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GENERAL NOTICE

Trade and Industry, Department of

General Notice

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GENERAL NOTICE

NOTICE 893 OF 2011

DEPARTMENT OF TRADE AND INDUSTRY

I, **Dr Rob Davies**, Minister of Trade and Industry, hereby:

- (a) Issue for public comment, the BROAD-BASED BLACK ECONOMIC EMPOWERMENT AMENDMENT BILL 2011 (Amendment Bill); and
- (b) Invite interested persons and the public to submit comments on the Amendment Bill within **60 days** from the date of this publication.


Interested parties are requested to forward their comments in writing for attention **Xolisile Zondo** and **Lindiwe Madonsela**, on to the following address (es)

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Dr Rob Davies, MP
Minister of Trade and Industry

7/12/2011

REPUBLIC OF SOUTH AFRICA

BROAD-BASED BLACK ECONOMIC EMPOWERMENT AMENDMENT BILL

(As introduced by the Minister of Trade and Industry (National Assembly))

(The English text is the official text of the Bill)

[B - 2011]

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the **Broad-Based Black Economic Empowerment Act, No. 23 of 2003 (the Act)** in order to promote compliance with the Act by Organs of State and Public Entities and to strengthen the evaluation and monitoring of compliance with the Act; to provide for the regulation of verification agencies by the Independent Regulatory Board of Auditors; to establish the **B-BEE Commission** to deal with compliance of **B-BBEE**; to clarify the interpretation of the Act and to provide for offences and penalties.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Amendment of section 1 of Act 53 of 2003

1. Section 1 of the Broad-Based Black Economic Empowerment Act, 2003 (hereinafter referred to as the Principal Act), is hereby amended –

(a) by the insertion before the definition of “black people” of the following definition:

“**B-BBEE transaction**” means any transaction, practice, scheme or other initiative which affects, or may affect, the **B-BBEE** compliance of any person.”

- (b) by the substitution for the definition of “black people” of the following definition:

“**Black People** [is a generic term which] means Africans, Coloureds, and Indians who are citizens of the Republic of South Africa by birth or descent or who became citizens of the Republic of South Africa by naturalisation -

(a) before 27 April 1994; or

(b) on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date but were precluded from doing so by Apartheid policies;”;

- (c) by the substitution for the definition of “**broad based black economic empowerment**” of the following definition:

“**broad based black economic empowerment**” means the sustainable economic empowerment of all black people, **[including] in particular** women, workers, youth, people with disabilities and people living in rural areas, through diverse but integrated socio-economic strategies that include, but are not limited to:-

(a) increasing the number of black people that manage, own and control enterprises and productive assets;

- (b) facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises;
- (c) human resource and skills development;
- (d) achieving equitable representation in all occupational categories and levels in the workforce;
- (e) preferential procurement, including the promotion of local content procurement; and
- (f) investment in enterprises that are owned or managed by black people;”;

(d) by the insertion of the following definitions before the definition of “Council”

“B-BBEE Verification Professional” means a person registered by the verification agency regulator and/or the South African National Accreditation System to conduct B-BBEE verification;

“Codes” means the codes of good practice issued by the Minister in terms of Section 9 of the Act;

“Commission” means the B-BBEE Commission established in terms of section 15 of the Act;”;

- (e) by the insertion of the following definitions after the definition of “Council”:

“Department” means the Department of Trade and Industry;

“Fronting B-BBEE Practice” means a transaction, arrangement or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of this Act or the implementation of any of the provisions of this Act, including but not limited to practices in connection with a B-BBEE transaction –

- (a) in terms of which black persons who are appointed to an enterprise are discouraged or inhibited from substantially participating in the core activities of that enterprise;
- (b) in terms of which the economic benefits received as a result of the B-BBEE status of an enterprise do not flow to black people in the ratio specified in the relevant legal documentation;
- (c) involving the conclusion of a legal relationship with a black person for the purpose of that enterprise achieving a certain level of B-BBEE compliance without granting that black person the economic benefits that would reasonably be expected to be associated with the status or position held by that black person;
- (d) involving the conclusion of an agreement with another enterprise in order to achieve and enhance B-BBEE status in circumstances in which –
 - (i) there are significant limitations on the identity of suppliers, service providers, clients or customers;

(ii) the maintenance of business operations in a context reasonably considered to be improbable having regard to resources;

(iii) the terms and conditions were not negotiated at arms length on a fair and reasonable basis;

“knowing”, “knowingly” or “knows”, when used with respect to a person, and in relation to a particular matter, means that the person either—

