

FAQs

 thedtic.gov.za/financial-and-non-financial-support/b-bbee/faqs/

Clarification notes

The following are the interpretative notes to be utilised by measured entities and rating agencies for the implementation of the codes.

Question: If a loan was made to an enterprise development beneficiary prior to it becoming a supplier, but the beneficiary has since become a supplier, can it still claim this as an enterprise development loan?

Answer: Where a qualifying beneficiary graduates from enterprise to supplier development status within the same measurement period, the measured entity can elect to recognise the qualifying contribution as either enterprise or supplier development. The qualifying contribution, however, cannot be double-counted or split across enterprise and supplier development recognition. This applies only to a loan and not to recoverable spend.

Question: An international measured entity sets up shop in South Africa and partners with a black-owned BEE company for black ownership. The entity receives level 4 verification after its first year of operation. Four years later, the BEE partner company decides to sell its shares and realise profit. The entity is now battling to get a replacement BEE partner, mainly because its licence is up for renewal and no BEE partner is willing to buy into an entity that is unable to offer a guarantee of renewal. Furthermore, without a BEE partner, the entity's chances of renewal are limited, if not completely diminished. It now wants to claim continued consequence while looking for a replacement BEE partner. The entity qualifies on all areas, except for the fact that its last verification stood at level 6, which is two levels below the original level 4; this is because the amended codes have increased targets and reduced points. The entity's motivation is that were it now verified under the old generic codes (against which it was initially verified), it could prove increased transformation as per the requirements.

Answer: The measurement of transformation is to be done against a valid code of good practice, inclusive of amendments. Thus, if transformation has not taken place – i.e. if there has been no improvement in B-BBEE Status Level – recognition of continued consequences cannot follow.

Question: A company whose 2018 results have been audited by the B-BBEE rating agency would like to know how net profit after tax (NPAT) is defined for the purposes of B-BBEE. The company states the following: We are in disagreement with the amount used as net profit after tax as the rating agency has included a dividend received from two subsidiary companies in our 2018 financial results. We appealed this decision, but the appeal was rejected. We received a dividend from subsidiary companies in order for them to repay a loan from many years ago, which we had granted with the aim of eventually

deregistering these subsidiaries. This current treatment has resulted in us being graded as non-compliant for the purposes of BEE, whereas we have in fact improved our score. We highlight that the International Financial Reporting Standards (IFRS) does not hold special distinctions for items of operational nature that occur irregularly or infrequently; rather, all results are disclosed as revenues, finance costs, post-tax gains or losses, or results from associates and joint ventures. The International Accounting Standards Board, or IASB, ceased recognising extraordinary items under IFRS rules in 2002. The IFRS has a separate disclosure for income or expenses of abnormal size or nature. These disclosures can be on the face of the income statement or in the notes section of the report. So, in short, for accounting purposes there is no distinction made for items that might be considered abnormal or extraordinary; these are simply lumped together with operating profits for reporting purposes. As a result, the crux of the problem is that the BEE definition still refers to GAAP accounting statements, while financial statements are prepared in terms of the IFRS. One of the distinctions is that dividends are shown on the face of the income statement, while under GAAP accounting standards the dividend would not have been disclosed on the income statement at all, but as a reduction of retained income. In either case, the dividend received is not part of operating income and should not be included in NPAT.

Answer: Net Profit after Tax is defined in Schedule 1 of the B-BBEE Codes of Good Practice as “means the operating profit of measured entity after tax”. It incorporates both the equity/loss figures and abnormal items, but excludes extraordinary items as determined by (GAAP) Generally Accepted Accounting Practices. The determination of NPAT is to be done by the financial auditors of the measured entity. If the measured entity wishes to have it restated using GAAP principles, this must be done by the financial auditors, not the B-BBEE verification agency.

