

## **THE BROAD-BASED BLACK ECONOMIC EMPOWERMENT**

### **PRACTICE GUIDE 01 of 2019**

#### **BROAD-BASED BLACK ECONOMIC EMPOWERMENT REQUIREMENTS FOR MULTINATIONAL CORPORATIONS**

##### **A. Introduction**

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 B-BBEE 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 implementation of B-BBEE including determining the validity of B-BBEE certificates.
4. Section 9 (1) of the B-BBEE 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. B-BBEE is an integrated coherent framework that seeks to advance the economic transformation of South Africa and bring about significant increase in the number of black people that manage, own and control the country's economy. The form in which economic transformation is realised is guided by the B-BBEE Act with the Codes guiding the implementation to achieve the outcome, not to aid measured entities to circumvent the B-BBEE Act.

## **B. Purpose of this practice guide**

6. According to the Paragraph 7 of Statement 000 of the Codes of Good Practice (the Codes), the generic score card comprises of five (5) elements being (a) ownership, which measures effective ownership by black people, (b) management control which measures effective control by black people, (c) skills development which measures the extent to which entities carry out initiatives designed to develop the competence of black people internally and externally, (d) enterprise and supplier development which measures the extent to which entities carry out initiatives to assist growth and sustainability of black enterprises and the extent to which they buy goods and services from empowering suppliers with strong B-BBEE recognition, and (e) socio-economic development entities carry out initiatives to promote access to the economy by black people.
7. These five elements of B-BBEE adopted in the Codes each have a specific purpose and together provide an integrated intervention to empower black people as envisaged in the B-BBEE Act. Further, the Codes allows for B-BBEE verification, which is a process to measure and determine compliance with the B-BBEE Act, and results in the issuing of a B-BBEE Certificate to the measured entity.
8. The B-BBEE Commission has become aware of inconsistent messages regarding B-BBEE requirements for multinational corporations (MNC), which has a negative impact on the overall objectives of the B-BBEE Act. For example, there are parties who advise MNC that in order to operate in South Africa, they will have to sell 51% of their business to black people, which is not true, because there are targets in each element of the B-

BBEE Codes and each entity will comply in accordance with its plan. A Multinational Business is defined in the Codes as a measured entity with a business in the Republic of South Africa and elsewhere which maintains its international headquarters outside the Republic. In lieu of this, the B-BBEE Commission deemed it necessary to issue this practice guide in order to simplify the B-BBEE requirements for MNC as per the B-BBEE Act.

**C. What are the B-BBEE Requirements for Multinational Corporations?**

9. In terms of paragraph 3.1 of Statement 000 of the Codes, 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 undertakes any economic activity with the measured entity whether direct or indirectly must comply with the B-BBEE Act.
10. Therefore, some of the MNC who satisfy the contents of paragraph 10 are required to implement the Codes. This means that a MNC will have to be measured against all elements of the Codes, including ownership. Simply put, a MNC that does business with an organ of state or public entity qualifies as a measured entity, and must comply with the B-BBEE Act.
11. The generic Codes prescribe a minimum of 25% + 1 vote to be in the hands of black people. The ownership target may vary when it comes to Sector Codes, and the below table provides a summary of ownership targets according to the Sector Codes:

<b>Types of codes of good practice</b>	<b>Ownership targets</b>
Generic Codes	25% + 1 vote
Information and Communication Technology	30%
Tourism	30%
Construction	32.5% and 35% in year 5 (year 5 is calculated from effective date of 1 December 2017)

Integrated Transport	25% + 1 vote
Property	25% + 1 vote
Forestry	25% + 1 vote
Financial Services	25% + 1 vote
AgriBEE	25% + 1 vote
Marketing, Advertising and Communication	45%
Defence	25% year 1  30% year 2  35% year 3  The years calculated from effective date of 9 November 2018.

12. Thus at the end of a particular measurement period a MNC will undergo a B-BBEE verification process, save for where its annual total revenue is R10 million and less or has 51% black ownership and its annual turnover is above R10 million and less R50 million, in which case it will be required to use only a sworn affidavit. However, practice has shown that majority of MNC qualify for B-BBEE verification based on the annual turnover being generated. Total revenue refers to the total income of an entity from its operations as determined under South African Generally Accepted Accounting Practice.
  
13. However, a MNC that is a start-up, meaning a recently formed or incorporated entity that has been in operation for less than one (1) year excluding any newly constituted enterprise which merely a continuation of a pre-existing enterprise, will be treated the same as an Exempted Micro-Enterprise (EME), and will automatically qualify for a B-BBEE level 4 status, and only need to complete a B-BBEE sworn affidavit confirming that the annual total revenue is less than R10 million and the level of black ownership if any.

