



## **Brochure**

# **Amended Broad-Based Black Economic Empowerment (BBBEE) Act**

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## **Codes of Good Practice**

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## 1. Introduction

The Broad-Based Black Economic Empowerment Act (henceforth “the Act”) is a South African governmental response to the growing challenge of social inequality and economic injustice in South Africa. The purpose of the Act is, amongst other things, to reduce social inequality and to increase the economic participation of Black people in the South African economy. Thus far, the South African government has observed that the process of socio-economic transformation in South Africa has been characterised by a severe challenge of ‘BEE fronting’ – a practice which wholly undermines the fundamental impetus of the Act.

‘Fronting’ refers to a wrongful and an intentional act in terms of which a company puts a Black person in a position of authority, within the company, in order for the company to eventually obtain a better overall BEE rating. To counter this practice, the South African authorities have substantively amended the BBBEE Codes of Good Practice. The aim of this document is thus to outline what major amendments that have accrued on the Act. In any case, through the adopted amendments South Africa may witness not only wealth redistribution, but equally, a diversification of its value chain.

On a policy perspective, the amendments are complementary to other development strategies – including; the Industrial Policy Action Plan (IPAP) of 2012; the South African Central Securities Depository Participant (SCDP); the New Growth Path and *et cetera*. Much focus has been placed on businesses and industries who are geared towards job creation and have a desire to address socio-economic challenges in the country. There is reason to believe that the amendments, if properly executed, would enhance South Africa’s economic growth as well as South Africa’s social development.

## 2. Revised Generic Scorecard Categories

Elements	Weighting (Old Codes)	Weighting (New Codes) & Accompanying Priorities	
Ownership	20	25	40% of compliance target, otherwise downgrading.
Management Control	10	15	
Employment Equity	15	n/a	
Skills Development	15	20 + 5	40% of compliance target, otherwise downgrading.
Preferential Procurement	20	n/a	
Enterprise and Supplier Development	n/a	40 + 3	40% of compliance target, otherwise downgrading.
Enterprise Development	15	n/a	
Socio-Economic Development	5	5	
<b>Total</b>	<b>100</b>	<b>105</b>	

*The table above illustrates some of the amendments that have accrued on the BBBEE Generic Scorecard. Below we consider both these and other amendments in turn.*

### **3. BBBEE Amendments**

- **General Amendments**

Generally, the BEE elements have substantially been reduced from seven to five. In the process, Management Control and Employment Equity have been consolidated into a single Management Control element. The result of this consolidation is that Management Control now carries 15 points, in contrast to the 10 points it initially carried. Another consolidation is evident in respect of Preferential Procurement and Enterprise Development elements. These two elements have been consolidated into a single element called Enterprise and Supplier Development. The effect of this consolidation is that Enterprise and Supplier Developments carries the highest weight in comparison to all other elements. Another general amendment that has taken place concerns the weighting totals. The weighting totals have been changed from 100 to 150.

- **Amendments on Turnover Thresholds**

These amendments are coupled by further amendments in turnover thresholds. For instance, in terms of the old codes, Exempted Micro-Enterprises (EMEs) were defined as enterprises with a turnover of R0 to R5 million rand. On the other hand, Qualifying Small Enterprises (QSEs) were defined as enterprises whose turnover falls between R5 to R35 million. Following the amendments, EMEs are characterises as enterprises with a turnover of R0 to R10 million, whilst QSEs are perceived as enterprises with a R10 to R50 million turnover.

The effect of the amendments is that the turnover range of EMEs and QSEs has been drastically stretched and that QSEs and large enterprises will now be assessed based on the same scorecard. Furthermore, unlike under the old codes where a generic company was one whose minimum turnover was R35 million, under the new codes a generic company is one whose turnover commences from R50 million. All of these amendments have grave implications for BEE compliance. This is evident below.

- **Specific Amendments: New Priority Areas**

The old codes did not categorically point out areas of priority. However, in the new codes areas of priority have been specifically singled out. The adopted amendments put high priority on the following elements – namely;

- ✓ Ownership
- ✓ Skills Development
- ✓ Enterprise and Supplier Development

Each of these three priority areas necessitate that a sub-minimum of 40% of Net Value Points be satisfied by an enterprise, if an enterprise is to avoid having 1 BEE rating level discounted from its BEE Contribution level Score. Furthermore, large enterprises need to comply with all of these priority elements in order to avoid 1 level discounting. However, QSEs need to comply with Ownership and either the Skills Development or the Enterprise and Supplier Development element in order to avoid 1 level discounting.

### ✓ Ownership

Ownership is by far the most complicated element of the Act. In terms of Ownership, compliance points have been accelerated from 20 to 25 and the voting rights of Black people have been afforded additional points. Unlike under the old codes, where shareholding by Family Trusts did not qualify for Black ownership, shareholding by Family Trusts now qualifies for Black ownership. In addition, the new principle is that only South African based and regulated mandated investments qualify for ownership assessment.

