



How to engage with the BEE Commissioner



# B-BBEE Act

- The objectives of this Act are to facilitate broad-based black economic empowerment by;
  - promoting economic transformation in order to enable meaningful participation of black people in the economy;
  - achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises;
  - increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training;
  - increasing the extent to which black women own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure and skills training;
  - promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity;
  - empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills;
  - promoting access to finance for black start-ups, small, medium and micro enterprises, co-operatives and black entrepreneurs, including those in the informal business sector; and
  - increasing effective economic participation and black owned and managed enterprises, including small, medium and micro enterprises and co-operatives and enhancing their access to financial and non-financial support.

# B-BBEE Commissioner: Functions

- The B-BBEE Commissioner and her office were established by the Department of Trade and Industry (DTI) who are the custodians of the B-BBEE legislation.
- The functions of the B-BBEE Commissioner are;
  - to oversee, supervise and promote adherence with this Act in the interest of the public;
  - to strengthen and foster collaboration between the public and private sector in order to promote and safeguard the objectives of broad-based black economic empowerment;
  - to receive complaints relating to broad-based black economic empowerment in accordance with the provisions of this Act;
  - to investigate, either of its own initiative or in response to complaints received, any matter concerning broad-based black economic empowerment;
  - to promote advocacy, access to opportunities and educational programmes and initiatives of broad-based black economic empowerment;
  - to maintain a registry of major broad-based black economic empowerment transactions, above a threshold determined by the Minister by notice in the Gazette;
  - to receive and analyse such reports as may be prescribed concerning broad-based black economic empowerment compliance from organs of state, public entities and private sector enterprises
  - to promote good governance and accountability by creating an effective and efficient environment for the promotion and implementation of broad-based black economic empowerment; and
  - To exercise such of her powers which are not in conflict with this Act as may be conferred on the Commission in writing by the Minister.

# B-BBEE Commissioner

- The B-BBEE Commissioner;
  - is not a policy office so she cannot change the Act or the B-BBEE Codes of Good Practice.
  - cannot apply penalties to Measured Entities but following an investigation may refer the matter to the National Prosecuting Authority (NPA) or the South African Police Service (SAPS).
- The B-BBEE Commissioner has stated that;
  - her office is the only entity authorised by the DTI to provide interpretive guidance;
  - guidance provided by other parties is seen as agreement between those parties and such agreement may not be aligned to her opinion; and
  - opinion will be provided as being 'changeable' and 'non-binding' due to the nature of the Codes;
    - changeable because the information provided may change and codes may be amended; and
    - non-binding because her office has no power to apply penalties.

# Who can be implicated in Fronting?

- “knowing”, “knowingly” or “knows”, when used with respect to a person, and in relation to a particular matter, means that the person either
  - had actual knowledge of that matter; or
  - was in a position in which the person reasonably ought to have;
    - had actual knowledge;
    - investigated the matter to an extent that would have provided the person with actual knowledge; or
    - taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter;
- A B-BBEE verification professional or any procurement officer or other official of an organ of state or public entity who becomes aware of the commission of, or any attempt to commit, any offence and fails to report it to an appropriate law enforcement agency, is guilty of an offence.

# Consequences of Fronting Practices

- Any person convicted of an offence in terms of this Act, is liable;
  - to a fine or to imprisonment for a period not exceeding 10 years or to both a fine and such imprisonment or, if the convicted person is not a natural person, to a fine not exceeding 10 per cent of its annual turnover; or
  - to a fine or to imprisonment for a period not exceeding 12 months or to both a fine and such imprisonment.
- For the purpose of determining a fine to be imposed for an offence, the court must take into account the value of the transaction which was derived from, or sought to be derived from, the commission of the offence.
- A court in which any person is convicted of an offence must report the conviction;
  - to the B-BBEE Verification Professional Regulator, if that person is a B-BBEE verification professional; and
  - to in any other case, to the Council and to that person's employer.
- Despite anything to the contrary contained in any other law, a magistrates' court has jurisdiction to impose any penalty provided for in this Act.



