ABVA BEST PRACTICE NOTES

PREAMBLE

HISTORY

The B-BBEE Verification Industry has faced various challenges since the birth of the industry. At the top of the list, is the legislative framework within which it operates. The B-BBEE Codes of Good Practice contains certain drafting errors, is unclear in areas and is silent on numerous pertinent issues.

This created an uncertain environment within which to apply verification and calculation in accordance with the Codes. More importantly, companies are unclear as to certain targets and the measurement of contributions which inhibits the development and execution of their B-BBEE strategies. This uncertainty is not conducive to the effective execution and roll-out of Government's BEE strategy. Within three months from the gazetting of the Codes of Good Practice, **the dti** issued the "Interpretive Guide". The purpose of this document was to address some of the uncertainties created by the Codes. The Interpretive Guide, however, went beyond interpreting and in some cases attempted to create new rules and in other cases contradicted the Codes. In addition, it was not a gazetted document and had no legal standing. It therefore rather contributed to the confusion instead of clarifying any of the uncertainties created by the Codes.

The imperfections contained in the B-BBEE legal framework leads to inconsistent application of the Codes and inconsistent interpretation. There is clearly a need for an inclusive process, based on legal principles of interpretational law, to ensure clarity with regard to the B-BBEE legal framework and the implementation of the B-BBEE Codes and the verification thereof. The outcome of such a process also needs to be voluntarily adopted by the existing Verification Industry, Consultants and Practitioners in order to ensure uniform and consistent application of the Codes.

In May 2009, the ABVA AGM therefore agreed to open up its membership to Consultants and the Private Sector in an effort to engage with a wider constituency on the interpretation of the Codes. A Technical Committee was formed constituting 7 Members, 6 of whom are voting Members and the 7th Member being an open seat to the Presidential Advisory Council to keep them informed of decisions. Of the 6 voting Members 3 are Verification Agencies whose seats are currently occupied on invitation by AQRate Verification Agency, EmpowerLogic and Empowerdex. Of the remaining three seats, one is occupied by the National Association of BEE Consultants (NABC) representing the majority of BEE consulting firms in South Africa, whilst the remaining seats are currently occupied by two influential business bodies in South Africa being BUSA and AHI.

The majority of accredited ABVA Members and some non-ABVA Verification Agencies including Consulting firms and Private companies have signed a voluntary declaration to abide by any Practice Notes issued by this committee. The pre-condition for this commitment is that the process of developing these Best Practice Notes should be consultative. All technical issues for consideration are therefore compiled by the committee from requests from the ABVA constituency where after draft Practice Notes are firstly circulated to all ABVA Members and Technical Committee Members for comment and consideration. Comments are collated and worked into the draft Best Practice Notes for discussion at the monthly Technical Committee meetings. The Technical Committee then attempts to reach consensus on the draft Best Practice Notes and once a majority view is agreed upon the committee issues the Best Practice Notes.

Verification Agencies that signed the declaration and subsequently neglects to apply these Best

Practice Notes will need to explain their failure to do so and in appropriate cases will be subjected to ABVA disciplinary procedure. These agencies voluntarily agreed that non application of these Best Practice Notes would be a basis for subjection to ABVA disciplinary procedure.

LEGAL STATUS AND PURPOSE OF BEST PRACTICE NOTES

The Best Practice Notes will have no formal legal standing as they are not legislation nor do they purport to be. It must be seen for what it is – an attempt by a concerned industry to achieve the consistent application of transformation legislation and where appropriate suggesting common application where the legislation is silent on the treatment of a particular matter. It is not ABVA's intention to neither pronounce nor prescribe any policy issue. We believe that to be the prerogative of Government and its structures.

No amount of Best Practice Notes can foresee all factual variables that may arise from time to time. A Verification Agency is therefore still expected to apply its mind to the particular facts of a case. ABVA accepts no liability for the application of these Best Practice Notes by any of its Members or the Private or Public Sectors. Where entities are uncertain about the correct legal interpretation of legislation or application of a Best Practice Note, the entity concerned is advised to seek legal advice.

It is anticipated that the broad application of these Best Practice Notes will lead to the formation of a body of consensus on the application of the transformation legislation that is wider than merely the signatories to the ABVA declaration.

It is also an express intention of these Best Practice Notes to highlight to the legislator issues of uncertainty for potential legislative review.

VALIDITY AND RETRACTION OF BEST PRACTICE NOTES

An ABVA Best Practice Note will become valid once published on the ABVA website. Should the need arise to retract a Best Practice Note for whatever reason such as new legislation replacing such Best Practice Note, it will be retracted by removing it from the ABVA website.

ABVA Members and constituents of the Technical Committee will, in addition to any amendments on the ABVA website, be notified in writing by ABVA of any changes to Best Practice Notes.

