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CORPORATE & COMMERCIAL

BLACK ECONOMIC EMPOWERMENT ALERT

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Practice Note in terms of B-BBEE Act, 2003: Rules for discretionary collective enterprises, published on 17 May 2021 (Practice Note)

The long-awaited Practice Note from the Minister of Trade, Industry and Competition on how Broad-Based Ownership Schemes (BBOS), Employee Share Ownership Programmes (ESOPs), Trade Unions, Investment Holding Companies that are BBOSs, Not for Profit Companies (NPCs) and Trusts (collectively referred to in the Practice Note as Discretionary Collective Enterprises) should be interpreted for purposes of the Broad-Based Black Economic Empowerment (B-BBEE) legislation has provided much needed clarity. It should be a source of extreme relief for organisations that have had to face significant uncertainty for several years as a result of the B-BBEE Commission's interpretation of various structural aspects of Discretionary Collective Enterprises.

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INCORPORATING
KIETI LAW LLP, KENYA

Practice Note in terms of B-BBEE Act, 2003: Rules for discretionary collective enterprises, published on 17 May 2021 (Practice Note)

The Practice Note expressly recognises Discretionary Collective Enterprises as valid vehicles for furthering B-BBEE.

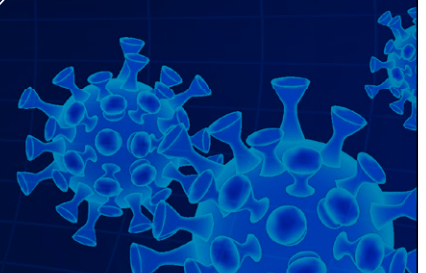
The long-awaited Practice Note from the Minister of Trade, Industry and Competition on how Broad-Based Ownership Schemes (BBOS), Employee Share Ownership Programmes (ESOPs), Trade Unions, Investment Holding Companies that are BBOSs, Not for Profit Companies (NPCs) and Trusts (collectively referred to in the Practice Note as Discretionary Collective Enterprises) should be interpreted for purposes of the Broad-Based Black Economic Empowerment (B-BBEE) legislation has provided much needed clarity. It should be a source of extreme relief for organisations that have had to face significant uncertainty for several years as a result of the B-BBEE Commission's interpretation of various structural aspects of Discretionary Collective Enterprises.

Highlights of the Practice Note include the following:

- The Practice Note expressly recognises Discretionary Collective Enterprises as valid vehicles for furthering B-BBEE.
- In relation to the use a defined class of natural persons as participants when structuring a BBOS, ESOP or Trust, the Practice Note recognises:
 - that schemes that typically provide for a discretion to the fiduciaries of the scheme to select individuals from the defined class of beneficiaries that would benefit out of distributions of the scheme, and that allow the fiduciaries to determine the proportion of entitlement that a particular beneficiary will receive once he/she is selected out of the defined class of natural person, are acceptable for B-BBEE recognition.

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Practice Note in terms of B-BBEE Act, 2003: Rules for discretionary collective enterprises, published on 17 May 2021 (Practice Note)...continued

Once the fiduciaries exercise their discretion, each beneficiary selected to partake in a particular distribution acquires a vested right to such portion of the particular distribution allocated to them at that point in time.

- where a scheme provides for a formula to determine the proportion of claim of a defined class of persons or the entitlement of individuals selected out of that defined class and the fiduciaries are not awarded a discretion to deviate from the formula, the scheme complies with the rule that the fiduciaries 'may have no discretion' on the terms.
- As long as the scheme does not provide for a discretion to the fiduciaries to distribute less than the fixed percentage or amount determined in terms of a formula to beneficiaries who are members of the defined class of natural person - the requirement that the fiduciaries may have 'no' discretion in relation to these terms are also met.
- The Practice Note states that if an individual at one point in time was selected to partake in a distribution of the scheme, that it not necessarily entitles that individual to partake in future distributions.
- The Practice Note provides the following example of a BBOS structure that will be recognised - a bursary scheme that is 100% for 'Black Female Students that Matriculate in Gauteng Province'. *In this example the defined class of natural person would be 'Black Female Students that Matriculate in Gauteng Province' and the fixed percentage of proportion of claim of this defined class would be '100%'. Typically, not all black female students that matriculate in Gauteng have a vested right to receive bursaries out of the scheme's limited funds, but only those that are selected by the fiduciaries from year to year. The defined class of natural persons' rights, are however, vested and the fiduciaries are not allowed to award a bursary to any individual that fall outside of the defined class of natural persons by for example awarding a bursary to a black male or white female or black female matriculating outside of Gauteng province. Also, the value of a distribution to a black female student selected may, if such discretion is provided to the fiduciaries, differ from the value of distributions to other black female students that were selected as long as the 'defined class of natural person' do not receive anything less than provided for by means of the fixed percentage (100% in this example).*

Practice Note in terms of B-BBEE Act, 2003: Rules for discretionary collective enterprises, published on 17 May 2021 (Practice Note)...*continued*

Discretionary Collective Enterprises that are single-purpose educational, developmental and community upliftment types of BBOS or Trusts are recognisable for black ownership.

