

The requirement to register BEE transactions

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On 6 June 2016, the South African Department of Trade and Industry (DTI) published, with immediate effect, Regulations to the Broad-Based Black Economic Empowerment Act 53 of 2003 (BEE Act). The Regulations aim to monitor compliance with broad-based black economic empowerment (BEE) by requiring major BEE transactions to be registered with the newly established BEE Commission. In this article, we set out the registration requirements and consider the implications of not registering a transaction as well as steps that may be taken to mitigate against such risk.

Registry of major BEE transactions

In order to promote adherence with the BEE Act, the BEE Commission was recently established to oversee and supervise BEE compliance. This includes maintaining a registry of major BEE transactions above a certain threshold. Unfortunately, the threshold to qualify as a major BEE transaction is unknown, as the Minister of Trade and Industry (Minister), who is entrusted with determining the threshold, has not yet done so. Although the Regulations have become operative, it is submitted that compliance with the registration requirement is not yet required until the Minister publishes its determination.

The Regulations require a party that enters into a major BEE transaction to register within 15 days of concluding the transaction by completing and submitting a prescribed form to the BEE Commission. Importantly, there is no requirement that the transaction documents (such as share purchase agreements and shareholder agreements) have to be included amongst the submission documents. Assuming that the prescribed form has been properly completed, the BEE Commission must issue a certificate of registration within 10 days of receiving the submission.

Consequences of a failure to register

The issuing of a certificate of registration, however, does not necessarily mean that the transaction complies with the requirements of the BEE Act. Within 90 days of registration of the transaction, the BEE Commission must assess the transaction for compliance with the BEE Act and advise the applicant, in writing, of any concerns that it may have. The applicant then has a “reasonable period” after receiving this advice to take steps to remedy the concerns raised by the BEE Commission on the transaction. If the applicant fails to remedy the transaction, the BEE Commission may institute an investigation. The scope of the investigation is not set out, but it appears that it would include matters such as the non-compliance of the transaction with BEE principles and whether there have been any fronting activities that hide the true level of compliance.

The registration of a major BEE transaction is not a requirement for the transaction to be implemented. Accordingly, a failure to register does not (by itself) lead to the transaction being invalid. We recommend, however, that the parties to

a BEE transaction should obtain legal advice on the risks that could cause the transaction to be declared invalid. This is because there is always a possibility that a transaction may need to be unwound or restructured in order to remedy any problematic areas by “unscrambling the egg”. In this regard, the BEE Commission may, on request, provide advisory opinions before a transaction is concluded. However, such advisory opinions are not a substitute for independent legal advice as they are not binding, and legal advice may actually be required in order to formulate the query placed before the BEE Commission for an advisory opinion. The most prudent approach, however, is to conclude the transaction but make it conditional on the BEE Commission not raising concerns within the 90-day period following the conclusion of the transaction. This will ensure that the transaction does not become effective pending confirmation that no objections have been raised by the BEE Commission.

Your Key Contacts



Noor Kapdi

Chief Executive Officer -

Africa, Johannesburg

D +27 11 326 6257

noor.kapdi@dentons.com



Shahid Sulaiman

Partner, Cape Town

D +27 21 686 0740

shahid.sulaiman@dentons.com



Minal Ramnath

Partner, Johannesburg

D +27 11 326 6257

M +27 83 949 3384

minal.ramnath@dentons.com