



REPABOLIKI YA AFERIKA BORWA

REPUBLIC VAN SUID AFRIKA

BROAD-BASED BLACK ECONOMIC EMPOWERMENT ACT

Section 9(5): Codes of Good Practice

It is hereby notified that the Minister of Trade and Industry hereby issues the following draft Code of Good Practice for public comments under section 9(3) of the Broad-Based Black Economic Empowerment Act 53 of 2003. Interested persons are invited to furnish the Minister with comments on this proposed code within 60 days of the date of publication.

**CODE 000: FRAMEWORK FOR THE MEASUREMENT OF BROAD BASED BLACK
ECONOMIC EMPOWERMENT**

**STATEMENT 002: SPECIFIC VERIFICATIONS ISSUES RELATING TO COMPLEX
STRUCTURES**

Issued under section 9(5) of the Broad-Based Black Economic Empowerment Act 53 of 2003 for public comment. Interested persons are invited to furnish the minister with comments on this proposed code within 60 days of the date of publication.

Arrangement of this statement

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1 DEFINITIONS

In this statement, unless the context otherwise indicates, a word or expression to which a meaning has been assigned in the Act bears the same meaning, and:

- 1.1 **"Acceptable Valuation Standard"** means a valuation of a Measured Entity or of the individual compliance data for particular Elements of BEE. All such valuations shall be undertaken in accordance with normal valuation methodologies that represent

standard market practice;

- 1.2 **"BEE Status"** shall have the meaning assigned in Code 000 Statement 000;
- 1.3 **"BEE"** means black economic empowerment;
- 1.4 **"Board"** shall have the meaning defined in statement 200;
- 1.5 **"Companies Act"** means the Companies Act 61 of 1973, as amended or substituted;
- 1.6 **"Consolidated Verification Certificate"** means a Verification Certificate as contemplated in paragraph 8;
- 1.7 **"Divisional Structure"** means an internal organisational arrangement within a Measured Entity whereby business/operation units operating in discreet areas of business (hereinafter **"divisions"**) operate autonomously to other divisions, but not to the Measured Entity of which they form part. Divisional Structures, by definition, do not include the subsidiaries of the Measured Entity using a Divisional Structure;
- 1.8 **"Enterprise"** shall have the meaning assigned in Code 100 Statement 100;
- 1.9 **"Exempted Micro Enterprise"** has the meaning assigned in Code 1000 Statement 1000;
- 1.10 **"Franchisee"** means an Enterprise that has acquired the right to trade as a Franchisee of a Franchise Arrangement from a Franchisor;
- 1.11 **"Franchising Arrangement"** means a franchise arrangement including its Franchisors and Franchisees;
- 1.12 **"Franchisor"** means Enterprise holding the rights to a franchise a Franchising Arrangement in the Republic of South Africa;
- 1.13 **"Group Structure"** means an ownership relationship whereby one or more Measured Entities that are juristic persons are subsidiaries of another Measured Entity that would qualify as a holding company;
- 1.14 **"holding company"** shall be interpreted *mutatis mutandis* by reference to the definition provided in section 1(4) of the Companies Act;

- 1.15 **"Measured Entity"** means a Enterprise as well as an organ of state or public entity subject to measurement under the Codes;
- 1.16 **"Qualifying Small Enterprise"** has the meaning assigned in Code 1000 Statement 1000;
- 1.17 **"Related Enterprise"** of a Measured Entity means an Enterprise:
- 1.17.1 which is directly or indirectly controlled by a Measured Entity;
- 1.17.2 which is directly or indirectly controlled by the natural persons who have direct or indirect control over that Measured Entity or the immediate family of those natural persons; and
- 1.17.3 over whom the Measured Entity has direct or indirect control;
- 1.18 **"Sector Code"** shall have the meaning defined in Code 000 Statement 010;
- 1.19 **"Separated Verification Certificate"** means a Verification Certificate as contemplated in paragraph 9;
- 1.20 **"subsidiary"** shall be interpreted *mutatis mutandis* by reference to the definition provided in section 1(3) of the Companies Act;
- 1.21 **"the Act"** means the Broad-Based Black Economic Empowerment Act 53 of 2003;
- 1.22 **"the Codes"** means all Codes of Good Practice issued in terms of section 9 of the Act, including without limitation, this statement;
- 1.23 **"the Public Finance Management Act"** means the Public Finance Management Act of 1999;
- 1.24 **"Top Management"** is a collective term encompassing Senior Top Management and Other Top Management as defined in Code 200 Statement 200;
- 1.25 **"Unincorporated Joint Venture"** means a joint venture between two or more Measured Entities which is not constituted in the form of an incorporated juristic person;
- 1.26 **"Verification Agency"** has the meaning assigned in Code 000 Statement 020; and

1.27 **"Verification Certificate"** has the meaning assigned in Code 000 Statement 020.

