LEGISLATION AND STRATEGY

Revised B-BBEE Codes

This edition is dedicated to explanation and commentary on these Codes as promulgated on 11 October 2013. Material is presented as follows:

Introduction
- This part covers the broad structure of new Codes plus the revised scorecard and recognition table. The benchmarks have been increased.

External Empowerment
- This section covers ownership and socio-economic development. Ownership is a priority element; failure to achieve a 40% target of net value will result in a demotion in recognition level.

Human Resource Empowerment
- The elements covered are Management Control (level of Black participation at various levels) and Skills Development. The latter is a priority element and carries significantly increased targets.

Supply Chain Empowerment
- The most important element which aims to expand the country’s operational and manufacturing capacity via small business support. There are three parts to this element, namely B-BBEE Procurement, Enterprise Development and Supplier Development. This too is a priority element.

Monitoring and Implementation
- Reference here is made to principles. The section concludes with general comments. The realisation of economic inclusivity hinges on Government and Business working collaboratively.
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Introduction
This edition of Beaumont’s Express is devoted to the new B-BBEE Codes which were promulgated on 11 October 2013. See Government Gazette No 36928 of 11 October 2013. Reference is also made to the B-BBEE Act which is to be amended shortly. Initial frameworks of the new Codes and selected commentary appear in this introduction which is then followed up by more detailed discussion under the headings found in Diagram 1. The article concludes with general points, including monitoring and implementation. Major points of interest are tagged with an Alert legend.

The 7 elements of the old generic scorecard have been collapsed into 5 elements and these, in turn, can be grouped under 3 broad headings, as reflected in Diagram 1. These headings are the Editor’s creation.

### New Scorecard Structure

<table>
<thead>
<tr>
<th><strong>External Empowerment</strong></th>
<th><strong>Human Capital Empowerment</strong></th>
<th><strong>Supply Chain Empowerment</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Ownership</td>
<td>Management Control &amp; Employment Equity</td>
<td>Procurement</td>
</tr>
<tr>
<td>SED</td>
<td>Skills Development</td>
<td>Enterprise Development</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Supplier Development</td>
</tr>
<tr>
<td><strong>30 points</strong></td>
<td><strong>35 points</strong></td>
<td><strong>40 points</strong></td>
</tr>
</tbody>
</table>

Diagram 1
The available points on the scorecard are now 105 excluding any potential bonus points. The configuration of the scorecard has changed significantly. The total points available under each element have changed, except for SED. Management control and employment equity have been merged into 1 element with a reduction in the number of points available. Skills development now attracts 25 points, up from the 15 previously. The most pronounced change is found in the supply chain element where the aim is to incubate the development of enterprises to the point where they enter the supplier chain of the measured entity and, thereby, become a source of procurement. This element attracts 40 points.

Some of the other key features of the new scorecard are:

- increase in the turnover thresholds for emerging micro enterprises ("EMEs") and qualifying small enterprises ("QSEs"): These are now, respectively, R10m and R50m per annum;
- QSEs and large enterprises are required to comply with all elements on the scorecard;
- the recognition levels for Black-owned EMEs and QSEs are enhanced;
- various targets for Black people are subject to sub-targets in line with the demographic distribution of race and gender groups according to the economically active population ("EAP") statistics used for employment equity;
- attainment of a minimum score is compulsory on 3 parts of the scorecard. These are styled as priority elements and indicated as such in the text below. Failure to do so will result in an effective demotion in level of B-BBEE recognition; and
- the recognition points (level 4, etc) have been adjusted upwards which will result in an automatic demotion on the scorecard, compared with the current situation.

Changes to the umbrella statute include the establishment of a Commission for BEE, provision for annual reports on B-BBEE (to this Commission) and the classification of fronting as a criminal offence. More details in this regard are found in the section below dealing with monitoring and implementation.

Revised Codes have been published on the 11 October 2013 and will become fully operational in 12 months’ time, namely from 12 October 2014. In other words, verification ratings in the 12 months to 11 October 2014 can be measured, at the election of the entity, on either the old or new Codes. Sector Codes must be aligned with the new generic Codes. The timing of this may vary from sector to sector. For example, the Financial
Services Sector has a built-in review mechanism for 2015; therefore, the alignment with the generic Codes in that sector is likely to take place sometime in 2015.