BEST PRACTICE NOTE LOGO

In order to identify and differentiate those Members of ABVA who have signed the declaration of intent to apply the Best Practice, ABVA, will in due course, be issuing a logo to such Verification Agencies for display on their certificates. We believe that this will lead to enhanced recognition of the BEE certificates of Measured Enterprises that have been verified by such Verification Agencies.

This will also afford the public at large, the opportunity to know exactly against what set of interpretations the particular Measured Entity has been verified.

DATE A BEST PRACTICE NOTE BECOMES EFFECTIVE

In acknowledgement of all stakeholders' goodwill towards establishing a uniform interpretation of the Codes and cognizant of the commitment by **the dti** to review the Codes within the first quarter of 2011, it is noted that ABVA's Best Practice process is not intended to derail or circumnavigate any process to review the Codes appropriately. Rather, it is intended to be a collaborative initiative with the Private Sector, Government and other stakeholders, to facilitate certainty.

ABVA is not the legislator, and prescribing transitional periods for alignment with these Best Practice Notes would have seemed prescriptive, albeit accommodating in nature. However, in the interest of not discriminating against any entity in applying the Best Practice Notes, the ability of business to align with such best practice has been considered.

When considering the effective date of the application of these Best Practice Notes, the committee, in addition to considering the Private Sector's ability to adapt to Best Practice Notes as they are issued, needed to stay true to the purpose of this initiative which was to provide certainty. Although difficult to balance these two principles, the following guidance with regards to the effective date of application of the Best Practice Notes is provided:

1. The ABVA Best Practice Notes are a formal statement by ABVA of what is currently widely applied as Best Practice in terms of the interpretation of the BEE legislation;

2. In those areas where a particular Best Practice has not yet been applied, these Best Practices are encouraged from the issue date of the Best Practice Note;

3. Certain practical circumstances may require that the application of a particular Best Practice Note may, within legally defendable parameters, be postponed to the verification following the one immediately post the issue date of the Best Practice Note and

4. Where the Verification Agency agrees to postpone implementation, as per point 3 above, it should clearly explain and note the reasons for such postponement.

ABVA acknowledges that the review of the Codes of Good Practice, planned for the short term, could impact on these Best Practice Notes. In such cases, guidance will be forthcoming from ABVA.

CONCLUSION

The Best Practice Notes is the culmination of various organizational and individual efforts. ABVA would like to extend it special thanks to the Members of the Technical Committee and in particular to those entities that have made the effort of providing this committee with detailed commentary and guidance on the draft Best Practice Notes.

We would also like to thank all Verification Agencies, Consulting firms and Private organizations that have signed the Declaration of Intent to apply these Best Practice Notes. It is inspiring to say the least, to see so many Verification Agencies voluntarily cooperating, to ensure consistency even to their own detriment in certain cases.

Varied interpretation prior to these Best Practice Notes will necessarily mean that several Verification Agencies that have signed these declarations will have to change the way they have been interpreting some of the legislation. They do so for the greater good. ABVA applauds you!

ABVA TECHNICAL COMMITTEE

Per Chairman:

CHRIS VAN WYK

ABVA BEST PRACTICE NOTES

GENERAL MATTERS

GEN001: ISSUE DATE OF CERTIFICATE

(Practice note date: 07/12/2010)

Introduction:

What should the issue date on the certificate be, in other words the date on which the 12 months start to run? Should it be the date of approval or the date of signing it; the on-site date or some other date?

Proposed Best Practice:

The issue date on the certificate should be the date on which the Verification Manager approved the rating. A Verification Agency has an ethical obligation towards its client to sign and issue the certificate to it as soon as it has approved the verification.

There should theoretically not be a material delay between the time of approval of the verification and the signing of the certificate.

GEN002: RELATED ENTERPRISES

(Practice note date: 07/12/2010)

Introduction:

The Verification Manual requires that related enterprises that collectively exceed either the R5 mil or R35 mil threshold but which individually falls below those respective thresholds does not have a choice – they should be verified in terms of the scorecard applicable to the collective turnover not their individual turnovers, irrespective of whether they form part of a consolidated verification or an individual verification. This could result in an EME being rated as a QSE or even a Generic Enterprise.

These provisions does not form part of the Codes and was introduced subsequent to the Codes by the "Guideline on Complex Structures and Fronting" issued by **the dti**. As such these provisions had no legal standing - that is to say until the gazetting of the Verification Manual on 18 July 2008 which incorporated these provisions.

One can only assume that the rationale of these provisions are to prevent larger organizations from splitting into smaller businesses to make use of the less stringent rules of either the QSE scorecard or the EME exemption. ABVA is of the view that the Codes in itself guards against this practice by providing in paragraph 2.5 of Statement 000, Code 000 for the disqualification of the entire scorecard of the entity if it is found to have split for the purpose of circumventing. We are also of the opinion that the rules for fronting which requires reporting such practices, further ensures that these kind of practices is punished properly if found to exist.