(a) had actual knowledge of that matter; or

(b) was in a position in which the person reasonably ought to have—

(i) had actual knowledge;

(ii) investigated the matter to an extent that would have provided the person with actual knowledge; or

(iii) taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter;

“Local Content” means locally produced goods, services or works or locally manufactured goods which satisfy a stipulated minimum threshold for local production and content”;

- (f) by the insertion of the following definition before the definition of “strategy”:

“ “Sector Charters” means sectoral transformation charters referred to in section 9 of the Act;”

- (g) by the insertion of the following definition after the definition of “this Act”:

““Verification Professional Regulator” means the Independent Regulatory Board of Auditors, a statutory body established in terms of section 3 of the Auditing Profession Act, 2005 (Act No 26 of 2005).”

Amendment of section 2 of Act 53 of 2003

2. Section 2 of the Principal Act is hereby amended: -

- (a) by the substitution for paragraph (g) of the following paragraph:

“(g) promoting access to finance for black [economic empowerment] start-ups, micro and medium enterprises and black entrepreneurs, including in the informal black business sector”.

- (b) by the insertion of the following paragraph after paragraph (g):

“(h) increasing effective black owned and managed enterprises, including SMMEs, and their access to financial and non-financial support”.

Substitution of Section 8 of Act 53 of 2003

3. The following section is hereby substituted for section 8 of the principal Act:-

“8 Remuneration and reimbursement of expenses

Council members may **[will not]** be remunerated for their services in accordance with the provisions of the National Treasury Regulations and, **[but]** will be reimbursed for expenses incurred by them in carrying out their duties, as determined by the Minister, with the concurrence of the Minister of Finance.”

Amendment of Section 9 of Act 53 of 2003

4. Section 9 of the Principal Act is hereby amended-

- (a) by the substitution for subsection (1) of the following subsection:

“(1) In order to promote the purposes of the Act, the Minister may by notice in the *Gazette* issue Codes of Good Practice on black economic empowerment that may include:-

(a) the further interpretation and definition of broad-based black economic empowerment and the interpretation and definition of different categories of black empowerment entities;

(b) qualification criteria for preferential purposes for procurement and other economic activities;

- (c) indicators to measure broad-based black economic empowerment;
 - (d) the weighting to be attached to broad-based black economic empowerment indicators referred to in paragraph (c);
 - (e) guidelines for stakeholders in the relevant sectors of the economy to draw up transformation charters and sector codes of practice for their sector; **[and]**
 - (f) indicators to measure local content; and
 - (g) any other matter necessary to achieve the objectives of this Act.”
- (b) by the insertion after sub-section (5) of the following subsection:-

“(6) A code of good practice remains in effect until amended, substituted or repealed in terms of this Act.”

Amendment of Section 10 of Act 53 of 2003

5. The following section is hereby substituted for section 10 of the principal Act: –

“10 Status of Codes of Good Practice

- (1) Every organ of state and public entity must take into account **[as far as is reasonably possible]** and apply any relevant code of good practice issued in terms of this Act in –
- (a) determining qualification criteria for the issuing of licences, concessions or authorisations in respect of economic activity in terms of any law;
 - (b) developing and implementing a preferential procurement policy;
 - (c) determining qualification criteria for the sale of state-owned enterprises; **[and]**
 - (d) developing criteria for entering into partnerships with the private sector; and
 - (e) determining criteria for the awarding of incentives, grants, and investment schemes in support of broad-based black economic empowerment.

- (2) Subject to section 12A, an enterprise in a sector in respect of which the Minister has issued a sector code in terms of section 9 may only be measured for compliance with the requirements of broad based-black economic empowerment in accordance with that code.
- (3) Enterprises operating in a sector in respect of which the Minister has issued a sector code in terms of section 9, must report annually on their compliance with B-BBEE to the Sector Council.”

Amendment of Section 11 of Act 53 of 2003

6. Section 11 of the Principal Act is hereby amended by the substitution for subsection (2) of the following subsection:–

- “(2) A strategy in terms of this section must –
- (a) provide for an integrated, co-ordinated and uniform approach to black economic empowerment by all organs of state, public entities, the private sector, non-governmental organisations, local communities and other stakeholders;
 - (b) develop a plan for financing broad-based black economic empowerment, including the creation of incentive schemes to support effective black owned and managed enterprises;
 - (c) provide a system for organs of state, public entities and other enterprise to prepare broad-based black economic

empowerment plans and to report on compliance with those plans; and

- (d) be consistent with this Act.”

