

FURTHER TIGHTENING OF BROAD BASED BLACK ECONOMIC EMPOWERMENT RULES PROPOSED BY MINISTER OF TRADE AND INDUSTRY

By Pieter Steyn, Director

LEGAL BRIEF MAY 2018

On 29 March 2018, the Minister of Trade and Industry published draft amendments to the Broad Based Black Economic Empowerment Codes ("**Codes**") for public comment. The proposed amendments are in line with the Government's policy to actively promote and support BBBEE (and especially majority owned black businesses) in South Africa.

The proposed changes include:

- > clarifying the measurement of the minimum requirements for the priority BBBEE elements (namely ownership, skills development and enterprise, and supplier development);
- > providing that the provisions whereby 100% and 51% black owned Exempt Micro Enterprises and Qualifying Small Enterprises are deemed to have a level 1 and level 2 BBBEE rating, respectively; will only apply if the black ownership is measured using the flow through principle using actual black shareholdings. The modified flow through principle whereby a majority black shareholding may be deemed to be 100% black owned may no longer be used for the purpose of these deeming provisions;
- > extending the deeming provisions to large enterprises (businesses with an annual turnover of over R50 million) if they are 51% or 100% black owned in accordance with the flow through principle. Furthermore large/generic enterprises cannot benefit from the deeming provisions if any of the following is utilised or recognised in the calculation of their black ownership:
 - > the modified flow through principle;
 - > the exclusion of ownership by organs of State or public entities;
 - > the exclusion of any BBBEE facilitators;
 - > private equity funds as contemplated in the Codes;
 - > the exclusion of mandated investments;
 - > the sale of assets, equity instruments and other instruments; and
 - > ownership following the sale or exit of black shareholders;
- > clarifying the measurement of unincorporated joint ventures for BBBEE ownership purposes;
- > changing the generic score card (which is used for measuring the BBBEE status of large enterprises) to increase the number of weighting points for management control from 15 to 19;
- > introducing financial targets for entities qualifying for the Youth Employment Service (Y.E.S) Initiative.

The proposed changes are not yet finalised and the sixty day period for public comment expires on 28 May 2018. The implications of the proposed changes on existing BBBEE structures and strategies will have to be carefully reviewed and, if necessary, appropriate changes made. Any change to the BBBEE policy framework (especially changes to the Codes) unfortunately causes uncertainty and makes it difficult for businesses to prepare and implement medium to long term BBBEE strategies. The Department of Trade

and Industry has already received some objections to certain of the proposed amendments. It is hoped that the final version of the amendments both removes uncertainty and promotes the adoption of financially and commercially sustainable medium to long term BBBEE strategies by business

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