

Gazette Guzzle

Quick Synopsis of the Rules for BEE Discretionary Collective Enterprises

Swipe or Scroll?

Latest Government BEE Practise Notes expressly recognises Discretionary Collective Enterprises as valid “Special Purpose Vehicles” (SPV’s) for BEE purposes. WOW, this broadens the range of BEE Ownership options enormously, whether you opt for a direct ownership solution, or an indirect ownership structure (non-intrusive), your choices are much broader and much easier.

Let’s call a “spade a spade”; your biggest concern in considering BEE Ownership, is the potential threat that someone else will tell you how to run your business. Your main concern is not necessary to participate in the concept of BEE ownership, as a principle, it is all about costs and management control.

Should any of these be relevant to your organisation, it would be wise to continue reading.....

BEE Shareholding does NOT mean you need to release control.

So what is different you may ask? This is where the concept of “Collective Enterprises” makes BEE ownership much easier, and much more flexible, and much more shareholder friendly, by applying collective enterprise concepts.

In essence, collective enterprises include well known concepts such as Employee Share Ownership Schemes (ESOP’s), Broad-Based Black Ownership Schemes (BBOS’s), Not-For-Profit Companies (NPC’s), Co-Operatives, Trusts, and Trade Unions, to name a few.

The important factor is, via your selected entity, such as a trust, benefits may be paid in “cash” or “in kind”, to a clearly defined range of black people (called a defined group of natural people), that could change year on year.

Example: a group such as “Bursary Students”, is now acceptable as part of your ownership structures. However, the fact is still; it must still be “paid”, and the new guidelines should not be seen as a means to circumvent the BEE Codes. If this is your thinking, you are on the wrong track, start over.

Purpose - Transparency & Clarity

The recently published Practice Note serves as an explanatory memorandum regarding the rules for Discretionary Collective Enterprises in terms of the B-BBEE Act. The primary aim here, is to provide clarity on how to structure your black ownership scheme to meet BEE criteria, under the B-BBEE Codes of Good Practice.

Outcome - Align the Misalignment

As a direct result of the complexity of potential ownerships structures, and the clever use (and abuse) of ownership structures allowed under the Companies Act, it has to great confusion on what is allowed under the Ownership criteria of the BEE Act and BEE Codes. Various ownership criteria, such as A Positive Oversight for a Class Definition of Black Beneficiaries, must form part of your BEE verification pack.

So what the heck does that mean? It simply means that you need to be able to provide clear evidence on who are your beneficiaries of the legal entity you have chosen to use for BEE Ownership purposes, such as an NPO, Trust, BBOS, etc. Simply put: Who will get the money and who did get the money / benefits?



Expansion of Black Ownership Encouraged

The Minister of Trade and Industry affirms that the expansive and purposeful participation of black citizens in the South African economy by means of business ownership, should be exasperated by on-point and fast-tracked implementation of B-BBEE legislation.

In this matter, an ideal B-BBEE ownership transaction has three distinguishing features:

Empowerment of Black People, Black Women, Black Designated Groups, Black Participants in an ESOP, BBOS, Employee Trust, Ordinary Trust, NPO and/or Co-operatives.

Empowerment and inclusivity of Entrepreneurs and Investors, SMMEs and Suppliers, Employees, Communities, and other Marginalised Groups.

The Practice Note states that if an individual at one point in time was selected to partake in a distribution of the scheme, that it not necessarily entitles that individual to partake in future distributions. You may keep it flexible.

Your BEE Ownership Scheme must meet the true spirit and objectives of the BEE Codes – real and sustainable empowerment, as outlined in Paragraph 2 of the Broad-Based Black Economic Empowerment Act 53 of 2003.

Granted, the improbability of accommodating all of the above group classifications in a singular transaction remains a valid obstacle to empowerment and will be unlikely to achieve.

The Minister recognizes this challenge, but unequivocally calls for broader participation of black participants in Collective Enterprises

(and sub-categories) and active, passive, and operational participation of black SMME's Investors and entrepreneurs.