Question: In terms of the guidelines on complex structures, a holding or parent company can obtain a consolidated B-BBEE scorecard that includes the measurement of contributions across more than one entity within a group or divisional structure. Is there a minimum threshold in terms of shareholding or otherwise that the holding or parent company needs to have in another entity in order for that entity’s B-BBEE contributions to be measured together with the holding or parent company?

The scenario is as follows: The parent or holding company that requires a group consolidation scorecard holds 35% shares in company A. Does company A qualify to be consolidated with other subsidiaries, even though in terms of the Companies Act it does not qualify as a subsidiary since the parent company does not have the majority of voting rights in company A? In other words, do we consolidate only subsidiaries or may we consolidate associated enterprises? If we are allowed to consolidate associated companies, what is the minimum threshold in terms of shareholding?

Answer: To qualify for inclusion in a consolidation, entities need to meet the definition of subsidiary as per Section 3 of the Companies Act: 3. (1) A company is — (a) a subsidiary of another juristic person if that juristic person, one or more other subsidiaries of that juristic person, or one or more nominees of that juristic person or any of its subsidiaries,

alone or in any combination — (i) is or are directly or indirectly able to exercise or control the exercise of a majority of the general voting rights associated with issued securities of that company, whether pursuant to a shareholder agreement or otherwise; or (ii) has or have the right to appoint or elect, or control the appointment or election of directors of that company who control a majority of the votes at a meeting of the board; or (b) a wholly owned subsidiary of another juristic person if all of the general voting rights associated with issued securities of the company are held or controlled, alone or in any combination, by persons contemplated in paragraph (a). (2) For the purpose of determining whether a person controls all or a majority of the general voting rights associated with issued securities of a company — (a) voting rights that are exercisable only in certain circumstances are to be taken into account only — (i) when those circumstances have arisen, and for so long as they continue; or (ii) when those circumstances are under the control of the person holding the voting rights; (b) voting rights that are exercisable only on the instructions or with the consent or concurrence of another person are to be treated as being held by a nominee for that other person; and (c) voting rights held by — (i) a person as nominee for another person are to be treated as held by that other person; or (ii) a person in a fiduciary capacity are to be treated as held by the beneficiary of those voting rights. (3) For the purposes of subsection (2), ‘hold’, or any derivative thereof, refers to the registered or direct or indirect beneficial holder of securities conferring a right to vote.

Question: With regards to the 5% learnerships, do they need to be 2.5% employed and 2.5% unemployed, or can there be any split?

Answer: Measured entities can split the 5% target in whichever way they see fit. For example, a measured entity that only has its employees as part of its learnership under 2.1.2.1 can still enjoy the full six-point recognition. For absorption recognition, however, the learner being absorbed must not have had a long-term contract of employment prior to absorption.

Question: Can absorption be claimed for an unemployed learner who was enrolled for an NQF 4 learnership and is now enrolled for an NQF 5 learnership?

Answer: No. The definition of absorption was amended to ensure the learner is awarded a long-term contract of employment before absorption can be recognised. The only exception would be sector codes that have a different definition of absorption.

Question: Does a qualifying beneficiary have to be operational at the time of contribution? In other words, can a start-up enterprise benefit from enterprise development?

Answer: A start-up enterprise can benefit from enterprise development, however, the objective of the measured entity needs to be clearly defined and measurable at the time of beneficiation. Furthermore, it needs to meet the definition of ‘entity’ as defined in Schedule 1 of the B-BBEE Codes of Good Practice.

Question: Where a measured entity holds a majority share (51%) in an enterprise or supplier development (ESD) beneficiary, can the measured entity claim points for its contribution to the beneficiary under ESD? Assume that the contribution was made to a qualifying ESD beneficiary and that the contribution itself meets all the criteria of a qualifying enterprise and supplier development contribution, as defined in the codes. The codes do not expressly state whether a beneficiary may or may not be 'controlled' by the measured entity. The only reference that might have any bearing on the above is Statement 000, Par 2.2, which states: "In interpreting the provisions of the codes any reasonable interpretation consistent with the objectives of the B-BBEE Act as amended and the B-BBEE Strategy must take precedence." The codes, however, do refer to the Companies Act, Paragraph 3 (subsidiary relationships), which states the following: "A company is a subsidiary of another juristic person if that juristic person is directly or indirectly able to exercise or control the exercise of a majority of the general voting rights." The codes define 'enterprise development contributions' and 'supplier development contributions' in Schedule 1.