Insertion of section 12A in Act 53 of 2003

7. The following section is hereby inserted in the principal Act after section 12:–

“12A Transformation policy

- (1) If requested to do so, the Minister may permit organs of state or public entities to determine their own transformation policies, if the Minister is satisfied that this will advance the objectives of B-BBEE and the strategic imperatives in the South African economy.
- (2) An organ of state or a public entity must apply any transformation policy made in terms of this section as if it were a Code.
- (3) In the event of any conflict between a Code issued in terms of section 9 and a transformation policy made in terms of this section, the transformation policy prevails.”

Repeal of sections 14 and 15 of Act 53 of 2003

8. Sections 14 and 15 of the principal Act are hereby repealed.

Insertion of sections 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25 in Act 53 of 2003

9. The following sections are hereby inserted in the principal Act after section 13:–

“14 Cancellation of Contract or authorisation

Any contract or authorisation awarded on account of false information furnished by or on behalf of an enterprise in respect of its B-BBEE status may be cancelled at the sole discretion of the organ of state or public entity without prejudice to any other remedies that the organ of state or public entity may have.

15 Establishment and status of B-BBEE Commission

- (1) The B-BBEE Commission is hereby established as a juristic person to function as an organ of state within the public administration, but as an institution outside the public service.
- (2) The Commission is headed by a Commissioner appointed by the Minister.
- (3) The Commission -
- (a) has jurisdiction throughout the Republic;
 - (b) is independent, and subject only to –

- (i) the Constitution and the law; and
 - (ii) any policy statement, directive or request issued to it by the Minister in terms of this Act;
 - (c) must be impartial and perform its functions without fear, favour, or prejudice; and
 - (d) must exercise the functions assigned to it in terms of this Act or any other law, or by the Minister, in-
 - (i) the most cost-effective and efficient manner; and
 - (ii) in accordance with the values and principles mentioned in section 195 of the Constitution.
- (4) Each organ of state must assist the Commission to maintain its independence and impartiality, and to exercise its authority and perform its functions effectively.

16 Appointment of Commissioner

- (1) The Minister must appoint a person with suitable qualifications and experience to be the Commissioner for a term of five years.
- (2) The Minister may re-appoint a person as Commissioner at the expiry of that person's office.
- (3) The Commissioner, who is the Chief Executive Officer of the Commission, is responsible for the general administration of the Commission and for carrying out any functions assigned to it in terms of this Act, and must –

- (a) perform the functions that are conferred on the Commissioner by or in terms of this Act;
 - (b) manage and direct the activities of the Commission; and
 - (c) supervise the Commission's staff.
- (4) The Minister must, in consultation with the Minister of Finance, determine the Commissioner's remuneration, allowances, benefits, and other terms and conditions of employment.
- (5) The Commissioner, on one month's written notice addressed to the Minister, may resign as Commissioner.
- (6) The Minister may remove the Commissioner from office for –
- (a) serious misconduct or permanent incapacity;
 - (b) engaging in any activity that may undermine the integrity of the Commission;
 - (c) any other ground that justifies the removal of the Commissioner.

17 Functions of B-BBEE Commission:

- (1) The functions of the Commission are –
- (a) to oversee, supervise and promote adherence with this Act in the interest of the public;

- (b) to strengthen and foster collaboration between the public and private sector in order to promote and safeguard the objectives of B-BBEE;
 - (c) to receive and investigate complaints relating to B-BBEE in accordance with the provisions of this Act;
 - (d) to promote advocacy, access to opportunities, and educational programmes and initiatives of B-BBEE;
 - (e) to maintain a registry of major B-BBEE transactions, above a threshold determined by the Minister from time to time;
 - (f) to receive and analyse reports as prescribed concerning B-BBEE compliance from organs of state, public entities and private sector enterprises;
 - (g) to promote good governance and accountability by creating an effective and efficient environment for the promotion and implementation of B-BBEE; and
 - (h) subject to this Act, to exercise such other powers as may be conferred on the Commission in writing by the Minister.
- (2) 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 but not limited to a special investigating unit established under the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), to perform any of its duties and functions under this Act.

18 Investigation by Commission

- (1) Subject to the provisions of this Act, the Commission has the power, on its own initiative or on receipt of a complaint in the prescribed form, to investigate any B-BBEE transaction which exceeds a value determined from time to time by the Minister.

- (2) The Commission may not investigate any matter that constitutes an administrative action, as defined in the Promotion of Administrative Justice Act, 2000 (Act No 3 of 2000) or may be reviewed on any ground permissible in law.

- (3) 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 inquiry.

