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ENGAGEMENT SESSION WITH THE PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY

24 FEBRUARY 2016

TIME: 09:00

PARLIAMENT, CAPE TOWN

the dti is in the process of finalizing the establishment of the B-BBEE Commission, an entity established in terms of section 13B of the B-BBEE Act 53 of 2003, as amended. As part of this process, we are engaging critical stakeholders on the mandate of the B-BBEE Commission, with the aim of obtaining the views and expectations of these stakeholders on the work ahead. The Minister will announce the date on which the B-BBEE Commission will open its doors.

ENGAGEMENT SESSION OUTLINE

Purpose

The purpose is to engage the Members of the Committee and solicit input in respect of the mandate of the B-BBEE Commission

Background

- 2013 marked the 10 years since the promulgation of the B-BBEE Act 53 of 2003
- The 2003 was framework legislation, with no institutional mechanism to oversee implementation
- No powers were provided to deal with non-compliance with the B-BBEE Act
- Lack of alignment of B-BBEE Act with other pieces of legislation
- B-BBEE Amendment Act 46 of 2013 promulgated to give effect to the changes
- Amendments came into effect on 24 October 2014
- Revised Codes came into effect on 1 May 2015
- Regulations drafted and to be published for public consultation soon

Material Amendments

Aligning the Act and the Codes

- Companies below R10m can provide an affidavit – **reduced compliance cost**
- Previously gazette **sector codes** to be aligned by 31 October 2015
- Minister gave industry until 15 November 2015 to submit revised codes
- Tourism, Marketing and Communication, AgriBEE, Forestry, Property, Transport, Financial, Information and Communication Technology sector charters have been submitted
- Construction and Chartered Accountancy sector charters have since been repealed.

Providing key definitions

- Various definitions such as **fronting practice**, B-BBEE initiative and black people clarified
- Fronting practice is a transaction, arrangement or conduct that directly or **indirectly undermines or frustrates** the achievement of the objectives of B-BBEE Act or the implementation of any provision of the B-BBEE Act
- Includes where a person is **discouraged or inhibited** from *substantially participating* in the activities of the enterprise, **economic benefits** not flowing to the said empowered person, using a black person to enter **into a legal relationship** to attain a level of B-BBEE status

Introducing the trumping provision to align with other pieces of legislation

- Trumping provision (section 3(b)) became effective on 24 October 2015
- B-BBEE Act will prevail in instances of conflict with any other law on a matter that B-BBEE Act deals with

Creating the B-BBEE Commission

- Section 13B empowers the establishment of the entity
- Section 13C empowers appointment of the Commissioner by the Minister
- Section 13F outlines functions of the B-BBEE Commission

Specifying requirements for Monitoring, Evaluation and Reporting

- Process for sector codes clarified, including reporting to sector councils (s9)
- Organs of state and public entities reporting in Annual Reports (13G)
- Listed entities and SETAs reporting to the B-BBEE Commission (13G)

Introducing prohibitions, offences and penalties

- 13N normal offences about confidential information and obstructing the administration of B-BBEE Act
- 13O prohibits fronting, misrepresentation of status, providing false information to verification agents, verification agent failing to report the contravention
- Penalties – natural person can be a fine or up to 10 years imprisonment – up to 10% annual turnover for juristic person – Magistrate Courts have jurisdiction
- *Cancellation* of contract or award in terms of s13A on account of providing false information
- *Exclusion* from doing business with the state (s13P) for up to 10 years – could be limited to the directors, members or shareholders – registered on tender defaulters register of National Treasury

Streamlining the verification process and the profession

- Accreditation, reporting, qualification standards for the profession, verification professional regulator

Clarifying the Minister's Powers in respect of Codes and Regulations

- S9 – power to issue guidelines, approve sector codes, repeal sector codes
- S10 – clarifies status of codes (generic and sector codes)
- S14 – power regarding regulations, guidelines, practice notes

Transparent process for organs of state and public entities to set higher criteria

- S9 (6) – permits organs of state and public entities to *exceed* the qualification criteria for procurement and other economic activities
- S10 (2)(a)-(b) – allows for *exemption* from complying with the codes or *deviation* from the codes – on *objectively verifiable* facts or circumstances
- *Equity Equivalent* Investment Program can be pursued by multi-nationals
 - Hewlett Packard (R93m) Skills Development
 - Microsoft SA – (R36.2m) Enterprise Development
 - Turner & Townsend (R19.5m) Skills Development and Enterprise Development
 - Lieberr (R18.2m) Skills Development
 - Hansen Transmission SA (R34.2m) Skills Development
 - IBM SA (R700m) Skills Development, Enterprise Development, Research & Development
 - DELL SA (R121m) Skills Development and Enterprise Development

Revised Elements of the Scorecard

Element	Weighting	Compliance Target
Ownership	25 points	25%+1 vote
Management Control	19 points	50%-88%
Skills Development	20 points	6% of payroll
Enterprise and Supplier Development	40 points	PP = 80% SD = 2% (NPAT) ED = 1% (NPAT)
Socio-economic Development	5 points	1% (NPAT)
	109 POINTS	

Functions of the Commission

Section 13F outlines the functions of the Commission as follows:

- Oversee, supervise and promote *adherence with the Act* in the *public interest*
- Strengthen *collaboration between public and private sector* to promote and safeguard the objectives of the Act
- Receive *complaints* on B-BBEE in terms of this Act
- Proactive and reactive *investigations* any B-BBEE matter
- Promote *advocacy, access to opportunities* and *educational programmes* and initiatives on B-BBEE
- Maintain a *register* of major B-BBEE transactions above the threshold published by the Minister
- Receive and analyse *prescribed reports* on compliance from organs of state, public entities and private sector enterprises
- Promote *good corporate governance* and *accountability* by creating an *effective and efficient environment* for promotion and implementation of B-BBEE
- Exercise any such powers as may be *directed by the Minister*, which are not in conflict with the Act

Emerging Trends and Issues

These are the trends based on reports and engagements that will need focus:

- Complex acquisition and B-BBEE deal structures
- Disputes between shareholders
- Economic benefit and dilution of value
- Abuse of B-BBEE Schemes
- Misrepresentation of B-BBEE credentials
- Declining number of black people in management and decision making
- Lock-in provisions resulting in delayed economic benefits
- Barriers to empowerment such as access to finance
- Expensive legal dispute resolution mechanism
- Corporate governance failures

Areas of Immediate Attention

The following are the areas identified for immediate attention:

- Alternative Dispute Resolution Mechanism
- Advisory services on B-BBEE Transactions
- Education and awareness campaigns on the B-BBEE Act
- Campaigns for awareness on B-BBEE Act
- Partnerships and Collaborations to advance B-BBEE Act
- Consistent application of the B-BBEE Act across sectors
- Systematics investigations and remedy

End