**Revised Scorecard**
The revised scorecard with the 5 elements can be found in Diagram 2. The adjusted recognition levels can be found in Diagram 3.

<table>
<thead>
<tr>
<th>Element</th>
<th>Code</th>
<th>Revised Weighting</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ownership</td>
<td>100</td>
<td>25</td>
</tr>
<tr>
<td>Management Control</td>
<td>200</td>
<td>15</td>
</tr>
<tr>
<td>Skills Development</td>
<td>300</td>
<td>20</td>
</tr>
<tr>
<td>Enterprise and Supplier Development</td>
<td>400</td>
<td>40</td>
</tr>
<tr>
<td>Socio-Economic Development</td>
<td>500</td>
<td>5</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>105</strong></td>
</tr>
</tbody>
</table>

Diagram 2

The scorecard reveals the change in priorities and target areas, compared with the original measurements. For example, socio-economic development remains at 5 points out of 105, compared with the original 100. In this sense, the importance of the element has decreased. Two significant changes lie in the material increase in the value of skills development and, generally, in respect of the supplier chain development.
Revised B-BBEE Recognition Levels

<table>
<thead>
<tr>
<th>Contributor Level</th>
<th>Current Points</th>
<th>New Points</th>
<th>Recognition Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>100+</td>
<td>100+</td>
<td>135%</td>
</tr>
<tr>
<td>2</td>
<td>85 -99</td>
<td>95 – 99</td>
<td>125%</td>
</tr>
<tr>
<td>3</td>
<td>75 – 84</td>
<td>90 – 94</td>
<td>110%</td>
</tr>
<tr>
<td>4</td>
<td>65 – 74</td>
<td>80 – 89</td>
<td>100%</td>
</tr>
<tr>
<td>5</td>
<td>55 – 64</td>
<td>75 – 79</td>
<td>80%</td>
</tr>
<tr>
<td>6</td>
<td>45 – 54</td>
<td>70 – 74</td>
<td>60%</td>
</tr>
<tr>
<td>7</td>
<td>40 – 44</td>
<td>55 – 69</td>
<td>50%</td>
</tr>
<tr>
<td>8</td>
<td>30 - 39</td>
<td>40 – 54</td>
<td>10%</td>
</tr>
<tr>
<td>Non-compliant</td>
<td>&lt;30</td>
<td>&lt;40</td>
<td>0%</td>
</tr>
</tbody>
</table>

Diagram 3

The points required for recognition at each of the levels have materially changed. A Level 4 contributor under the old Codes could drop to as much as Level 7 and could possibly become non-compliant if certain minimum achievements are not reached in 3 priority elements.

At present, procurement conditions of government departments and State-owned enterprises require suppliers to have a Level 3 or 4 contributor status. These conditions will, presumably, be revised. There is talk that the ratings on price and B-BBEE status under the PFA will be adjusted with greater emphasis to be placed on B-BBEE status.

The margin between incentive and disincentive can be narrow. This was evident, for example, in the equity equivalent ownership option for multi-nationals under the previous Codes. Rigidity, expense and bureaucracy effectively closed this door. Has the DTI got the right balance with the new recognition levels? Will these act as incentives for enterprises to devote increased resources to empowerment or will companies or other organisations look to do the minimum?

This article aims to provide readers with an understanding and working knowledge of the new Codes. This can be supplemented
through reference to the full Codes, especially on complex matters and for clarity on interpretation.

External Empowerment

Ownership – A priority element

Under this heading, we have combined ownership and SED. The ownership element measures effective ownership of entities by Black people. The SED element measures the extent to which entities contribute to initiatives that promote access to the economy by Black people.

The ownership element seeks to move from narrow to broad-based ownership programmes. Included here are employee share ownership programmes and community trusts. Earlier indications that scope of recognition of SED programmes would be narrowed has not occurred.

Besides a reconfiguration of the points and aspects of the ownership scorecard, the most impact lies with the net value or level of debt-free transactions regarding ownership deals.