Although the Verification Manual was gazetted in terms of section 9(1) of the Act, we believe that through the insertion of these provisions it goes over and beyond what the Codes requires and as such is *ultra vires* (beyond the law). We base our view on the fact that the entire Verification Manual derives its legal authority from paragraph 10.7 of Code 000, Statement 000. This provision allows for the development of standards and Verification Methodology between the industry body (ABVA) and **the dti** from time to time.

These standards and methodology can therefore not override or re-write the substantive provisions laid down by the Codes. Paragraph 2.5 of Code 000, Statement 000 clearly requires that an intent to circumvent the Codes must be present before any sanction can be applied against the contravening ME for splitting its business into smaller units. The provision in the Verification Manual goes beyond that, in that it penalizes businesses which are subdivided into smaller units irrespective of the intent of such business for the subdivision. There are often very legitimate commercial reasons for the subdivision of business which has nothing to do with BEE.

We also do not believe that it is possible to effectively police this provision. There is no external document of proof that could verify whether or not a business forms part of a larger group or not. In light hereof, we believe this provision will punish those businesses who are honest and that those businesses who are fraudulently splitting into smaller businesses will fall through the cracks because they will not voluntarily admit to splitting for purposes of circumventing the Codes.

Proposed Best Practice:
When a Verification Agency conducts a verification of a related enterprise, it is incumbent upon the Verification Agency to investigate whether the Measured Enterprise was intentionally split off from any other related enterprise in order to circumvent the Codes. ABVA suggests that where the Verification Agency finds that a business was split with the necessary intent to circumvent the Codes that it shall decide the appropriate remedy which could include any one or more of the following:

i) The Verification Agency applies the scorecard that would have been applicable to the collective turnover for the related businesses;

ii) The Verification Agency terminates the engagement with the Measured Entity and disallows the entire scorecard in accordance with paragraph 2.5 of Statement 000;

iii) The Verification Agency reports the transgression to **the dt**i.

OWNERSHIP

OWN001: SALE OF ASSET POINTS IN GROUP STRUCTURE

(Practice note date: 07/12/2010)

Introduction:
On page 48 of the Interpretive Guide, it is stated that the Seller in a sale of asset transaction may transfer the benefit of any recognition earned as a result of the "sale of assets" provisions to another enterprise who is part of the same group structure. As such, the position of the Interpretive Guide contradicts paragraph 3.1.1 of Statement 102 of the Codes which provides that a Seller may claim recognition for a sale of asset in its own ownership scorecard.

The Verification Manual states in paragraph 8.1.7 on page 53 that the Interpretive Guide and the Codes should be referred to for additional methodology relating to the sale of assets. Even if one could argue that this provision elevates the status of the Interpretive Guide to legislation by means of incorporation, there are presumptions applicable to the interpretation of statutes which compels one to disregard the wording of the Interpretive Guide on account of contradiction with prior legislation (such as the Codes), without the express intention to do so. Paragraph 8.1.7 does not convey an express intention to contradict paragraph 3.1.1 of Statement 102 of the Codes.

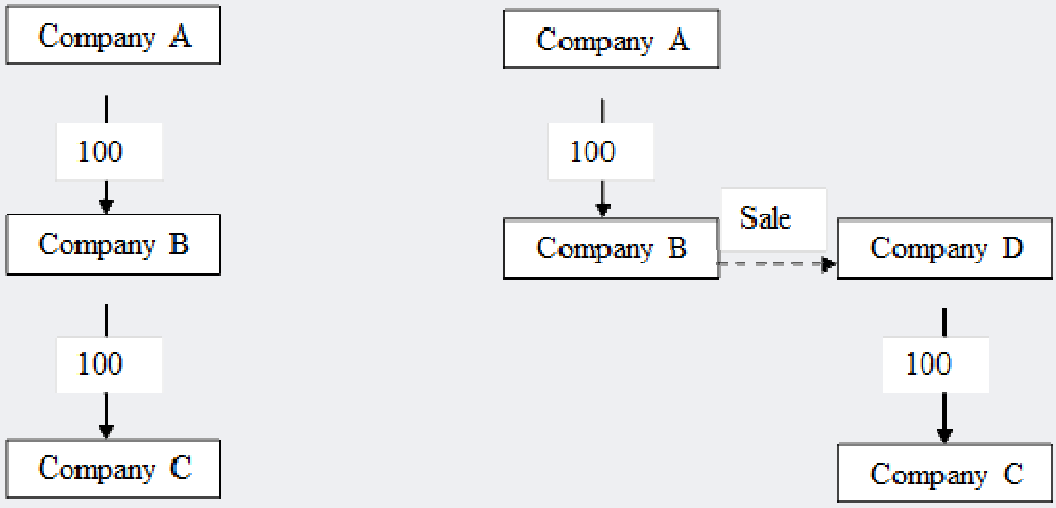
Proposed Best Practice:

It is suggested that best practice is for Verification Agencies to only allow the entity that can be classified as the Seller to claim the sale of asset points. Recognition so earned is not transferable, except to the extent that it flows through to a measured entity as a result of the application of the "flow-through principle".