On one hand, EMEs who have less than 51% of their ownership in the hands of Black people will – by automatic operation of the law – qualify as level 4 BBBEE contributors. On the other hand, EMEs and QSEs whose ownership in the hands of Black people 51% or more will automatically score a BBBEE rating of level 2 or 1, respectively.

The Ownership element, as an area of high priority, emphasis the need for Employee Share Ownership Programmes, Broad-Based Ownership Schemes, and Co-Operatives. In light of this, the Black New Entrant threshold has shifted from R20 million to R50 million. Over and above this, enterprises who apply the Modified Flow Principle cannot, as a rule, also apply the Exclusion principle. The law, as it currently stands, requires that an enterprise stick to one formula.

### ✓ Skills Development

Skills Development is also a priority element. The focus is on providing training for staff members within an enterprise – in which case an enterprise would receive 8 points, and a further 4 points for skills development programmes provided to black disabled staff members in particular. An enterprise can obtain 5 bonus points for training, and subsequently absorbing into full employment, Black people to whom it has provided training. Training in this case may take the form of learnerships, internships and/or vocational training.

When providing training, enterprises are, in terms of the Regulations of Employment Equity Act and the Commission on Employment Equity Report, demanded to take into account demographic breakdown of the areas in which they operate. For example, if an enterprise operates in the Western Cape – where coloured people form the majority population – the expectation is that the enterprise would train a higher percentage of coloured people compared to people of all other races. The question is whether or not the element of Skills Development would foster racial segregation.

Furthermore, in order for an enterprises' skills development project to be recognised, the rule is that the enterprise providing such a project must not only have been registered, but also, its training must be the relevant SETA requirement. Unlike under the old codes, mandatory sector training – such as health and safety – does no longer qualify as a skills development project. Where a learner, an intern or a trainee, as the case may be, is provided with international training – such international training must meet SAQA requirements.

The training provided, be it uncertified or in-house training, is capped at 15% of total skills spend and the main target has significantly increased from 2% or 3% to 6% of leviabale amount. In any event, legitimate training expenses – such as accommodation, catering and

travel expenses – are also capped at 15% of total skills spend. The main focus of the Skills Development element is on the provision of learnerships, internships and/or training opportunities both for employees and Black people.

✓ Enterprise and Supplier Development

The element of Enterprise and Supplier Development is a priority element which seeks to encourage the spirit of entrepreneurship in South Africa. This element carries a total weight of forty points, which is the highest score when compared to those of all other elements. There is reason to believe that this is the most crucial element in the Act. Under Enterprise and Supplier Development, enterprises get ten points for developing other suppliers and they get an additional five points for developing – in particular – other black suppliers and/or businesses. Furthermore, the amendments have, for this element, introduced new terms. For instance, what was then known as ‘Value-Adding Supplier’ is now known as ‘Empowering Suppliers’.

In terms of the amendments, EMEs and start-ups are categorised as Empowering Suppliers. Preference is placed on buying from, and/or making use of services offered by, Empowering Suppliers. This is evident in the fact that 21 of the 25 points could be obtained by enterprises who do business with Empowering Suppliers. The intention is to support small enterprises.

Thus, an enterprise doing business with a Black owned business can get up to 1.5 points, should such an enterprise make an early payment to a Black owned business. In addition, businesses engaged in three year business contract(s) with any of the following suppliers will obtain an enhanced recognition of 120% of actual spend: Supplier Development beneficiaries; Black-owned EMEs and QSEs and all new suppliers of the measured entity.

• **Specific Amendments: Non-Priority Areas**

✓ Management Control

Management Control is a non-priority area whose weighting has increased from 10 to 15 points. The Management Control element now also entails the element of Employment Equity. As a result of the amendments, it not only necessitates that enterprises take into account the demographic breakdown of racial groups, in terms of Employment Equity Act, when hiring is made – but equally, it demands that ‘designated employers’ should, as a matter of strict law, submit Employment Equity Act returns. The penalty for non-compliance with this requirement is harsh: In that ‘designated employers’ could be fined an amount commencing from R1.5 million.

The new amendments further emphasise the need to have Black people in positions of management. Under the old codes, there were no compliance targets for the category of Black senior, middle and junior management. However, under the new codes, compliance targets are 60%, 75% and 88% – respectively. Thus, enterprises are required to have Black employees in management positions, if they wish to be in compliance with the law.

In assessing compliance with the Management Control element, the new amendments require that current payroll data be used as an assessing mechanism. In any case, it is vital for enterprises to note that having an unskilled and/or an uneducated Black employee in the enterprise would not affect an enterprises' BBBEE rating. Enterprises are thus encouraged to retain skilled and/or educated Black employees – as having such employees may improve an enterprises' BBBEE rating.