The required level of debt-free ownership increases over a ten-year term which runs from the initial conclusion of the ownership transaction and not the promulgation of the new Codes.

In total, 8 of the 25 points available for ownership are allocated to the net value portion. At least 40% of the annual target must be achieved. If this is not the case, the recognition level of an enterprise will be deemed to have dropped by one level.

Wealth creation and the accumulation of capital are fundamentals to the ownership element. Investments, however, are not risk-free. Where share prices rise, the margin of net value will likely increase. If share prices fail to appreciate, there will potentially be an increasing deficit on the net value calculation. The net value criterion does not take into account commercial developments such rights issue which an investor may finance by way of debt.

The ownership and net value scorecards can be found in Diagrams 4 and 5 below.
## Ownership Scorecard

<table>
<thead>
<tr>
<th>Description</th>
<th>Points</th>
<th>Target</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exercisable Voting Rights of Black people</td>
<td>4</td>
<td>25%+ 1 Vote</td>
</tr>
<tr>
<td>Exercisable Voting Rights of Black women</td>
<td>2</td>
<td>10%</td>
</tr>
<tr>
<td>Economic Interest to which Black people are entitled</td>
<td>4</td>
<td>25%</td>
</tr>
<tr>
<td>Economic Interest to which Black women are entitled</td>
<td>2</td>
<td>10%</td>
</tr>
<tr>
<td>Economic Interest of the following Designated Groups, ESOPs, BBOS, Co-ops</td>
<td>3</td>
<td>3%</td>
</tr>
<tr>
<td>Designated Groups, ESOPs, BBOS, Co-ops</td>
<td>2</td>
<td>2%</td>
</tr>
<tr>
<td>New Entrants</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Net Value or realisation</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>25</td>
<td></td>
</tr>
</tbody>
</table>

Diagram 4

## Ownership Net Value Sub-Minimum

<table>
<thead>
<tr>
<th>Year</th>
<th>Net Value Target</th>
<th>40% Sub-Minimum</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>2.5%</td>
<td>1.0%</td>
</tr>
<tr>
<td>2 – 3</td>
<td>5.0%</td>
<td>2.0%</td>
</tr>
<tr>
<td>4 – 5</td>
<td>10.0%</td>
<td>4.0%</td>
</tr>
<tr>
<td>5 – 6</td>
<td>15.0%</td>
<td>6.0%</td>
</tr>
<tr>
<td>7 – 8</td>
<td>20.0%</td>
<td>8.0%</td>
</tr>
<tr>
<td>9 - 10</td>
<td>25.0%</td>
<td>10.0%</td>
</tr>
</tbody>
</table>

Diagram 5
New entrants, now, are included in the main portion of the ownership scorecard rather than by way of bonus points. The status of a new entrant is further defined at the R50m mark which is assessed at the time of the transaction.

Ownership points are one of the priority scorecard elements. It is understood that the equity equivalent scorecard for multi-nationals will be revised but no details in this regard appear with the latest changes. Past experience makes it difficult to predict but there will be rapid approval of equity equivalent schemes over the next year, which if correct will negatively impact on the recognition levels of many multinationals.

The net value requirements are likely to mitigate against broad-based ownership schemes which are the very antithesis of the stated objective. Broad based schemes typically are made-up of small investors who will depend on debt financing with ownership transactions.

An entity can retain portion of ownership points after the sale of shares by Black participants, subject to certain conditions and a maximum of 40% of the score. These include that the participant held shares for at least 3 years, net value target was achieved (see diagram 5) and transformation progress per the scorecard has taken place during the tenure of the investment.

Socio-Economic Development
The target spend on socio-economic development remains at 1% of NPAT. The weighting points, likewise, are kept at 5 points. These points, as a percentage of the total scorecard, have been reduced.

The full value of contributions is recognised where at least 75% of the beneficiaries of SED are Black persons.

The SED element measures the extent to which entities contribute to initiatives that promote access to the economy by Black people. Contributions can be made directly or through projects approved by an organ of state or sector.

