
Group 2	Achieve 1.5 X the YES target and 5% absorption	Move 1 B-BBEE recognition level up on the B-BBEE scorecard and earn 3 bonus points on the overall scorecard
Group 3	Achieve double YES target and 5% absorption	Move 2 B-BBEE recognition levels up on the B-BBEE scorecard

Informal Skills Development spend for the YES initiative

Informal Skills Development expenditure for YES employees will be recognised during the Verification Process of the Skills Development element under Amended Code Series 300, Statement 300. YES Measured Entities will be able to only claim up to 50% of their Skills Development Spend as Informal Training (Category F and G of the Skills Development Matrix) against the Skills Development Scorecard.

Employment Conditions a YES Measured Entity must meet

A participating YES Measured Entity must comply with the South African legislation governing basic conditions of employment and working conditions which includes signing a fixed term or temporary employment contract with all eligible employees filling the new positions within the entity.

Where an employee/s does not complete a full 12-month period due to unforeseen circumstances the YES Measured Entity needs to ensure that at least eight (8) full months have been completed in order to be eligible for B-BBEE Recognition and where an employee ceases to participate due any other circumstances, the YES Measured Entity will have one (1) month to replace them in order to be eligible for B-BBEE recognition.

The Yes Measured Entity must ensure quality work experience is provided; must create new jobs additional to existing headcount and may sponsor new jobs if it cannot create a sufficient number of jobs.

For more information or clarity, entities may contact the B-BBEE Commission and may contact YES entity regarding registration.

How to contact us:

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1. Who are we?

The Broad-Based Black Economic Empowerment Commission ("B-BBEE Commission") is established as an entity within the administration of the Department of Trade and Industry ("the dti") by the Broad-Based Black Economic Empowerment Act 53 of 2003, as amended by Act 46 of 2013 ("the B-BBEE Act"). Its role includes overseeing the implementation of the B-BBEE Act and to act against fronting practices.

2. What does the Socio-Economic Development Element entail?

According to paragraph 7 of Statement 000 of the Codes of Good Practice (the Codes), one of the elements identified to advance empowerment of black people is Socio-Economic Development (SED) which is contained in Statement 500.

Every measured entity on an annual basis is required to contribute 1% of Net Profit After Tax (NPAT) or 0.1% of allocated budget, gross receipts or discretionary spend for entities governed by Statement 004 (also known as the specialised scorecard), towards socio-economic development initiatives that will enable black people to gain access to the mainstream economy.

SED contributions consist of monetary or non-monetary contributions actually initiated and implemented in favour of beneficiaries with the objective of facilitating income generating activities for targeted beneficiaries.

To be recognised, at least 75% of the full value of SED contributions must directly benefits black people. If less than 75% of the full value of SED contributions directly benefits black people, only the value of the contribution made multiplied by the percentage that benefits black people, is recognisable.

3. Who must implement Socio-Economic Development Initiatives?

Statement 500 must be implemented by all organs of state and public entities, all entities that undertake any economic activity with organs of state and/or public

entities, as well as entities that undertake any economic activity with the measured entities whether direct or indirectly.

4. Examples of Socio-Economic Development Initiatives

Key to Statement 500 is the income generating factor in the initiatives to be implemented. Below is a non-exhaustive list of qualifying initiatives towards income generating activities for purposes of SED recognition:

- (a) Sustainable livelihood initiatives, limited to economic activities.
- (b) Building of vocational, literacy and work related (including self-employment) skills.
- (c) Providing opportunities for adult education.
- (d) Income generating skills and knowledge.
- (e) Improvement of capacity to work, including self-employment.
- (f) Generation of income from productive activities.
- (g) Increased employability and earning power.
- (h) Providing training or mentoring to beneficiary communities. Such contributions are measurable by quantifying the cost of time (excluding travel or commuting time) spent by staff or management of the Measured Entity in carrying out such initiatives. A clear justification must support any claim for time costs incurred, commensurate with the seniority and expertise of the trainer or mentor).
- (i) Maintaining a socio-economic development unit by the Measured Entity. Only that portion of salaries and wages attributable to time spent by the staff in, and the other expenses related to, promoting and implementing socio-economic development constitute contributions.

Initiatives mentioned in part (a) to (g) above, simply mean initiatives that enhance the ability of black people who remain non-participants in the economic mainstream to be included in participating in the economy in a sustainable manner by encouraging implementation of socio-economic development contributions linked to improving the financial circumstances of black people in order to and discourage perpetual dependence on hand-outs. For example, provision of development capital for communities, training or mentoring beneficiary communities which will assist them to increase financial capacity or offering preferential terms to beneficiary communities when purchasing their goods/ services.

Further, the Codes in “Schedule 1 on interpretation and Definitions” in addition to the initiatives listed above, has indicated that SED contributions can take the form of:

- (a) development programmes for women, youth, people with disabilities, people living in rural areas;
- (b) support of healthcare and HIV/AIDS programmes;

- (c) support for education programmes, resources and materials at primary, secondary and tertiary education level, as well as bursaries and scholarships;
- (d) community training; skills development for unemployed people and adult basic education and training; or
- (e) support of arts, cultural or sporting development programmes.

5. What will not qualify as Socio-Economic Development?

Any support of the initiatives outlined in 4 above, through SED contributions cannot be charitable in nature such as mere donations that are not linked to income generation. Further, SED is not necessarily tantamount to Corporate Social Investment (CSI).

CSI is mostly used to promote good will in communities where the measured entity operates, but does not necessarily meet the income generation test. This is usually in form of handouts, for example, donation of school uniform and books, building repairs, donation of food parcels etc.

In justifying the conversion of CSI programmes into SED contributions, it is usually argued that the manner in which the Codes have been drafted makes it easy for entities to blur the lines between socio-economic development and corporate social investments.

Nonetheless, it must always be remembered that SED places less reliance on donations and rather enable income generation for beneficiaries in order to create and maintain sustainable access to the economy. For Below is an example of how an entity can make meaningful impact by providing the following in implementing initiatives mentioned in paragraph 4 above:

Qualifying contribution type	Contribution amount	Benefit factor
Grant and related contributions		
Grant contributions	Full grant amount	
Direct Cost incurred in supporting socio-economic development, sector specific initiatives or Approved Socio-Economic Development Contributions	Verifiable cost (monetary and non-monetary)	100%
Discounts in addition to normal business practices supporting socio-economic development, sector specific initiatives or	Discount amount (in addition to normal business discount)	100%

Approved Socio-Economic Development Contributions		
Overhead costs incurred in supporting socio-economic development, sector specific initiatives or Approved Socio-Economic Development Contributions	Verifiable cost (monetary and non-monetary)	80%
Human resource capacity contributions		
Professional services rendered at no cost supporting socio-economic development, sector specific initiatives or Approved Socio-Economic Development Contributions	Commercial hourly rate of professional	80%
Professional services rendered at discount supporting socio-economic development, sector specific initiatives or Approved Socio-Economic Development Contributions	Value of discount based on commercial hourly rate of professional	80%
Time of employees of Measured Entity productively deployed in assisting beneficiaries and socio-economic development, sector specific initiatives or Approved Socio-Economic Development Contributions	Monthly salary divided by 160	80%

6. Measurement of Socio-Economic Development Contributions

In recognising SED contributions, a verification professional as prescribed in the verification manual of **the dti** published on 18 July 2008 (as may be amended from time to time), ought to verify the B-BBEE status of the beneficiary entity through sufficient and appropriate evidence, obtain confirmation from the beneficiary entity or black participants that it has satisfied the definition of “black people”, and acknowledgement of the contribution, and confirm that the SED initiative has been initiated and implemented within a particular measurement period resulted in income generation for the beneficiaries.

7. Measurement of Third Party Initiatives

Where an SED initiative is implemented through a third party, the measured entity contribution must be initiated and implemented with the target beneficiary. Mere contribution of the funds to a third party does not qualify for recognition of SED

points. Further, contributions made after the date of measurement cannot be recognised.

Where the third party identified by a measured entity to facilitate its SED contributions is a Non-Profit Organisation (NPO) or Public Benefit Organisation (PBO) including Non-Profit Companies (NPC), such entity must be able to produce either a B-BBEE certificate or sworn affidavit on its B-BBEE compliance.

NPOs/PBOs/NPCs are referred to as specialised enterprises for purposes of B-BBEE measurement. Their B-BBEE compliance is measured in terms of Statement 004 (also referred to as the specialised scorecard).

The specialised scorecard classify specialised enterprises in terms of annual turnover, allocated budget or gross receipts. This means that a specialised entity with R0 and less R10 million annual turnover/allocated budget/gross receipts are regarded as Exempted Micro Enterprise (EMEs), if annual turnover/allocated budget/gross receipts is above R10 million but less R50 million it is called a Qualifying Small Enterprise (QSE), and those with annual turnover/allocated budget/gross receipts of R50 million above are regarded as large entities,

How a B-BBEE Sworn Affidavit/Certificate is obtained:

Specialised EMEs are given an automatic level 4 but if it has 51% of black beneficiaries it will be level 2, and 75% black beneficiaries it will obtain a level 1. EMEs only have to obtain a sworn affidavit. See attached template for guidance.

Specialised QSEs have to be measured by an accredited verification professional (<https://www.sanas.co.za/Pages/index.aspx>) to obtain a B-BBEE certificate. But if it has 51% of black beneficiaries it will automatically be level 2 and 75% black beneficiaries it is a level 1. Also has to complete a sworn affidavit for QSEs.

Large specialised entities have to be verified by either an accredited verification professional.

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FRONTING PRACTICES

WHAT IS THE OBJECTIVE OF THE B-BBEE ACT?

The objective of the Broad-Based Black Economic Empowerment Act No. 53 of 2003 as amended by Broad-Based Black Economic Empowerment Act No. 46 of 2013 ("the B-BBEE Act") is to facilitate the implementation of broad-based black economic empowerment.

Broad-based black economic empowerment means the viable economic empowerment of all black people [including, in particular women, workers, youth, people with disabilities and people living in rural areas, through diverse but integrated socio-economic strategies that include, but not limited to—

- (a) Increasing the number of black people that manage, own and control enterprises and productive assets;
- (b) Facilitating ownership and management of enterprises and productive assets by communities, workers, co-operatives and other collective enterprises;
- (c) Human resource and skills development;
- (d) Achieving equitable representation in all occupational categories and levels in the workforce;
- (e) Preferential procurement from enterprises that are owned or managed by black people; and
- (f) Investment in enterprises that are owned or managed by black people.