2 OBJECTIVES OF THIS STATEMENT

The objectives of this statement are to:

- 2.1 provide guidance as to which Measured Entities are subject to measurement under the Codes;
- 2.2 provide guidance as to the consolidation of compliance data in certain specific instances;
- 2.3 provide guidance as to the attribution of compliance data in certain specific instances;
- 2.4 provide guidance as to the separation of compliance data in certain specific instances; and
- 2.5 provide clarity as to the transfer of certain BEE contributions in the event of a sale of business.

3 INTERPRETATION OF THIS STATEMENT

- 3.1 When interpreting a provision of this statement, any reasonable interpretation that is consistent with the objectives of the Act must be preferred over any other interpretation that is inconsistent with such objectives.
- 3.2 To the extent that any provision of this statement is inconsistent with the Act, the Act shall prevail.

4 APPLICATION OF THIS STATEMENT

This statement applies to all Measured Entities subject to measurement under Codes 000 to 700, Code 800 and Codes 1000 to 1700.

5 MEASURED ENTITIES SUBJECT TO MEASUREMENT UNDER THE CODES

- 5.1 In furtherance of the objectives of the Act, the following entities shall be subject to measurement in terms of the Codes:
 - 5.1.1 all organs of state;

- 5.1.2 all public entities listed in schedule 2 of the Public Finance Management Act;
- 5.1.3 all public entities listed in schedule 3 part A and part C of the Public Finance Management Act;
- 5.1.4 any public entity listed in schedule 3 part B and part D which are trading entities and which undertake any business with any organ of state or public entity or with any Enterprises; and
- 5.1.5 any Enterprise which undertakes any business with any organ of state or public entity.

- 5.2 Any Enterprises undertaking any business with any other Measured Entity ("Client Measured Entity"), whether directly or indirectly, which is subject to measurement under the Codes in terms of paragraph 5.1, may be required to evidence its own level of compliance to the Client Measured Entity and, in such event, will be subject to measurement under the Codes.

- 5.3 A Measured Entity subject to measurement in terms of paragraphs 5.1 and 5.2 and which is not a Qualifying Small Enterprise or an Exempted Micro Enterprise will be measured in accordance with Codes 000 – 700.

- 5.4 A Measured Entity subject to measurement in terms of paragraphs 5.1 and 5.2 and which is a Qualifying Small Enterprise or an Exempted Micro Enterprise will be measured in accordance with Codes 1000 – 1700.

6 GENERAL VERIFICATION CERTIFICATE REQUIREMENTS

- 6.1 Organs of state and public entities listed in Schedule 1 of the Public Finance Management Act can rely upon a single Verification Certificate.

- 6.2 Public entities listed in Schedules 2 and 3 of the Public Finance Management Act as well as any Enterprise must obtain a Verification Certificate in respect of themselves and to the extent that any such entity may have a subsidiary, each such subsidiary must obtain its own Verification Certificate.

- 6.3 Related Enterprises which are:

- 6.3.1 not Exempted Micro Enterprises, shall each obtain their own Verification Certificate;
- 6.3.2 Exempted Micro Enterprises:
- 6.3.2.1 must, if the combined value of the turnover of each of the Related Enterprises is in excess of the level required to qualify as an Exempted Micro Enterprise, obtain either a Consolidated Verification Certificate or individual Verification Certificates for each Related Enterprise; and
- 6.3.2.2 if the combined value of the turnover of each of the Related Enterprises is not in excess of the level required to qualify as an Exempted Micro Enterprise, remain exempted from obtaining a Verification Certificate.
- 6.4 If a Measured Entity undertakes its business within a sector in respect of which a Sector Code (as provided for in Code 000 Statement 010) has been gazetted, it shall be measured in accordance with that Sector Code, save to the extent that the Sector Code is silent as to any of the issues dealt within Codes 000 – 700 or Codes 1000 – 1700 (as the case may be).
- 6.5 A Measured Entity that is governed by a Sector Code shall not be entitled to apply that Sector Code to its suppliers or enterprise development recipients unless those Measured Entities are also subject to that Sector Code.