14. Despite paragraph 13, a MNC 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. For contracts of R50 million or more they will be required to submit a Generic scorecard applicable to large entities and would require a verification process. The presentation of such scorecards must use annualised data.
15. A MNC that was subjected to a B-BBEE verification process will then have a B-BBEE certificate which amongst others will indicate a summary of how the entity performed against the applicable Codes. Please see below example:

<b>B-BBEE Elements</b>	<b>Target Score Including</b>	<b>Bonus Points</b>	<b>Actual Score Achieved</b>
Ownership	e.g. 25 points. As well as a percentage of black ownership if the MNC implemented the ownership target as outlined in paragraph 12 above. But if the MNC opted not to comply with the ownership target and also not participating on the Equity Equivalent Investment Programme, no ownership points will be allocated.		
Management Control	e.g. 19 points		
Skills Development	e.g. 20 points		
Enterprise and Supplier Development	e.g. 40 points		
Socio-Economic Development	e.g. 5 points		
Total Score	e.g. 109 points		
Priority Elements Achieved	YES / NO and specify them		

Empowering Supplier Status	YES / NO and specify them	
Final B-BBEE Status Level		

\* Indicate how each element contributed to the outcome of the scorecard

#### D. Alternative to B-BBEE ownership for MNCs

16. In terms of the Codes, all entities operating in the South African economy are required to make a contribution towards the objectives of the B-BBEE through compliance with the Codes, including Sector Codes where applicable. However, it is acknowledged that there may be MNC that have global practices preventing them from complying with the ownership element of the Codes through the traditional sale of shares to black people.
17. In this instance, the Codes provide for an Equity Equivalent Investment Programme (EEIP) which the MNC can contribute towards. EEIP is governed by Statement and such contributions count towards the ownership element of B-BBEE made by the multinational. The value of these EEIP contributions may be measured against 25% of the value of the multinational's South African operations or may be measured against 4% of the total revenue from its South African operations annually over the period of continued measurement.
18. Participation on the EEIP, is not automatic and therefore an application must be made to the Minister of Trade and Industry, in which the MNC must also prove that it has a global policy that does not dilute its ownership outside the home country and such must be supported by evidence.
19. Further, a MNC must identify a programme where the 4% or 25% contribution will be invested. The EEIP must promote and advance three critical areas namely, skills development, supplier development and research and development, in giving effect to the National Development Plan.
20. Where the Minister of Trade and Industry has granted approval for a MNC to participate on the EEIP, the identified programme and points awarded may not form part of any

other B-BBEE elements in the multinational's B-BBEE Scorecard. The multinational must still comply with the rest of the elements under the Codes.

21. Further, a memorandum of agreement will be entered into between the Department of Trade and Industry and the MNC in question regarding the administration and implementation of the EEIP, as well as monitoring.
22. A EEIP is not a lifetime recognition, it is time bound based on the amount contributed and the maximum number of years a MNC can be able to claim ownership points resulting from an EEIP is ten (10) years.
23. This is how the B-BBEE certificate of a MNC with an EEIP will look:

<b>B-BBEE Elements</b>	<b>Target Score Including</b>	<b>Bonus Points</b>	<b>Actual Score Achieved</b>
Ownership	e.g. 25 points, excluding black ownership percentage because participation on EEIP only provides ownership points and not black ownership.		
Management Control	e.g. 19 points		
Skills Development	e.g. 20 points		
Enterprise and Supplier Development	e.g. 40 points		
Socio-Economic Development	e.g. 5 points		
Total Score	e.g. 109 points		
Priority Elements Achieved	YES / NO and specify them		
Empowering Supplier Status	YES / NO and specify them		
Final B-BBEE Status Level			

**\*Indicate how each element contributed to the outcome of the scorecard**

## **E. What MNC should be aware of**

24. The Codes have outlined clear requirements for B-BBEE implementation, and thus no MNC corporation must be forced to sell 51% equity to black people based on the impression given by any person that it is mandatory. Paragraph 12 above has outlined the ownership targets applicable under each sector code, and any contrary advice by intermediaries or consultants must not be accepted.
25. The B-BBEE Act does not specify the black person to whom the MNC must sell equity too, and therefore, each MNC must decide for itself the relevant black shareholder or partner, which can also include its employees or a community in which it operates. Where an MNC opts to implement an employee share ownership scheme or a broad-based scheme, it must ensure that such programmes meet the ownership requirements as per the ownership scorecard as well as additional rules in Annexes 100(B)-(D) of Statement 100. Models marketed which make use of Non-Profit Organisations or Public Benefit Organisations as holding structures can only be recognised if they house a broad-based ownership scheme, otherwise they cannot grant black ownership points
26. MNCs as explained in the preceding paragraphs are required to implement the Codes, and there is no provision in the B-BBEE Act allowing such MNC to be exempted from implementing the B-BBEE Act.
27. A MNC listed on the Johannesburg Stock Exchange (JSE) is required to report on its B-BBEE Compliance to the B-BBEE Commission annually in line with Section 13G (2) of the B-BBEE Act, read with regulation 12 of the B-BBEE Regulations. The fact that the listing on the JSE is secondary, does not exempt a MNC from reporting.

## **F. Conclusion**

28. In terms of Section 13O (1) (a) of the B-BBEE Act, a person commits an offence if that person knowingly misrepresents or attempts to misrepresent the broad-based black economic empowerment status of an enterprise, and the B-BBEE Commission may institute an investigation in terms of Section 13J of the B-BBEE Act. In addition, Section 13A of the B-BBEE Act has empowered organs of state and public entities to cancel any contract or authorisation awarded on account of false information knowingly furnished



by or on behalf of an enterprise in respect of its broad-based black economic empowerment status.

29. If an entity is found to have violated the B-BBEE 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.
30. The Practice Guide is issued as a guide purely to assist with the interpretation of B-BBEE requirements for MNC. The B-BBEE Commission is available to assist through education and awareness sessions, clarifications on issues of interpretation, advisory opinions on proposed B-BBEE initiatives and general engagements such as meetings.
31. 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 the B-BBEE Act. In such an instance, an amended version will be published to replace this one.
32. 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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