



LENIENCY PROGRAMME

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A. GLOSSARY OF TERMS

B-BBEE	Broad-Based Black Economic Empowerment
B-BBEE Act	Broad-Based Black Economic Empowerment Act No.53 of 2003 as amended by Act No.46 of 2013
B-BBEE Codes of Good Practice	Generic Codes of Good Practice or Sector Codes of Good Practice in terms of section 9 of the B-BBEE Act
B-BBEE Commission	Broad-Based Black Economic Empowerment Commission established in terms of section 13B of the B-BBEE Act
B-BBEE Regulations	Regulations Regulating the Administration and Implementation of the Broad-Based Black Economic Empowerment Act and the Functions of the Commission, 2016
the dti	Department of Trade and Industry

1. INTRODUCTION

- 1.1 The Broad-Based Black Economic Empowerment Act No. 53 of 2003 as amended by Broad-Based Black Economic Empowerment Act No. 46 of 2013 (“the B-BBEE Act”) promulgated on 24 October 2013 to amongst others provide for monitoring of implementation of the B-BBEE Act in the South African economy.
- 1.2 The amendment to the B-BBEE Act also introduced the establishment of the Broad-Based Black Economic Empowerment Commission (hereinafter referred to as B-BBEE Commission). The B-BBEE Commission is mandated to oversee, supervise and promote adherence to the B-BBEE Act in the interest of the public.
- 1.3 In so doing, Section 13F(1)(f) of the B-BBEE Act requires the B-BBEE Commission to maintain a registry of major broad based black economic empowerment (“B-BBEE”) transactions, above a threshold determined by the Minister of Trade and Industry (the Minister) by notice in the Gazette. Regulation 18 in Part 5 of the B-BBEE Regulations of 2016 outlines the process for registration of a major B-BBEE transaction.
- 1.4 On 9 June 2017, the Minister issued Notice No. 551 in Government Gazette No. 40898 (“*Notice*”) which determines the threshold for registering a B-BBEE transaction. In the Notice a major B-BBEE transaction refers to any transaction between entities/parties that results in ownership recognition in terms of Statement 100, the value of which equals or exceeds twenty-five million rands (R25 million). The threshold is based on the value of the transaction excluding administration, professional and legal fees. For Statement 102, the value of the transaction means the value of the sale of asset/business/equity instrument.
- 1.5 The main benefit of the registry for major B-BBEE transactions for the B-BBEE Commission is that it will allow for monitoring regarding compliance, levels of transformation and extent to which benefits of the major B-BBEE transactions flow

to the black persons that are part of these deals in compliance to the objectives of the B-BBEE Act.

- 1.6 The Notice states that major B-BBEE transactions concluded on or after the proclamation date of the B-BBEE Act, 2003 as amended, namely 24 October 2014 must be registered. The B-BBEE Commission has since issued an Explanatory Notice on how to register such transactions.
- 1.7 This then means that all major B-BBEE transactions concluded prior to the promulgation of the amended B-BBEE Act were excluded from being registered as they predate the promulgation of the B-BBEE Act. The Notice only encourages voluntary registration of such transactions. Some of these transactions are not consistent with the B-BBEE Act and are currently being recognised for B-BBEE points under the ownership scorecard of the relevant Codes of Good Practice (the Codes).
- 1.8 Therefore, in its efforts to oversee, supervise and promote adherence to the B-BBEE Act, the B-BBEE Commission has developed this Leniency Programme (the Programme) to facilitate a process through which major B-BBEE transactions that are not consistent with the B-BBEE Act can be reported to the B-BBEE Commission in return from immunity from investigation and enforcement.
- 1.9 The Programme outlines the requirements, procedures and implications for cooperation relating to reporting of major B-BBEE transactions concluded before 24 October 2014.

2. BACKGROUND

- 2.1 South Africa's first democratic government was elected in 1994 with a clear mandate to redress the inequalities of the past in every political, social and economic sphere. This mandate is entailed in the Constitution, particularly section 9 of the Constitution referred to as the *equality clause*. Government embarked on a comprehensive process to provide legislative framework for the economic transformation of the South African economy following the adoption of the B-BBEE Strategy, which also aimed to complement other transformational legislation such as the Employment Equity Act.
- 2.2 The 2003 B-BBEE Act was promulgated to advance economic transformation and enhance economic participation of black people into the mainstream economy. The 2007 codes of good practice were issued in February 2007 to guide the implementation. Over a decade of implementing the 2003 B-BBEE Act, the Department of Trade and Industry (**the dti**) conducted a review which highlighted significant gaps and loopholes, prevalence of fronting practices and slow progress in economic transformation, amongst other things.
- 2.3 In 2013, the 2013 B-BBEE Act was promulgated and became effective on 24 October 2014. The amendments brought about significant changes to the 2003 B-BBEE Act to close the implementation loopholes and gaps identified, which included:
- providing definitions that assist in interpreting the legislation;
 - creating clarity in relation to the powers of the Minister of Trade and Industry (the Minister);
 - providing transparency in the implementation of B-BBEE by making provision for exemptions and deviations, as well as permission to exceed the Codes of Good Practice;

