

BROAD-BASED BLACK ECONOMIC EMPOWERMENT

EXPLANATORY NOTICE 1 OF 2023

UNDERSTANDING THE INVESTIGATION PROCESS OF THE BROAD-BASED BLACK ECONOMIC EMPOWERMENT COMMISSION AS GUIDED BY THE B-BBEE ACT

A. Introduction

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 practice guides, explanatory notices, non-binding advisory opinions and clarification services to improve the understanding of the Act.
2. In terms of section 13F(1)(c) the B-BBEE Commission is allowed to receive complaints relating to B-BBEE in the manner that the Act has provided for. The Act further in section 13F(1)(d) requires the B-BBEE Commission to investigate, either on its own initiative or in response to complaints received, any matter concerning B-BBEE. Regulation 15 of the B-BBEE Regulations outlines the process for lodging a complaint.
3. This Explanatory Notice is issued in terms of section 13F(3)(b)(i) of the Act to guide any member of the public on the investigation process of the B-BBEE Commission following receipt of a complaint or upon resolving on its own accord to initiate an investigation.

B. What is a B-BBEE complaint?

4. A complaint is a matter initiated by the B-BBEE Commissioner in terms of section 13J(1) of the Act, or that has been submitted to the Commission in terms of section 13F(1)(c) of the Act.
5. For a complaint to be considered by the B-BBEE Commission, it has to relate to the contravention of the B-BBEE Act, and can fall within the scope of any of the B-BBEE elements namely, ownership, management control, skills development, enterprise and supplier development and socio-economic development, including any specific sector element.
6. Contravention of the Act would generally result in a fronting practice. A fronting practice involves a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of the B-BBEE Act or the implementation of any of the provisions of this Act, including but not limited to practices in connection with a B-BBEE initiative— (a) in terms of which black persons who are appointed to an enterprise are discouraged or inhibited from substantially participating in the core

activities of that enterprise; (b) in terms of which the economic benefits received as a result of the broad-based black economic empowerment status of an enterprise do not flow to black people in the ratio specified in the relevant legal documentation of that enterprise; (c) involving the conclusion of a legal relationship with a black person for the purpose of that enterprise achieving a certain level of broad-based black economic empowerment compliance without granting that black person the economic benefits that would reasonably be expected to be associated with the status or position held by that black person; or (d) involving the conclusion of an agreement with another enterprise in order to achieve or enhance broad-based black economic empowerment status in circumstances in which— (i) there are significant limitations, whether implicit or explicit, on the identity of suppliers, service providers, clients or customers; (ii) the maintenance of business operations is reasonably considered to be improbable, having regard to the resources available; (iii) the terms and conditions were not negotiated at arm's length and on a fair and reasonable basis; (iv) not meeting the agreement obligations set for enterprise and supplier development and skills development.

C. Who can lodge a complaint?

7. Any person affected by a fronting practice or a concerned member of the public can lodge a complaint with the B-BBEE Commission at no cost. A party lodging the complaint can do so directly with the B-BBEE Commission or through legal or any other form of representation.
8. Soliciting a legal or any other form of representation in order to lodge a complaint with the B-BBEE Commission **is not mandatory**, and any party who chooses to solicit such representation needs to do so out of their free will. A complaint lodged with or without any form of representation will receive the same level of attention and treatment from the B-BBEE Commission.
9. There are circumstances that may warrant a person to lodge a complaint, but not be willing to disclose their identity, that is allowed. However, where a person chooses to remain anonymous, the B-BBEE Commission will not be obliged to provide any update concerning the status of the complaint, until such time that the anonymity is waived in writing to the B-BBEE Commission. On the other hand, where anonymity is not claimed, the person will be entitled to request an update on a complaint from time to time using the assigned case number.
10. A complaint can also be withdrawn in writing to the B-BBEE Commission at any time before the B-BBEE Commission can make its finding(s) and recommendation(s). Despite the withdrawal of the complaint, the B-BBEE Commission may continue to investigate a complaint as if the B-BBEE Commission had initiated it in terms of section 13J(1) if it is justifiable to do so.