DEFINITION OF FRONTING AND FRONTING PRACTICES IN TERMS OF THE B-BBEE ACT

"Fronting" means a deliberate circumvention or attempted circumvention of the B-BBEE Act and the Codes of Good Practice that came into effect on the 1st of May 2015 (the Codes). Fronting commonly involves the reliance on data or claims of compliance with the B-BBEE Act based on misrepresentation of facts, made by the party claiming compliance or by any other natural or juristic person.

"Fronting practices" include the following:

Window dressing: This includes cases wherein black people are appointed or introduced to an enterprise on the basis of tokenism and may be:

- Appointed to an enterprise, but are discouraged and/or inhibited from substantially participating in the core business and activities of the enterprise.
- Appointed to an enterprise, but are discouraged and/or inhibited from substantially participating in the stated areas and/or levels of their participation.
- Appointed to an enterprise with the sole mandate to assist the entity to circumvent the B-BBEE Act and not intention to participate in its core business and activities.

Benefit Diversion:

- The economic benefits received by an enterprise as a result of its B-BBEE status owing to the black shareholding, does not flow to black people in the ratio stipulated in the relevant legal documents

Opportunistic intermediaries: This involves the conclusion of a legal relationship where the agreement is with:

- A black person in order to achieve a level of B-BBEE that is compliant with the Codes of Good Practice without the economic benefits that would be expected to flow from that status being afforded to the black person
- With other enterprises, in order to achieve a B-BBEE status in certain defined circumstances

FRONTING INDICATORS

The following is a non-exhaustive list of fronting indicators that can assist in identifying fronting practices:

- The black people identified by an enterprise as its shareholders, in top and middle management are unaware or uncertain of their role within an enterprise;
- The black people identified by an enterprise as its shareholders, in top and middle management have roles of responsibility that differ significantly from those of their non-black peers;

- The black people who serve as top or middle management are paid significantly lower than the market norm, whereas their non-black peers earn what the market norm prescribes or more;
- There is no significant indication of active participation by black people appointed as top management in the strategic decision making level;
- An enterprise only conducts minimal or insignificant functions and does not perform the core functions that are reasonably expected of other, similar, enterprise;
- An enterprise relies on a third-party to conduct most core functions normally conducted by enterprises similar to it; and is also dependent on the third-party for operations in order to fulfil contractual obligations such as technical or operational duties; and
- An enterprise buys goods or services at a significantly higher rate than the market prescribes from a related person or shareholder.

PENALTIES AND PROHIBITIONS

A natural or juristic person convicted of fronting practice(s) in terms of the B-BBEE Act may be liable to a fine of up to 10% annual turnover or a maximum imprisonment of ten (10) years. Further, any natural or juristic person convicted of an offence in terms of the B-BBEE Act may not for a period of 10 years from date of conviction, conduct business with any organ of the state or public entity and will be registered in a register of the tender defaulters with the National Treasury.

Enterprises are encouraged to comply with the B-BBEE Act and desist from knowingly engaging or participating in conduct that would result in undermining the legislation or making use of black people as mere tokens instead of meaningful contributors towards economic growth.

Contact details:

Where you suspect possible fronting either by your enterprise and / or any other or direct involvement, contact us at:

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UNDERSTANDING RECOGNITION OF OWNERSHIP THROUGH A PRIVATE EQUITY FUND

1. Who are we?

- 1.1 The Broad-Based Black Economic Empowerment Commission ("B-BBEE Commission") is established as an entity within the administration of the Department of Trade, Industry and Competition ("the dti"). The B-BBEE Commission was established in terms of section 13B of the Broad-Based Black Economic Empowerment Act No. 53 of 2003 as amended by Broad-Based Black Economic Empowerment Act No. 46 of 2013 ("the B-BBEE Act"). Its role includes overseeing the implementation of the B-BBEE Act and acting against fronting practices.

2. The Purpose of the Brochure

- 2.1 This brochure aims to serve as a guide for the treatment and measurement of private equity funds with regard to B-BBEE ownership recognition.

3. What does a Private Equity Fund for B-BBEE purposes entail?

- 3.1 The ownership element of the Codes of Good Practice (the Codes) seeks to achieve a substantial change in the racial composition of ownership and management structures of existing and new enterprises. The use of private equity funds is one of the ways to ensure that there is a transfer of ownership of the South African economy into the hands of black people.
- 3.2 The purpose of a private equity fund is to encourage the creation and growth of black-owned private equity fund management firms. The private equity fund

refers to a third-party fund in which investments are made on behalf of the actual owner of the funds pursuant to a mandate given by that person to the fund. For example, a collective investment scheme used for making investments in various equity securities in line with the investment strategy of the fund.

3.3 Over and above promoting the creation of black-owned private equity fund management firms, the fund is further utilised as a conduit to facilitate investment in black-owned entities in order to alleviate the challenge of access to finance that is still faced by a number of such entities. In this regard, certain provisions were included to allow investments made by such private equity fund managers to be recognised as being investments made by black shareholders while at the same time requiring them to provide funding that will facilitate economic participation by black investors.

3.4 These provisions are aligned to Section 2 (e) of the B-BBEE Act, which stipulates that the objectives of B-BBEE among others are to promote investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity.

4. What are the criteria for recognition of ownership through a private equity fund?

4.1 Where a private equity fund can be recognised, it is subject to strict criteria in the Codes, which prevents circumvention and misrepresentation. This subsection means that not every private equity fund will qualify for B-BBEE purposes, even if it legally complies in the normal commercial sense.

4.2 A measured entity may treat any of its ownership arising from such an investment as if it were held by black people, where the private equity fund meets the following criteria:

- a) At least 51% of any of the private equity manager's exercisable voting rights associated with the equity instruments through which the private equity fund holds rights of ownership must be held by black people;
- b) At least 51% of the private equity fund's executive management and senior management must be black people;
- c) At least 51% of the profits made by the private equity fund manager, after realising any investment made by it, must be, by a written agreement, accrued to black people. The term profit is deemed as profit from the operations of the private equity fund manager and the carried interest that the fund manager (and/or its associated entities, provided that at least 51% of the profits of the associated entities accrue to the fund manager) receives after realising any investment made by it;
- d) The private equity fund manager must also be a B-BBEE owned company which is defined as a juristic person having shareholding, or similar members interest, that is B-BBEE controlled. Black participants must enjoy a right to economic interest that is at least 51% of the total of such rights measured using the flow-through principle; and
- e) The private equity fund manager must seek to invest at least 51% of the value of funds under management in companies that have at least a 25% direct shareholding using the flow-through principle. The fund manager can facilitate direct black shareholding at the time of entering the transaction should the target company not meet the requirement of at least 25% black shareholding at the time the transaction is concluded.

4.3 The black ownership of the private equity fund manager will be determined using the criteria in Statement 100. This criteria dictates that there has to be exercisable voting rights, which are the rights of a shareholder to vote in meetings or in respect of decisions based on the number or percentage of shares held and the rights associated with the class of those shares in the entity. It also dictates that economic interest, which refers to the rights of a

shareholder to receive dividends and capital gains or growth. The criteria also dictate net value in the hands of black people because of either direct or indirect participation in the measured entity. The purpose of net value is to consider aspects such as loan repayments and issuance of dividends to ensure the repayment of the loans used to acquire shares by black participants.

5. When can the B-BBEE ownership points be recognised?

5.1 If a private equity fund meets the criteria above then the fund and its underlying investee companies can claim B-BBEE ownership points, and the determination will be as follows:

- (i) At each measurement date (the status given to the private equity fund manager will be applicable for a period of 12 months); the later of 11 October 2014 and the date of establishment of a new fund;
- (ii) Within one year from the commencement date, more than 5% of the value of funds invested by the private equity fund must at all times be invested in enterprises that have at least 25% direct black shareholding;
- (iii) Within two years from the commencement date, more than 10% of the value of the funds invested by the private equity fund must at all times be invested in enterprises that have at least 25% direct black shareholding;
- (iv) From the first day of the third year and the last day of the fourth year from the commencement date, more than 20% of the value of funds invested by the private equity fund must at all times be invested in enterprises that have at least 25% direct black shareholding;
- (v) From the first day of the fifth year and the last day of the sixth year from the commencement date, more than 30% of the value of the funds invested by the private equity fund must at all times be invested in enterprises that have at least 25% direct black shareholding;

- (vi) From the first of the seventh year and the last day of the eight-year from the commencement date, more than 40% of the value of the funds invested by the private equity fund must at all times be invested by the private equity fund must at all times be invested in enterprises that have at least 25% direct black shareholding; and
- (vii) From the first day of the ninth year and beyond from the commencement date, at least 51% of the value of the funds invested by the private equity fund must at all times be invested in enterprises that have at least 25% direct black shareholding.

5.2 This simply put means that:

Year of investment	Percentage to Achieve
1	>5%
2	>10%
3 to 4	>20%
5 to 6	>30%
7 to 8	>40%
9 and beyond	51%

5.3 It should be noted that the measurement of at least 51% of the value of funds invested by any private equity fund that must be invested in enterprises with at least 25% direct black shareholding is to be measured with reference to the cost of the investment made by the private equity fund;

5.4 In the case of private equity funds that were fully invested prior to 11 October 2014, investments by the fund managers will be considered as being made by black people if the private equity fund management entities meet the following criteria:

- (i) At least 51% of any of the private equity fund manager's exercisable voting rights associated with the equity instruments through which the

private equity fund holds rights of ownership in a measured entity, must be held by black people;

- (ii) At least 51% of the profits accruing to the private equity fund manager after realising any investment made by it, must by a written agreement, accrue to black people; and
- (iii) The private equity manager must be a B-BBEE owned company.

5.5 Therefore, if a private equity fund meets the criteria above, then irrespective of the capital providers, the fund and its underlying investee companies can claim that the private equity shares are held by black people.

6. How are private equity funds verified?

6.1 When determining the ownership points of a private equity fund, the verification agency or professional, as prescribed in the verification manual issued by **the dtic**, must apply the prescribed verification methodologies to determine that:

- (i) The private equity fund manager must be a B-BBEE owned entity;
- (ii) At least 51% of the private equity fund managers' exercisable voting rights associated with the equity instruments through which the private equity fund holds rights of ownership are held by black people as per the Codes;
- (iii) At least 51% of the private equity fund's executive management and senior management must be black people as defined in the Codes; and
- (iv) At least 51% of the profits made by the private equity fund manager after realising any investment made by it must, by a written agreement, accrue to black people.

