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B-BBEE COMMISSION
a member of the dti group

RECOGNITION OF BLACK OWNERSHIP THROUGH SALE OF ASSETS, EQUITY INSTRUMENTS, AND OTHER BUSINESSES

1. Who are we?

1.1 The Broad-Based Black Economic Empowerment Commission ("B-BBEE Commission") is established as an entity within the administration of the Department of Trade, Industry and Competition ("**the dtic**") in terms of section 13B of 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"). Its role includes overseeing the implementation of the B-BBEE Act and act against fronting practices.

2. What does Statement 102 entail?

2.1 Statement 102 of Code Series 100, provides an alternative avenue for black people to acquire ownership and control of enterprises and economic resources. This Statement defines the specific requirements for the recognition of ownership resulting in the disposal of assets, equity instrument or other businesses to black people.

2.2 A measured entity (the Seller) is able to recognise black ownership for selling a separately identifiable business to black people (the Purchaser). A separately identifiable related business must form part of the same chain of ownership and be owned by the seller, and for the purposes of Statement 102, it is a business that is related to the seller by virtue of being a subsidiary, joint venture, associate, business division, business unit, or any other similar related arrangements within the ownership structure of the seller.

2.3 However, where a seller has claimed benefits in terms of Statement 102 under its ownership scorecard it may not claim benefits under the enterprise and supplier development element.

3. Which transactions qualify under this statement?

3.1 A qualifying transaction in terms of this Statement may involve the sale of:

(a) An asset: This relates to a resource that is owned by the seller and has economic value, for example property, machinery or tools, manufacturing plant etc.

(b) A business: This means that the seller must sell a separately identifiable business which forms part of the same chain of ownership and be owned by the seller, such as a subsidiary entity or division. However, that does not mean that the seller must still be involved in the ownership of the sold asset post the sale.

(c) Equity instruments: This refers to an instrument by which a participant holds rights of ownership in an entity, for example stock shares such as those traded on the Johannesburg Securities Exchange, convertible debentures etc.

3.2 In simple terms, a sale of an asset, business or equity instrument refers to a transaction that involves the sale of a separate legal entity considered a separately identifiable business in which the assets such as tools or machine or plant or equity instruments in a subsidiary are transferred to black people.

4. What qualification criteria is used under this statement?

4.1 A measured entity, seeking to benefit from Statement 102, must demonstrate that the transaction involving a sale of asset, equity instrument or business will result in one of the following outcomes:

(a) The creation of sustainable businesses or business opportunities in the hands of black people and the transfer of critical and specialised skills, managerial skills and productive capacity to black people. Therefore, black people must independently own and manage the asset, business or equity instrument acquired, free of any influence in terms of decision making processes from the seller.

(b) A sale of asset, equity instrument and business must involve a separately identifiable related business with no unreasonable limitations or conditions with regard to its clients or customers, and demonstrate that it has its own clients, customers or suppliers other than the seller. This also means that the seller cannot dictate to the purchaser which customers can the purchaser do business with post the transfer.

(c) Any operational outsourcing arrangement between the seller and the associate enterprise must be negotiated at arms-length on a fair and reasonable basis. Thus, where the purchaser opts to use the resources of the seller for practical reasons, the arrangement must be negotiated independently and on an equal footing, with no undue pressure being exerted on the purchaser, and the seller must not interfere with the operations or administration of the purchaser post the transfer of the asset, business or equity instrument.

(d) The transaction should be subjected to an independent verification value by an independent expert. This is a process involving a standard valuation method for an asset, business or equity instrument using normal standard valuation methods that represent standard market practice.

5. How is ownership calculated post transaction?

5.1 A seller seeking recognition of a qualifying transaction under Statement 102 in its ownership scorecard, must determine that recognition principles mentioned in paragraph 4 exist on date of measurement. Statement 102 further requires that the calculation of ownership realisation points (or net value) must be based on:

(a) The total value of the transaction;

(b) The value of equity instruments held by black people in the separately identifiable related business;

(c) The carrying value of the acquisition debt of black people in the separately identifiable related business; and

(d) All calculations in terms of paragraphs (a) to (c) above must use a standard valuation method.

6. Compliance with the priority elements under Statement 000

6.1 The seller applying Statement 102 for its full or part ownership compliance, will have to comply with the 40% sub-minimum for ownership and discounting principle to the extent of the transaction involving the separately identifiable related business.

6.2 The seller will have to comply with all other priority elements (skills development and enterprise and supplier development) as required by paragraph 3.3 of Statement 000.

7. Recognition by the Seller

7.1 The below formula as outlined in Annexe 102 (A) is applicable in determining the equivalency percentage for exercisable voting rights and economic interest irrespective of the level of black shareholding of the entity acquiring the asset:

$$A = \frac{B}{C} \times D$$

Where

A is the equivalency percentage for exercisable voting rights and economic interest of the ownership scorecard

B is the value of the qualifying transaction to the separately identifiable related business determined using a standard valuation method

C is the value of the seller determined using a standard valuation method

D is the indicator percentages of the separately identifiable related business

7.2 For the first three years after the transaction, the seller will recognise ownership points on the date of measurement based on the value of the seller and thee value of the separately identifiable related business.

7.3 But, for each year thereafter the third year, the seller will recognise ownership points on date of measurement based on the ownership indicator percentage achieved at the date of measurement in the third year after the transaction.

7.4 Further, the seller seeking recognition of a qualifying transaction for exercisable voting rights and economic interest a per the ownership scorecard, must obtain a review of the transaction value by an independent expert, who is required to opine on the fairness of the transaction value. The continued recognition is also subject to opinion of the independent expert supporting the transaction value.

7.5 Net value points recognition for the seller will be based on the points achieved using the principle as outlined in paragraph 5 above on the third year of the transaction, using the time graduation factor as outlined in Statement 100, subject to an independent expert opinion that the net value calculation is fair and has been applied accurately for each year after year three.

8. What is not sale of an asset/business or equity instrument?

8.1 The following transactions do not constitute qualifying transaction for sale of asset, business or equity instrument:

(a) Transfers of business rights by way of license, lease or other similar legal arrangements not conferring unrestricted ownership. This means for instance, even if a lease of an asset is for a long term period such as 30 years, that will not amount to transfer of ownership. An example of a transfer of a right is where the seller grants the purchaser the right to use the seller’s intellectual property in conducting its business for a limited period at a cost.

(b) Sales of franchises by franchisors to franchisees (where one pays another for the right to use the trademark), but includes sales of franchises from franchisees to other franchisees or to new franchisees. For instance, where a franchisee who has already acquired a franchise from the franchisor, intends to acquire another franchise or sells an existing franchise to another franchisee. Fast food restaurants are good examples of this type of business model.

(c) A qualifying transaction with a repurchase clause, whereby the seller is granted a right to repurchase the asset, business or equity instrument within a three-year period after implementation of the transaction, even if transaction implementation is deferred post year three. The seller cannot have any right to enforce such a repurchase.

(d) A rearrangement that still allows the seller to own and control the operations of the asset that has purportedly been sold to black people. This relates to a restructuring process, whereby the seller through the purchaser still enjoys a benefit from the asset or business by owning shares or granted the ability to consent to certain decision that the purchaser ought to make in relation to the asset or business they have acquired.

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