Answer: No. Where the beneficiary entity is majority-owned by the measured entity, the objective of the ESD cannot be fully met as there is no operational independence. This is because the measured entity has significant economic connections to the beneficiary entity.

Question: What is your opinion on the verification of labour brokers in general? The labour broker would hire temporal employees on behalf of a client and place them at different clients. The client would then train the temps in order to equip them with the requirements of the job. For ease of reference, labour broker means measured entity. ABC (Pty) Ltd means the labour broker client.

Employment equity: Can the labour broker claim for the temps under their employment equity scorecard if the employment contract is signed between labour broker and the temp? If the temp has been with the labour broker for more than three months and placed at one client for longer than three months, can the temp be regarded as an employee of the client for employment equity purposes? If not, how should the temp be accounted for under the labour broker's BEE scorecard?

Skills development: The labour broker would like to claim the training done for the temps as part of skills development. For example, if ABC (Pty) Ltd is a client of a labour broker and is looking for temps who have forklift driving certificates, does the forklift training paid for by the labour broker become mandatory training or can the labour broker claim for this training?

Preferential procurement: The BEE codes are not specific or detailed in how this should be treated. The codes mention that labour brokers and contractors are included in the calculation of measured procurement expenditure. This is in the case where ABC (Pty) Ltd pays the labour broker for the outsourced labour. How does the labour broker as a

measured entity account for this expenditure for the purposes of BEE? Does the labour broker see the temps as suppliers or exclude the money paid to temps as employee costs?

Supplier development: Can the labour broker claim training provided for the temps as part of its supplier development programme? This is, of course, if the temp is seen as procurement.

Enterprise development: Can the labour broker claim training provided for the temps as part of its enterprise development programme? This is, of course, if the temp is seen as procurement.

Socio-economic development: Can the labour broker claim training provided for temps as part of its socio-economic development programme?

Answer: Measured entities should recognise the employee qualification as set out in the Constitutional judgement *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others*. Where a TES employee earns below the earnings threshold (currently R224 080.48 per annum) as determined by the Minister of Employment and Labour, and in terms of the basic conditions of employment is placed for three months or more at the host site or TES client, such an employee is deemed a permanent employee of the host, and must be reported and recognised as such for B-BBEE measurement purposes. The same does not apply to those earning above the earnings threshold; they remain TES employees

Question: The term 'socio-economic project contribution' is defined in Schedule 1, Part 2 (definitions) of the revised codes as follows: "Monetary or non-monetary contributions carried out for the benefit of any projects approved for this purpose by any organ of state or sectors including, without limitation: (a) projects focusing on environmental conservation, awareness, education and waste management; and (b) projects targeting infrastructural development, or reconstruction in underdeveloped areas; rural communities or geographic areas identified in the government's integrated sustainable rural development or urban renewal programmes; (c) new projects promoting beneficiation." What process should an organ of state follow for a project to be approved under socio-economic contributions? In addition, does the department have in place a policy or guidelines for companies/organisations looking to have their projects recognised as contributing to this socio-economic aspect? We recently received a legal opinion from state law advisors that "the process of approving a project for socio-economic development purposes is separately regulated". How is this process of approving a project for socio-economic development purposes separately regulated within organs of state?

Answer: Approval in the form of a letter on official letterhead signed by the representative of the organ of state is sufficient to accept any of the projects listed under the definition of 'socio-economic project contributions'. The Department of Trade, Industry and

Competition cannot prescribe processes to any department, as requested in the second part of this query. Projects should meet the descriptions provided for in the definition, and supporting socio-economic development evidence should be submitted.