- 6.2 Therefore, the role of the verification agency or professional is to conduct an independent verification of the claims made by a measured entity in respect of above-mentioned requirements. This role does not include the provision of advice to the measured entity on the interpretation of the B-BBEE Act as that inherently compromises the independence required to conduct a verification. Such advisory would amount to unprofessional conduct that is contrary to the objectives of the B-BBEE Act.
- 6.3 The verification agency or professional does not serve as an appeal or review platform on the position of the B-BBEE Commission where an assessment or advisory opinion on the status of a private equity fund was issued to the measured entity.

7. Emerging Concerns on Private Equity Funds

- 7.1 The B-BBEE Commission during the execution of its mandate has identified the following concerns on the structure of private equity funds:
- a) The black ownership of the private equity fund management does not meet the three ownership criteria as per Statement 100, and even if the black ownership is through a trust or broad-based ownership scheme, it does not meet the rules in Annexes 100 (B) and (D).
 - b) There is no operational influence by black people in entities where the investment has been channelled.
 - c) The use of commercial terms and practices are used in defence for not empowering black people. For example, profits distributed do not result in 51% of the profits flowing into the hands of black people.
 - d) The inclusion of B-BBEE undertakings which appear to be motivated by the need to ensure that the measured entity can recognise black ownership for as long as the B-BBEE ownership requirement persists

and not for the empowerment of black people in a manner that is anticipated in the B-BBEE Act.

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B-BBEE REQUIREMENTS FOR JOINT VENTURES

1. Who are we?

The Broad-Based Black Economic Empowerment Commission (“B-BBEE Commission”) is established as an entity within the administration of the Department of Trade, Industry and Competition (“the dtic”) by the Broad-Based Black Economic Empowerment Act No. 53 of 2003 as amended by Broad-Based Black Economic Empowerment Act No. 46 of 2013 (“the B-BBEE Act”). Its role includes overseeing the implementation of the B-BBEE Act and acting against fronting practices.

2. The Purpose of the Brochure

This brochure aims to provide guiding principles for the measurement of joint ventures within the context of B-BBEE.

3. What is a Joint Venture?

The structures in business are not always simple. The implementation of B-BBEE has revealed various complex structures, which include joint ventures.

The legal dictionary (<https://legaldictionary.net/joint-venture/>) defines a joint venture as a business arrangement wherein two or more parties, whether as individuals or entities, enter into an agreement to combine resources for a specific business undertaking for profit.

Two types of joint ventures may be used. Firstly, an incorporated joint venture, which means that an entity has been incorporated and governed in terms of the Companies Act. In that case, the incorporated entity will have to determine its own B-BBEE

measurement in line with the principles outlined in paragraphs 4, 5 and 6 of Statement 000 of the Codes of Good Practice (the Codes). Secondly, there is also an unincorporated joint venture, and this is where there is no incorporated entity, and in that case, a consolidated B-BBEE scorecard is required for the joint venture.

An unincorporated joint venture will be governed by the joint venture agreement, stating the responsibility of each party, how profits will be shared, and responsibility for losses incurred and the costs attached therein.

4. REASONS FOR ESTABLISHING A JOINT VENTURE

There are various reasons why entities or parties decide to enter a joint venture arrangement and that may include, among others, the need for:

- a) Exploring new markets;
- b) Increasing skills and resources;
- c) Growth and diversification;
- d) Collaboration and spreading costs; and
- e) Skills and knowledge transfer.

5. B-BBEE Requirements for Unincorporated Joint Venture Certificates

When parties choose to access any economic benefit through an unincorporated joint venture, in terms of the B-BBEE Act, the joint venture must submit its own consolidated B-BBEE certificate or sworn affidavit.

5.1 Before 1 December 2019

When the amendments to the Codes came into effect on 1 May 2015, including the prescription for the use of sworn affidavits for Exempted Micro-Enterprise (EMEs) and 51% and 100% black-owned Qualifying Small Enterprises (QSEs), the Codes did not provide guidance on the consolidation of B-BBEE sworn affidavits where

parties who qualify as EMEs or a 51% and 100% black-owned QSE opted to form an unincorporated joint venture.

This oversight meant that an unincorporated joint venture for entities relying on sworn affidavits before 1 December 2019 were invalid. (The invalidity did not apply to entities that are governed by the amended Construction Sector Code which specifically included rules for joint ventures.)

However, entities that qualified for the use of a B-BBEE Certificate issued by a verification professional accredited by the South African National Accreditation System, were able to determine a consolidated B-BBEE scorecard for the unincorporated joint venture. This provision meant that the entities only had to approach a SANAS accredited verification agency/professional with their individual B-BBEE Certificates, for the verifier to produce the joint venture B-BBEE Certificate.

5.2 After 1 December 2019

As a result of the amendments effected to the Codes through Notice Number 303 of Government Gazette Number 42496 gazetted on 31 May 2019, entities that use B-BBEE sworn affidavits and B-BBEE Certificates are now able to use a consolidated unincorporated joint venture scorecard. This is how it works:

- a) The parties will need to first obtain a valid B-BBEE sworn affidavit or B-BBEE Certificate for their individual enterprises. Should the individual entity's B-BBEE Certificate or Sworn Affidavit be invalid, the joint venture certificate will also be invalid.
- b) The parties will then need to consolidate the compliance data based on a weighting in accordance with the joint venture agreement. This means that the parties scores will be weighed according to their proportionate share in the joint venture and added together for a combined score of 100.

- c) The consolidation of the compliance data shall be based on a weighting in accordance with the joint venture agreement relevant to the specific joint venture. Therefore, should the two or more companies enter an unincorporated joint venture their respective scores in terms of the relevant Codes of Good Practice will be weighted according to their proportionate share in the joint venture.
- d) Should an entity qualify in terms of the QSE scorecard, its B-BBEE score of 100 must be used to calculate the consolidated score.
- e) 51% black-owned EMEs and QSEs will qualify for a score of 95 points, while 100% black-owned EMEs and QSEs will qualify for a score of 100 points.
- f) EMEs with less than 51% black ownership will qualify for a score of 85 points

The process described in part (b) and (f) can only be done by a SANAS accredited verification agency/professional.

A consolidated joint venture will determine its B-BBEE status in line with the principles of Statement 000 of the Codes of Good Practice based on whether the entity is an EME, QSE or large entity.

6. Validity of an Unincorporated Joint Venture Certificate

The same process outlined in the Practice Guide 01 of 2018 issued by the B-BBEE Commission on determining the validity of a B-BBEE verification certificate, B-BBEE Certificate and Sworn Affidavit must be utilised to test the validity of an unincorporated joint venture certificate.

A joint venture certificate is valid for a period of twelve (12) months, and only applicable to a specific project. This means that the parties will need a new joint

venture certificate every time they want to access a new project opportunity or initiative.

7. General Matters

During the execution of its mandate, the B-BBEE Commission has noted the following concerns (not an exhaustive list) regarding joint venture structures:

- a) The absence of an agreement governing the relationship between the parties, such as outlining their roles and responsibilities, including among others how profits will be shared.
- b) The use of joint venture initiatives to partner with black people or a black-owned entity merely to access economic opportunities, and not to empower black people.
- c) Limitations or restrictions on the participation of black people in decision-making over the affairs of the joint venture.
- d) Lack of good corporate governance in relation to the affairs of the joint venture such as limiting black people from accessing the financial records of the joint venture.
- e) What is implemented in practice is different from the commitment in the joint venture agreement, resulting in conflict and fronting. For example, not having a separate financial account for the joint venture or deviating from the profit-sharing arrangement to the disadvantage of black people.

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UNDERSTANDING THE CONTINUING CONSEQUENCE PRINCIPLE FOR THE RECOGNITION OF BLACK OWNERSHIP AFTER SALE OR LOSS OF SHARES BY BLACK PARTICIPANTS

1. Who are we?

The Broad-Based Black Economic Empowerment Commission (“B-BBEE Commission”) is established as an entity within the administration of the Department of Trade, Industry and Competition (“the dtic”). The Commission was established in terms of section 13B of the Broad-Based Black Economic Empowerment Act No. 53 of 2003 as amended by Broad-Based Black Economic Empowerment Act No. 46 of 2013 (“the B-BBEE Act”). Its role includes overseeing the implementation of the B-BBEE Act and acting against fronting practices.

2. The Purpose of the Brochure

- 2.1 This brochure aims to guide how B-BBEE participants and companies must treat and measure B-BBEE equity instruments following the sale or loss of shares by black participants in the context of the continuing consequence principle.

3. What does the continuing consequence principle entail?

- 3.1 The ownership element of the Codes of Good Practice (the Codes) seeks to achieve a substantial change in the racial composition of ownership and management structures of existing and new enterprises. This element should be evidenced by an increase in the number of black people owning productive assets coupled with management control over such assets.

- 3.2 In promoting ownership and management of new or existing enterprises by black people, Code Series 100 on Ownership, for practical reasons, permits measured entities to recognise black ownership after the sale or loss of B-BBEE shares. This element is known as the continuing consequence principle.
- 3.3 A measured entity can only benefit from the continued consequence principle, where the ownership transaction fully meets the requirements of the ownership scorecard which is:
- a) Exercisable voting rights. The rights of a shareholder to vote in meetings or in respect of decisions based on the number or percentage of shares held and the rights associated with the class of those shares in the entity;
 - b) Economic interest. The rights of a shareholder to receive dividends and capital gains or growth;
 - c) Net value in the hands of black people as a result of either direct or indirect participation in the measured entity. This aspect includes loan repayments and issuance of dividends to ensure the repayment of any loans obtained by black participants to acquire the shares in the entity.
 - d) In the event that ownership was held through a Broad-Based Ownership Scheme (BBOS) or Employee Share Ownership Programme (ESOP) or a Trust, the ownership must also have been compliant with the rules in Annexes (B) – (D) of Statement 100 respectively.
- 3.4 Therefore, a measured entity cannot benefit from the continuing consequence principle where the ownership transaction was not consistent with the B-BBEE Act from the onset. For example, where one of the three ownership criteria was not met, such as the flow of economic interest to black people prior to loss or sale of shares, the measured entity cannot claim B-BBEE points by applying the continuing consequence principle.

3.5 This continuing consequence principle does not grant full points on the ownership scorecard. The black participation arising from continued recognition of black ownership cannot contribute more than 40% of the score on the ownership scorecard – that is 40% of the 25 points available. Should the measured entity desire to increase its ownership points, it will have to conclude another B-BBEE transaction.

