



**REPABOLIKI YA AFERIKA BORWA**

**REPUBLIEK VAN SUID AFRIKA**

# **BROAD-BASED BLACK ECONOMIC EMPOWERMENT ACT**

## **Section 9(5): Codes of Good Practice**

It is hereby notified that the Minister of Trade and Industry hereby issues the following draft Code of Good Practice for public comments under section 9(3) of the Broad-Based Black Economic Empowerment Act 53 of 2003. Interested persons are invited to furnish the Minister with comments on this proposed code within 60 days of the date of publication.

**CODE 100: MEASUREMENT OF THE OWNERSHIP ELEMENT OF BROAD-BASED BLACK ECONOMIC EMPOWERMENT**

**STATEMENT 102: THE RECOGNITION OF OWNERSHIP CONTRIBUTIONS ARISING FROM INVESTMENTS BY BEE TARGETED WAREHOUSING FUNDS**

Issued under section 9(5) of the Broad-Based Black Economic Empowerment Act 53 of 2003 for public comment. Interested persons are invited to furnish the minister with comments on this proposed code within 60 days of the date of publication.

<b>Para Subject</b>	<b>Page</b>
1 Definitions.....	1
2 Interpretation of this Statement.....	2
3 Application of this Statement.....	2
4 Objectives of this Statement .....	3
5 Key Measurement Principles .....	3
6 Composition of a Warehousing Fund.....	3
7 Measurement of Exercisable Voting Rights held by a Warehousing Fund.....	5
8 Measurement of Economic Interest held by a Warehousing Fund.....	5

**1 DEFINITIONS**

In this statement, unless the context indicates otherwise, a word or expression to which a meaning has been assigned in the Act bears the same meaning, and:

- 1.1 **"BEE"** means broad-based black economic empowerment;
- 1.2 **"black designated groups"** has the meaning defined in Statement 100;
- 1.3 **"black people"** has the meaning defined in Code 000 Statement 000;
- 1.4 **"Broad-Based Ownership Scheme"** has the meaning defined in Statement 100;
- 1.5 **"Economic Interest"** has the meaning defined in Statement 100;
- 1.6 **"Element"** has meaning defined in Code 000 Statement 000;
- 1.7 **"Enterprise"** has the meaning defined in Statement 100;

- 1.8 **"Equity Interest"** has the meaning defined in Statement 100;
- 1.9 **"Exercisable Voting Right"** has the meaning defined in Statement 100;
- 1.10 **"Intended Black Participants"** means the black Participants to whom the Warehousing Fund intends transferring an Equity Interest held by it at the end of the warehousing period and with whom the Warehousing Fund and the Enterprise in which such Equity Interest is held have concluded a tripartite agreement regulating the terms of the warehousing arrangement and the price ultimately payable by the Intended Black Participants for such Equity Interest;
- 1.11 **"Net Equity Interest"** has the meaning defined in Statement 100;
- 1.12 **"Ownership Fulfilment"** has the meaning defined in Statement 100;
- 1.13 **"Ownership Scorecard"** has the meaning defined in Statement 100;
- 1.14 **"Participant"** has the meaning defined in Statement 100;
- 1.15 **"Realisation Points"** has the meaning defined in Statement 100;
- 1.16 **"Statement 100"** means Code 100 Statement 100;
- 1.17 **"the Act"** means the Broad-Based Black Economic Empowerment Act of 2003, as amended or substituted;
- 1.18 **"the Codes"** means all Codes of Good Practice issued in terms of section 9 of the Act;
- 1.19 **"the Generic Scorecard"** means the balanced BEE scorecard included in Code 000 Statement 000;
- 1.20 **"Warehousing Fund"** means a fund meeting the requirements in paragraph 6 below; and
- 1.21 **"Weighting"** bears the same meaning as assigned in Code 000, Statement 000.

## **2 INTERPRETATION OF THIS STATEMENT**

This statement is to be interpreted in a manner that is consistent with the objectives of the Act, and those set out in paragraph 4.

## **3 APPLICATION OF THIS STATEMENT**

This statement is to be used in the measurement of contributions towards the ownership Element of broad-based black economic empowerment in respect of Warehousing Funds.

## **4 OBJECTIVES OF THIS STATEMENT**

The objectives of this statement are to:

- 4.1 specify the key measurement principles associated with ownership by and contributions to Warehousing Funds;
- 4.2 specify the requirements for recognition of Warehousing Funds;
- 4.3 specify the manner of measurement of Exercisable Voting Rights to which Warehousing Funds are entitled;
- 4.4 specify the manner of measurement of Economic Interest to which Warehousing Funds are entitled; and
- 4.5 specify the manner of measurement of Net Equity Interest in the context of ownership of Equity Interest by Warehousing Funds.

## **5 KEY MEASUREMENT PRINCIPLES**

An Enterprise may be awarded points in its Ownership Scorecard for the notional participation of black people in the Economic Interest and/or Exercisable Voting Rights of that Enterprise, arising from the ownership of an Equity Interest in that Enterprise by a Warehousing Fund.

