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CORPORATE & COMMERCIAL ALERT

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The continued recognition of black ownership after the sale or loss of shares by black participants for purposes of the BEE codes

Code Series 100: Statement 100 (Statement 100) of the Amended Codes of Good Practice issued in terms of the Broad-Based Black Economic Empowerment Act 53 of 2003 (B-BBEE Act) sets out the general principles for measuring ownership for purposes of broad-based black economic empowerment. Of the principles contained in Statement 100, one that is often overlooked by measured entities, is that contained in paragraph 3.8 of Statement 100, which allows for the recognition of ownership after the sale or loss of shares by black (as such term is defined in the B-BBEE Act) participants.

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The continued recognition of black ownership after the sale or loss of shares by black participants for purposes of the BEE codes

Paragraph 3.8 allows for the continued recognition of the black ownership portion of a black participant in two scenarios.

Code Series 100: Statement 100 (Statement 100) of the Amended Codes of Good Practice issued in terms of the Broad-Based Black Economic Empowerment Act 53 of 2003 (B-BBEE Act) sets out the general principles for measuring ownership for purposes of broad-based black economic empowerment. Of the principles contained in Statement 100, one that is often overlooked by measured entities, is that contained in paragraph 3.8 of Statement 100, which allows for the recognition of ownership after the sale or loss of shares by black (as such term is defined in the B-BBEE Act) participants.

Paragraph 3.8 allows for the continued recognition of the black ownership portion of a black participant in two scenarios. The first, being where a black participant sells their shares in the measured entity, whilst the second scenario covers a loss of shares by a black participant in an instance where, for example, the holding of the shares was subject to certain conditions

which are subsequently defaulted by the black participant, resulting in a loss of those shares.

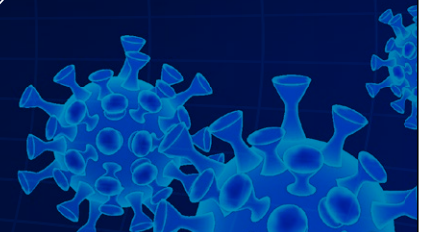
The application of the continued recognition principle is however subject to certain criteria, being, *inter alia*, -

1. that the black participant held the shares for a minimum period of three years;
2. net value based on the Time Based Graduation Factor as per Annexe 100E must have been created in the hands of black people; and
3. transformation must have occurred within the measured entity when one has regard to the B-BBEE recognition level of the measured entity from the period of entry of black participants to the time that the black participant exits the measured entity.

Notwithstanding the inclusion of such continued recognition in Statement 100, a measured entity cannot claim more than 40% on its ownership scorecard in respect of such continued recognition.

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The continued recognition of black ownership after the sale or loss of shares by black participants for purposes of the BEE codes...*continued*

The utility for measured entities in applying the continued recognition principle is that it allows for measured entities to retain a portion of their ownership points after a black participant has exited the measured entity, subject to compliance.

Further requirements apply in the case of a sale or loss of shares by a black participant, being that a (i) written tripartite agreement is required to be concluded between the black participant, measured entity and the lender recording the loan or security arrangement applicable; and (ii) the period over which the continued recognition points are allocated or recognised cannot exceed the period for which the black participant held the shares.

The manner in which the ownership points attributable to a measured entity wishing to claim ownership points under paragraph 3.8 in Statement 100 are calculated is in accordance with the following formula -

$$A \times B \times C$$

Where

A the value created in the hands of black participants expressed as a percentage of the total value of the black participants' 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.

The utility for measured entities in applying the continued recognition principle is that it allows for them to retain a portion of their ownership points after a black participant has exited the measured entity, subject to compliance with the requirements espoused above. In a context where measured entities have often expended significant time and expense in ensuring a black ownership level, paragraph 3.8 in Statement 100 acts as an important safeguard in ensuring that efforts in obtaining black ownership are not entirely lost by measured entities, especially in circumstances which fall outside of their control such as a loss of shares due to default.

Kendall Keanly and Chloé Brockman

2019 THE LEGAL DEALMAKER OF THE DECADE BY DEAL FLOW

DealMakers

2019

M&A Legal DealMakers of the Decade by Deal Flow: 2010-2019.
 1st by BEE M&A Deal Flow.
 1st by General Corporate Finance Deal Flow.
 2nd by M&A Deal Value.
 2nd by M&A Deal Flow.

2018

1st by M&A Deal Flow.
 1st by M&A Deal Value.
 2nd by General Corporate Finance Deal Flow.
 1st by BEE M&A Deal Value.
 2nd by BEE M&A Deal Flow.
 Lead legal advisers on the Private Equity Deal of the Year.

2017

2nd by M&A Deal Value.
 1st by General Corporate Finance Deal Flow for the 6th time in 7 years.
 1st by General Corporate Finance Deal Value.
 2nd by M&A Deal Flow and Deal Value (Africa, excluding South Africa).
 2nd by BEE Deal Flow and Deal Value.

2016

1st by M&A Deal Flow.
 1st by General Corporate Finance Deal Flow.
 2nd by M&A Deal Value.
 3rd by General Corporate Finance Deal Value.

2015

1st by M&A Deal Flow.
 1st by General Corporate Finance Deal Flow.

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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