4. What qualification criteria is used for benefiting under the continuing consequence principle?

4.1 Where the continued consequence principle is applied for recognition of B-BBEE points, it is subject to strict criteria in the Codes, which also prevents circumvention and misrepresentation. This means that not every exit by black shareholders will qualify for recognition.

4.2 A measured entity can recognise a portion of black ownership after a black shareholder has exited through the sale or loss of shares provided that:

- a) The black participant held the shares for a minimum period of 3 years;
- b) The sub-minimum of 40% of net value based on the time-based graduation factor must have been met at the time of sale or loss of shares; and
- c) Transformation has taken place within the measured entity using the B-BBEE recognition level from the period of entry of black participants to the exiting period.

4.3 The following additional rules also apply:

- a) A written tripartite agreement between the lender (if applicable), measured entity, and black participant must record the loan or security arrangement, except where the measured entity is the lender; and

- b) The maximum period that the measured entity can claim ownership points under this principle, is the period that the black participants held their shares in the entity.

5. How long can an entity continue to benefit from the continued consequence principle as a result of loss/sale shares by the black participant?

5.1 The benefit under the continued consequence principle cannot be perpetual as it will undermine the essence of transferring ownership to black participants. It is instead a transitional arrangement to recognise a legitimate ownership for a period while the parties engage in a new transaction.

5.2 Therefore, B-BBEE ownership recognition by applying the continued consequence principle is allowed for the same number of years that the black shareholder held his/her shares, provided all the requirements mentioned in paragraphs 3.3 and 4.2 above are met. This means that if the black participant(s) held the shares for five (5) years, the measured entity can only claim ownership points for five (5) years.

5.3 This period of recognition is to allow the measured entity to consider implementing another empowerment transaction with other black participants without losing out on ownership points. As stated above, a scheme that was flawed in its structure or implementation can never qualify under this principle

6. How are ownership points using the continued consequence principle calculated?

6.1 The ownership points attributable to the measured entity under the continuing consequence principle will be calculated by multiplying the following elements:

- a) The value created in the hands of black participants as a percentage of the total value of their shareholding in the measured entity, at the date of sale or loss of shares;

- b) The B-BBEE status of the measured entity based on the balanced scorecard at the date of measurement; and
- c) The ownership points that were attributable to the measured entity on the date of sale or loss of the shares.

7. Formula for the calculation of the recognition of ownership after the sale or loss of shares by black participants.

7.1 In calculating the ownership points post-sale of shares by a measured entity, the following formula will be used:

$A = B \times C \times D$
<p>Where</p> <p>A is the percentage of rights of ownership that survive the sale or loss of an equity instrument by a black participant in paragraph 3.8 of Code Series 100.</p> <p>B is the percentage of rights of ownership for each of the indicators in the ownership scorecard that were attributable to the black participant immediately before his or her sale or loss of shares.</p> <p>C is the net value percentage provided for in paragraph 3 of Code Series 100 undertaken for the equity instruments sold or lost by the black participant on the date of the sale or loss. The value of the entity is measurable as at the date of sale or loss of shares.</p> <p>D is the most recently determined B-BBEE recognition level of the measured entity (which must be less than one (1) year old) based on its generic scorecard result for all elements other than ownership determined using Statement 000.</p>

7.2 As indicated in the above table, which is also outlined in paragraph 5 of Annexe 100 (E) of Code Series 100, for purposes of calculating ownership points under the continued recognition points, item “D” is determined using a balance scorecard excluding the points achieved for the ownership element.

8. How is the continuing consequence principle verified?

8.1 When determining the ownership points applying the continuing consequence principle, the verification agency or professional as prescribed in the verification manual issued by **the dtic**, ought to apply the prescribed verification methodologies and determine that:

- a) Black people had exercisable voting rights;
- b) Economic interest accrued to black people;
- c) There was net value realisation in the hands of black;
- d) In the event that ownership was held through a Broad-Based Ownership Scheme (BBOS) or Employee Share Ownership Programme (ESOP) or a Trust, the ownership must also have been compliant with the rules in Annexes (B) – (D) of Statement 100 respectively
- e) Determine that the black participant held the shares for a minimum period of 3 years;
- f) The sub-minimum of 40% of the net value based on the time-based graduation factor must have been met at the time of sale or loss of shares;
- g) Determine if the transformation has taken place within the measured entity using the B-BBEE recognition level from the period of entry to the exit of the black participants;
- h) If the shares were lost, review the agreement between the measured entity, black participant and a lender to ascertain the record of the loan or security arrangement, unless the measured entity is the lender and to ensure that recognition does not exceed the holding period;
- i) Recalculate continuing benefits and confirming that it is less than 40% of the score on the ownership scorecard; and

- j) For black participants who have lost or sold their shares, obtain proof of acquisition date and the date when the shares were lost or sold.

8.2 Therefore, the role of the verification agency or professional is to conduct an independent verification of the claims made by a measured entity in respect of above-mentioned requirements. This role does not include the provision of advice to the measured entity on the interpretation of the B-BBEE Act as that inherently compromises the independence required to conduct a verification. Such action would amount to unprofessional conduct that is contrary to the objectives of the B-BBEE Act.

8.3 The verification agency or professional does not serve as an appeal or review platform on the position of the B-BBEE Commission where an assessment or advisory opinion on the application of the continued consequence principle was issued to the measured entity.

9. Emerging Concerns on the Continued Consequence Principle

9.1 The B-BBEE Commission during the execution of its mandate has identified the following concerns on the application of the continued consequence principle to recognise B-BBEE ownership points:

- a) The black ownership is flawed from inception. For instance, where a lack of ownership was held through a trust or BBOS, the object of the trust or BBOS deviated from facilitating the transfer of ownership into the hands of black people.
- b) Black people were not involved in the operations and decision-making processes of the measured entity.
- c) Recognition of flawed ownership structures by the verification agency or professional.

- d) No net value realisation for the period black participants held the shares in the measured entity.
- e) Recognition of structures that undermined the ownership requirements as per Statement 100.

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RECOGNITION OF BLACK OWNERSHIP THROUGH SALE OF ASSETS, EQUITY INSTRUMENTS, AND OTHER BUSINESSES

1. Who are we?

- 1.1 The Broad-Based Black Economic Empowerment Commission (“B-BBEE Commission”) is established as an entity within the administration of the Department of Trade, Industry and Competition (“the dtic”) in terms of section 13B of the Broad-Based Black Economic Empowerment Act No. 53 of 2003 as amended by Broad-Based Black Economic Empowerment Act No. 46 of 2013 (“the B-BBEE Act”). Its role includes overseeing the implementation of the B-BBEE Act and act against fronting practices.

2. What does Statement 102 entail?

- 2.1 Statement 102 of Code Series 100, provides an alternative avenue for black people to acquire ownership and control of enterprises and economic resources. This Statement defines the specific requirements for the recognition of ownership resulting in the disposal of assets, equity instrument or other businesses to black people.
- 2.2 A measured entity (the Seller) is able to recognise black ownership for selling a separately identifiable business to black people (the Purchaser). A separately identifiable related business must form part of the same chain of ownership and be owned by the seller, and for the purposes of Statement 102, it is a business that is related to the seller by virtue of being a subsidiary, joint venture, associate, business division, business unit, or any other similar related arrangements within the ownership structure of the seller.
- 2.3 However, where a seller has claimed benefits in terms of Statement 102 under its ownership scorecard it may not claim benefits under the enterprise and supplier development element.

3. Which transactions qualify under this statement?

- 3.1 A qualifying transaction in terms of this Statement may involve the sale of:
- (a) An asset: This relates to a resource that is owned by the seller and has economic value, for example property, machinery or tools, manufacturing plant etc.

- (b) A business: This means that the seller must sell a separately identifiable business which forms part of the same chain of ownership and be owned by the seller, such as a subsidiary entity or division. However, that does not mean that the seller must still be involved in the ownership of the sold asset post the sale.
- (c) Equity instruments: This refers to an instrument by which a participant holds rights of ownership in an entity, for example stock shares such as those traded on the Johannesburg Securities Exchange, convertible debentures etc.

3.2 In simple terms, a sale of an asset, business or equity instrument refers to a transaction that involves the sale of a separate legal entity considered a separately identifiable business in which the assets such as tools or machine or plant or equity instruments in a subsidiary are transferred to black people.

4. What qualification criteria is used under this statement?

4.1 A measured entity, seeking to benefit from Statement 102, must demonstrate that the transaction involving a sale of asset, equity instrument or business will result in one of the following outcomes:

- (a) The creation of sustainable businesses or business opportunities in the hands of black people and the transfer of critical and specialised skills, managerial skills and productive capacity to black people. Therefore, black people must independently own and manage the asset, business or equity instrument acquired, free of any influence in terms of decision making processes from the seller.
- (b) A sale of asset, equity instrument and business must involve a separately identifiable related business with no unreasonable limitations or conditions with regard to its clients or customers, and demonstrate that it has its own clients, customers or suppliers other than the seller. This also means that the seller cannot dictate to the purchaser which customers can the purchaser do business with post the transfer.
- (c) Any operational outsourcing arrangement between the seller and the associate enterprise must be negotiated at arms-length on a fair and reasonable basis. Thus, where the purchaser opts to use the resources of the seller for practical reasons, the arrangement must be negotiated independently and on an equal footing, with no undue pressure being exerted on the purchaser, and the seller must not interfere with the operations or administration of the purchaser post the transfer of the asset, business or equity instrument.
- (d) The transaction should be subjected to an independent verification value by an independent expert. This is a process involving a standard valuation method for an asset, business or equity instrument using normal standard valuation methods that represent standard market practice.

5. How is ownership calculated post transaction?

- 5.1 A seller seeking recognition of a qualifying transaction under Statement 102 in its ownership scorecard, must determine that recognition principles mentioned in paragraph 4 exist on date of measurement. Statement 102 further requires that the calculation of ownership realisation points (or net value) must be based on:
- (a) The total value of the transaction;
 - (b) The value of equity instruments held by black people in the separately identifiable related business;
 - (c) The carrying value of the acquisition debt of black people in the separately identifiable related business; and
 - (d) All calculations in terms of paragraphs (a) to (c) above must use a standard valuation method.

6. Compliance with the priority elements under Statement 000

- 6.1 The seller applying Statement 102 for its full or part ownership compliance, will have to comply with the 40% sub-minimum for ownership and discounting principle to the extent of the transaction involving the separately identifiable related business.
- 6.2 The seller will have to comply with all other priority elements (skills development and enterprise and supplier development) as required by paragraph 3.3 of Statement 000.