Question: We have been advised that fixing roofs does not qualify as leading to access in the economy, that donations must increase the beneficiaries' ability for employment, and that socio-economic development should be distinguished from corporate social investment (CSI). Does this mean that the provision of suitable housing or functional buildings for a school does not qualify as socio-economic development? This issue raises the more urgent clarification regarding the definition of socio-economic development, and different interpretations of the term income generation. One interpretation states that income generation cannot be futuristic in nature, and should immediately lead to the beneficiaries being able to generate income.

Answer: Socio-economic development contributions should be differentiated from CSI initiatives in that they should seek to promote the participation of beneficiaries in the economy. There should be a link between the contribution and the opportunity created for beneficiaries to access the economy. It is important to note that the 2013 codes refer to the facilitation of income-generating activities. This means that activities that provide beneficiaries with the opportunity to access the economy should count since this leads to generation of income by beneficiaries.

Question: Under Statement 102: Point, 4.1.3, does it matter how the black party/participant funds the transaction? If they took a private loan, would that have to be used in net value calculations? With regard to Point 6.1.2, is it correct in saying that the value finalised in year three will be taken forth year-on-year? Basically, will the measured entity forever recognise that sale of asset? With regard to Point 5.6.4, "the rights of ownership in the equity instrument are comparable to rights that would have accrued had the sale/transaction taken place at seller level". My understanding of this point is that you must treat the sale of asset as a sale of shares to an individual black shareholder. Value of asset against value of company will be the equivalent to a black shareholder buying shares in the company. With regard to Point 3.2.2.3, for the three years, can the black party/participant drop a BEE level or do they have to maintain their BEE status at time of purchase for the points to be recognised?

Answer: Any loan constitutes a third party right to the shareholding and should be accounted for in the net value calculations. To the second point, yes, after year three the value is finalised and taken forth. To the third point, yes, you must treat the sale of asset as a sale of shares to an individual black shareholder. To the final point, no, the BEE level has no impact on the calculation.

Question: In terms of enterprise development, a measured entity pays a contribution to a third party for ESD facilitation. An ESD facilitator then identifies an end-beneficiary for enterprise development. An end beneficiary gets a loan from the ESD facilitator. With regard to the recognition percentage for the measured entity, is 100% for the grant given

for ESD facilitation or 70% for the loan? I would think that it would be 100% since it was a grant, and the loan is not with the measured entity but with the third party and end-beneficiary.

Answer: The loan made to the ESD facilitator should be allocated to the end beneficiary in the financial period. There is no grant where the intention is to provide loans to black-owned small, medium and micro enterprises. Only 70% of the contribution made is claimable as ESD, in line with the benefit factor matrix.

Question: Should B-BBEE certificates recognised under preferential procurement be the latest valid B-BBEE certificate or be valid at least one day into the financial year end of the measured entity?

Answer: The certificate needs to either be valid for at least one day in the measurement period or valid at the time of verification.

Question: When is the first-year-repayment graduation factor of 10% payable?

Answer: As 'year' is not defined in the B-BBEE codes, it takes on its ordinary meaning of a 12-month period commencing on the first day of the first month and ending on the last day of the 12th month. As such, the 10% target for the first year commences on the first day that all rights and obligations in terms of equity ownership are enforceable. The intent is to ensure that there is always value in black hands, from day one, before net value points can be awarded. It is for this reason that entities offer B-BBEE shareholding at a discount.

Question: Are related party Commissioners of Oath allowed to authorise their own transactions and attest to the sworn affidavits for exempted micro enterprises (EMEs) and qualifying small enterprises (QSEs)?

Answer: No, complete independence is required, as per the Justices of the Peace and Commissioners of Oath Act.

Question: Is the Workplace Skills Plan/Annual Training Report mandatory for B-BBEE verification for QSEs?

