

BLACK ECONOMIC EMPOWERMENT

BEE
AMENDMENT
ACT AND
DRAFT CODES
OF GOOD PRACTICE

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The Broad-Based Black Economic Empowerment Amendment Act, No 46 of 2013 (BEE Amendment Act) which amends the Broad-Based Black Economic Empowerment Act, No 53 of 2003 (BEE Act) to, amongst others, make the BEE Act the overarching legislation in South Africa with regard to BEE, to make it mandatory for all governmental bodies to apply the generic BEE Codes of Good Practice or other relevant code of good practice gazetted in terms of the BEE Act when procuring goods or services or issuing licences or other authorisations under any other laws, and to penalise fronting or misrepresentation of BEE information, came into force and effect on 24 October 2014.

The so-called trumping provision contained in s3(2), will become effective on 24 October 2015, being the date which is one year after the rest of the BEE Amendment Act comes into force.

The following are several highlights of the amendments introduced by the BEE Amendment Act:

Status of Sector Codes and generic BEE Codes

Section 10(1) now provides that every organ of state and public entity must apply any relevant code of good practice issued in terms of the BEE Act when, amongst other things, determining qualification criteria for the issuing of licences, concessions, or other authorisations in respect of economic activity in terms of any law; or/and developing and implementing a preferential procurement policy. This provision makes it clear that organs of state and public entities are obliged to apply a code of good practice gazetted in terms of the BEE Act and not to simply, "take into account and, as far as is reasonably possible apply" such code of good practice, as was previously the case.

The new s10(2)(a) provides that the Minister of Trade and Industry may, after consultation with the relevant organ of state or public entity, exempt the organ of state or public entity from the requirement to apply a code of good practice in terms of s10(1) or allow a deviation therefrom if particular objectively verifiable facts or circumstances applicable to the organ of state or public entity necessitate a deviation. The BEE Act also requires that such an exemption or deviation is published in the government gazette. Therefore an organ of state or public entity would not be entitled to deviate from the requirement to apply a code of good practice unless it has first obtained the consent of the Minister of Trade and Industry to do so and it is gazetted in the government gazette.

Section 9(5) makes it clear that where a Sector Code has been issued for a particular sector, the compliance of entities within that sector must be measured in terms of the Sector Code. This is subject to the provisions of s9(6) which

provides that if an organ of state or public entity wishes to specify qualification criteria for procurement and other economic activities which exceed those set out in a code of good practice, such organ of state or public entity must make a request in that regard to the Minister of Trade and Industry and any such consent must be published in the government gazette.

The BEE Act also makes it clear that a code of good practice remains in effect until amended, replaced or repealed. This is relevant in the case of Sector Codes which are currently undergoing an alignment process with the revised generic BEE Codes.

The trumping provision means that any legislation which contains its own BEE provisions will have to instead defer to the BEE Act and codes of good practice, and the organs of state or public entities issuing licenses or authorisation or procuring goods or services in terms of such legislation will be compelled to apply the BEE Act and applicable code of good practice instead of the BEE provisions set out in such legislation.

Fronting

- The concept of fronting is now widely defined in the BEE Act.
- A person commits an offence if he knowingly engages in fronting, or knowingly misrepresents his BEE status, or provides false information to secure a particular BEE status or outcome.
- An offender may be subjected to a fine or imprisonment not exceeding 10 years, or to both a fine and imprisonment.
- If the offender is an enterprise and not a natural person, it could be subject to a fine of up to 10% of its turnover.

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BEE Commission

The BEE Act now empowers the creation of a BEE Commission, to amongst other things, oversee, supervise and promote adherence with the BEE Act in the interest of the public; receive complaints relating to BEE; investigate, either of its own initiative or in response to complaints received, any matter concerning BEE; and to promote good governance and accountability by creating an effective and efficient environment for the promotion and implementation of BEE.

The Commission may issue non-binding opinions on the interpretation of any provision of the BEE Act.

The Commission may make a finding as to whether any BEE initiative involves a fronting practice.

The Commission may institute proceedings in a court to restrain any breach of the BEE Act, including any fronting practice, or to obtain appropriate remedial relief.

If the Commission is of the view that any matter it has investigated may involve the commission of a criminal offence in terms of the BEE Act or any other law, it must refer the matter to the National Prosecuting Authority or an appropriate division of the South African Police Service.

The Commission is also entitled to refer a matter to the South African Revenue Services (SARS) or to any other regulatory authority if it is of the view that the provisions of relevant legislation have been breached.

Draft BEE Codes

On 10 October 2014, the Minister of Trade and Industry issued the draft codes of good practice in relation to Qualifying Small Enterprises (QSEs), the development of Sector Codes, scorecards for specialised enterprises, recognition for sales of assets, and equity equivalents for multinationals, for public comment by 14 November 2014. The date prescribed by the Minister for the submission of comments is in contravention of section 9(5)(b) of the BEE Act which requires that the Minister must grant interested persons at least 60 days to comment on draft codes. Hopefully the Ministry will address this issue soon.