The term "Seller" is defined in schedule 1 to the Codes as *"the Entity or the person concluding a Qualifying Transaction with the Associated Enterprise"*. This is not necessarily the direct owner of the assets prior to the sale thereof.

The following scenario serves to illustrate the proposed best practice:
Company A is the holding company of Company B. Company B own 100% of Company C. A transaction is concluded in terms of which all the shares held by Company B in Company C is sold to a third party Company D.

Prior to Transaction **Post Transaction**



Prior to the transaction Company B owned 100% of Company C. Post the sale of the shares held by Company B in Company C, to Company D, Company D owns 100% of Company C.

Example 1: Ultimate Holding entity is the Seller

1.1. It often happens in a wholly owned subsidiary scenario as above, that the actual transaction is negotiated and concluded by the ultimate holding company, Company A in this example. In such cases the "Seller" will be Company A even though the actual assets sold - the shares in Company C,

belonged and was the direct assets of Company B.

1.2. Because, in these cases, Company A is the "Seller" it would be able to claim the ensuing black ownership percentages and resultant sale of asset points in terms of paragraph 3.1.1 of Statement 102. This black ownership percentages recognized for Company A as a result of this sale of assets, can however flow through to all its subsidiaries including Company B.

1.3. When calculating the recognition earned by Company A , the value of A that should be utilized in the calculation should be the market capitalization of A. In other words the value of the group held by Company A and not only the value of the individual entity called Company A.

Example 2: Subsidiary Entity is the Seller

2.1 Where the transaction for the sale of asset is negotiated and concluded by the direct owner of that asset, in this case Company B, Company B is the "Seller" for purposes of applying paragraph 3.1.1 of Statement 102.

2.2 Company B will therefore be able to claim the ensuing Black ownership percentages and resultant sale of asset points. The Black ownership percentages recognized for Company B as a result of this sale of assets, can flow through to all its subsidiaries. Company A, however, cannot earn any recognition in this case as it is not the "Seller" or a subsidiary of Company B. The flow through principle can therefore not result in Company A gaining any recognition out of the sale of asset.

2.3 The market capitalization of Company B should be applied as its value.

Effect of Consolidation

Note that the ABVA Technical Committee is not pronouncing at this stage on the effect of a sale of asset by a subsidiary on the ownership of a consolidated rating of the group that subsidiary is a part of.

OWN002: MODIFIED FLOW THROUGH PRINCIPLE

(Practice note date: 07/12/2010)

Introduction:

As a general principle, when measuring the rights of ownership of any category of Black people in a Measured Enterprise, only rights held by natural persons are relevant.

If however, the rights of ownership of Black people pass through a juristic person (Company or Close Corporation), then the rights of ownership of Black people in that juristic person are measurable. This principle applies across every tier of ownership in a multi-tiered chain of ownership until that chain ends with a Black person holding rights of ownership.

In the Codes, ownership is measured and scored from the perspective of two indicators - voting rights and economic interest. There are two key principles which need to be applied in measuring the voting rights and economic interest called the Flow-Through and the Modified Flow-Through principles.

This practice note relates to the interpretation of the modified flow through principle as contained in the Codes and more particularly the words ***"chain of ownership"*** used therein.

The Flow-Through and Modified Flow-Through principles as per the Codes
The method of applying the Flow-Through Principle across one or more intervening juristic persons entails multiplying the percentage of the participant's rights of ownership in the juristic persons through which those rights pass by the percentage rights of ownership of each of those juristic persons successively to the Measured Enterprise.

According to the Codes, the Modified Flow-Through Principle applies to any BEE owned or controlled company in the ownership of the Measured Enterprise where in the **chain of ownership**, Black people have a flow-through level of participation in excess of 50% then, according to this principle, only once in **that chain** may such Black participation be treated as if it were 100% Black.

