

New generic codes in BBBEE clash with sector codes

By [Pieter Steyn](#)

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Several amendments to the Broad Based Black Economic Empowerment (BBBEE) Act and new "generic" Codes of Good Practice (which set out the methodology for determining a firm's BBBEE rating) have been announced.



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The amendments have criminalised fronting practices, established a BBBEE Commission and materially changed and tightened the requirements for achieving a good BBBEE rating. For example the amended "generic" codes:

1. increase the number of points required for a firm to qualify for the various BBBEE ratings;
2. reduce the number of "elements" used to measure BBBEE from seven to five (namely, ownership, management control, skills development, enterprise/supplier development and socio-economic development);
3. create new "priority elements" (namely, BBBEE ownership, skills development and enterprise/supplier development). If a firm does not score a minimum target for each "priority element," the firm's BBBEE level will be automatically decreased by one level (for example a level 4 status will automatically become level 5). For ownership, the minimum target is measured with regard to the "debt free" portion of BBBEE ownership (effectively requiring a minimum 10% BBBEE shareholding to avoid the automatic downgrade);
4. significantly amend the methodology for earning BBBEE points for procurement and enterprise development by introducing a new concept of "empowering supplier" and emphasising the development of a firm's suppliers.

Sector codes

The Act allows so called "sector codes" to be issued to determine the BBBEE rating of a firm operating in the relevant sector. Sector codes must first be agreed by stakeholders in the sector and then issued as a draft for public comment for at least 60 days. The Minister of Trade and Industry must approve and issue the final sector code in terms of the Act. Nine sector codes have been issued in the tourism, construction, forest, transport, chartered accountancy, property, information and communication technology (ICT), agricultural and financial sectors.

One of the recent amendments to the Act confirms that firms operating in a sector governed by a sector code must apply the sector code and not the "generic" codes. However, the sector codes (apart from the updated property sector code, which was issued on 23 October 2015) have not been aligned to take account of the changes to the "generic" Codes. This means that the more onerous requirements of the amended "generic" Codes have not been included in the sector codes and it is accordingly easier for a firm covered by a sector code to achieve a high BBBEE rating than it is for a firm measured under the "generic" codes. The Department of Trade and Industry (DTI) has recognised the undesirability of this dual system and in May 2015, the Minister issued a notice requiring the sector codes to be aligned to the "generic" Codes by 30 October 2015, failing which consideration would be given to repealing the sector codes. If a sector code is repealed, the "generic" codes will apply to firms previously covered by the sector code.

Codes will not meet Ministerial deadline

The Minister issued an updated property sector code on 23 October 2015 and a draft updated tourism sector code has been published for public comment. Given the requirement under the Act to publish codes for at least 60 days public comment, it is clear that the other sector codes will not meet the Minister's 30 October 2015 deadline. The key issue is accordingly whether the Minister will repeal these sector codes or grant a further extension. The Minister's options are limited as he cannot unilaterally amend the sector codes and until it is repealed, a sector code will continue to apply to firms in the relevant sector.

Sector codes have been subject to criticism and calls for their repeal have been made. Many sector councils (which are meant to administer the sector codes) have in practice been dysfunctional. For example, the Communications Minister only appointed the ICT Sector Council, envisaged by the ICT Charter, in October 2015. However, sector codes allow flexibility in implementing BBBEE in the sector having regard to the particular needs and characteristics of the sector and avoid a "one shoe fits all" approach. In some cases, higher targets are imposed than under the "generic" codes.

For example, the ICT sector has a 30% BBBEE ownership target (as opposed to a 25% target in the "generic" codes). The Minister's approval is required to issue a sector code and this ensures that deviations from the "generic" codes are properly monitored by the DTI. The involvement of all stakeholders in developing a sector code also facilitates debate and ultimately consensus on the implementation of BBBEE in the sector.

The repeal of a sector code will have potentially serious implications for firms in that sector. Although the amendments to the "generic" codes have been publicised widely and included a one-year transition period for firms to adjust their strategies, the decision to repeal a sector code will not be taken by the Minister lightly and it is hoped that key stakeholders in the sector will be consulted. The Minister may however have no option but to repeal the sector code if the stakeholders cannot agree on amendments to align it with the "generic" codes.

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