7. Recognition by the Seller

- 7.1 The below formula as outlined in Annexe 102 (A) is applicable in determining the equivalency percentage for exercisable voting rights and economic interest irrespective of the level of black shareholding of the entity acquiring the asset:

$$A = \frac{B}{C} \times D$$

Where

A is the equivalency percentage for exercisable voting rights and economic interest of the ownership scorecard

B is the value of the qualifying transaction to the separately identifiable related business determined using a standard valuation method

C is the value of the seller determined using a standard valuation method

D is the indicator percentages of the separately identifiable related business

- 7.2 For the first three years after the transaction, the seller will recognise ownership points on the date of measurement based on the value of the seller and the value of the separately identifiable related business.
- 7.3 But, for each year thereafter the third year, the seller will recognise ownership points on date of measurement based on the ownership indicator percentage achieved at the date of measurement in the third year after the transaction.
- 7.4 Further, the seller seeking recognition of a qualifying transaction for exercisable voting rights and economic interest as per the ownership scorecard, must obtain a review of the transaction value by an independent expert, who is required to opine on the fairness of the transaction value. The continued recognition is also subject to opinion of the independent expert supporting the transaction value.
- 7.5 Net value points recognition for the seller will be based on the points achieved using the principle as outlined in paragraph 5 above on the third year of the transaction, using the time graduation factor as outlined in Statement 100, subject to an independent expert opinion that the net value calculation is fair and has been applied accurately for each year after year three.

8. What is not sale of an asset/business or equity instrument?

- 8.1 The following transactions do not constitute qualifying transaction for sale of asset, business or equity instrument:
- (a) Transfers of business rights by way of license, lease or other similar legal arrangements not conferring unrestricted ownership. This means for instance, even if a lease of an asset is for a long term period such as 30 years, that will not amount to transfer of ownership. An example of a transfer of a right is where the seller grants the purchaser the right to use the seller's intellectual property in conducting its business for a limited period at a cost.
 - (b) Sales of franchises by franchisors to franchisees (where one pays another for the right to use the trademark), but includes sales of franchises from franchisees to other franchisees or to new franchisees. For instance, where a franchisee who has already acquired a franchise from the franchisor, intends to acquire another franchise or sells an existing franchise to another franchisee. Fast food restaurants are good examples of this type of business model.
 - (c) A qualifying transaction with a repurchase clause, whereby the seller is granted a right to repurchase the asset, business or equity instrument within a three-year period after implementation of the transaction, even if transaction implementation is deferred post year three. The seller cannot have any right to enforce such a repurchase.

- (d) A rearrangement that still allows the seller to own and control the operations of the asset that has purportedly been sold to black people. This relates to a restructuring process, whereby the seller through the purchaser still enjoys a benefit from the asset or business by owning shares or granted the ability to consent to certain decision that the purchaser ought to make in relation to the asset or business they have acquired.

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CUSTOMER SERVICE STANDARDS MANUAL FOR THE BROAD-BASED BLACK ECONOMIC EMPOWERMENT COMMISSION

August 2020

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Abbreviations and Acronyms

Description	Acronyms
Broad-Based Black Economic Empowerment	B-BBEE
Broad-Based Black Economic Empowerment Commission	B-BBEE Commission
Johannesburg Stock Exchange	JSE
National Development Plan	NDP
Public Finance Management Act	PFMA
Sectoral Education Training Authority	Seta
The Department of Trade, Industry and Competition	the dtic
The Broad-Based Black Economic Empowerment Act	B-BBEE Act

1. Introduction

- 1.1 How customers or clients are treated is often the difference between organisations that succeed and those that may fail due to poor customer care. This also contributes to how the general public views the organisation and may even derail potential customers/clients from engaging with the institution in light of poor customer care.
- 1.2 It has been three years since the B-BBEE Commission was established since June 2016, and customer expectations are rising and it is important that the B-BBEE Commission guard against inconsistent or poor service as part of promoting our brand promise, which is '***an inclusive economy for all, together***', which in essence refers to equal participation in the economy, equal access to wealth opportunities by all people, inclusion of black industrialists in the economy and availability of non-financial and financial support, including incentive schemes to achieve equality. Therefore, this brand promise can only be achieved through effective and measured implementation of all the elements of B-BBEE, working together as a team towards a common goal of a transformed, empowering and an inclusive economy for all the South Africa citizens.
- 1.3 The impact assessment study that the B-BBEE Commission conducted in 2019, has indicated that the general public is not aware of the standards of service delivery that the B-BBEE Commission offers. Service standards are important to a regulatory institution as it guides the ways in which customers are to be treated and the best practices to be observed when interacting with customers.
- 1.4 Having such standards in place and educating employees on acceptable levels and quality of service encourage repeat business and improve the overall service level, and also boost the confidence customers have in the institution.
- 1.5 Thus, service standards are of paramount importance as they are the key foundational points by which the institution delivers to its customer care.

2. Purpose

- 2.1 The Customer Service Standards Manual for the Broad-Based Black Economic Empowerment Commission (“B-BBEE Commission”) is provided as a tool to assist the institution in ensuring the delivery of consistent, high quality services to our stakeholders by employees of the B-BBEE Commission
- 2.2 The Manual consolidates in a single framework processes and standards that apply to services offered by the B-BBEE Commission as guided by the B-BBEE Act.
- 2.3 It is the expectation of the management of the B-BBEE Commission all employees will apply and ensure compliance with the Service Standards contained in the Manual.
- 2.4 The Manual serves as a guide to safeguard the performance standards set out in the B-BBEE Act, and does not seek to replace the B-BBEE Act and its authority.
- 2.5 This Manual may be updated anytime by the B-BBEE Commission if there are any material changes arising from developments in the application of the B-BBEE Act. In such an instance, an amended version will be published to replace this one.

3. Who are we

- 3.1 The Broad-Based Black Economic Empowerment Commission (“B-BBEE Commission”) is established as an entity within the administration of the Department of Trade, Industry and Competition (“the dtic”) in terms of section 13B of the Broad-Based Black Economic Empowerment Act No. 53 of 2003 as amended by Broad-Based Black Economic Empowerment Act No. 46 of 2013 (“the B-BBEE Act”). Its role includes overseeing the implementation of the B-BBEE Act and to act against fronting practices.

3.2 Our Vision

An inclusive industrialised economy that is globally competitive

Inclusive – refers to equal participation, equitable opportunities for of all, and benefits experienced by every section of the society across South Africa. This generally implies a link of macroeconomic and microeconomic factors of the economy for inclusivity to materialise. As the B-BBEE Commission, we are vested with a regulatory responsibility to ensure that the South Africa's economy is broad-based and inclusive in order to attain the vision 2030 in the NDP. For the economy to thrive, function and grow all South Africans must be involved and contribute meaningfully in the value chain and critical sectors of the economy. Therefore, inclusivity must be facilitated through skills development, ownership, management control, enterprise and supplier development, as well as removing economic barriers for black people, so joint efforts by private and public sector is required as no one individual can do this on their own.

Industrialised – refers to the creation of a sustained productive economy that is driven by a wide range of locally sourced and produced products and services. This is an economy that has a high rate of literacy, stimulates economic and employment growth through targeted programmes, allows trade and investment more in education to produce highly competent and skilled labour force that could contribute to job creation, creates start-ups and broaden the production base. Involves well developed and productive commercial markets such as advanced manufacturing and value added services. In essence more beneficiation and exporting of value added products instead on raw material.

Economy - entails the state of the country in terms of production, distribution and consumption of goods and services in a particular geographic region. The IMF in its press briefing of April 2015 painted a picture of declining economic growth in emerging and developing economies. It is imperative for the country to grow its economy through internal production and distribution of goods locally and internationally, and there is a need for a strong trade investment arm within government that will not only identify markets for locals, but will also ensure sustainability.

Globally Competitive - implies viable and integrated international markets with export capability in order to stimulate economic growth. South Africa does not operate in a confined space but has to compete with other nations for resources, skill and markets, which means that we have to support our local products and services and leverage these against other markets. We need to focus on areas where we have uniquely South African products that can be targeted for export markets – we need to have niche and unique offerings. In this regard, benchmarks, peer reviews and adherence to world standards provide the necessary pointers on the areas that the country must improve or capitalize on to remain globally competitive, without compromising national economic interests.

3.3 Our Mission

To facilitate the accelerated productive implementation of the Act

Facilitate – to make it easy and possible for B-BBEE stakeholders to comply with and implement the B-BBEE Act by interacting and engaging with them; and by providing guidance and support through advisory opinions, explanatory notices and clarifications, amongst other things, on the application and interpretation of the Act, and implementing education and awareness programmes and corrective measures for non-compliance.

Accelerated – ensuring that transformation moves at a faster pace with a target in mind from the existing baseline, which can be regularly measured to ensure that the country is meeting its economic objectives on equity and empowerment for all intended beneficiaries of B-BBEE. This includes reaching out to those pockets of people, sectors and industries that have not felt transformation and empowerment to date, and enhance the impact of B-BBEE on all sectors of our society.

Productive - moving to a more applied industry where raw products are transformed into finished products within our country; a state where we do not rely on imported goods for our finished products. We plan to interact with learning and technology institutions, engage with students and youth to encourage entrepreneurship and innovation at a young age, facilitate access to financial and non-financial support and

guidance for budding and established companies, not working longer hours but working smarter and creatively, come up with new and innovative ideas and technologies to take the country forward, and provide a conducive working environment where citizens are serviced properly.

Implementation – it is often said that South Africa has the best policies but always suffers when it comes to implementation due to many factors including red tape, lack of coordination, not understanding the vision, implementers not understanding mandate, lack of resources and finances and other related constraints. Thus, it is important that the B-BBEE Commission is properly and sufficiently resourced with the funds, assets and people with the requisite skill and expertise to deliver on the mandate.

3.4 Our Brand Promise

‘An inclusive economy for all, together’

Inclusive – refers to equal participation, equitable opportunities for all, and benefits experienced by every section of the society across South Africa. This generally implies a link of macroeconomic and microeconomic factors of the economy for inclusivity to materialize.

Economy - entails the state of the country in terms of production, distribution and consumption of goods and services in a particular geographic region. It is imperative for the country to grow its economy through internal production and distribution of goods locally and internationally, and there is a need for a strong trade investment arm within government that will not only identify markets for locals, but will also ensure sustainability.