The direct programmes commonly take the following form:

- development of women, youth etc;
- support for healthcare and HIV/AIDS programmes;
- educational programmes and support, including bursaries and scholarships;
- community training; and
- support for arts, culture and sporting development.

Earlier indications that the scope of SED was to be significantly narrowed have NOT materialised.
Human Resource Empowerment

This element combines the elements of Management Control and Employment Equity compared with the old scorecard. This merged element is now referred to as Management Control and measures effective control of entities by Black people and their participation in all management levels. The available points, in the process, have however been reduced from 25 – 15.

This element is divided into 4 portions which are reflected in the following diagram. This categorisation is the Editor’s creation.

<table>
<thead>
<tr>
<th>Management Control</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Board Structure &amp; Voting Rights</strong></td>
</tr>
<tr>
<td>6 points</td>
</tr>
</tbody>
</table>

Diagram 6

The total points available exceed the scorecard allocation. In the light of the EAP formula (see below) it is confusing that the scorecard separately measures Black women participation as this is already covered in the EAP formula. As is, women are counted twice.

Each of the layers sets targets for male and female Black participation, except for disabled Black persons where there is no gender split. The adjusted recognition for gender (“ARG”) formula has been removed.

Furthermore, the make-up of employees from senior to junior management is also to be in line with demographics found in the economically active population (“EAP”) statistics as used for employment equity purposes.

The EAP formula reads:

\[ A = \left( \frac{AM}{C} + \frac{CM}{C} + \frac{IM}{C} + \frac{AF}{C} + \frac{CF}{C} + \frac{IF}{C} \right) \frac{6}{6} \]

In this formula, A is the percentage of Black employees in each occupational level, AM refers to African males and AF African females and so on. C is the compliance target according to the latest EAP figures.
The EAP formula presupposes that organisations have sufficient positions at all levels to accommodate the gender and race configurations found in the EAP statistics. Enterprises that do not have this complete range of demographics will not be able to score the full points on offer, even if the actual population is fully representative of Black people. The bonus point in the old scorecard for exceeding the EAP target has fallen away.

The targets for each of the sub-parts under management control are found in the following 3 diagrams.

**Management Control (Board) Scorecard**

<table>
<thead>
<tr>
<th>Description</th>
<th>Target</th>
<th>Points</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exercisable voting rights of Black board members</td>
<td>50%</td>
<td>2</td>
</tr>
<tr>
<td>Exercisable voting rights of Black female board members</td>
<td>25%</td>
<td>1</td>
</tr>
<tr>
<td>Black executive directors</td>
<td>50%</td>
<td>2</td>
</tr>
<tr>
<td>Black female Executive directors</td>
<td>25%</td>
<td>1</td>
</tr>
</tbody>
</table>

**Diagram 7**

The targets in Diagram 7 are calculated as a percentage of the total population of Board Members and Executive Directors respectively. The reference to voting rights is linked to shareholding rights. The bonus point for an independent non-executive director has fallen away.

**Management Control (EXCO) Scorecard**

<table>
<thead>
<tr>
<th>Description</th>
<th>Target</th>
<th>Points</th>
</tr>
</thead>
<tbody>
<tr>
<td>Other Black executive management (as % of executive directors)</td>
<td>60%</td>
<td>2</td>
</tr>
<tr>
<td>Other Black female executive management (as % of executive directors)</td>
<td>30%</td>
<td>1</td>
</tr>
<tr>
<td>Black employees in Senior Management</td>
<td>60%</td>
<td>2</td>
</tr>
<tr>
<td>Black female employees in Senior Management</td>
<td>30%</td>
<td>1</td>
</tr>
</tbody>
</table>

**Diagram 8**
The target percentages are calculated with reference to the total number of employees in each of the categories. The term “Top Executive” has been replaced with Other Executive Management in diagram 8; this term is not found in the Employment Equity Act. Other Executive Management refers to executives who do not serve on the board such as HR executive, transformation executive and other such roles. The double counting under the previous Codes for Board and Exco, therefore, falls away.

The structure for professional and junior management is found in the following diagram.