- clarifying the role of sector codes and providing for repeal of inconsistent sector codes;
- making provision for the B-BBEE Act to trump other conflicting legislation in order to achieve alignment across all sectors of the economy;
- criminalising fronting practices and introducing penalties; and
- establishing the B-BBEE Commission to monitor the implementation of B-BBEE.

2.4 While regulatory reform is critical to stimulate economic growth and transforming the economy, it was deemed equally important to establish a structure with clearly prescribed functions that would monitor the implementation to ensure that South Africa delivers against the mandate of the B-BBEE Act. Section 13B of the B-BBEE Act therefore establishes the B-BBEE Commission to oversee and monitor the implementation, which includes handling and investigating complaints regarding alleged violation of the B-BBEE Act.

3. THE LENIENCY PROGRAMME

3.1 What does it mean?

3.2 The Leniency Programme is a compliance mechanism that encourages reporting of all major B-BBEE transactions prior to the promulgation of the amended B-BBEE Act, as well as promote adherence to the B-BBEE Act.

3.3 The B-BBEE Act in section 13F(3)(b)(ii) permits the B-BBEE Commission to issue non-binding advisory opinion on any provision of the B-BBEE Act to any person who seeks advice on the nature of the identified B-BBEE initiative or structure. However, bulk of requests for such services have been in relation to new transactions and not exiting ownership transactions.

- 3.4 Therefore, it is not practical for the B-BBEE Commission to uncover all major transactions prior to 24 October 2014, and test compliance with the requirements of ownership as per the B-BBEE Act. Therefore, the Programme will assist in aiding the B-BBEE Commission access to such transactions and also afford the opportunity to align such transactions to the B-BBEE Act in ensuring true and meaningful B-BBEE ownership.
- 3.5 The Programme is also necessitated by unwarranted ownership recognition points reflected on some of the B-BBEE certificates as a result of the lack of integrity in the verification industry, where certain verification professionals issue or recognise points for ownership even when the black ownership in question falls short of meeting the requirements of the B-BBEE Act or the verification professional had failed to apply the prescribed verification methodologies to verify black ownership.
- 3.6 Therefore, in addressing these challenges the B-BBEE Commission is of the view that the Programme will encourage any party to a transaction prior to 24 October 2014, to report the transaction to the B-BBEE Commission in return for immunity from investigation.
- 3.7 The granting of immunity must not be interpreted to mean that the B-BBEE Commission will not initiate an investigation against misaligned transactions or that the victims of such transactions are prevented from lodging a complaint with the B-BBEE Commission in line with section 13F(1)(c) and (d) of the B-BBEE Act read with regulations 15 of the B-BBEE Regulations, or that the B-BBEE Commission condones any state procurement or economic activity which was awarded as a result of any misaligned ownership transaction.
- 3.8 Immunity from investigation is granted simply for reasons that the transaction by law is not required to be registered and that the party or parties to that transaction have voluntarily decided to report the transaction to the B-BBEE Commission, prior to the

B-BBEE Commission calling for such transaction in terms of section 13F(1)(a) of the B-BBEE Act or having initiated an investigation.

3.9 Interpretation of the Leniency Programme

3.10 Section 1 of the B-BBEE Act applies to interpretation of this Leniency Programme.

3.11 Section 2 of the B-BBEE Regulations also applies to this Leniency Programme.

3.12 A word or expression that is defined in the B-BBEE Act including the B-BBEE Regulations bears the same meaning in this Leniency Programme as in the B-BBEE Act or Regulations.

3.13 Reportable B-BBEE ownership transactions

3.14 The Leniency Programme apply to all ownership transactions (excluding Statement 103 which deals with recognition of equity equivalents for multinational) concluded prior to 24 October 2014 from R25 million and above at the time of being concluded. The threshold is aligned to the threshold determined by the Minister through Notice *No. 551 in Government Gazette No. 40898*.