✓ Socio-Economic Development

No functional amendments have accrued on the Socio-Economic element. The element remains with a weighting of 5 points. A significant issue of concern under this element is that – unlike under the old codes, where, for example, if an enterprise donates to a Non-Profit Organisation (NPO) then such a donating enterprise would obtain a maximum of 25 points – due to the amendments, an enterprise donating to an NPO will only score a maximum of 5 points. The implications are that NPOs may substantively loose out on donations, as enterprises are not given a lucrative incentive for donating to NPOs.

• **BBBEE Compliance and Verification**

Like large enterprises, QSEs who are less than 51% Black owned need to comply with all 5 elements, subject to discounting. They are further required by the law to undergo a process of BBBEE verification. On the other hand, EMEs who are less than 51% Black owned qualify for an automatic level 4 BBBEE rating.

In direct contrast, EMEs and QSEs who are more than 51% Black owned need not to undergo BBBEE verification. Instead, they may obtain a sworn affidavit confirming both their turnover and their Black ownership. They may then use such an affidavit as proof of their BBBEE status for procurement purposes.

EMEs and QSEs who have 51% or more of their ownership in the hands of Black people automatically qualify, by the mere operation of the law, for a BBBEE level 1 or 2 rating. They need to comply only with Ownership and either the Skills Development or the Enterprise and Supplier Development element.

#### **4. The Benefits of BBBEE Compliance**

There are potentially certain benefits which may be obtained by enterprises who comply with BBBEE requirements. These include, but are not necessarily limited to, the following;

- ✓ Compliant enterprises will be favourably considered for procurements by the Public Sector and all BBBEE verified enterprises,
- ✓ Compliant enterprises would be able to retain their market share.
- ✓ Compliant enterprises will have access to tax incentives and financial grants,
- ✓ Compliant enterprises will no longer need to complete long questionnaires relating to BEE when tendering for a contract. They will just submit their BBBEE Compliance Certificate.

Clearly, BBBEE compliance is a matter of paramount importance in South Africa.

## 5. Contribution Levels

Major changes are also evident in the BBBEE contribution levels. For example, an enterprise which, under the old codes, was a level 4 contributor will, under the new codes be categorised either as a level 6 or level 7 contributor – provided that all other things remain the same.

BBBEE Status	Qualification Points (Old Codes)	Qualification Points (New Codes)	BBBEE Procurement Recognition Level
Level 1 Contributor	≥ 100	≥ 100	135%
Level 2 Contributor	≥ 85 but < 100	≥ 95 but < 100	125%
Level 3 Contributor	≥ 75 but < 85	≥ 90 but < 95	110%
Level 4 Contributor	≥ 65 but < 75	≥ 80 but < 90	100%
Level 5 Contributor	≥ 55 but < 65	≥ 75 but < 80	80%
Level 6 Contributor	≥ 45 but < 55	≥ 70 but < 75	60%
Level 7 Contributor	≥ 40 but < 45	≥ 55 but < 70	50%
Level 8 Contributor	≥ 30 but < 40	≥ 40 but < 55	10%
Non-compliant	< 30 points	< 40 points	0%

*This table illustrates the amendments that have taken place in respect of BBBEE recognition levels.*

## 6. Conclusion

The changes in the BBBEE Codes of Good Practice will have far-reaching implications on the South African economy. On the negative, it seems highly likely that enterprises will feel a huge burden in respect of compliance – as compliance standards are said to have been lifted too high. In addition, the fact that enterprises have only been given a 12 month period to comply with the new amendments may present serious compliance challenges.

However, on the positive side, there is reason to believe that the amendments would not only counter the challenge of BBBEE fronting – which is a criminal offence in terms of the Act. The proposed penalty has been a maximum period of 10 years' imprisonment, and/ or a fine for individual private sector executives found guilty of the misrepresentation of corporate BEE points, or a penalty of 10% of total yearly turnover for companies found guilty of fronting. It is proposed that those who fail to report fronting should also get a penalty of a maximum period of 1 year in prison.

Furthermore, the amendments are believed to be a strategic approach to closing other exploited gaps in the BBBEE law. It seems likely that the South African economy would thus benefit from an improved economic and wealth distribution – subject to the proper application of the law.

Generally, whereas the process of public participation was followed in amending the Act, and whereas it was stressed in such public discussions that too much emphasis should not

be placed on the ownership element – however; the final version of the amended Act continues nonetheless to prioritise the element of ownership.

Over and above this, there can be no doubt that EMEs and QSEs who are mainly white owned will be burdened by the amendments – so long as the tendering and procurement is concerned. For example, small white EMEs and QSEs which substantively complied with most elements under the old codes (with the exception of the ownership elements) and created job opportunities for Black people, are, as a result of the new amendments, now compelled to give up part of their ownership if they wish to be preferred for procurement purposes. It follows that the new ownership element may be a hurdle for such enterprises.

**IBN Business & Immigration Solutions** advises and supports businesses in improving their BBBEE ratings. Please do not hesitate to contact us ([info@ibn.co.za](mailto:info@ibn.co.za)) if you have further questions concerning the BBBEE amendments.

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