

# New BEE Regulations addresses two key aspects

The final Broad-Based Black Economic Empowerment Regulations, in terms of the Broad-Based Black Economic Empowerment Act (BEE Act), were gazetted by the Minister of Trade and Industry in early June 2016. The Regulations came into effect the same day.



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According to Ashleigh Hale, partner and co-head of Bowman Gilfillan Africa Group's Corporate Department, two key aspects addressed by the Regulations are the registration of major BEE transactions and annual BEE reporting requirements for listed companies and government entities.

## Registration of a BEE Transaction

Hale explains that the B-BBEE Commission (Commission) must maintain a registry of 'major' BEE transactions, being those that fall above a certain threshold. The Minister is required to publish this threshold notice in the Government Gazette but this has not yet happened.

"Because the threshold for a major BEE transaction has not yet been determined, it is not currently possible to comply with this registration requirement, despite the BEE Regulations having taken effect.

“Further, it is not clear what a BEE transaction is for the purposes of the Regulations because a definition of a ‘-BBEE transaction’ has not been included in the Regulations.

“According to the Regulations, a party that enters into a major BEE transaction is required to register the transaction with the Commission by completing and submitting a prescribed form. No underlying transaction documents are required to be submitted.

“Once the form has been submitted, if the Commission is of the view that the transaction does not adhere to the BEE Act (for example, if it is of a view that the transaction amounts to fronting), it must advise the submitting party of its concerns in writing. The submitting party must take steps to remedy the issues identified ‘within a reasonable period’.

“If the submitting party fails to remedy the issues to the satisfaction of the Commission, the Commission may proceed to initiate an investigation. This investigation will presumably focus on the possible fronting practices.

“It is not clear how adherence to the BEE Act will be assessed by the Commission prior to any investigation being conducted, given that the information required to be submitted to the Commission is very limited, with no underlying transaction documents required.

“In addition, while the Regulations specifically state that the registration requirement does not constitute a requirement to obtain approval from the Commission before the transaction can be implemented, it is recommended that the parties to a major BEE transaction take steps to seek appropriate advice prior to concluding the transaction, including through the advisory services of the Commission.

“The Commission’s role in assessing the BEE transaction thus appears to amount to an indirect approval process.”

## **BEE reporting for listed companies**

The Regulations also provide that JSE-listed companies and government entities must submit a compliance report to the Commission on an annual basis.

A company listed on the JSE must either submit its compliance report to the Commission within 90 days of the end of its financial year, or within 30 days of the approval of its audited financial statements and annual report, where the annual compliance report is included in its annual report.

Government entities have to submit their reports within 30 days of the approval of their audited financial statements and annual reports.

“Reporting companies have to detail the score obtained by the company for each of the BEE elements, whether they are an empowering supplier and whether they have achieved the priority element thresholds of ownership, skills development and enterprise and supplier development.

“Once the Commission receives the compliance report, it must respond within 90 days describing the state of compliance with the BEE Act and highlighting areas of improvement.

“If the Commission finds ‘non-compliance’ with the BEE Act, it will notify the company and the company will be required to correct its report and ensure compliance with its reporting duties under the BEE Act within 30 days. If a company fails to comply with its reporting duties, the Commission must reject any submitted compliance report and indicate the reasons for its decision. They will then be considered not to have complied with the requirements of the BEE Act.

“The Commission may allow a company that has submitted a report to appear before it in either an open or closed meeting, to respond to any questions the Commission may have in relation to its report,” concludes Hale.

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