Together – forging and forming relations, working as teams and partnering with others to achieve end goal – private sector, government, labour and civil society - no one should be left behind as we strive for an inclusive economy for all. This economy must effectively benefit all of us, thus we should work towards the same vision as outlined in the NDP, and in line with goals and targets set by Cabinet from time to time.

3.5 Our Values

Our operational environment presents various challenges for us, and these include lack of proper corporate governance, fronting tendencies, falsification of empowering credentials, misrepresentation of facts to secure contracts and quick fix solutions to empowerment, all of which present a fertile ground for unethical conduct in and outside the public sector. Having considered this environment and our goal of operating a credible and effective regulatory entity, we have agreed and committed ourselves to live by the following equally important values:

Value 1: An inclusive economy is our first consideration

- Our first priority and commitment is our national economic interests
- Our stakeholders are key to us achieving our economic goals

Value 2: Open access and availability to all economic citizens

- We offer swift turnaround times guided by our service standards
- We offer fair and consistent redress within the legislative parameters
- We offer quick responses as we do not own any red tape

Value 3: Impartiality

- We act without favour, fear, bias or prejudice
- We handle all matters objectively in living our purpose
- We respect confidentiality within the law

Value 4: Consistency

- We provide clear directions and reliable guidance
- We provide decisions and advice that is consistent

Value 5: Accountability for all decisions and actions taken by us

- We uphold and respect all decisions and actions taken by our entity
- We trust all staff to serve stakeholders diligently and professionally
- We take responsibility for our actions

Value 6: Zero Tolerance for corruption

- We are committed to proper governance
- We are transparent in all dealings
- We do not tolerate any corruption

3.6 Description of Business Units

3.6.1 The B-BBEE Commission comprises of the following sub programmes:

3.6.1.1 **Programme 1 - Compliance:** The strategic goal of programme 1 is to safeguard the outcomes of an inclusive economy.

3.6.1.2 **Programme 2 – Investigation and enforcement:** The strategic goal of programme 2 is to implement corrective enforcement to achieve compliance.

3.6.1.3 **Programme 3 – Research, analysis and reporting:** The strategic goal of programme 3 is researching, analyzing and reporting on the state of transformation.

3.6.1.4 **Programme 4 – Relationship Building/ Stakeholder Relations:** The strategic goal of programme 4 is collaborating with relevant stakeholders to advance transformation.

3.6.1.5 **Programme 5 – Administration:** The strategic objective of programme 5 is developing capability and capacity of the B-BBEE Commission to deliver on its mandate.

4. Legislative and Other Mandates

4.1 We are established by Section 13B of B-BBEE Act and we have jurisdiction throughout South Africa. We must be impartial and perform our functions without fear, favour or prejudice, in the most cost-effective manner and in accordance with the values and principles mentioned in section 195 of the Constitution. In terms of Section 13E of the B-BBEE Act, we are financed from money that is appropriated by Parliament for the B-BBEE Commission, and money lawfully received from any other source. The Auditor-General is mandated to audit our financial records every year. Given that we are not a listed public entity yet, we operate within the budget and reporting framework of the dtic.

4.2 Section 13F of the B-BBEE Act articulates our functions as follows:

- To oversee, supervise and promote adherence to the B-BBEE Act in the interest of the public;
- To strengthen and foster collaboration between the public and private sector in order to promote and safeguard the objectives of broad-based black economic empowerment;
- To receive complaints relating to broad-based black economic empowerment in accordance with the Act;
- To investigate, either on its own initiative or in response to complaints received, any matter concerning broad-based black economic empowerment;
- To promote advocacy; access to opportunities and educational programmes and initiatives of broad-based black economic empowerment;
- To maintain a register of major broad-based black economic empowerment transactions, above a threshold determined by the Minister in the Gazette;
- To receive and analyse such reports as may be prescribed concerning broad-based economic empowerment compliance from organs of state, public entities and private sector enterprises;
- To promote good governance and accountability by creating an effective environment for the promotion and implementation of broad-based black economic empowerment;
- To exercise such other powers which are not in conflict with the Act as may be conferred on the B-BBEE Commission in writing by the Minister; and
- Increase knowledge of the nature and dynamics and promote public awareness of matters relating to broad-based black economic empowerment by implementing education and awareness measures, providing guidance to the public and conducting research on matters relating to its mandate and activities.

4.3 Our strategic focus areas are derived from the mandate in Section 13F of the B-BBEE Act, with the resources made available in accordance with Section 13E and takes into account all responsibilities under the Constitution and the PFMA governing organs of state and public entities.

4.4 The B-BBEE Act and the Codes of Good Practice clearly outline the imperatives that the performance of our mandate must make an impact on, and in terms of which transformation progress should be measured, namely:

- Ownership
- Management Control
- Enterprise and Supplier Development
- Skills Development
- Socio-Economic Development

5. Customer Service Standards

5.1 These service standards are measures of the quantity and quality of the services that are provided by the B-BBEE Commission to its customers. The standards cover the actual delivery of the service, the standards of employee behaviour, and the availability of customer feedback and complaints processes.

5.2 These are the services and service standards that the B-BBEE Commission promises to its customers over and above the standards set in the B-BBEE regulations for specific processes:

Key Service	Service Beneficiary	Service Standard
Provide clarification on the interpretation of the B-BBEE Act	B-BBEE Stakeholders	100% enquiries responded to and feedback provided upon receipt of enquiry within 5 days
Provide feedback to clients for enquiries or tip-off received on violation of the B-BBEE Act	B-BBEE Stakeholders	100% enquiries responded to and feedback provided upon receipt of enquiry within 5 days
Conduct awareness workshops and education campaigns	B-BBEE Stakeholders	Session organised within one (1) month from the date of request.

Attend to telephone enquiries	B-BBEE Stakeholders	90% of calls attended to daily and where message was left by the B-BBEE stakeholder a call to be returned within a day of receiving the message
Receive and acknowledge submitted major B-BBEE transactions	Transaction parties and B-BBEE Stakeholders	100% of submitted transactions acknowledged and letter provided within 5 days of submission
Register major B-BBEE transactions	Transaction parties and B-BBEE Stakeholders	100% of submitted transactions registered within 10 days subject to completeness of the required information
Assess registered major B-BBEE transactions	Transaction parties and B-BBEE Stakeholders	Feedback provided within 90 days from the date of registration of the transaction
Receive and acknowledge compliance reports submitted	JSE listed companies, SETA's, organs of states and public entities	100% of submitted transactions acknowledged and letter provided within 5 days of submission
Analyse submitted compliance reports	JSE listed companies, SETA's, organs of states and public entities	Feedback provided to within 90 days from receipt date
Acknowledge all new complaints received	Complainants	100% of complaints received acknowledged within 5 days
Pre-screening of complaints	Complainants	100% of complaints processed and finalised within one (1) months of submission
Merit assessment of complaints	Complainants	100% of complaints assessed for merit within three (3) months

		of submission
Conduct an investigation	Complainants and Respondents	Investigation finalised within 12 months of commencing an investigation. Complex matters may go over the period of 12 months and complainants will be notified of additional time required and reasons thereof.
Provide feedback to complainants	Complainants	Feedback provided to complainants once every two (2) months.
Provide recordings of meetings	Respondents and complainants	Meetings are recorded for internal processes of the B-BBEE Commission and any party is welcome to bring their own recording device, subject to confidentiality and without prejudice to be agreed upon in each meeting.

5.3 In delivering these services and maintain the prescribed service standards, the B-BBEE Commission is committed to:

- upholding the *batho-pele* principle;
- provide services fairly with a focus on customer needs;
- be flexible, innovative and reliable in service delivery;
- engage with the not-for-profit and business sectors to develop and implement services solutions;
- focus on quality while maximising service delivery; and
- employee behaviour standards.

6. Customer Feedback

- 6.1.1 In the event that we have failed to meet these standards in respect of your matter without proper notification of reasons, customer complaints can be addressed in writing to the office of the Commissioner at FNotoane@beecommission.gov.za or telephone 012 394 1446. General customer feedback to us can also be transmitted to the same address.
- 6.1.2 The B-BBEE Commission will also on a continuous basis roll-out customer surveys as part of service delivery improvement plan.

7. Effective Date

- 7.1 The B-BBEE Commission is committed in working together with the B-BBEE stakeholders on building an inclusive economy that is globally competitive. These service standards come into effect from **1 April 2021**.

UNDERSTANDING THE USE OF TRUSTS IN B-BBEE OWNERSHIP INITIATIVES

About the Guide

The Broad-Based Black Economic Empowerment (“B-BBEE”) Commission is an entity established in terms of the B-BBEE Act, as amended, to oversee the proper implementation of the B-BBEE Act. This guide is developed and distributed by the B-BBEE Commission to provide guidance on the treatment of Trusts when used as a vehicle to facilitate ownership for purposes of compliance with the objectives and requirements of the B-BBEE Act.

What is a Trust?

A Trust generally refers to an arrangement in terms of which a person, often the Founder or Trustee, holds property or asset for the benefit of another, commonly known as a beneficiary, and can be for charity or estate planning, amongst other reasons. Under the B-BBEE Act, a Trust can be used to facilitate ownership by employees, communities or other similar collective groups.

Requirements for recognition of Trusts in ownership transactions

For the purposes of achieving B-BBEE objectives, black people may hold their rights of ownership in a measured entity through some form of a vehicle such as a Trust. To ensure that black people effectively own, control and manage the ownership rights held through the Trust and to prevent avenues for circumvention of the B-BBEE Act by measured entities, the Codes of Good Practice provide rules for the Trusts. These rules apply to Trusts as well as to transactions that involve Broad-Based Ownership Schemes and Employee Share Ownership Programmes that are structured in a form of a Trust.

While Trusts can be used to facilitate ownership, the transaction in question must still meet the requirements for recognition of ownership, which comprises of excisable voting rights, economic interests and net value in the hands of black people as a result of direct or indirect participation in the measured entity. The measured entity may on an annual basis recognise points for as long as the black shareholders still hold rights of ownership in the entity.

Ways Trusts can be implemented in the B-BBEE Codes of Good Practice

Broad-Based Ownership Scheme

Broad-Based Ownership Scheme refers to a collective ownership scheme constituted with the view to facilitating the participation of specified natural persons in the benefits flowing from the ownership by that scheme or by its fiduciaries of an equity interest in an entity, which could be in a form of a community or stokvel or group of enterprises. A Broad-Based Ownership Scheme may be created in a form of a Trust, and in that case it must meet both the rules for Broad-Based Ownership Scheme and for Trusts as set in the Codes of Good Practice.