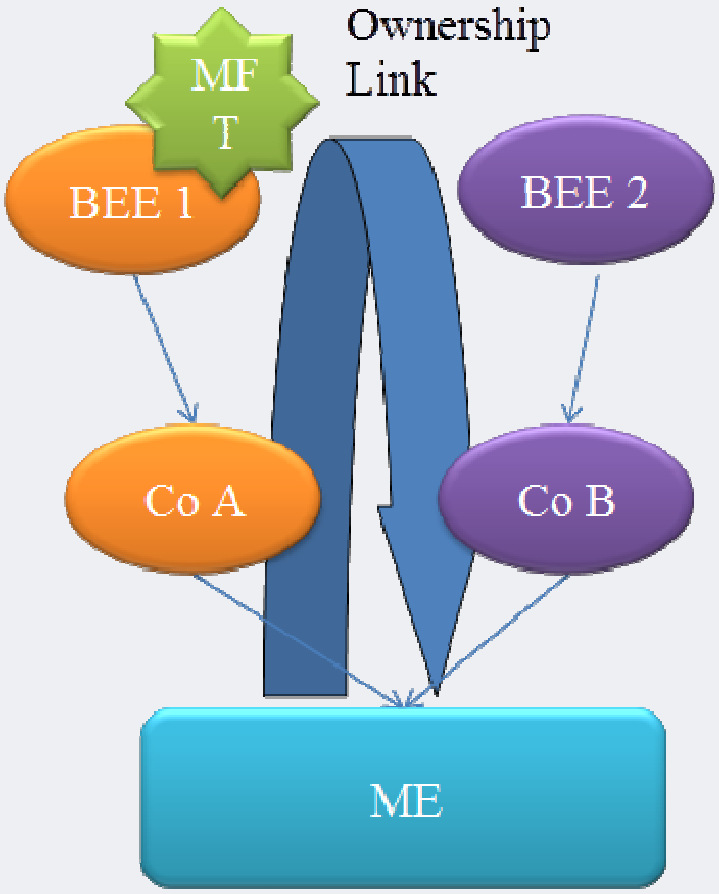
Para 3.3.3 of Statement 100 further states that the "The Modified Flow-Through Principle may only be applied in the calculation of the indicators in paragraphs 2.1.1 (Exercisable Voting Rights in the Enterprise in the hands of black people) and 2.2.1 (Economic Interest of Black people in the Enterprise).

The interpretation of "chain of ownership"
The issue to be addressed is whether the phrase "chain of ownership" refers to the entire shareholder base as suggested by **the dti** at an earlier meeting of the Joint Technical Committee (JTC) or whether the term refers to different links (legs) of shareholders leading into the Measured Enterprise and that by implication the modified flow-through principle may be applied once in every link (leg).

The dti's view at the JTC on the matter is best summarized by the minutes of that particular meeting an extract of which follows:

"...the dti response:
When applying the Modified Flow-Through Principle the following needs to be taken into consideration:

- *All links leading to the Measured Entity are regarded as one single chain of ownership.*
- *Thus using the example below – the Measured Entity would have to select either BEE1 or BEE2 on which to apply the MFT but not both as they both form part of the ownership chain leading to the Measured Entity:*"



ABVA's considered opinion is that the principle canon of South African law of interpretation of statutes is that the intention of the legislature is to be ascertained from the ordinary words used in the enactment. Where these words are clear and unambiguous, they must be attributed their ordinary, literal, grammatical meaning within the context of the legislation as a whole.

We are of the opinion that the mere reference to the words 'that chain' (see second last paragraph on page 1 above) implies that there could be more than one chain of ownership. Whereas the interpretation of **the dti** necessarily implies that all businesses could only have one chain of ownership as all 'links' together form the 'chain'. The clear and unambiguous wording therefore justifies an interpretation that says that when the Codes refer to a chain of ownership it is referring to a leg of ownership or 'link' to use the words of **the dti**.

Conceptually it would also not make sense to limit the application of this principle to one 'link' leading into the Measured Enterprise. One of the primary reasons put forward for the development of this principle during the drafting process of the Codes, was to cater for the financing of BEE partners through the use of special purpose vehicles (SPV) within which the financier could retain equity (shareholding) as security for its funding, in addition to the Black shareholding in that SPV. The BEE partner would through the application of this principle not be prejudiced for the fact that it needed to acquire financing to do the deal as long as it retained control (more that 50%) of the SPV.

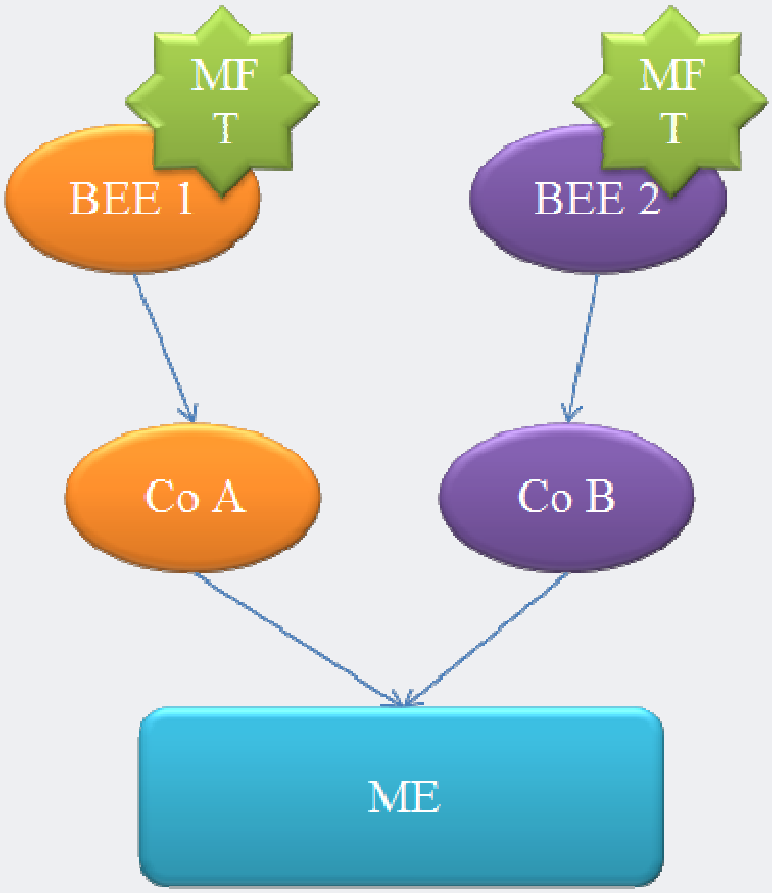
If the application of this principle is limited to one leg in the ownership of the Measured Entity it would lead to the anomalous result that only one of the BEE partners in a deal could benefit from the application of the principle while all other BEE participants would be excluded. Such an interpretation would lead to traditionally white owned businesses being incentivized to conclude a BEE deal with only one BEE partner instead of including as many as possible (broad base) Black participants. In addition to such an interpretation being nonsensical it is extremely arbitrary.