3.15 The threshold is based on the value of the transaction excluding administration, professional and legal fees. For Statement 102, the value of the transaction means the value of the sale of asset/business/equity instrument

3.16 Who must report the B-BBEE ownership transaction?

3.17 Any party to the B-BBEE ownership transaction can report the transaction to the B-BBEE Commission in the prescribed **FORM B-BBEE 22** issued in accordance with

13F(1)(a) of the B-BBEE Act, within ninety (90) days from the effective date of this Leniency Programme.

3.18 The following documents to be submitted with **FORM BBEE 22** in reporting a B-BBEE ownership transaction:

- 3.18.1 Letter of authority or any similar proof that the party/entity registering the B-BBEE ownership transaction is authorised by the other parties/entities to the transaction to register;
- 3.18.2 Brief Description of the B-BBEE ownership transaction;
- 3.18.3 Explanation on the status of the B-BBEE ownership transaction and impact on black participants;
- 3.18.4 Copy of a signed the Sale Agreement, or similar agreement transferring shares/interest/assets/business, as the case may be, from one party/entity to another;
- 3.18.5 Copy of a signed Shareholders' Agreements, or similar agreement governing the relationship between holders of interest, in respect of the B-BBEE ownership transaction;
- 3.18.6 Copy of signed trust deeds, if the ownership structure of the B-BBEE ownership transaction includes a trust;
- 3.18.7 Copy of a signed financing agreement relating to the transaction, irrespective of whether or not it was vendor financed;
- 3.18.8 Copy of the valuation report prepared for the purpose of determining the value of the B-BBEE ownership transaction;
- 3.18.9 Copy of the sale agreement where black people have exited due to sale or loss of shares;
- 3.18.10 Copy of the Schematic Diagram of the ownership structure before and after the conclusion of the B-BBEE ownership transaction;
- 3.18.11 List of shareholders of the measured entity after the conclusion of the B-BBEE ownership transaction, indicating the percentage of each

shareholder, class of shares, and clearly reflecting black shareholders on the list;

3.18.12 Copy of a valid B-BBEE Certificate or a B-BBEE Sworn Affidavit, as the case may be, of the measured entity involved in the B-BBEE ownership transaction; and

3.18.13 Any document that the parties/entities deem relevant to the transaction.

3.19 A party that reports a B-BBEE ownership transaction will receive immunity from B-BBEE investigation in terms of sections 13F(1)(d) and 13J(1) of the B-BBEE Act, should there be any inconsistency with the B-BBEE Act.

3.20 Immunity from investigation will be removed should the party fail to report the B-BBEE ownership transaction to the B-BBEE Commission within the stipulated time frame or that the B-BEE Commission has already initiated an investigation in relation to the transaction or any related transaction wherein the black ownership derived from the reported B-BBEE ownership transaction is recognised by the related transaction.

3.21 **Process post reporting the B-BBEE ownership transaction**

3.22 Upon receipt of the B-BBEE ownership transaction, a reportable transaction number will be allocated within five (5) days, and within ten (10) days issue the certificate of reporting a B-BBEE ownership transaction to the party that submitted the transaction using **FORM B-BBEE 23**, after the B-BBEE Commission has satisfied itself that the party in question meets the requirements of the Leniency Programme. Part of the evaluation may involve request for additional information or meeting with the party that reported the B-BBEE ownership transaction.

3.23 The B-BBEE Commission may within ninety (90) days after issuing the reporting certificate, assess the reported B-BBEE ownership transaction to determine adherence to the B-BBEE Act, and advise the party that submitted the transaction in writing of any concerns about the transaction.

3.24 The party issued with the written advice must take steps to remedy the B-BBEE ownership transaction within 90 days after receiving the advice from the B-BBEE Commission.

3.25 The B-BBEE Commission will maintain a database of all reported B-BBEE ownership transaction and publish such on its website or through any media platform.

3.26 Immunity from B-BBEE investigation

3.27 The B-BBEE Commission will provide the party reporting the B-BBEE ownership transaction with written immunity from B-BBEE investigation. Immunity granted is only limited to the reported B-BBEE ownership transaction, and will not extend to other B-BBEE elements as per the applicable Codes or other ownership transactions such as party is part of, unless the transaction has been reported in terms of this Programme.

3.28 The B-BBEE Commission may either grant absolute or conditional immunity depending on the circumstances surrounding the reporting of the B-BBEE ownership transaction. Absolute immunity will be granted in instances where the B-BBEE Commission after assessing the reported B-BBEE ownership transaction is of the view that there is no need to refer certain aspects of the transaction to other regulatory institutions such as the Companies and Intellectual Property Commission. Conditional immunity on the other hand will be granted where the B-BBEE Commission has determined contraventions of other pieces of legislation and thus obligated to refer such violations to the relevant regulatory or enforcement

institutions such as South African Revenue Services, National Prosecuting Authority and the Competition Commission.