Broad-Based Ownership Scheme must meet the following requirements:

<i>Nomination of Trustees</i>	At least 50% of the fiduciaries of the scheme must be independent persons having no employment with or direct or indirect beneficial interest in the scheme, at least 50% pf the fiduciaries of the scheme must be black people with at least 25% being Black women and the chairperson of the scheme must be independent
<i>Black participants and portion of entitlement</i>	Codes Series 100, requires the trust to define participants and the portion of their entitlement to receive distribution of the economic interest. It is important for each participant to know in advance the portion of their entitlement, and during B-BBEE measurement, proof of payment

	<p>will be produced. The trustees do not have discretion with regard to changing the participants and their portion of entitlement.</p> <p>Beneficiaries cannot be selected each year to receive benefits in a form of dividends from the measured entity, for payment of their education, training or social upliftment projects which are matters that should be catered for under skills development corporate, social investments or socio-economic development</p>
<i>Trust proceeds</i>	<p>A trust is a broad-based scheme and must adhere to the requirements of both annexes 100 (B) and (D). the trust deed must provide guidance as to how the beneficiaries will receive the proceeds and must adhere to paragraph 1.1.7 of Annexe 100 (B) which states that 85% of the value of the benefits allocated to the trust must accrue to black people. This then means only 15% of the proceeds payable to the trust can be utilised for administrative and operational management of the trust.</p>
<i>Financial reports of the scheme</i>	<p>The trustees as the representatives of a trust have an oversight role over the financial reports of a trust. Thus, they have a duty to inform the participants on the status of such reports on an annual general meeting of the scheme.</p> <p>Further, the trustees must hold a meeting with the black participants for the purpose of updating them on the status of accounts of the trust. Paragraph 1.1.12 of Annex 100 (B) provides that the scheme fiduciaries must present the financial</p>

	<p>reports of the scheme to participants yearly at an annual general meeting of the scheme.</p> <p>On winding-up or termination of the trust, all accumulated Economic Interest must be transferred to the beneficiaries or to an entity representing the interest of the participants or class of beneficiaries.</p>
<i>Documents governing the scheme</i>	The Constitution of the scheme must be available on request to any participant in an official language in which that person is familiar.

Employee Share Ownership Programme

Employee Share Ownership Programme refers to instances where employees are offered shares/stock/units options in an entity they work for, which may be at no cost or where they can purchase shares/stock/units at discounted or favourable price mostly as an incentive. Employee Share Ownership Programme may be created in a form of a Trust, and in that case it must meet both the rules for Employee Share Ownership Programme and for Trusts as set in the Codes of Good Practice

Employee Share Ownership Programme must meet the following requirements:

<i>Appointment of trustees</i>	At all times 50% of fiduciaries of the scheme must be appointed by the employees and this must be attained throughout the scheme's existence.
<i>Black participants and portion of entitlement</i>	The trust deed must state information relating to the portion of entitlement for each black participant. It is important for each participant to know in advance the portion of their entitlement, and during B-BBEE measurement, proof of payment will have to be produced. The trustees

	do not have discretion with regard to changing the participants and their portion of entitlement.
<i>Trust proceeds</i>	A trust which is established as an employee share ownership scheme, must adhere to the requirements of both Annexe 100 (C) and (D) of Code Series 100 and the trust deed must also provide guidance as to how the beneficiaries will receive the proceeds.
<i>Financial reports of the scheme</i>	The trustees as the representative of a trust have an oversight role over the financial reports of a trust. Thus, they have a duty to inform the participants on the status of such reports on an annual basis through meetings that are held. The trust deed must provide that the trustees will hold a meeting with black participants for the purpose of updating them on the status of accounts of the trust. Paragraph 2.5.4 of Annex 100 (C) provides that the scheme fiduciaries must present the financial reports of the scheme to participants yearly at an annual general meeting of the schemes.
<i>Participation by Black participants at the Measured Entity board</i>	In terms of paragraph 2.5.2 in Annexe 100 (C), the participants must take part in managing the scheme at a level similar to the management role of the shareholders in a company in which they hold shares. Represented by the trustees, the beneficiaries must be able

	<p>to take part in the decision taken by other shareholders in meetings through board active participation and exercisable voting rights.</p> <p>On winding-up or termination of the trust, all accumulated Economic Interest must be transferred to the beneficiaries or to an entity representing the interest of the participants or class of beneficiaries. Further, an employee share ownership scheme is a form of ownership and should not be confused with daily operations of the entity and its labour relations issues where dismissed, retrenched, deceased and incapacitated employees end up forfeiting their share/units as employment contracts and terms are not attached to their shareholding and should not be implemented as such.</p>
<i>Documents governing the scheme</i>	<p>The constitution of the scheme must be available on request to any participant in any official language in which that person is familiar.</p>

Trusts

Where ownership is facilitated through a Trust, whether such Trust is a Broad-Based Ownership Scheme, Employee Share Ownership Programme, or just a Trust, the Trust must meet the Trust Rules set in the Codes of Good Practice. This means a Trust that is set up a Broad-Based Ownership Scheme or Employee Share Ownership Programme must meet the rules for Trusts and in addition to that, the

rules for Broad-Based Ownership Scheme or Employee Share Ownership Programme as the case may be.

The qualification criteria for the recognition of Trusts are as follows:

- the Trust Deed must define the beneficiaries and the proportion of their entitlement to receive distributions;
- a written record of the names of the beneficiaries or the use of a defined class of natural person satisfies the requirement for identification;
- a written record of fixed percentages of entitlement or the use of a formula for calculating entitlement satisfies the need for defining proportion of benefit;
- the Trustees must have no discretion on the above-mentioned terms; and
- on winding-up or termination of the trust, all accumulated Economic Interest must be transferred to the beneficiaries or to an entity representing the interest of the participants or class of beneficiaries.

Family Trusts

Further, the Codes of Good Practice allow for establishment and recognition of family trusts to facilitate ownership. For a family Trust to receive B-BBEE recognition status, the trust deed must define the beneficiaries and the proportion of their entitlement to receive distributions. A written record of the names of the beneficiaries or the use of a defined class of natural person satisfies the requirements of defining beneficiaries; only the trustees have discretion on the operations and terms of the trusts. On winding-up or termination of the trust, all accumulated Economic Interest must be transferred to the beneficiaries or to an entity representing the interest of the participants or class of beneficiaries.

<i>Qualification for recognition of Family Trusts</i>	The trust deed must define the beneficiaries and the proportion of their entitlement to receive distributions; a written record of the names of the beneficiaries or the use of a defined class of natural persons satisfies the requirement of defining beneficiaries; a
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	<p>use of a formula for calculating entitlement satisfies the need for defining proportion of benefit.</p> <p>Only the trustees must have discretion on the above-mentioned; and</p> <p>On winding-up or termination of the trust, all accumulated Economic Interest must be transferred to the beneficiaries or to an entity representing the interest of the participants or class of beneficiaries</p>
<i>Documents governing the scheme</i>	<p>The measured entity must be in possession of a certificate issued by a competent person to the effect: that the Trust was created for a legitimate commercial reason which must be fully disclosed; and that the terms of the Trust do not directly or indirectly seek to circumvent the provisions of the Codes and the Act.</p>

However, there is a need at all times to make a distinction between a Trust for purposes of estate planning and/or avoiding payment of estate duty, and a trust that is established for purposes of B-BBEE in that the latter must adhere with the requirements of Annexe 100.

These trusts should not be used as an investment facilitation instruction for the benefit of the beneficiaries or have an element of passiveness when it comes to the treatment of beneficiaries, as opposed to active participation required from black participants under Code Series 100, irrespective of whether the shares are directly or indirectly held.

Minors or Children as beneficiaries or participants

Further, we note that black children satisfy the definition of black people as per the B-BBEE Act, however, this does not mean that true empowerment will be achieved in instances where children are sighted as beneficiaries. Such participants are regarded as mere financial beneficiaries and not indirect shareholders through the trust, because they are not able to exercise voting rights in a manner that is consistent with real ownership, and only enjoy a financial benefit.

B-BBEE ownership is focused on changing ownership patterns of the means to the economy, through knowledge creation and economic interest, and there is no way B-BBEE can be accelerated through recognition of black children, as they have no capacity to act legally, and therefore cannot delegate or appoint proxies, thus fall short of meeting exercisable voting rights as one of the key requirements for ownership. Thus, including under-age children as beneficiaries will be regarded as circumvention of the B-BBEE Act as they have no capacity to exercise rights flowing from such ownership.

Conclusion

Where measured entities create Trusts that have the effect of circumventing the B-BBEE Act, for instance by putting in place evergreen structures where shares never vests, ceding voting rights of participants to the measured entity or its appointed representatives, limiting involvement or active participation of beneficiaries in the measured entity through the Trustees or relevant fiduciaries, would amount to fronting practice and misrepresentation of the B-BBEE status where such Trusts have been recognised for B-BBEE points or presented as real black ownership.

Further, there is a clear distinction between Trusts established for aspects such as community projects or skills development or employee wellness benefits, no matter how beneficial they may be, such Trusts cannot be recognised for ownership purposes as they do not result in ownership and true empowerment for black people. Such Trusts can be recognised under the relevant elements of the Codes of Good Practice, and claiming them under ownership undermines the objectives of the B-

BBEE Act and thus amount to fronting practice and/or misrepresentation of the B-BBEE status.

If implemented correctly, Trusts have a potential of advancing transformation of the economy as they increase the number of black people owning, managing and controlling the productive assets and entities in the country. This will assist in broadening ownership as intended in the B-BBEE Act.

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GUIDE ON ENTERPRISE AND SUPPLIER DEVELOPMENT

About the Guide

The guide is developed and distributed by the Broad-Based Black Economic Empowerment Commission ("B-BBEE Commission") with the aim of providing guidance on how Enterprise and Supplier Development is treated within the B-BBEE Codes of Good Practice (the Codes) issued in accordance with the B-BBEE Act.

What is meant by Enterprise and Supplier Development?

Enterprise Development (ED) and Supplier Development (SD) is one of the three priority elements of the Broad-Based Black Economic Empowerment (B-BBEE) Scorecard. The aim is to strengthen local procurement, enhance local supplier development programmes and increase financial support towards black entities.

Thus, the measured entity (ME) is required to achieve a 40% sub-minimum on the total points allocated for preferential procurement (40% of 25 points), supplier development (40% of 10 points) and Enterprise development (40% of 5 points).

This means that for a measured entity not to drop a level down on its overall B-BBEE status, it will need to at least score 10 points for preferential procurement, 4 points for supplier development and 2 points for enterprise development.