Management Control (Professional/Junior Management) Scorecard

<table>
<thead>
<tr>
<th>Description</th>
<th>Target</th>
<th>Points</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black Professional employees, experienced specialists and mid-management</td>
<td>75%</td>
<td>2</td>
</tr>
<tr>
<td>Black female Professional employees, experienced specialists and mid-management</td>
<td>38%</td>
<td>1</td>
</tr>
<tr>
<td>Black junior management employees</td>
<td>88%</td>
<td>1</td>
</tr>
<tr>
<td>Black female junior management employees</td>
<td>44%</td>
<td>1</td>
</tr>
<tr>
<td>Black disabled employees</td>
<td>2%</td>
<td>2</td>
</tr>
</tbody>
</table>

Diagram 9

Each of the targets is calculated as a percentage of all such employees in each of these sub-categories.

Current payroll data is to be used to calculate the score under this element.

Organisations that have a flat structure are able to condense the available points accordingly. For example, where the Other Executive Management and Senior Management are merged, then the points available under the 2 sub-sets are combined as 6 points allocated with 4 points to Black males and 2 to Black females.

It is not clear how the EAP formula will work in these circumstances as it does not apply at Other Executive Management but does at the Senior Management level.
The concept of an “empowering supplier” is described in Schedule 1 (interpretation/definitions) and used in the Enterprise and Supplier Development element (see commentary below). Suffice to say now that an “empowering supplier” is a “good citizen South African entity” – actual wording – the criteria for which are four-fold, one of which is that “50% of jobs created are for Black people provided that the number of Black employees since the immediate prior verified B-BBEE Measurement is maintained”.

The reference to jobs here is not confined to the levels covered in the management control element; the reference to jobs created must mean new jobs and the maintenance of the number of Black employees is intended to encourage “Black for Black” recruitment when a vacancy arises i.e. to maintain the diversity status quo. The maintenance of numbers will however not be satisfied should an entity have retrenched Black persons over the past year.

Skills Development – A priority element

The second part of the human capital portion relates to skills development and measures initiatives to develop the competencies of Black employees and Black people internally and externally.

There are 20 points available, plus 5 bonus points. A minimum of 40% achievement must be reached in each part to this element. This requirement presumably excludes the bonus points for absorption.

Key features are:

- an increased target spend of 6% of payroll;
- training of Black persons is to be spread over the different race sub-groups according to the EAP breakdown;
- development is open to both employees and non-employees;
- encouragement to place Black employees and unemployed Black persons in learnerships, apprenticeships and internships;
- the 6% training target includes external training expenditure for unemployed Black people.

The skills development element must be read in conjunction with the learning programme matrix (“LPM”).
The requirement that training target spend on Black people is to be divided or spread amongst the different race sub groups according to the EAP in any particular year presupposes that training needs of employees arise simultaneously and that a training complement will be made up according to the EAP breakdown. This is not reality.

The targets and points for skills development can be found in Diagram 10 below. A distinction is made here between Black employees and Black people; the latter refers to employees and non-employees. Only the sub-element in respect of disabled persons is restricted to employees.

### Skills Development

<table>
<thead>
<tr>
<th>Description</th>
<th>Points</th>
<th>Target</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expenditure on learning programmes for Black people*</td>
<td>8</td>
<td>6%</td>
</tr>
<tr>
<td>Expenditure on learning programmes for Black employees with disabilities</td>
<td>4</td>
<td>0.3%</td>
</tr>
<tr>
<td>Number of Black people* in learnerships, apprenticeships and internships</td>
<td>4</td>
<td>2.5%</td>
</tr>
<tr>
<td>Number of unemployed Black people* in training specified in the LPM including learnerships etc.</td>
<td>4</td>
<td>2.5%</td>
</tr>
<tr>
<td>Bonus: Number of Black people* absorbed after learnership programmes.</td>
<td>5</td>
<td>100%</td>
</tr>
</tbody>
</table>

* Not restricted to employees

Diagram 10

Line 1 of Diagram 10 spells out the target spend for skills development, namely 6% of payroll as described in the Skills Development Act. This compliance target includes external training expenditure for unemployed Black people. The target for Black people participating in learnerships, etc is a percentage of total employees. It is not necessary that Unemployed Black persons who benefit from training must be employed by the measured entity as the training can be performed by a third party.