7 SPECIFIC VERIFICATION CERTIFICATES REQUIREMENTS FOR COMPLEX STRUCTURES

- 7.1 A Measured Entity that undertakes its business in more than one sector shall be entitled to obtain a Separated Verification Certificate for each of its trading business or operational units, provided that such of its business or operational units that are not subject to a Sector Code shall be measured in accordance with Codes 100 – 700 or Codes 1000 – 1700 (as the case may be).
- 7.2 Group Structures and Franchising Arrangements may, subject to the provisions of paragraph 10, qualify for the attribution of compliance data.
- 7.3 Divisional Structures may, subject to the provisions of paragraph 9, obtain one or

more Separated Verification Certificates for their trading divisions.

- 7.4 Any Unincorporated Joint Venture is required to prepare a Consolidated Verification Certificate.

8 CONSOLIDATED VERIFICATION CERTIFICATES

- 8.1 Measured Entities entitled to obtain a Consolidated Verification Certificate in terms of paragraphs 6.3 or 7.4 shall be entitled to consolidate all of their compliance data in respect of each of the Elements of BEE on a single Verification Certificate as if those Measured Entities were a single Measured Entity.
- 8.2 The consolidation of the compliance data shall be undertaken in accordance with Acceptable Valuation Standards.
- 8.3 A Consolidated Verification Certificate shall clearly state upon it:
- 8.3.1 the details of the each of the Measured Entities in respect of which it is prepared;
and
- 8.3.2 the fact that it is a Consolidated Verification Certificate.
- 8.4 Nothing in this statement precludes a Verification Agency from preparing a statement consolidating the BEE compliance data of all Measured Entities in a Group Structure, in a Divisional Structure, in a Franchising Arrangement or in a group of Related Enterprises for research and reporting purposes, save that such statement of consolidation shall never constitute a Verification Certificate and shall not contain the words "Verification Certificate" on it.

9 SEPARATED VERIFICATION CERTIFICATES

- 9.1 In circumstances where a Separated Verification Certificate may be issued in accordance with paragraphs 7.1 and 7.3:
- 9.1.1 the ownership Element of BEE shall measured at the level of the Measured Entity itself;
- 9.1.2 those aspects of the management control Element of BEE that relate to:

- 9.1.2.1 membership of the Board of the Measured Entity shall be measured at the level of the Measured Entity itself; and
- 9.1.2.2 membership of Top Management shall be measured at the level of the business/operational unit in respect of which the Separated Verification Certificate is prepared;
- 9.1.3 the employment equity Element of BEE shall be measured at the level of the business/operational unit in respect of which the Separated Verification Certificate is prepared;
- 9.1.4 the skills development Element of BEE shall be measured at the level of the business/operational unit in respect of which the Separated Verification Certificate is prepared unless that Measured Entity undertakes any of those functions on a centralised basis in which event the provisions of paragraph 10 will apply to any such centralised functions;
- 9.1.5 the preferential procurement Element of BEE shall be measured at the level of the business/operational unit in respect of which the Separated Verification Certificate is prepared unless that Measured Entity undertakes any of those functions on a centralised basis in which event the provisions of paragraph 10 will apply to any such centralised functions;
- 9.1.6 the enterprise development Element of BEE shall be measured at the level of the business/operational unit in respect of which the Separated Verification Certificate is prepared unless that Measured Entity undertakes any of those functions on a centralised basis in which event the provisions of paragraph 10 will apply to any such centralised functions;
- 9.1.7 the residual Element of BEE shall be measured at the level of the business/operational unit in respect of which the Separated Verification Certificate is prepared unless that Measured Entity undertakes any of those functions on a centralised basis in which event the provisions of paragraph 10 will apply to any such centralised functions;
- 9.2 A Separated Verification Certificate shall clearly state upon it:

- 9.2.1 the details of the Measured Entity;
- 9.2.2 the details of business/operational unit in respect of which it is prepared; and
- 9.2.3 the fact that it is a Separated Verification Certificate.

