

Ms Muriel Mushariwa
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Dear Ms Mushariwa

CLARIFICATION ON THE LEGITIMACY OF SHARE OPTIONS

1. We refer to our meeting of 20 November 2020 and your undated letter submitted to the B-BBEE Commission on 25 November 2020.
2. Please note that this letter is specifically issued to clarify share options and is not necessarily a practice guide to be shared with the public as the legitimacy of each share option transaction should be measured against the Ownership element in order to determine compliance with the B-BBEE Act.
3. According to paragraph 3.13 of the B-BBEE Act, exercisable voting rights and economic interest will be recognised where a participant holds an instrument granting the holder the right to acquire an equity instrument or part thereof at a future date, if exercisable voting rights attached to that instrument are irrevocably transferred to the holder for the option period and are exercisable by the holder before acquiring the equity instrument and the net value of the instrument must be determined by using a standard valuation method for calculating the net value.

4. These provisions were put in place to allow black shareholders to participate in the economic mainstream by affording black people the opportunity to acquire shares in a company while accumulating funds to repay those shares through dividends declared over the years, considering the duration of the share option.
5. We are also aware that companies might be opting for such a transaction in order to acquire automatic B-BBEE Level 2 or 1 status, however, in most cases we find that the transactions fail to meet the Ownership test when measured against voting rights, economic interest and net value realisation including additional rules in Annexes (A)-(D).
6. While we note that option and share warrants are permissible under the B-BBEE Act, entities wishing to opt for such should be cognisant of the rules set out in the B-BBEE Act regarding recognition of B-BBEE ownership and failure to do so would result in misrepresentation of B-BBEE Status and fronting.
7. Where an entity wishes to enter into a share options transaction through a Trust, such as Employee Share Ownership Programme (ESOP) or Broad-Based Economic Schemes (BBOS), such Trust, ESOP or BBOS should meet all the requirements of the ownership scorecard as well as rules set out in Annex 100 of Statement 100 in order to comply with the B-BBEE Act.
8. NGO's and PBO's do not have ownership and such cannot contribute towards the black ownership of an entity as they are regarded as specialised entities and determined their measurement under Statement 004, however, when such organisations wish to enter into a B-BBEE transaction and contribute black ownership, such organisations should house either an ESOP or a BBOS in order to be recognised for black ownership, whereby the Trust will still be measured against the requirements of Trusts.
9. It is important to also note that where the share option is in a form of a Trust, the indirect shareholders should be afforded similar rights as those that would have been afforded to the direct shareholders as ultimately the entity acquires black shareholding from the indirect shareholders even if they are beneficiaries of a Trust, ESOP or BBOS.

10. The beneficiaries should be able to exercise their voting rights through Trustees who receive the mandate from the beneficiaries on how they should be represented and should also be able to receive economic interest proportionate to their shareholding.
11. Further, with the share option arrangement, the holder of the option where such option seeks to transfer either 51% or 52% of the entity to black people, must be in a position wherein they exercise factual control and thus, the grantor, cannot maintain full ownership and control of the entity as that will demonstrate that the share option is only utilises to facilitate B-BBEE points recognition as opposed to true empowerment of black people. Thus a share option arrangement will not be recognised where, there is no indication that black people as majority shareholders have factual control such as appointing majority of the Directors, receive economic interest for the option period, as well as net value realisation.
12. Thus, where a measured entity in an effort to comply with the B-BBEE ownership requirements, will establish share option structure not aligned to the requirements of the B-BBEE Act, such must be reported to the B-BBEE Commission.
13. Having said the above, we strongly advise that where an entity wishes to enter into a share option transaction, such should be in line with the B-BBEE Act and aim to accomplish the objectives of the B-BBEE Act by affording black people the opportunity to meaningfully participate in the company.
14. Should you wish to have clarity on this, please do not hesitate to contact us on +27 (12) 394 1535 or mramare@beecommission.gov.za

We look forward to your cooperation towards creating an inclusive industrialised economy that is globally competitive.

Yours sincerely

Ms Thembakazi Dondashe
Compliance Division
B-BBEE Commission
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