3.29 Irrespective of whether absolute or conditional immunity from B-BBEE investigation has been granted, any party who after receiving immunity from the B-BBEE Commission is found to have engaged in any fronting practice outside the reported B-BBEE ownership transaction, will forfeit the immunity granted.

3.30 Failure to implement the directive of the B-BBEE Commission regarding remedying the B-BBEE ownership transaction will also result in the cancellation of the immunity status.

3.31 Further, if subsequent to granting immunity from B-BBEE investigation it is established by the B-BBEE Commission that the reporting party failed to disclose information that was material for purpose of benefiting from the Leniency Programme, the B-BBEE Commission will withdraw the immunity and proceed to investigate the B-BBEE ownership transaction in line with the requirements of the B-BBEE Act.

3.32 Requirements and rules for receiving immunity from B-BBEE investigation

3.33 A party reporting the B-BBEE ownership transaction will only qualify for immunity from B-BBEE investigation provided such a party is:

3.33.1 The first person to voluntarily report the B-BBEE ownership transaction to the B-BBEE Commission;

3.33.2 Disclose full and complete information pertaining to the reported B-BBEE ownership transaction;

- 3.33.3 Acting in good faith and cooperative in the manner that it interacts with the B-BBEE Commission and has not concealed any material information relating to the B-BBEE ownership transaction;
- 3.33.4 Willing to act in accordance with the directives of the B-BBEE Commission post assessment of the reported B-BBEE ownership transaction; and
- 3.33.5 The rules of confidentiality of information as prescribed in the B-BBEE Act also apply in respect of any information that is submitted through the Leniency Programme process. However, confidentiality claims cannot be raised to restrict the B-BBEE Commission from accessing all relevant and material information relating to the B-BBEE ownership transaction.

3.34 Failure to report a B-BBEE Ownership transaction

- 3.35 Any party that fails to report a B-BBEE ownership transaction within the stipulated time frame will forfeit any immunity made available by the B-BBEE Commission, and when the B-BBEE Commission solely becomes aware of such transactions, the B-BBEE Commission will initiate an investigation and findings of such an investigation will be issued without remedial actions, and further refer the matter for prosecution to the National Prosecuting Authority.

3.36 B-BBEE ownership transactions that cannot be reported

- 3.37 There are instances where the Leniency Programme will not be applied, for example:

- 3.37.1 Transactions that are already subject to investigation in terms of section 13J(1) of the B-BBEE Act read with regulation 15 of the B-BBEE Regulations;

- 3.37.2 Transactions where the B-BBEE Commission issued an advisory opinion and such advice was disregarded by the parties;
- 3.37.3 Matters referred to the B-BBEE Commission for investigation by other regulatory institutions such as, but not limited to, the South African Revenue Services, Competition Commission, Companies and Intellectual Property Commission, and South African National Accreditation Systems; and
- 3.37.4 Transaction involves persons who are under investigation in terms of section 13J(1) of the B-BBEE Act read with regulation 15 of the B-BBEE Regulations.

4. Engagement with the B-BBEE Commission

- 4.1 Any party seeking to engage the B-BBEE Commission on this Programme can contact the Compliance Division at:
 - 4.1.1 Telephone: +27 12 649 0918
 - 4.1.2 Email: mramare@beecommission.gov.za
- 4.2 The party reporting the B-BBEE ownership transaction must send the information to the B-BBEE Commission through any of the channels below:
 - 4.2.1 By hand: 420 Witch-Hazel Avenue, Eco-Glades 2 Block C, Eco-Park, Centurion
 - 4.2.2 By Post: Private Bag X84, Pretoria, 0001
 - 4.2.3 By Email: mramare@beecommission.gov.za

5. Conclusion

- 5.1 The B-BBEE Commission is committed to meeting the timelines set for issuance of reporting certificates and providing speedy feedback to parties/entities, where necessary. However, this depends on the parties/entities following the process fully, and providing the relevant documents as required.
- 5.2 The B-BBEE Commission is committed to ensuring that the B-BBEE Act is implemented in a manner that is consistent to achieve the objectives of B-BBEE which should bring about an inclusive economy for all.
- 5.3 The B-BBEE Commission may request reasonable additional information from the parties/entities in order to properly execute its mandate in terms of this process, and where necessary, a meeting may be held with the parties/entities.
- 5.4 The B-BBEE Commission will ensure that it communicates any changes to the procedure outlined in this Programme reporting B-BBEE ownership.