Also note that we are of the view that the legal fraternity in general supports the interpretation of ABVA as several listed entities which we have come across have structured their transactions based on this interpretation by their transaction attorneys. This is no small matter to decide and merely stating that all 'links' leading into the measured enterprise is to be regarded as one chain is insufficient reason for the interpretation. There is no legal basis for such an interpretation. If the legislator wanted to say this it would not have referred to a 'chain of ownership' but rather to a single company. If some other approach was intended, it was incumbent upon the legislator to make that plain.

The clause would have read something like this: "The modified flow through principle can only be applied to one company in the shareholder base of the Measured Enterprise".

Proposed Best Practice:

If there are multiple ownership chains, the Measured Entity can apply the modified flow-through once in each of the chains. A chain is a leg or link of ownership into the Measured Enterprise as illustrated below.



OWN003: CESSION OF DIVIDENDS OR PLEDGE OF SHARES AS SECURITY FOR THE REPAYMENT OF A LOAN OBLIGATION INCURRED BY THE BLACK PARTNER IN ACQUIRING ITS SHARES

(Practice note date: 07/12/2010)

Introduction:

a) Does the repayment of a loan out of dividends impact on economic interest points claimable?

b) Does a cession of dividends or a pledge in security for the repayment of a loan impact on economic interest and /or voting rights.

It is common practice for Black partners in BEE transactions to obtain financing for the purchase of their interest in the ME. If all BEE partners had their own capital to invest there would have been no need for transformation. Financing and practices to secure the repayment of monies advanced is therefore common practice in BEE transactions.

The Codes defines Economic Interest as:

"a claim against an Entity representing a return on ownership of the Entity similar in nature to a dividend right, measured using the Flow Through and, where applicable, the Modified Flow Through Principles;"

An obligation to repay a loan incurred by the Black shareholder to purchase its shares, therefore has no effect on the economic interest points claimable on the ownership scorecard. The outstanding loan amount related to the acquisition of the Black partner's shares does however impact on the Ownership Fulfillment and Nett Value points on the ownership scorecard.

Sometimes the financier requires that the Black shareholder who obtained the loan pledges its shares to the financier as security for the repayment obligation it has. This discussion does not allow a detailed explanation of the difference between the legal mechanisms of cession and pledge respectively.

If however, pursuant to a pledge in securitatem debiti, there were to be an accompanying cession of dividend entitlements, the pledge may well attract an impairment of scores in respect of dividend entitlements. Whether it does lead to a denial of such scores it may, however, sensibly turn upon whether the diverted dividends are (as one would expect) to be applied in the reduction of the debt which the pledge secures.

If the diverted dividends are to be applied in reduction of debt, one might sensibly argue that the shareholder continues to derive an economic benefit from dividends declared, so that the score should not be denied.

The notion of "Exercisable Voting Rights" is defined in Schedule 1 to the Codes, to mean *"a voting right of a participant that is not subject to any limit"*. If one interprets *"limit"* broadly to signify any constraint upon the exercise of a voting right, then a restriction upon the exercise of a voting right pursuant to a pledge in securitatem debiti may well be an impediment to the scoring of points in relation to "Exercisable Voting Rights".

Proposed Best Practice:

a) An obligation to repay a loan incurred by the Black shareholder to purchase its shares has no effect on the economic interest points claimable on the ownership scorecard. The outstanding loan amount related to the acquisition of the Black partner's shares does however impact on the Ownership Fulfillment and Nett Value points on the ownership scorecard.

b) In consideration of the above the respective cession or pledge does not encompass a "diversion" of either "Exercisable Voting Rights" or dividend flows ("Economic Interests"), its impact should be limited to the one point allocated to "Ownership Fulfillment". This impact upon "Ownership Fulfillment" is further immaterial, in that this point can in any event not be claimed until all debt is discharged.

c) In keeping with "substance over form" it is incumbent upon the analyst to look to the substantive effects of the pledge of the shares. If the pledge does not operate to curtail voting rights, or to deprive the shareholder of the benefit of dividends (where repayment of the loan is regarded as being to the benefit of the shareholder), then the mere execution of a pledge in securitatem debiti should not have any material impact upon scoring.