The expenditure references in the scorecard are on skills development in accordance with the learning programme matrix (“LPM”).
Full details of the LPM can be found in Annex 300 (A) in code 300. The revised matrix covers much of the same ground found in the previous codes, namely bursaries, internships, learnerships, learnerships or apprenticeships and work-integrated learning. All 5 of these elements involve formal training, assessment and some form of accreditation.

In-house training (F and G categories) is retained and can be claimed up to 15% of the target spend. International training can be recognised, provided that this meets with the SAQA requirements for recognition. Wording is important here – meets with SAQA requirements as opposed to registered with SAQA. Even so, the practical application of this provision may be problematic.

Skills development points can only be claimed if various preconditions have been met, namely a workplace skills plan, annual training report (“ATR”) and pivotal reports. Further, SETA priority skills training must form part of these internal training programmes. Pivotal training covers professional, vocational, technical and academic. It is anticipated that SETAs will, in the near future, call on enterprises to report on pivotal training.

Any legitimate expenses incurred for any Learning Programmes can be claimed, including accommodation etc (up to 15% of total value of spend), remuneration paid to leaners (categories B, C and D of the LPM) and scholarships and bursaries subject to conditions. See paragraph 6 of Code 300 for full details.

The available bonus points for the absorption of graduates from learnership programmes can be claimed where the persons find employment in the industry as well as with measured employer. The aim is that programme graduates obtain formal employment. A trainee tracking tool must be developed for this purpose. Absorption rate below 100% can be claimed pro rata.

Absorption is defined as the “successful securing of permanent or long-term contract employment for the learner OR to assist the Learner’s proceed with further education and training” – actual wording.

The definition of absorption is complex and perhaps far removed from the realities of the labour market. The aim surely is for learners to continue work experience and not only the form of engagement. For example does the definition exclude or include employment with a labour broker? How applicable are the amendments to the labour broker provisions in the LRA? Tracking of progress, therefore, will be important.
The 40% sub-minimum requirement applies to all items on the SD element scorecard, excluding absorption. If this threshold is not achieved, the enterprise will be penalised.

Reference is made, under employment equity, to “empowering supplier” criteria. Further provision in this regard applies to skills development in broad terms. At least 12 days per annum are to be provided for skills transfer to suppliers by assisting beneficiaries to increase their operational, technical or financial capacity. The cost of this intervention will fall under enterprise or supplier development.

**Supply Chain Empowerment - A priority element**

This category refers to the new and expanded element which comprises three parts, viz (a) enterprise and (b) supplier development as well as (c) preferential procurement.

The revised weighting here is 40 points, which talks to the priority attention to be given to the development of small business. The element measures:

- the purchase of goods and services from “Empowering Suppliers” with strong B-BBEE credentials; and
- initiatives directed to assist and accelerate the growth and sustainability of Black enterprises.

The term “Empowering Suppliers” goes beyond B-BBEE recognition levels and is in broad terms a good corporate citizen. Further details on this concept are found below.

This major change in the scorecard recognizes the difference between wealth creation and wealth distribution and, at the same time, that meaningful job creation happens with small and medium businesses, rather than in large established organisations.

The target spend is 3% of net profit after tax. Two percentum of the target spend must go to supplier development and the remaining 1% to enterprise development. In the absence of a minimum of 40% compliance of the target the measured entity will drop one recognition level.

This element is divided into three parts, namely:

- procurement spend from empowering suppliers, EMEs and QSEs;
- contribution to supplier development as a percentage of NPAT; and
- contribution to enterprise development as a percentage of NPAT.

The reconfiguring of this element is directed to favour local manufacturing concerns above, for example, an agent which only acts as a conduit for imports.
Revised weighting levels for recognition will reduce the contributor status of all suppliers.

These general suppliers must, furthermore, satisfy a number of provisions to classify as an “empowering supplier”.

**How do enterprises become an “empowering supplier”?**

There are 4 criteria which are used to obtain this status in addition to the other scorecard provisions. An “empowering supplier” is . . . a good citizen South African entity which complies with all regulatory requirements of the country. Large enterprises must comply with at least 3 thereof. QSEs must comply with at least 1 criterion.