- (4) For the purposes of conducting an investigation, the Commission may exercise the powers conferred upon the Companies and Intellectual Property Commission by sections 176 to 179 of the Companies Act, 2008 (Act No 71 of 2008) read with the changes required by the context.

- (5) Without limiting the jurisdiction of the Commission, the Commission may make a finding as to whether any B-BBEE transaction involves fronting practices.

- (6) The Commission may institute proceedings in a court to restrain the commission of any breach of this Act, including any fronting B-BBEE practice, or to obtain appropriate remedial relief.
- (7) If the Commission is of the view that any matter it has investigated may involve the commission of a criminal offence, it must refer the matter to the National Prosecuting Authority or an appropriate division of the South African Police Services.
- (8) The Commission may refer to –
- (a) the South African Revenue Service, any concerns regarding behaviour or conduct that may be prohibited or regulated in terms of legislation within the jurisdiction of that Service;
 - (b) the Independent Regulatory Board for Auditors, any concerns regarding behaviour or conduct by a B-BBEE Verification Professional; or
 - (c) any other regulatory authority, any concerns regarding behaviour or conduct that may be prohibited or regulated in terms of legislation within the jurisdiction of that regulatory authority.

19 Finances

- (1) The Commission is financed from –
 - (a) money that is appropriated by Parliament for the Commission;
 - (b) money received from any other source.

- (2) The Commissioner is the accounting authority of the Commission for purposes of the Public Finance Management Act, 1999 (Act No 1 of 1999).

- (3) The Auditor General must audit the B-BBEE Commission's financial records each year.

20 Offences and Penalties

- (1) A person is guilty of an offence if that person knowingly -
 - (a) misrepresents or attempts to misrepresent the B-BBEE status of an enterprise;

 - (b) provides false information or misrepresents information to the Verification Personnel in order to secure a particular B-BBEE status or any benefit associated with the compliance with this Act;

- (c) provides false information or misrepresents information relevant to assessing the B-BBEE status of an enterprise, to any organ of state or public entity.
- (2) 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 in terms of sub-section (1) and fails to report it to an appropriate law enforcement agency, is guilty of an offence.
- (3) Any person convicted of an offence in terms of this Act, is liable:-
- (a) in case of a contravention of sub-section (1), to a fine or to imprisonment for a period not exceeding 10 years or to both a fine and imprisonment; or
 - (b) in any other case to a fine or to imprisonment for a period not exceeding 12 months or to both a fine and imprisonment;
 - (c) in the case of an enterprise, to a fine of 10% of that enterprise's annual turnover.
- (4) In addition, any person and/or entity convicted of an offence under subsections (1) or (3) of section 20, shall be banned from contracting or transacting any business with any organ of state and/or public entity, and shall be entered into the National Treasury register of tender defaulters.

21 Monitoring, Evaluation, and Reporting

- (1) All spheres of government, public entities, and organs of state must report on their compliance with B-BBEE in their audited annual financial statements and annual reports under the Public Finance Management Act, 1999 (Act No. 1 of 1999).

- (2) All public companies listed on the Johannesburg Stock Exchange must provide to the Commission –
 - (a) the report on their compliance with B-BBEE that is contained in their sustainability reports;

 - (b) any other prescribed information.

- (3) All Sectoral Education and Training Authorities must report on skills development spending and programmes to the Commission.

22 B-BBEE Verification Professional Regulator

The B-BBEE verification professional shall be regulated by the B-BBEE verification agency regulator established in the Audit Profession Act, 2005 (Act No. 26 of 2005) as amended from time to time.

23 Interpretation of this Act

- (1) If any conflict relating to the matters dealt with in this Act arises between this Act and the provisions of any other law save the Constitution and/or any Act expressly amending this Act, the provisions of this Act will prevail.
- (2) Any person who is measuring B-BBEE compliance in terms of this Act must do so in a manner in which substance takes precedence over legal form.

24 Regulations

- (1) The Minister may make regulations, guidelines and practice notes with regard to any matter that is required by this Act or that it is necessary to prescribe in order to ensure proper implementation of this Act
- (2) Without limitation to sub-section (1), the Minister may make regulations in respect of –
 - (a) the conduct of investigations by the Commission;
 - (b) the information that any organ of state, public entity or private enterprise is required to provide to the Commission and the form and period of such reporting.

25 Short title and commencement

This Act is called the Broad-Based Black Economic Empowerment Act, 2003, and comes into operation on a date to be determined by the President by proclamation in the *Gazette*.”

Short title and commencement

10. This Act is called the Broad-Based Black Economic Empowerment Amendment Act, 2011 and comes into operation on the date fixed by the President by proclamation in the *Gazette*.

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