OWN004: THE DEFINITION OF 'CURRENT EQUITY INTEREST DATE' IN THE GRADUATION FACTOR CALCULATIONS FOR NETT VALUE IN PARAGRAPH 4.1 OF ANNEXURE 100(C)

(Practice note date: 07/12/2010)

Introduction:
The term *'current equity interest date'* is not defined. If this date was deemed to be the commencement date of the Codes then it would mean that ownership transactions concluded in subsequent years from 9 Feb 2007 onward would need to be done at increasing discounts to attain the points. There would subsequently be no incentive for any business to do an ownership transaction say in year 10 after 9 Feb 2007 because it would have to give the shares away for free to earn any points for Nett Value.

Proposed Best Practice:
ABVA's Technical Committee interprets the term *'current equity interest date'* in line with the term "Nett Value date" which is defined as meaning:

"..the later occurring of the date of commencement of statement 100 and the date upon which the earliest of all still operative transactions undertaken by the Measured Entity in order to achieve Black rights of ownership, became effective and unconditional."

Please note that when measuring Nett Value for an equity equivalent transaction in terms of Statement 103 that the graduation factors run from the commencement date of the Codes (9 February 2007).

OWN005: PRIVATE EQUITY FUNDS
(Practice note date: 07/12/2010)

Introduction:
The Interpretive Guide directly contradicts the Codes of Good Practice with respect to the requirements of the Codes in respect of Private Equity Funds by supplanting the term 'private equity fund' with 'Private Equity Fund Manager'. The Codes would always take legal precedent over the Interpretive Guide, but if the Interpretive Guide's version was the actual intent the Codes need to be amended.

The problem is that the Verification Manual, which enjoys equal status to the Codes (both are gazetted in terms of section 9(1)), now refers to the Interpretive Guide on this matter. In other words, one part of the legislation now contradicts the other part of it.

South African interpretational law however requires that latter pieces of legislation should be disregarded where it directly contradicts preceding pieces of legislation (the Codes) without the express intent to do so.

Proposed Best Practice:
The provisions of the Interpretive Guide relating to Private Equity Funds should not be applied at all. Verification Agencies should also not rely on the findings of verification engagements conducted on Private Equity Funds in terms of the Interpretive Guide, when determining the Black participation that flows through from such a fund into the Measured Enterprise when determining the Measured Enterprise's ownership score.
While acknowledging that **the dti** have met with stakeholders in the private equity industry subsequent to gazetting of the Codes to discuss this matter, the Codes have not been amended to date. ABVA urgently appeals to **the dti** to amend these provisions of the Codes in line with the

suggested practice in the Interpretive Guide.

OWN006: BROAD-BASED OWNERSHIP SCHEMES AND TRUSTS
(Practice note date: 07/12/2010)

Introduction:
a) The purpose of a Broad-Based Ownership Schemes (BBOS) is to benefit a broad generic group of natural people e.g. rural schools, Black women with HIV etc. Because it is impossible to have each and every natural person in SA that form part of such a broad generic grouping benefit out of one BBOS the trustees are always afforded a discretion to select who the natural persons or projects are that will benefit out of the income and capital of the BBOS on a year to year basis. They are also afforded the discretion to decide what amount to award to those natural persons or projects.

The problem is that most BBOS take the legal form of a trust. Paragraph 3 of Annexure 100 (B) however prohibits trusts from conferring discretion on trustees with regard to the identity of the beneficiaries or their proportion of entitlement. The question is therefore whether BBOS that take the legal form of trusts should in addition to qualifying as a BBOS in terms of paragraph 1 of Annexure 100(B) also qualify in terms of the paragraph 3 relating to the rules for trusts.

We are of the view that because a BBOS is defined in Schedule 1 to the Codes as an ownership scheme that complies with the criteria of Annexure 100 (B) that it could only refer to compliance with paragraph 1 and not also paragraph 3. Also, because of the very nature of a BBOS as highlighted above it could not have been the intention of the legislator to have BBOS's that take the form of trusts, comply with paragraph 3 in addition to paragraph 1.

Paragraph 7.2 on page 42 of the Verification Manual also seems to require trusts in general to comply with the rules for BBOS's before additional points can be earned. The mixing of the rules for trusts and BBOS's in paragraph 7.2 is clearly in contradiction of Annexure 100 (B) rules. It should therefore be disregarded to the extent that it contradicts the Codes.

b) Where the constitution of a BBOS makes it clear that only Black people can be beneficiaries of the BBOS without prescribing the percentage of Black female participation, measuring Black female participation is almost impossible. For example, the BBOS decides to build a community hall for a Black rural community. It is not possible to determine the usage of that hall per gender and we suggest that the Codes be amended to allow a 'deemed female participation of 51%', which is consistent with our latest census.