Answer: It is mandatory for B-BBEE purposes when the QSE is capable of reporting in terms of the Skills Development Act or Skills Development Levies Act.

Question: Do you accept internal valuations for net value? Is a valuation required annually?

Answer: An internal valuation is acceptable. The B-BBEE rating agency needs to inspect the valuation for reasonability in terms of 9.2.5.4.1 of the Verification Manual, Appendix 2. Business valuation is based on specific financial data and is valid at a certain point in time. Valuation therefore needs to be valid at the time of verification.

Question: In terms of complex ownership structures involving private equity ownership and trusts, can such a measured entity use a BEE affidavit? In other words, can the measured entity use the flow-through principle in multiple layers to determine ownership status for BEE affidavits, or affidavits used for direct ownership?

Answer: The substance over form principle should be applied. The intention of the codes is not to benefit the complex ownership structure. Furthermore, the affidavit should be standardised. The sector code will have to customise the affidavit according to their various sectors.

Question: Regarding BEE affidavits for EMEs and QSEs in a complex ownership structure involving black private equity, is it permissible to apply enhanced recognition for black private equity fund managers or to recognise them as true black ownership. Code 3.10.1 allows measured entities to treat ownership arising from private equity funds as if that ownership is held by black people, where the private equity fund meets certain criteria stipulated (codes 3.10.1.1 to 3.10.1.3)

Answer: Yes, as long as the stipulated criteria are met.

Question: A legislated commission (same as Sector Education Training Authorities) seeks to review its position on whether a commissioner or CEO can be considered an executive director on the Management Control Scorecard for Specialised Enterprises since they are not appointed directors. Currently, their Management Control Scorecard reflects no executive directors, only non-executive directors and other executive management. Public entity companies, with the minister's intervention, appoint a board of directors for the entity. In carrying out its fiduciary duties, the board will appoint executive managers (CEOs etc.) who are not directors to assist in carrying out the mandate of the shareholder. In the case of the unnamed commission, we are of the opinion that the appointed commissioner should be considered to be an executive director of the commission.

Answer: The verification agency should measure the role they play, the powers that comes with position, and whether there are equivalent roles to which the codes apply when it comes to the private sector.

Question: What evidence is required for learnership absorption?

Answer: Any of the following documents can be requested by the BEE professional: Learnership completion certificate, learnership agreement, affidavit by the learner, interview, offer and acceptance of employment, permanent employment contract or confirmation letter and payslip.

Question: How do you evidence an unemployed learnership?

Answer: You can evidence this with an affidavit, interview, agreement, letter of appointment or intake form. The learner must not have been permanently employed to qualify for absorption

Question: What is the common practice regarding accepted timing of absorption (if absorbed after measurement date, but before certificate date)?

Answer: The absorption must have happened before the verification period, irrespective of the measurement period, to align with the objective of the BEE Act. The objective is the creation of employment that qualifies as absorption, as defined in the May 2019 amendments. As long as the person was a learner within the financial period, it should be claimable where they have completed the learnership programme by the time of verification.

Question: What evidence is required for learnerships that are outsourced, i.e. the host is different to the sponsor?

Answer: The tripartite agreement will stipulate all parties of the learnership agreement, i.e. learners, employer and the institution. Only the employer (who is the sponsor) can claim the learnership, not the host. This must be measured and verified with proof of payments and learnership agreements.

Question: What evidence is required for Youth Employment Services (YES) candidates?

Answer: Confirmation from YES and evidence pertaining to enrolment with YES programme, i.e. access to the YES system. B-BBEE rating agencies must make use of the Practice Note on the Implementation of YES initiative, government notice 640 of 2018.

Question: Can the annual fees that Chartered Accountants (CAs) pay to their professional body be claimed under skills development?

Answer: Membership fees are paid to ensure that CAs maintain and/or retain their professional status, and are not claimable as training. However, the Continuous Professional Development courses or any training received from the professional body is claimable.