D. What are multiple complaints?

11. At any time after a complaint has been initiated by the B-BBEE Commission, or submitted by another person, the B-BBEE Commission may publish a notice disclosing the alleged contravention and inviting any person to file a complaint in respect of that matter who believes

that they have been affected by the alleged practice or is affecting a material interest of that person.

12. There are also circumstances where the B-BBEE Commission may consolidate or join two or more complaints under a common investigation if the matter involves the same person(s) as potential respondent(s). If the Commission consolidates two or more complaints as permitted by the Act, each complaint will continue to be separately identified by its own case number. The consolidation does not change the status of the complainant, and each person who submitted one of the consolidated complaints will remain a complainant.
13. Where complaints have been consolidated, it is possible that an investigation may not be warranted in one or more of the complaints, and in such a case, the Commission will inform the affected person(s), and continue to investigate any of the remaining consolidated complaints, subject to notifying the complainant(s) and provided the one-year period of investigation has not lapsed.
14. Where the period to investigate has lapsed, the Commission must **within thirty (30) days** send a notification to the complainant indicating the lapse of time, and request to extend the investigation period further by completing the prescribed **FORM B-BBEE 21**. Where the complainant is unable or refuses to grant the extension, the Commission may continue to investigate the matter as though it has initiated the investigation.

E. What documents are required to lodge a complaint ?

15. A party submitting a complaint to the B-BBEE Commission must fully complete and submit a **Form B-BBEE 7**.
16. The B-BBEE Commission further requires the below documentation to support the **Form B-BBEE 7**:
 - 16.1 Statement under oath giving background of the complaint from the beginning until the time the matter is being reported to the B-BBEE Commission;
 - 16.2 Certified copy of complainant identity document;
 - 16.3 Share Certificate of the complainant in relation to an ownership complaint;
 - 16.4 Shareholders agreement/Memorandum of Association/ Memorandum of Incorporation of the company(ies) the complaint is against;
 - 16.5 Resolution or minutes of meetings held in relation to the company(ies) the complaint is directed;
 - 16.6 Financial Information/Statement of the party(ies) of the potential respondent;
 - 16.7 B-BBEE Certificate/Sworn Affidavit of the party(ies) the complaint is against;
 - 16.8 Salary advice of the person lodging the complaint;

- 16.9 Recent contact details of the respondent (Name of contact person, address, email address and contact details);
 - 16.10 Letter of authority if the complaint is lodged on behalf of someone or on behalf of a union; and
 - 16.11 Any other relevant documentation that will assist the B-BBEE Commission with the matter being reported.
17. Where a document listed above, is not available or does not apply to the complaint being lodged, please indicate so on the **Form B-BBEE 7** or **statement under oath**.

F. What is the investigation process flow?

18. Upon receipt of the complaint, the B-BBEE Commission in terms of regulation 15 of the B-BBEE Regulations is expected to acknowledge receipt of the complaint in writing **within five (5) days** and provide a case number.
19. Following the issuance of the case number, the B-BBEE Commission **must within twelve (12) months**:
 - 19.1 Assess the merits of the complaint;
 - 19.2 Request any further information from the complainant by issuing a **Form B-BBEE 8**. Where the Commission has requested additional information from the complainant, the information must be submitted **within fourteen (14) days** of receipt of the notice of request for additional information, and if the party fails to do so, the B-BBEE Commission may close the complaint or continue to investigate as if the Commission initiated the matter;
 - 19.3 Where the B-BBEE Commission upon assessing the merits of the complaint resolves that the matter does not fall within its jurisdiction or does not warrant an investigation, the Commission shall proceed to issue a notice of non-investigation (**Form B-BBEE 11**) to the complainant with reasons.
 - 19.4 Investigate the complaint if it is justifiable to do so, and notify the respondent(s) of the complaint by issuing a **Form B-BBEE 10**. The investigation will follow the procedures that are in accordance with the Act, and conform to all the rules relating to fair administration of justice processes applicable to investigations;
 - 19.5 The B-BBEE Commission is also enabled **by section 13H** of the B-BBEE Act to delegate any power conferred to the Commissioner or any duty assigned to him or her under the Act, to any person with appropriate knowledge and experience who is appointed to or contracted with the Commission to assist it in the carrying out of its functions.
 - 19.6 During the investigation the Commission may issue summons in a prescribed **Form B-BBEE 20** in line with section 13K of the B-BBEE Act;