Proposed Best Practice:
a) BBOS that take the legal form of trusts do not have to comply with the rules for trusts (paragraph 3 Annexure 100 (B)) in addition to complying with the rules for BBOS (paragraph 1 of Annexure 100 (B)) and trusts do not need to comply with the rules for BBOS's in order to meet the requirements for trusts as set out in Annexure 100 (B).

b) Where it is clear from a reading of the constitution of the BBOS that only black people can benefit as beneficiaries without any specific gender allocation of distributions, then black people points should be earned based on that provision in the constitution. In such circumstance if black female participation is not also defined or fixed by the scheme constitution points can only be earned for black female participation if the actual distribution to them can be verified.

c) Also note that the constitutions or trust deeds of these BBOS's often refer to 'previously disadvantaged individuals' or 'historically disadvantaged individuals'. Both of these terms include non-black individuals and these terms can therefore not be equated to 'black people'. In such cases it cannot be assumed that the BBOS is black owned and the particular BBOS in question will need to prove the specific racial and gender demographic of the beneficiaries.

PREFERENTIAL PROCUREMENT

PP001: ON DATE OF MEASUREMENT, CAN WE ACCEPT THE CERTIFICATE THAT WAS VALID AT THE TIME OF DECISION MAKING AND EXPIRED AT THE END OF THE YEAR?

(Practice note date: 07/12/2010)

Introduction:

a) At which moment should the certificate have been valid:

i) At every time of making the procurement decision? or;

ii) At any one time during the measurement period within which the procurement decision was made but not necessarily at the moment of making the procurement decision? or;

iii) At any one time during the period commencing with the start of the measurement period going up to the verification date?

b) Most companies in the absence of accredited Verification Agencies made their procurement decision on the basis of their suppliers committing to providing a certificate within a reasonable time.

Proposed Best Practice:

It is suggested that a certificate should be accepted as sufficient proof of a supplier's BEE status if it was valid at any time from the commencement of the measurement period up to the date of actual verification. In other words if the VA is furnished with a certificate of a supplier of the ME that was issued post the financial period of the ME under review, then it should still be accepted even though the ME made its procurement decision while there was still no formal certificate. Also where the certificate in question for example expires half way through the measurement period all procurement subsequent to that date for the remainder of the measurement period of the ME should also be accepted in addition to the procurement while it was still valid.

PP002: THE TREATMENT OF BUSINESSES THAT HAVE BEEN MEASURED IN TERMS OF THE MINING CHARTER OR ANY OTHER SECTION 12 CHARTER

(Practice note date: 07/12/2010)

Introduction:

May businesses that procure from suppliers that fall under the Mining Charter or that have measured their BEE compliance in terms of some other section 12 Charter, exclude such spend? Some have asserted that 100% and above compliance with the Charter would equate to a Level 4 on the scorecard?

Procurement from suppliers that are subject to such a Charter is not exempt and cannot be excluded. There are no basis for this in the Codes.

There are no legal basis for equating compliance with such a Charter to a specific contributor level in terms of the Codes. If for example a mining company or a financial services company is not rated in terms of the Codes it cannot be awarded any contributor level in terms of the Codes and should be regarded as 'Non-Compliant' for procurement purposes.

Proposed Best Practice:
The only way in which a Mining company can attain a BEE status (contributor level) in terms of the Codes is if it undergoes a Codes verification. Compliance with the mining charter or any other section 12 Charter does not translate into a BEE Status per the Codes. Such suppliers should be regarded as non-compliant for purposes of determining the measured entity's Preferential Procurement score. However, for the avoidance of doubt, a supplier that has undertaken a Sector Code verification can contribute to the preferential procurement score of the measured enterprise because a Sector Code enjoys equal status with that of any other Code. Sector Charters on the other hand does not.

ENTERPRISE DEVELOPMENT

ED001: EARLY PAYMENT MECHANISM

(Practice note date: 07/12/2010)

Introduction:
An interpretation of the measurement of this particular mechanism has been doing the rounds that effectively allows 100% of the invoiced amount for all cash on delivery sales to be claimed by a measured entity. This necessitated ABVA to provide the correct calculation methodology as prescribed by the Codes.

The correct methodology to be applied when calculating the contribution a business makes to the development of another when it pays it early would be to calculate the interest it forfeited on that payment by making payment early. The Codes however neglected to apply this logic and instead opted to provide an arbitrary mechanism.

Proposed Best Practice:
This mechanism is only available if payment is made within less than ten days. If early payment is at least made within the first ten days from the date of invoice by the qualifying supplier, then the amount that can be claimed is a percentage of the invoice amount which is equal to 15 minus the amount of days from the date of invoice to the date of payment.

Example:

Say that the invoiced amount is R100 and that the measured entity makes payment thereof 5 days after the invoice date then the measured entities contribution to ED is measured as follows:

R100 x (15 – 5)%
= R100 x 10%
= R10