

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

### **PRACTICE GUIDE 02 of 2017**

#### **APPLICATION OF THE 2007 CODES OF GOOD PRACTICE**

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 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 matters relating to the application of 2007 codes for consistency.
4. Section 9 (1) of the 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.
6. The amended codes came into effect on 1 May 2015, and in ensuring proper implementation as well as avoiding any potential confusion that might result from migration of the old generic codes to the amended codes, the Minister of Trade and Industry as the custodian of the B-BBEE legislative framework, issued a General Notice Number 444 in Government Gazette 38799, providing a transitional period for the implementation of the amended generic codes.
7. The notice stated that all B-BBEE verification in respect of a financial year ending on or before 30 April 2015 can be conducted using the old codes (Notice 112, Gazette No 29617 of 9 February 2007); and all B-BBEE verification in respect of a financial year ending after 1 May 2015 must be conducted using the amended codes, with the exception of sector codes.
8. Taking into account the objectives of the B-BBEE Act, in conjunction with the application of the substance takes precedence over legal form principle, the use of 30 April 2015 timeframe within the context of the 18 months' rule, would mean that the amended codes could only be fully implemented after a period of two (2) years, a practice which amounts to an act that hinders the B-BBEE Commission from performing its mandate as per section 13F (1) (a) of the B-BBEE Act.
9. It is imperative to align the general notice to the objectives of the B-BBEE Act, by setting a deadline for the use of old codes, to promote application of uniform rules in measuring B-BBEE implementation. Therefore, application of the old codes was only permissible for all B-BBEE verifications that were conducted for the first year in which the amended codes came into effect, which meant that all B-BBEE verifications conducted on or after

1 May 2016, had to be based on the amended codes irrespective of financial year period with exception of sector codes.

10. The 1-year transitional period is also embedded in paragraph 10 of Code Series 000, wherein it is stated that for the first year of gazetting the amended Codes, a measured entity had an option of either applying the old codes or the amended codes, only for the first year after the gazette of amended Code Series 000. This clearly indicates that the transitional period was only for a year.
11. In lieu of the above, the B-BBEE Commission in accordance with the requirements to advice on the interpretation of any provision of the Act as per section 13F(1)(a) and (3)(b) (ii) of the B-BBEE Act, has concluded that the application of the old generic codes lapsed on the inaugural year the amended codes came into effect.
12. All verification professionals have a responsibility and duty to provide entities with proper advice and guidance, including the implementation of this guide for the determination of the B-BBEE status of entities in a manner that upholds B-BBEE objectives.
13. In terms of section 13O (2) a verification professional, procurement officer or any official of an organ of state or public entity who becomes aware of the commission of, or attempt to commit, any offence referred to under section 13O (1) and fails to report it, is guilty of an offence.
14. In terms of section 13F (1) (d) read with section 13J of the Act, the B-BBEE Commission has the power to investigate, either on its own initiative or in response to a complaint received, any matter concerning B-BBEE.
15. If an entity is found to have violated the 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.

16. This Practice Guide is issued as a guide purely to assist with the interpretation and application of the codes as per General Notice Number 444 in Government Gazette 38799.
17. 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 codes.
18. 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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Issued by the B-BBEE Commission

22 May 2017