## **6 COMPOSITION OF A WAREHOUSING FUND**

- 6.1 A Warehousing Fund is a fund:
  - 6.1.1 established by an Enterprise or by an organ of state or public entity for the specific purpose of holding an Equity Interest in another Enterprise purchased from exiting black Participants for a fixed duration with the obligation to ultimately transferring that Equity Interest into the ownership of the Intended Black Participants; and
  - 6.1.2 approved by the minister by notice in gazette.
- 6.2 In addition to the requirements of paragraph 6.1, any Warehousing Fund must conform to the following requirements:
  - 6.2.1 the constitutional documents of the fund must be so constituted as to ensure that the Warehousing Fund's objectives are aligned in all material respects to the Codes;
  - 6.2.2 the governance structures of the Warehousing Fund should be substantially aligned to those governing the National Empowerment Fund as set out in that funds enabling Act, being the National Empowerment Fund Act of 1998; and

- 6.2.3 the maximum duration of the holding of an Equity Interest by the Warehousing Fund must not exceed 3 years.
- 6.3 In addition to the requirements of paragraphs 6.1 and 6.2, the remaining capital invested in any Warehousing Fund, after settling any indebtedness to contributors, must, upon winding up or termination of the fund, be transferred to a Broad-Based Ownership Scheme(s) such that:
- 6.3.1 100% of the value of such contributions and Contribution Growth are distributed to or applied to the benefit of black people;
- 6.3.2 at least 40% of the value of such contributions and Contribution Growth are distributed to or applied to the benefit of black women; and
- 6.3.3 at least 10% of the value of such contributions and Contribution Growth are distributed to or applied to the benefit of black designated group,
- provided that such Broad-Based Ownership Scheme shall not be a connected person of the administrators of the Warehousing Fund or any of its contributors. For the purposes of this paragraph, the term "connected person" shall have the meaning assigned in the Income Tax Act of 1962.
- 6.4 In granting his/her approval, the minister shall be entitled to specify such parameters relating to such approval as may relate to such matters as:
- 6.4.1 the maximum rate of return on a recoverable contribution made to a Warehousing Fund by a contributor; and
- 6.4.2 the terms relating to the mechanisms for disposal of any investment by the Warehousing Fund in the event of the failure the tripartite agreement referred to in clause 1.10.
- 6.5 The minister may revoke an approval as referred to in paragraph 6.1.2 at any time on good cause shown, whereupon all recognition under this statement shall no longer apply.
- 6.6 Organs of state, public entities and Enterprises can qualify for recognition of enterprise development contributions to black economic empowerment under Code 600 Statement 600 through the making of recoverable and non-recoverable contributions to the funding of a Warehousing Fund.

## **7 MEASUREMENT OF EXERCISABLE VOTING RIGHTS HELD BY A WAREHOUSING FUND**

- 7.1 Provided that a Warehousing Fund meets all of the applicable requirements set forth in paragraph 6, an Enterprise in which it owns an Equity Interest will be entitled to claim points on its Ownership Scorecard for Exercisable Voting Rights, equivalent in number to those held by the Warehousing Fund, held by notional black Participants such that:
- 7.1.1 100% of those notional black Participants are black people;
  - 7.1.2 40% of those notional black Participants are black women; and
  - 7.1.3 10% of those notional black Participants are members of black designated groups.
- 7.2 Notwithstanding the provisions of paragraph 7.1, no such Exercisable Voting Rights shall be recognisable unless the Warehousing Fund, the Enterprise in which the Warehousing Fund holds an Equity Interest, and the Intended Black Participants, have concluded a tripartite agreement in terms of which those Exercisable Voting Rights are irrevocably transferred to those Intended Black Participants for the duration of the warehousing period.

## **8 MEASUREMENT OF ECONOMIC INTEREST HELD BY A WAREHOUSING FUND**

- 8.1 Provided that a Warehousing Fund meets all of the applicable requirements set forth in paragraph 6, an Enterprise in which it owns an Equity Interest will be entitled to claim points on its Ownership Scorecard for Economic Interest held by notional black Participants.
- 8.2 The calculation of the Economic Interest held by such notional black Participants shall be measured on the basis that the percentage of Economic Interest received by the Warehousing Fund, that is applied by that Warehousing Fund to reducing the cost to the Intended Black Participants of acquiring the Equity Interest from the Warehousing Fund at the end of the warehousing period, multiplied by the percentage of Economic Interest to which the Warehousing Fund is entitled, shall be deemed to Economic Interest in the Enterprise to which notional black Participants are entitled such that:
- 8.2.1 100% of those notional black Participants are black people;
  - 8.2.2 40% of those notional black Participants are black women; and
  - 8.2.3 10% of those notional black Participants are members of black designated groups.

8.3 The calculation of Net Equity Interest for such notional black Participants shall be based upon the result of the calculation in paragraph 8.2.