# Powers of the BEE Commissioner

- The Commission must increase knowledge of the nature and dynamics and promote public awareness of matters relating to broad-based black economic empowerment by;
  - implementing education and information measures to develop public awareness of the provisions of this Act, and in particular to advance the purposes of this Act;
  - providing guidance to the public by;
    - issuing explanatory notices outlining its procedures;
    - issuing non-binding opinions on the interpretation of any provision of this Act; or
  - applying to a court for a declaratory order on the interpretation or application of the provisions of this Act; and
  - conducting research relating to its mandate and activities and, from time to time, publishing the results of that research.
- The Commission may liaise with any regulatory authority on matters of common interest and, without limiting the generality of the foregoing, may;
  - exchange information with and receive information from any such regulatory authority pertaining either to matters of common interest or to a specific complaint or investigation;
  - participate in the proceedings of any regulatory authority; and
  - advise, or receive advice from, any regulatory authority.
- Notwithstanding the provisions of any law, but subject to the approval of the Minister, the Commissioner may enter into an agreement with any other person, body of persons or organ of state, including a special investigating unit established under the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), to perform any of the Commission's duties and functions under this Act.

# Powers of the BEE Commissioner

- The Commission has the power to investigate any matter arising from the application of the Act, including any B-BBEE initiative or category of B-BBEE initiatives.
- The format and the procedure to be followed in conducting any investigation must be determined by the Commission with due regard to the circumstances of each case and may include the holding of a formal hearing.
- Without limiting the powers of the Commission, the Commission may make a finding as to whether any B-BBEE initiative involves a fronting practice.
- The Commission may institute proceedings in a court to restrain any breach of this Act, including any fronting practice, or to obtain appropriate remedial relief.
- If the Commission is of the view that any matter it has investigated may involve the commission of a criminal offence in terms of this Act or any other law, it must refer the matter to the National Prosecuting Authority or an appropriate division of the South African Police Service.
- The Commission may, if it has investigated a matter and justifiable reasons exist, refer to
  - the South African Revenue Services any concerns regarding behavior or conduct that may be prohibited or regulated in terms of legislation within the jurisdiction of that Service; or
  - any regulatory authority any concerns regarding behavior or conduct that may be prohibited or regulated in terms of legislation within the jurisdiction of that regulatory authority.



# Powers of the BEE Commissioner

- The Commission may publish any finding or recommendation it has made in respect of any investigation which it had conducted in such manner as it may deem fit. (b)
- A decision of the Commission to publish any finding or recommendation it has made may not be put into effect;
  - before proceedings for the judicial review of the decision have been completed or were not instituted within the period allowed therefor;
  - if the Commission has referred the matter to the National Prosecuting Authority or the South African Police Service in terms of subsection (5), and no prosecution has been instituted against the person concerned;
  - if the person concerned has been prosecuted and acquitted following the investigation of the Commission; or
  - 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.

# Confidential Information

- When submitting information to the Commission, a person may claim that all or part of that information is confidential.
- Any claim must be supported by a written statement explaining why the information is confidential.
- The Commission must
  - consider a claim; and
  - as soon as practicable make a decision on the confidentiality of the information and access to that information and provide written reasons for that decision.
- A person who has made a claim in respect of which the Commission has made a decision, may apply to court for a review of that decision within;
  - 60 court days of becoming aware of the decision; or
  - such longer period as a court may allow on good cause shown.
- When making any finding in respect of an investigation, the Commission may take confidential information into account.
- If any finding would reveal any confidential information, the Commission must provide a copy of the proposed finding to the party claiming confidentiality at least 30 court days before publishing those reasons.
- Within 14 court days after receiving a copy of the proposed finding, a party may apply to a court for an appropriate order to protect the confidentiality of the relevant information.

# Request for Opinion Process

1. Identify if the issue is clearly addressed in the Act or Codes
2. If confirmed as an issue of interpretation then assess material impact on the score.
3. If there is a material impact on the score then initiate a Request for Opinion
4. Draft the Request for Opinion
5. Attach all related documentation.
6. Submit your RFO.
7. Expect a response in 30 Days.
8. If the response does not address all of the issues, then request a meeting for further clarification.



# B-BBEE Commissioner on Ownership

- The B-BBEE Commissioner has provided the following interpretive guidance on the Ownership element;
  - Voting Rights
    - Black direct shareholders must be invited to vote at all meetings of the Shareholders.
    - Black indirect shareholders must be invited to vote at all meetings of the Shareholders.
    - In relation to Trusts;
      - the beneficiaries of the Trust must be invited to exercise their voting rights at any shareholders meeting.
  - Economic Interest
    - Black shareholders must benefit from dividend distribution without limitations.
    - Any limitations or conditions attached to dividend distribution may qualify as a Fronting Practice.
    - In relation to Trusts;
      - any requirement for a Black beneficiary to allocate their dividends to a particular activity will disqualify the Trust from being recognised as an 'Ownership Trust'.
  - Net Value
    - Black shareholders must benefit from gains in net value of their shares.
    - In relation to Trusts,
      - beneficiaries must not be disadvantaged by the addition of new beneficiaries; and
      - beneficiaries must realise any gains if they exit the Trust.