Who should benefit from Enterprise and Supplier Development?

Exempted Micro-Enterprises (EMEs) (R10million and less annual revenue), and Qualifying Small Enterprises (QSEs) (annual revenue of between R10 million and R50 million) which

are at least 51% black owned or at least 51% black women owned utilising the flow through principle.

Generic entities (generates annual revenue of R50 million and above) also qualify as beneficiaries of enterprise and supplier development, provided that they qualified as an EME or QSE when they were initially identified for the enterprise and supplier development support at the first instance. Further, a measured entity is only allowed to recognise a generic entity as a beneficiary for only 5 years, and not beyond.

What are the Enterprise and Supplier Development?

Minister of Trade, Industry and Competition, has issued various Codes of Good Practice, which include the generic Codes, that are applicable to all sectors that do not have a specific sector code approved and gazetted by the Minister, as well as sector Codes, that must be applied in the relevant sectors for which they were approved such as construction, property, tourism, transport etc.

In each of the Codes, there are specific targets that have been set for the measured entity to comply with under the ED and SD categories of the enterprise and supplier development scorecard. The below table summaries these targets according to the type of Codes:

Sectors	Elements	Generic Entity	Qualifying Small Enterprise
Generic Codes	Supplier Development	2% of Net Profit After Tax (NPAT)	1% of NPAT
	Enterprise Development	1% of NPAT	1% NPAT
Defence Sector Codes	Supplier Development	1% of NPAT	1% of NPAT
	Enterprise Development	1% of NPAT	1% of NPAT
Financial Sector Codes	Supplier Development	1% of NPAT	1% of NPAT

	Enterprise Development	1% of NPAT	1% of NPAT
ICT Sector Codes	Supplier Development	2% of NPAT	2% of NPAT
	Enterprise Development	3% of NPAT	2% of NPAT
Property Sector Codes	Supplier Development	2% of NPAT	1% of NPAT
	Enterprise Development	1% of NPAT	1% of NPAT
Agri-BEE Sector Codes	Supplier Development	(3% of NPAT for year 1 to year 4) thereafter 2% of NPAT	1% of NPAT
	Enterprise Development	1.5% of NPAT	1.5% of NPAT
Construction Sector Codes	Supplier Development	Contractors – 3% of NPAT BEPs – 3% of NPAT	Contractors – 3% of NPAT BEPs – 3% of NPAT
	Enterprise Development	Contractors – Ann. CSC 400 (C) BEPs – Ann. CSC 400 (C)	Contractors – Ann. CSC 400 (C) BEPs – Ann. CSC 400 (C)
Tourism Sector Codes	Supplier Development	3 % of NPAT	3 % of NPAT
	Enterprise Development	0.5 % of NPAT	0.5 % of NPAT
MAC Sector Codes	Supplier Development	2% of NPAT	1% of NPAT
	Enterprise Development	1% of NPAT	1% of NPAT
Transport Sector Code (targets are set for each sub-sector)			

Bus Commuter Sub Sector Code	Enterprise Development	Generic Entity – 3% of NPAT Qualifying Small Enterprise – 3% of NPAT
Coach Services Sub Sector Code	Enterprise Development	Generic Entity – 3% NPAT Qualifying Small Enterprise – 3% NPAT
Taxi Industry Sub Sector Code	Enterprise Development	1% of payroll/3% of NPAT Taxi Owners - 2% of NPAT or 0.3% of Payroll
Road Freight Sub Sector Code	Enterprise Development	Generic Entity - 3% of NPAT Qualifying Small Enterprise - 2% of NPAT
Public Sub- Sector Code	Enterprise Development	National & Provincial DOT 3 years Target – 1% of discretionary spend Public Entities including SOEs & Agencies 3 Years Target – 3% of NPAT or 1 % of discretionary spend
Marine Transport and Services Industry Sub Sector Code	Enterprise Development	Generic Entity - 3% of NPAT Qualifying Small Enterprise - 2% of NPAT
Forwarding and Clearing Sub Sector Code	Enterprise Development	Generic Entity Investment in the Black owned enterprises – 3% of NPAT Investment in the Women-owned enterprises 1.5% of NPAT Qualifying Small Enterprise - 3% of NPAT
Rail Sub Sector Code	Enterprise Development	Generic Entity - 3% of NPAT Qualifying Small Enterprise - 1% of NPAT
Domestic Aviation Sub- Sector Code	Enterprise Development	Generic Entity - 3% of NPAT Qualifying Small Enterprise - 2% of NPAT

A list of all gazetted Codes is available on our website <https://www.bbbeeecommission.co.za/b-bbee-codes-of-good-practice/> for further information.

How to identify Enterprise and Supplier Development beneficiaries?

An SD beneficiary is an entity that is part of the measured entity's supply chain (meaning that the beneficiary entity is registered as a supplier on the measured entity's supplier database), whereas an ED beneficiary is not registered on the measured entity's supplier database.

When identifying an SD beneficiary, the measured entity should look to their supply chain, to identify existing black owned EME's and QSE's that they can assist and develop, and with regard to an ED beneficiary, the measured entity should identify entities that it can assist and develop to become part of their supply chain.

This process has a twofold benefit for the measured entity, namely (i) to develop a reliable existing and future supplier, and (ii) to gain additional bonus points when the ED beneficiary graduates into a supplier. This will also assist in transforming the measured entity's value chain and facilitate new entrants.

For both ED and SD beneficiary identification, the measured entity must assess and identify the needs of the beneficiary entity and enter into an ED or SD Agreement with the beneficiary entity indicating what support will be provided. The Agreement must include clear objectives, priority interventions, key performance indicators, and a concise implementation plan with clearly articulated milestones.

What contributions can the measured entity make towards the ED and SD beneficiaries?

Below are the most common types of contributions that a ME's can contribute towards the identified ED or SD Beneficiaries:

- (a) Grant Contribution
- (b) Direct costs incurred by the ME on behalf of the Beneficiary Entity, for example the purchase of a computer for the Beneficiary Entity.

- (c) Discounts in addition to normal business practice.
- (d) Professional services rendered by the ME to the Beneficiary Entity at no cost.
- (e) Overhead costs incurred by the ME on behalf of the Beneficiary Entity, for example providing free rental space to the Beneficiary Entity.
- (f) Loans on favourable terms.
- (g) Early payment of supplier.

Implementation of Enterprise and Supplier Development through Intermediaries

To stimulate these investment contributions, a measured entity in determining its ESD points is permitted to recognise payments made to a suitably qualified and experienced third party and/or intermediary to perform enterprise and supplier development initiatives on its behalf.

However, the measured entity cannot recognise B-BBEE points prior to the contributions being initiated and effectively implemented for the benefit of the beneficiary entity. The measured entity also remains accountable to ensure that the initiative complies with the requirements irrespective of the fact that it is done through an intermediary.

In addition, the same beneficiary entity cannot be recognised for both SD and ED support at the same time, as this will result in double counting which is not allowed by the B-BBEE Act. This is also the case, even in instances where the measured entity implements ESD initiatives without a third party.

Documentation required by the verification agency to evidence contributions for Enterprise and Supplier Development

In recognising ESD contributions, the verification professional/agency as prescribed in the verification manual issued by **the dtic**, ought to apply the following verification methodology:

- (a) Verify the B-BBEE status of the beneficiary entity through sufficient and appropriate evidence such as B-BBEE sworn affidavit etc;

- (b) obtain confirmation from the beneficiary entity that it has satisfied the definition of “black people”;
- (c) An ED or SD agreement between the measured entity and the ED or SD beneficiary;
- (d) Proof of the contribution to the ED or SD Beneficiary, evidencing the support given (e.g. invoice and proof of payment of contribution); and
- (e) A letter from the ED or SD Beneficiary confirming and acknowledging the value and nature of the assistance received from the measured entity. This must be done only after the support has been provided and not before getting the actual support.

This methodology is applicable irrespective of whether the contributions were made directly by the measured entity or through an intermediary. Consequently, where there is no evidence linking the contribution of the measured entity to the beneficiary entity, the measured entity must not receive the points.

Awarding the B-BBEE points in the absence of any substantive evidence proving that the measured entity has actually complied with the ESD requirements, will undermine the objectives of the B-BBEE Act, and reduce B-BBEE implementation into a tick box exercise, as there would be no actual performance by the entity, and this will also result in false information being recorded on the measured entity’s B-BBEE certificate, which on its own constitutes an offence in terms of the B-BBEE Act.

What beneficiary entities must not do?

The following are some of the things that a beneficiary entity must not do in order not to aid a fronting practice:

- (a) Participate in an ESD initiative without understanding the terms of either the ED or SD agreement. Where clarity is needed, the beneficiary entity can contact the B-BBEE Commission for guidance and advice.

- (b) B-BBEE points recognition is based on actual performance by the measured entity, therefore the beneficiary entity must not provide the measured entity with a letter acknowledging receipt of the ED or SD support before actually receiving the support.
- (c) The ED and SD initiatives are to enhance the operational effectiveness and growth of the beneficiary entity, therefore, initiatives must be meaningful and not be done for the sake of compliance such as a telephonic mentoring and coaching.
- (d) ED or SD initiatives requires the measured entity to provide financial or non-financial support to the beneficiary entity. This is not the same as procurement of goods and services by the measured entity, therefore, the beneficiary entity is not to accept a procurement opportunity which a measured entity will recognise for preferential procurement points as a form of ED or SD support.
- (e) Part of ED and SD includes early payment for rendered services or supplied goods by the measured entity to the supplier entity. The early payment must be within fifteen (15) days from date of invoice, therefore, the supplier entity should not be made to back-date the invoice so that it can appear as through the measured entity implemented an early payment, whilst that is not the case.

What are the consequences of not adhering to the Codes?

A measured entity that fails to adhere to the requirements of the Codes, may be liable for contravention of the B-BBEE Act, and the penalties provided therein may apply, in that a natural or juristic person can be convicted of fronting practice(s) in terms of the B-BBEE Act or be liable to a fine of up to 10% annual turnover or a maximum prison term of ten (10) years.

Further, any natural or juristic person convicted of an offence in terms of the B-BBEE Act may not for a period of 10 years from date of conviction, conduct business with any organ of the state or public entity and will be registered in a register of the tender defaulters with the National Treasury.

Therefore, the measured entity and beneficiary entity are encouraged to comply with the B-BBEE Act and desist from knowingly engaging or participating in conduct that would result in undermining the legislation or making use of black people as mere tokens instead of meaningful contributors towards economic growth.

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