

Interpretation of the B-BBEE Codes

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Introduction: The B-BBEE Regulatory Environment

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- B-BBEE Laws
 - The B-BBEE Act is primary legislation but other legislation too promote B-BBEE
 - Generic Codes
 - Sector Codes
 - Notices, clarifications and guidance notes etc.
- B-BBEE 'Overseers'
 - B-BBEE Commission
 - DTIC
 - BEE Advisory Council
 - Verification Agencies
 - Sector Charter councils

Interpretation: Fronting Practices

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- Interpretation of Fronting Practice
 - Applies to any initiative under any law promoting B-BBEE
 - Must undermine or frustrate:
 - the achievement of the objectives, or
 - the implementation of the provisions of the Act
 - Examples are indicative but not exclusive nor determinative
 - Can be attributed to a juristic person
- The offences
 - Fine or imprisonment up to 10 years and up to 10% turnover
 - Misrepresenting B-BBEE status can be fronting but also separate offence
 - Misrepresenting information to VA or state or public entity also offences
 - VA's who fail to report an offence or attempted offence also criminally liable
 - Knowingly includes where reasonably ought to have obtained actual knowledge
 - Compliance with the Act and applying a reasonable interpretation not fronting

Interpretation of the Codes: Generic Codes

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Structure of the Generic Codes

- Code Series of numbered statements
 - Code Series/Statement
 - 000 - General Principles and the Generic Scorecard (2019)
 - 003 – Guidelines For Developing And Gazetting of Sector Codes (2015)
 - 004 – Scorecards for Specialised Enterprises (2015)
 - 005 – Accreditation of Verification Agencies (2011*Old Codes)
 - ❖ Verification Manual – (2015*)
 - 100 – Measurement of the Ownership Element (2013)
 - 102 – Recognition of sale of Assets etc.
 - 103 – Recognition of Equity Equivalentents for Multinationals
 - 200 – Measurement of the Management Control (2013)
 - 300 – Framework for Measuring skills development (2013)
 - 400 – Measurement of ESD (2013)
 - 500 – Measurement of SED (2013)
 - 600 – Measurement Framework for QSE's (2015)
 - Schedule 1 – Definitions (2015)

Interpretation of the Codes: Statement 000

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Statement 000: Key Interpretive principles

- Substance takes precedence over legal form
- Any reasonable interpretation consistent with objectives of B-BBEE Act and B-BBEE Strategy must take precedence
- B-BBEE Act Objectives:
 - Promote economic transformation to enable meaningful participation;
 - Achieve substantial change in racial composition of ownership, management and skills;
 - Increase ownership and management by black women and collective enterprises and access to economic activities, infrastructure and skills training
 - Promoting investments that lead to broad based and meaningful participation to achieve sustainable development and general prosperity
 - Empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills
 - Promoting access to finance for black start up's etc.
 - Increasing effective economic participation of small medium and micro enterprises etc.

Interpretation of the Codes: Statement 000

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Statement 000: Key Interpretive principles

- Start up enterprises vs EME's
 - Start up's – must have been in operation for less than 1 year and does not include pre-existing enterprises that may be newly constituted
 - EME's – must have annual turnover of up to R10million
- Deemed recognition for 51% black owned EME's and QSE's – must apply flow through
- Start Ups, EME's and QSE's tendering for large (R50M+) contracts
- Consolidated B-BBEE Scorecards

Interpretation of the Codes: Statement 003

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Statement 003: Key Interpretive principles

- Sector Codes –
 - Must use the same definitions in respect of beneficiaries as in the Generic Codes
 - Must use the same calculation methodologies to measure compliance
 - Deviations from targets, weightings and thresholds or new elements only where justifiable based on sound economic principles, sectoral characteristics or empirical research
 - Must set targets above the minimum set out in the Generic Codes
- Sector Charter Councils
 - Develop sector codes and monitor implementation
 - Can provide guidance on sector specific matters
 - Must report to Minister and Advisory Council on progress
 - Can share information with (inter alia) B-BBEE Commission
 - Must require submission of B-BBEE certificates and reports

Interpretation of the Codes: Statement 100

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Statement 100: Ownership

- Black Ownership of companies
 - Trace Participant – black natural person
 - Rights of ownership – voting rights + economic interest in shares/equity
 - Voting rights need not always be exercised by participant
 - Entitlement to Economic interest
 - Additional requirements for Collective Enterprises and Trusts to claim 100% points
 - Equity vs debt instruments and NVF instruments
 - Put, call and compulsory options
 - Continued recognition principal
- Modified Flow Through
 - Cannot also apply the Exclusion Principle
 - Only yields max 4 out of 25 points – limited application
 - Can only be applied once in a chain

Interpretation of the Codes: Statement 400

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Code/Statement 400: Enterprise and Supplier Development

- Procurement from 51% black owned enterprises
 - EME's and QSE's - must be measured using the flow through principle?
 - Generic/Large entities - modified flow through can be applied (if all Net Value points earned)
- ED and SD
 - SD for suppliers and ED for non suppliers
 - Generally, only (flow through) 51% black owned EME' and QSE's
 - 51% (flow through) black owned large enterprises
 - ED and/or SD beneficiaries - 5 years
 - Procurement spend recognized as if EME or QSE – 5yrs
 - Only ED and SD spend (payable) at date of measurement qualify
 - TMPS – salaries and wages include pension and medical aid?
 - Independence of ED or SD beneficiary?

Interpretation of the Codes: DTIC Practice Note

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DTIC Practice Note (2021)

- Clarification: Discretionary Collective Enterprises
 - Ownership by black children
 - Directly
 - through a juristic persons
 - Attributing voting rights
 - Perpetual (evergreen) ESOP's
 - No need to define individual participation rights
 - Discretion of fiduciaries
 - Contributions in kind and can include SD etc.
 - Economic interest – dividends = entitlement not payment
 - 13G reporting – government entities, listed entities, seta's – no need to specify number's age, province etc. if info not available

Interpretation of the Codes: Questions

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Questions?



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