

Circular No. 2

28 October 2014

BROAD-BASED BLACK ECONOMIC EMPOWERMENT: REVAMPED

Government is well under way in implementing its plan to “revamp” Broad-Based Black Economic Empowerment (**BEE**) in South Africa.

The recent developments in BEE law are summarised below.

EFFECTIVE DATE FOR BEE AMENDMENT ACT, 46 OF 2013

The Broad-Based Black Economic Empowerment Amendment Act, 46 of 2013 (the **Amendment Act**) which brings about significant changes to BEE, came into effect on **24 October 2014**.

The Amendment Act introduces a number of far-reaching changes to the Broad-Based Black Economic Empowerment Act 53 of 2003 (the **2003 Act**).

All of the provisions of the Amendment Act, save for section 3(b) (which provides that the Amendment Act will prevail in the event of a conflict with any other legislation) came into operation on 24 October 2014.

The delayed commencement of section 3(b) which will only come into operation on 24 October 2015, provides Parliament with an opportunity to align other BEE related legislation with the Amendment Act.

The key changes introduced by the Amendment Act include the following:

1. The Amendment Act introduces a broad definition of “fronting practice” which essentially is a transaction, arrangement or other act that directly or indirectly undermines or frustrates the achievement of the objectives or the implementation of any of the provisions of the 2003 Act.
2. The Amendment Act criminalises fronting and other misrepresentations regarding the BEE status of an enterprise. Any person convicted of an offence in terms of the 2003 Act (as amended) may be liable to a fine or a maximum prison sentence of 10 years, or in the case of a juristic person, a fine of up to 10% of its annual turnover.

3. Section 8 of the Amendment Act establishes a regulator for BEE, known as the Broad-Based Black Economic Empowerment Commission (the **Commission**). The Commission is tasked with overseeing and promoting compliance with the 2003 Act (as amended) and receiving and investigating complaints regarding BEE, including fronting practices, either at its own initiative or in response to complaints received.
4. Organs of State and public entities are required to report on their compliance with BEE in their annual financial statements and annual reports. Companies whose securities are listed on the JSE are required to report to the Commission on their compliance with BEE annually.
5. The Amendment Act introduces a right for government or public entities to cancel any contract or authorisation awarded or granted as a result of false information provided regarding the BEE status of an entity.
6. The Amendment Act makes it a mandatory obligation for Government and public entities to take the Codes of Good Practice into account when issuing licences or other authorisations. Previously, Government and public entities were only required to take the Codes into account “as far as reasonably possible”.

AMENDED CODES

On 11 October 2013 the Department of Trade and Industry released the amended BEE Codes of Good Practice (the **Amended Codes**).

The Amended Codes will come into effect on 1 May 2015 and will replace the Codes which were published in 2007 (the **2007 Codes**).

On 10 October 2014, the Minister of Trade and Industry published amendments to the Amended Codes for public comment which amendments address items that were previously excluded from the Amended Codes.

These items include the following:

1. Statement 003 which describes the procedure for the development and gazetting of Transformation Charters and Sector Codes and the status thereof;
2. Statement 004 which provides guidance on the measurement of the BEE status of “specialised enterprises” (such as non-profit organisations and (the old) section 21 companies) together with scorecards for this purpose;



3. Statement 102 which sets out the circumstances when an entity may obtain BEE ownership points for a sale of assets, equity instruments or businesses;
4. Statement 103 which defines the means by which Multinationals may apply for recognition of “equity equivalent programmes”; and
5. Code series 600 which addresses the measurement of Qualifying Small Enterprises.

The public has until 14 November 2014 to submit comments on the amendments described above.

ALIGNMENT OF SECTOR CODES

Sector codes or charters were published for the following sectors under the 2003 Act and the 2007 Codes:

1. Agriculture;
2. Chartered Accountancy;
3. Construction;
4. Finance;
5. Forest;
6. Information and Communication Technology;
7. Media, Advertising and Communication;
8. Property;
9. Tourism; and
10. Transport.

The various sector codes are being amended to ensure that they are aligned with the provisions of the Amended Codes.

With the host of changes introduced in the area of BEE recently, including the criminalisation of “fronting practices” (as broadly defined in the Amendment Act), businesses would do well to familiarise themselves with the amended legislative requirements.

FURTHER ADVICE

Should you require advice or assistance on the amended BEE legislation please contact Michael Jackson on 031 – 536 8512, email : mjackson@coxyeats.co.za or Keren Watson on 031 - 536 5818, email : kwatson@coxyeats.co.za or Simon Watson on 031 - 536 8530, email : swatson@coxyeats.co.za or Jason Goodison on 031 - 536 8517, email : jgoodison@coxyeats.co.za or Jenna Padoa on 031 - 536 8529, email : jpadoa@coxyeats.co.za.