The following are highlights of the draft codes:

Qualifying Small Enterprise (QSE) codes

Under the previous QSE codes, each element carried a total weighting of 25 points, and a QSE was entitled to select 4 of the 7 elements to have its compliance assessed.

Under the draft QSE codes, a QSE's BEE compliance will be measured in terms of all of the 5 elements (so there will no longer be an entitlement to make an election) and the weightings for certain elements have been changed.

The Management Control weighting has been reduced to 15 points, Enterprise and Supplier Development has been increased to 30 points and Socio-Economic Development has been reduced to 5 points. The reductions are quite dramatic shifts from the previous QSE codes.

In respect of Ownership, the QSE scorecard had been different from the generic Ownership scorecard in that QSEs did not have a specific measurement for black female ownership or designated group ownership (but were awarded bonus points if this did exist). The draft scorecard contains points specifically for ownership by black females and designated groups and points have been shifted towards these sub-elements.

The draft QSE Management Control scorecard contains specific points for the involvement of black females at executive and management levels other than executive management, which is not contained in the previous QSE scorecard and the points have been altered accordingly. Additionally, the draft QSE codes specify that these management control elements will not be measured in accordance with the demographic representation of employees in South Africa (as is required in terms of the generic scorecard).

The procurement points of QSEs will be measured in terms of their procurement spend on Empowering Suppliers based on their BEE compliance levels and from Empowering Suppliers that are at least 51% black-owned, whereas previously, the procurement points were awarded only on the BEE compliance levels of all suppliers to a QSE. This is in line with the change to the generic scorecard but is likely to have a significant impact on QSEs going forward.

The new generic BEE codes made it clear that QSEs would also be subject to the penalty regime, in that Ownership, Skills Development and Enterprise and Supplier Development are designated as priority elements having minimum compliance thresholds, and a failure by a QSE to meet the minimum threshold for Ownership or the minimum threshold for one other priority element will result in a reduction of its BEE compliance level by one level.

Development of Sector Codes

The draft codes provide that a Sector Code must set targets which are over and above the minimum targets set out in the generic codes. Such a requirement was not previously contained in the code on the development of Sector Codes. Many existing Sector Codes contain targets which are in fact lower than set out in the generic codes, for reasons which are justifiable in the context of the relevant sectors. Such a provision is unreasonable.

The draft codes provide that a Sector Code may deviate from the thresholds set out in the generic codes only where those deviations are justifiable based on sound economic principles, sectorial characteristics or empirical research. The term 'thresholds' is presumably a reference to the thresholds set in respect of the priority elements under the generic codes.

In addition, the grounds upon which the Minister may refuse to gazette a Sector Code include if the fundamental principles of any of the elements of the generic scorecard

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are not adequately addressed; and if there are deviations in the calculation, methodologies and definitions applicable to measuring BEE compliance.

Provision is also made for the gazetting of sector transformational plans by the Minister in conjunction with the Line Ministry of the relevant sector, with the 'support' of stakeholder inputs.

The draft codes provide that organs of state and public entities will be obliged to apply sector transformation plans, and an entity conducting business with government will be obliged to comply with the provision of an applicable sector transformation plan.

Such a proposal to allow government to create sector transformation plans and oblige entities to comply with them is irregular and in clear conflict with the provisions of the BEE Act which do not empower the Minister to create such sector transformation plans. The provisions give government the ability to circumvent any sector code development process being undertaken by a particular industry.

The draft codes state that no sector transformation plan will be developed in respect of a sector that has a Sector Code in place.

Equity Equivalents

An equity equivalent programme must promote and advance enterprise and supplier development, research and development and critical and core skills.

The draft codes provide that the where the beneficiaries of an equity equivalent programme are:

1. Exempted Micro Enterprises (EMEs), they must have be level one BEE compliant;
2. QSEs, they must have be level one BEE compliant;
3. natural persons, the beneficiaries who are natural persons must constitute 75% of the total beneficiaries and the economic interest allocated to the beneficiaries must be at least 75%. It isn't clear what the latter statement means.

Depending on the total contribution to be made by a multinational in terms of an equity equivalent programme, the investment will be agreed to have been made for a particular period of time and the applicable BEE compliance certificate issued to the multinational will be valid for such period. As examples, if the total contribution of a multinational to an equity equivalent programme is:

1. more than R100million, the investment period as agreed with the Minister may be up to 10 years; and
2. between R75million and R100million the investment period as agreed with the Minister may be up to 7 years.

At the end of an investment period, a multinational will have to option to top up its contribution towards the programme for continued recognition.

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