These full criteria are:

- **25% of cost of sales must be spent in RSA:** Expenses here exclude labour costs and depreciation. Labour costs can be countered where enterprises operate in service industries subject to a limit of 15%;
- **at least 50% of new jobs created are for Black people.** The number of Black employees in the first of year measurement has to be maintained;
- **level of local beneficiation** – at 25% of output is to include local manufacturing, production and/or assembly and/or packaging; and
- **skills transfer** – at 12 days per annum must be spent to assist Black EMEs and QSEs to increase their operational, technical or financial capacity.

**NOTE:** EMEs and start-ups are automatically recognised as empowering suppliers.

The criteria for an “empowering supplier” raise questions over business rationale, interpretation, administration and proof. Words used here are not defined and there is no elaboration on the manner in which the criteria are to be measured or the consequences for non-compliance. Do the provisions mean that a supplier who is recognised as a B-BBEE contributor in all other respects but is not an “empowering supplier” is no longer compliant? How does an entity demonstrate that it complies with “all regulatory requirements”? Multinationals and importers of unique products and services may find it difficult to comply with the local production criteria, especially when read with the import exclusion provision mentioned below. The criterion relating to number of Black employees has been covered above with Management Control and is similarly problematic.

The procurement scorecard is found in Diagram 11 below and the enterprise and supplier development scorecard in Diagram 12.
ESD (Procurement) Scorecard

<table>
<thead>
<tr>
<th>Description</th>
<th>Points</th>
<th>Target</th>
</tr>
</thead>
<tbody>
<tr>
<td>B-BBEE procurement spend from all empowering suppliers</td>
<td>8</td>
<td>80%</td>
</tr>
<tr>
<td>B-BBEE procurement spend from empowering suppliers who are QSEs</td>
<td>4</td>
<td>15%</td>
</tr>
<tr>
<td>B-BBEE procurement spend from empowering suppliers who are EMEs</td>
<td>4</td>
<td>15%</td>
</tr>
<tr>
<td>B-BBEE Procurement spend from 51% Black-owned suppliers</td>
<td>9</td>
<td>40%</td>
</tr>
<tr>
<td>B-BBEE Procurement spend from 30% Black women-owned suppliers</td>
<td>4</td>
<td>12%</td>
</tr>
<tr>
<td>Bonus points: B-BBEE procurement spend from Designated Group Suppliers*, ≥ 51% Black owned</td>
<td>2</td>
<td>2%</td>
</tr>
</tbody>
</table>

Diagram 11

* Black Designated Groups cover the very marginalised such as rural persons, youth, disabled persons and military veterans. See Schedule 1 of the Code.

The targets for preferential procurement have been increased.

Note that the over-riding criterion to be “empowering suppliers” does not apply Black women-owned suppliers.

The procurement target spend from Black-owned business at 40% is a substantial jump from the previous 12%. Enterprises even found this latter figure to be difficult to obtain.

Provision is made to multiply the value of spend or contributions made under this element where the supplier or beneficiary becomes integrated into the supply chain through multiyear contracts (at least three years), graduation from enterprise development into a supplier as well and first time contracts. See paragraph 3.5 of code 400 for details.

The import exclusion principle has been retained. Various stipulations apply to this exclusion which mirror the previous code.
An additional stipulation is that the measured entity (importer) must have ED and SD plans “for imported goods and services”. This targets import substitution which is unlikely to make commercial sense where the imports are unique or require critical mass. This provision must be read in conjunction the “empowering supplier” comments above.

This exclusion may not apply to designated sectors as determined by the Minister of Trade and Industry. Such sectors are determined under the PFMA and currently include clothing, textiles, leatherwork and footwear; bus bodies; electric pylons; canned food and a percentage of make-up of rolling stock. See paragraph 4.3 of code 400.

The concept of a value-adding supplier has been done away with.