- Minors are not restricted from being participants or beneficiaries in any way of Discretionary Collective Enterprises whether as part of a defined class of natural persons or individually.
- Distributions out of Discretionary Collective Enterprises may be in cash or in kind. Distributions in kind to members of a defined class of natural persons do not in any way detract from the Economic Interest points claimable by or through Discretionary Collective Enterprises.
- Whether distributions are made or not has no bearing on whether or not Economic Interest may be claimed in terms of the Codes. Measured entities and discretionary Collective Enterprises may not be penalised for not having made distributions in any particular year.
- Discretionary Collective Enterprises that are single-purpose educational, developmental and community upliftment types of BBOS or Trusts are recognisable for black ownership.
- Evergreen ESOP structures, which provides perpetual benefit to workers, may also satisfy the ownership provisions of the Codes. All accumulated economic interest of an ESOP must be payable to the participants at the earlier of a specified date or event, or the termination of the scheme. The purpose of this requirement is to ensure that the accumulated economic interest of the scheme ultimately goes to its participants and not to anybody else. The constitution may accordingly say no more than that its accumulated economic interest must be distributed to its participants on termination or winding-up of the scheme.
- In relation to constitutions of Discretionary Collective Enterprises that do not comply with the rules for BBOSs, ESOPs or Trusts, or that provide for a discretion to the fiduciaries to distribute, in their sole and unfettered discretion, such portions of the scheme's income and capital to some members of a defined class of natural persons to the exclusion of others, the Practice Note states:
 - The exercise of such a discretion will not disqualify the Discretionary Collective Enterprise from qualifying for recognition as a BBOS, ESOP, Trust or in general from qualifying under the Ownership Scorecard.
 - The race and gender composition of Rights of Ownership that flow through the Collective Enterprise must be determined with reference to the wording of the constitution, MOI or trust deed and any applicable law having regard to the race and gender of members of the defined class of natural persons and that class's vested proportion of entitlement to income and or assets.

Practice Note in terms of B-BBEE Act, 2003: Rules for discretionary collective enterprises, published on 17 May 2021 (Practice Note)...*continued*

Where the determination of race and gender of participants are not practically determinable from a pure reading of the trust deed, reliance may be placed on an independent competent person's report estimating the rights of ownership that flows through the scheme.

- Where the determination of race and gender of participants are not practically determinable from a pure reading of the trust deed, reliance may be placed on an independent competent person's report estimating the rights of ownership that flows through the scheme. Such report may have regard to various factors which could include where appropriate (i) ad hoc distributions to participants of income and capital during the Measurement Period; and (ii) official estimating records such as publicly available municipal records, university or school enrolment records and the South African census reports.
- The Practice Note recognises that participants in Discretionary Collective Enterprises with discretionary terms seldom have the right to vote at general meetings and that their rights are represented by the fiduciaries who make decisions for and on their behalf. For this reason, the voting rights of such participants, although exercised by such fiduciaries, will be attributed to the race and gender of the participants and not that of the fiduciaries.
- Listed companies which are required to report on their B-BBEE compliance to the B-BBEE Commission in terms of section 13(G) of the B-BBEE Act that have one or more Discretionary Collective Enterprises or other juristic vehicles in its chain of ownership that are not capable of reporting on the "black people" ' in terms of racial classification, their number, their province or age will be required to report only on the participation of "black people" but not the other categories, and must do so in line with the information that the Discretionary Collective Enterprises are able to produce. A Measured Entity which is unable to produce verified information requested cannot, however, be compelled to do so, and therefore cannot be considered as non-compliant with the requirements of Annexure 100 B-D. Unverified information cannot be included in the Ownership Scorecard.

Verushca Pillay

 <p>TOP RANKED Chambers Global 2021</p> <p>Cliffe Dekker Hofmeyr</p> <p>BAND 2 Capital Markets: Equity</p>	 <p>TOP RANKED Chambers Global 2021</p> <p>Cliffe Dekker Hofmeyr</p> <p>BAND 1 Corporate/M&A</p>	 <p>TIER 1 CORPORATE & COMMERCIAL, M&A 2020-2021</p>	 <p>2020</p> <p>FINANCIAL AND CORPORATE</p> <p>TOP TIER FIRM</p>	 <p>DealMakers 2020</p> <p>2020 1st by M&A Deal Flow. 2020 1st by BEE Deal Flow. 2020 1st by BEE Deal Value. 2020 2nd by General Corporate Finance Deal Flow. 2020 2nd by General Corporate Finance Deal Value. 2020 3rd by M&A Deal Value. 2020 Catalyst Private Equity Deal of the Year.</p>	 <p>PRIVATE EQUITY AWARDS AFRICA ★★★★★ 2020 WINNER</p> <p>CDH wins Single Deal Local Legal Advisor of the Year award for the OMPE & Footgear deal in the 9th annual Private Equity Africa awards</p>
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2021 RESULTS

- CDH's Corporate, Commercial and M&A practice** is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2021.
- Ian Hayes** is ranked in the Hall of Fame in Corporate & Commercial and M&A in THE LEGAL 500 EMEA 2021.
- David Pinnock** is ranked as a Leading Individual in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.
- Willem Jacobs** is ranked as a Leading Individual in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.
- Justine Krige** is ranked as a Next Generation Partner in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.
- Johan Latsky** is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.
- Peter Hesseling** is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.
- Rachel Kelly** is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.
- Vivien Chaplin** is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.
- Roux van der Merwe** is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2021.
- CDH's Investment Funds practice** is ranked in Tier 3 in THE LEGAL 500 EMEA 2021.
- John Gillmer** is recommended in Investment Funds in THE LEGAL 500 EMEA 2021.
- Mark Linington** is recommended in Investment Funds in THE LEGAL 500 EMEA 2021.
- Wayne Murray** is ranked as a Rising Star in Investment Funds in THE LEGAL 500 EMEA 2021.



2020 CONSISTENT LEADERS IN M&A LEGAL DEALMAKERS

<p>2020 1st by M&A Deal Flow. 1st by BEE Deal Flow. 1st by BEE Deal Value. 2nd by General Corporate Finance Deal Flow. 2nd by General Corporate Finance Deal Value. 3rd by M&A Deal Value. Catalyst Private Equity Deal of the Year.</p>	<p>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.</p>	<p>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.</p>	<p>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.</p>
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DealMakers



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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.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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