Validation of BBOS, ESOP, and various types of Trusts

The Practice Note recognises that when structuring a BBOS, ESOP, or trust, a defined class of black beneficiaries is now fully compliant with ownership provisions as called for by the Codes. This entails that the particulars of individual beneficiaries do not have to be named or identified separately, and upfront, but must be available on request. *In essence, it means that you may refer to an Educational Fund as your main beneficiary, but when benefits are being paid, you need to be able to provide factual detail on your beneficiaries once benefits were paid.*

According to the Minister's statement, meaningful broad-based ownership by black individuals, communities, and employees are most appropriately served when identified by a natural defined class instead of documenting participants with vested rights separately.

A critical concept: Defined Class of Natural People

Inherent in the new guidelines lies the concept of "Defined Class of Natural People", and in laymen's terms, it means you need to 'be able to identify the group of beneficiaries. Typical examples will be: African Disabled People, Bursary Students at Universities, Independent and Contractor Based Truck Drivers as registered vendors at your business, and Black Homeless Children.

Fiduciary Matters Explained

A pungent point of misinterpretation falls within the realm discretionary issues posed onto the fiduciaries of a scheme in one of two ways:

To identify individuals from the defined class of beneficiaries who would benefit most from distributions of the scheme. Example: Truck drivers in a Logistics company.



To calculate the proportion of entitlement bestowed onto a beneficiary, once he/she has been chosen from the "defined class of natural person" category. Example: Equal distribution of benefits between all approved beneficiaries

As a point of further clarification, the Practice Notes confirm that in the situation of fiduciaries without a discretion to distribute less than a set percentage to beneficiaries, the "no discretion" requirement will be deemed as achieved.

Furthermore, the formula that calculates the proportion of claim values of a defined class of persons or the entitlement (rights) of individuals selected from the defined class in question, now complies with the regulation that applicable fiduciaries "may have no discretion" on the terms of the ruling scheme. Only relevant however, if these fiduciaries are not awarded a discretion to deviate from the formula . It simply means that your typical Trust Deed, or Constitution, must allow limited discretion to fudiciaries.

Distribution Options

The nature of distributions by Collective Enterprises and its sub-category entities may be affected "in cash" or "in kind." For instance, it makes provision for benefits such as granting of bursaries, providing accommodation, covering of transport costs, on behalf of the defined class of natural person beneficiaries, as opposed to providing monetary distributions (cash).

Take into consideration, that these distribution strategies should not detract from the overall Economic Interest Points that may be claimed via these schemes .

Measurement of Voting Rights

Voting rights at constitutional and beneficiary levels within Collective

Enterprises and its sub-category entities, have participants rarely casting their voting rights at scheme meetings. This is due to their rights being represented by those fiduciaries nominated to vote on their behalf.

Hence, the Minister confirms the scheme participants' voting rights are attributed to the race and gender of such participants, regardless of the fiduciary exercising the physical vote on the participant's behalf. Voting may be executed through the constitution or by a competent person's report .

Reporting Requirements

Regarding reporting modus operandi of a company, it may very well be that a discretionary Collective Enterprise (including its sub-category entities) and other juristic vehicles in the affected chain of ownership are unable to report on the black participants.

More likely in the scenario of number, location, age data collection, mainly due to non-distinguishing between categories, or lack of verification required by the Codes which complicates the reporting process.

In such circumstances, the requirement for the measured entity is to report on only black people participation figures, and not on the other categories.

However, take note that reporting should be done in line with any additional information that the Collective Enterprise can produce, for example, provinces, demographic breakdown, or economic status regardless of proof of validity.

In these cases, unverified data may not be included in the Ownership Scorecard.



Need Assistance?

BEE Analyst offers competent solutions and advice regarding BEE related ownership schemes by:

- Evaluating your current scheme and ensure compliance to the new Practise Notes.
- Set guidelines to rectify any matters of non-compliance
- Determine the feasibility, and sustainability of BBOS and ESOP options for your company
- Facilitate all consultation processes before and during the implementation of a BBOS and/or ESOP entity as your preferred option.
- Handle, manage and perform all legal related aspects to set-up and register your BEE Ownership Scheme

We offer customized solutions geared for small, medium, and large South African companies.

Contact:

Gerhard at +27 12 997 0037

eMail: gerhard@beeanalyst.co.za

Visit:

www.beeanalyst.co.za