**ESD (Enterprise and Supplier Development) Scorecard**

<table>
<thead>
<tr>
<th>Description</th>
<th>Points</th>
<th>Target</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annual Supplier Development contributions</td>
<td>10</td>
<td>2% of NPAT</td>
</tr>
<tr>
<td>Annual Enterprise Development contributions</td>
<td>5</td>
<td>1% of NPAT</td>
</tr>
<tr>
<td>Bonus points</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bonus point - Graduation from ED from SD</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Bonus point - Jobs created by ED and SD from above contributions</td>
<td>1</td>
<td></td>
</tr>
</tbody>
</table>

The value of contributions for SD and ED are calculated as a percentage of the target. These contributions are recognisable on an annual basis and can span multiple years. See paragraphs 4.10 and 4.11 of Code 400. The bonus points are over and above the total of 105 points.

The sub-minimum requirement of 40% applies to the scorecards in diagrams 11 and 12, excluding the bonus points under SD and ED, failing which the recognition level will be discounted.

Supplier and enterprise development beneficiaries are limited to QSEs and EMEs which are respectively 50% Black-owned and 50% Black women-owned. Note that the percentage ownership in Black hands here is 50%; elsewhere the holding for Black women is set at 30%.
Measured entities are encouraged (note the wording) to conclude formal plans for development of both ED and SD. These arrangements are to cover:

- clear objectives (based on a needs analysis);
- priority intervention;
- key performance indicators (such as job creation, customer mix, product spread, etc); and
- an implementation plan with milestones.

The target spend on ED and SD support can come in “cash or kind”. The existing formula or mix is retained with modifications and some variations. Double counting with SD and ED is not permitted. See paragraph 4.13 of code 400. An outline or key features can be found below. For full details refer to paragraphs 9 and 10 of code 400 as well as Annex 400(B).

Overhead costs incurred here can be claimed up to 70% of spend.

The benefit factor for loans, etc has been reduced to 70%.

The recognition for early bird payments is retained but limited to 15% of 10 points.

The human capital contributions, ie where an enterprise makes staff available to assist suppliers or enterprises, are now limited to 60% of cost.

Monitoring and Implementation

Key principles are explained in Statement 000 which can be found in the front of the revised Codes. Substance is to prevail over form, adoption of any reasonable interpretation which is consistent with the objectives of the B-BBEE Act, consequences for misrepresentation of B-BBEE status and corporate restructuring to break up a measured entity to take advantage of special status, eg start-up or QSE will be an offence.

Entities must keep suitable evidence or documentation to support its B-BBEE compliance.

An annual affidavit will suffice as proof of the turnover level of an EME or QSE, as well as the extent of Black ownership in a QSE or EME.

A start-up operation will be measured as an EME for the first year following formation and deemed to have a Level 4 contributor status.

Entities will, in due course, be expected to file an annual B-BBEE report. This could be similar to the EEA2 report under the Employment Equity Act. No details are currently available.

SANAS will fall out of the picture as the body charged with accrediting verification agencies.
The verification process for EMEs and Black controlled EMEs and QSEs has been simplified.

Concluding Comments

The shift in emphasis from wealth distribution to wealth creation is welcomed. The preference for broad-based ownership schemes, skills development and capacitating small businesses are a reflection of this move.

The design of the Codes speaks to the realisation and inherent opportunity in public/private partnerships to address economic and labour market deficits. Government will, for example, need to ensure that SETAs perform effectively and efficiently in regard to skills development.

Annual reports of the Commission for Employment Equity over recent years show a decline in size of large and small employees as measured by number of employees.

The average number of employees engaged by small employers under the EEA is 50. The full application of the Codes for these small employers, even if they qualify as QSEs, will increase the costs of doing business. Many of these businesses will struggle to meet the priority requirements of the new Codes with concomitant discounts in recognition.

It is questionable whether Sector Codes will survive given the intention of the DTI to ensure alignment between Sector Codes and the generic model.

The notion of an “empowering supplier” has not been properly thought through and needs clarification and/or deletion.

Transformation in tight economic conditions is a tough call. Economic inclusivity, and especially job creation, will be realised with annual economic growth of 5%. The restraints on economic growth are numerous but many lie in the hands of Government. It, too, must play its part and be prepared to make the tough decisions needed, such as with education and labour relations. Without this, the new Codes will not realise the stated objectives.
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