10 ATTRIBUTION OF COMPLIANCE DATA

- 10.1 Where subsidiaries in a Group Structure are entitled to do so in accordance with paragraph 7.2, they shall be entitled to recognise such portion of the following Element BEE compliance data of their holding company or of a co-subsiary as may be attributable to them, together with their own corresponding data, on their own Verification Certificate, provided that such data is apportioned and attributed between the holding company/co-subsiary and the subsidiary using an Acceptable Valuation Standard:
 - 10.1.1 the training aspects of the skills development Element data (other than in respect of learnerships) where the holding company or co-subsiary is responsible for the implementation of some of the functions associated with that Element and the subsidiary makes a monetary contribution to the costs of the performance of that function by the holding company/co-subsiary;
 - 10.1.2 preferential procurement Element data where the holding company or co-subsiary is responsible for centralised procurement of specific items on behalf of all Measured Entities in the Group Structure and does not trade outside of the Group Structure. Notwithstanding the foregoing, any margins or service or related fees charged by a holding company or the co-subsiary shall be included within the total procurement spend of the subsidiary procuring from it and will be measured on the basis of the BEE Status of that holding company or co-subsiary;
 - 10.1.3 enterprise development Element data where the holding company or co-subsiary is responsible for undertaking some enterprise development functions for all Measured Entities in the Group Structure; and
 - 10.1.4 residual Element data where the holding company or co-subsiary is responsible for some residual functions for all Measured Entities in the Group Structure.

10.2 Franchisees in a Franchising Arrangement are entitled to recognise:

10.2.1 as a contribution to their own compliance data, any quantified and expressly stated portion of any franchise or related fee payable to the Franchisor that is to be applied by the Franchisor in:

10.2.1.1 providing training to the employees of the Franchisees or paying for learnerships in the Franchisee if such contributions qualify for recognition as a skills development Element contribution;

10.2.1.2 making of enterprise development Element contributions on behalf of the Franchisee; and

10.2.1.3 making of residual Element contributions on behalf of the Franchisee; and

10.2.2 as preferential procurement contributions of the Franchisee in their own compliance data, such portions of the preferential procurement element data attained by the Franchisor as may be attributable to the Franchisee if the Franchisor undertakes some procurement on behalf of its Franchisees or the Franchisor appoints some of the Franchisee's suppliers, provided that such data is apportioned between the Franchisor and the Franchisee using an Acceptable Valuation Standard. Any margins or service or related fees charged by a Franchisor shall however be included within the total procurement spend of the Franchisee procuring from it and will be measured on the basis of the BEE Status of the Franchisor.

10.3 Where in paragraph 9, provision is made for attribution in terms of this clause 10, the provisions of paragraph 10.1 will apply *mutatis mutandis* to such provisions.

10.4 Where an attribution of compliance data as contemplated in this paragraph 10 has been undertaken, the resulting Verification Certificate shall state upon it:

10.4.1 that such attribution has been undertaken; and

10.4.2 identify the Element scores which have included an attributed data.

11 TRANSFER OF BEE COMPLIANCE DATA

11.1 To the extent that any Measured Entity has undertaken any initiatives which attribute BEE

compliance data based upon:

- 11.1.1 cumulative enterprise development Element contributions;
- 11.1.2 cumulative residual Element contributions; or
- 11.1.3 historical contributions arising from Code 100 Statement 101,

then, in such instance, those contributions will be considered to attach to the business of the Measured Entity for that portion of full value of the contribution as is represented by the value that the portion of the underlying business of the Measured Entity sold to another entity holds to the pre-sale value of the Measured Entity (all measured using an Acceptable Valuation Standard), where that Measured Entity subsequently enters into any bona fide transaction whereby all or a portion of the underlying business of the Measured Entity is sold to another entity.

- 11.2 Where the value of contributions as contemplated in paragraph 11.1 are transferred as provided for in that clause, the seller Measured Entity will only be entitled retain recognition for that the balance of the value of such contribution following the sale.
- 11.3 The BEE compliance scores resulting from transferred contribution as contemplated in this paragraph 11 must recalculated on the basis set forth in Code 100 Statement 101, Code 600 and Code 700 following sale, it being specifically recorded that the contributions and not their resulting BEE compliance scores are transferred.