- 19.7 The Commission as part of the investigation process can also decide to hold a formal hearing in accordance with the procedure of the Commission before a Panel chaired by the Chairperson; and
- 19.8 Make a finding in writing, with or without recommendations. The finding will be communicated to both the complainant(s) and respondent(s). Before making its final finding(s) in terms of section 13J(3) of the Act, the Commission must notify the respondent in writing of the details of any adverse findings against them, and provide the respondent(s) with **30 days** to respond to each or any of the findings. The Commission may, based on the merit or upon request from the respondent(s), extend the 30 days period by a further once off period not exceeding **ten (10) days**.
- 19.9 If the respondent(s) fails to respond to each or any adverse finding within the stipulated time after being notified of such by the Commission, the Commission shall proceed to make its finding(s) in terms of section 13J of the Act.
- 19.10 The Commission may in a manner it deems appropriate publish the findings. Publication may not take place where:
- 19.10.1 A judicial review on the decision of the Commission has been initiated wither by the complainant or respondent within the period allowed;
- 19.10.2 The Commission has referred the matter to the National Prosecuting Authority or the South African Police Service, and no prosecution has been instituted against the person concerned;
- 19.10.3 If the person concerned has been prosecuted and acquitted following the investigation of the Commission; or
- 19.10.4 Where the person concerned has been convicted by a court of law, following an investigation of the Commission, before such person has in respect of the conviction exhausted all recognised legal proceedings pertaining to appeal or review.
- 19.11 If the Commission upon investigating a complaint, is of the view that a matter can be resolved through an alternative dispute resolution mechanism (ADR), the Commission may facilitate the resolution of the matter or refer, in a prescribed **Form B-BBEE 12**, such a matter to any appropriate dispute resolution process or forum in terms of its procedures. Where the ADR process has not been successful to resolve the dispute between the parties, the Commission may continue to investigate the matter if it considers it justifiable to do so.
20. In an instance where the Commission has reasonable ground to believe that a document filed in respect of investigation contains false information, the Commission may issue a demand for correct information in **Form B-BBEE 9** to the person who filed the document, for such corrected information to be submitted **within 14 days** of receipt of the notice of demand to correct information.
21. Where the B-BBEE Commission has on its own decided to initiate an investigation it will do so by issuing a notice to investigate in the prescribed **Form B-BBEE 10** and follow the process outlined in paragraphs 19.4 to 19.7 above.

22. If the Commission is of the view that more time is warranted to conclude its process in respect of an investigation as contemplated, the Commission must inform the complainant of the need to extend the time, explain the circumstances warranting a longer period, and the exact period required as an extension.
23. The Commission may, if it has investigated a matter and justifiable reasons exist, refer any concern to the South African Revenue Services, or any regulatory authority, by issuing a **FORM B-BBEE 13**.
24. A referral to the other institutions will follow the mandatory prescripts of that institution and the B-BBEE Commission has not control over the decision and processes of that institution.

G. Conclusion

25. The B-BBEE Commission is committed to meeting the timelines set for finalising an investigation. However, this depends on the complexity of the investigation and cooperation from all parties involved.
26. The B-BBEE Commission is committed to ensuring that the 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.
27. The B-BBEE Commission's powers and discretions under the Act, including its powers to investigate complaints, are not affected by the process of issuing the Explanatory Notice on any specific matter.
28. The B-BBEE Commission will ensure that it communicates any changes to the procedure outlined in this Explanatory Notice.
29. For any queries or further clarity on this Explanatory Notice, kindly feel free to contact us at the following contact details:

B-BBEE Commission

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Pretoria

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Schematic Process Flow

