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Reg No: 2012/181277/08

TECHNICAL REVIEW COMMITTEE – PRACTICE NOTE – 0002A

TRC – PN – 0002A

Rev A Issued December 2023

RE : MEASUREMENT DATE EXCEEDING 12 MONTHS BEYOND A MEASURED ENTITY'S FINANCIAL YEAR-END – CLARIFICATION BY THE CSCC TECHNICAL REVIEW COMMITTEE

There have been numerous instances where Verification Agencies have sought to misinterpret the provisions of the Amended Construction Sector Codes of 1 December 2017, by verifying a Measured Entity using a financial period that ended in excess of 12 months from the date of measurement and subsequent issue.

This matter was confirmed in a meeting between the CSCC Technical Review Committee, the DTiC and SANAS on 8 September 2021, and it was agreed that this Practice Note will be issued to confirm this important issue. A further request was made from both SANAS and the DTiC to confirm the term "Commencement of Verification" as this reference in the ACSC has been deemed to align to that referenced in the SANAS Manual.

Background

On 14 August 2020, SANAS issues a directive to all Verification Agencies in response to numerous queries and observations around the concept of the Measurement Period of a Measured Entity in respect of a B-BBEE Verification. An extract of this clarification reads as follows:

"Unless otherwise stated in specific B-BBEE Sector Code of Good Practice, The Measurement Period can thus only ever be the Financial Year-End of the Measured Entity as registered with the Companies Intellectual and Property Commission (CIPC). Any other period elected would fall short of the requirements detailed in the 2008 Verification Manual. Measurement of a Measured Entity's B-BBEE Verification Status is based on historical data in which the Latest Measurement Period is utilised for a B-BBEE Verification. The intention behind this is to ensure that B-BBEE Verifications are conducted on the most recent information and aligned to the Financial Year-End of the Measured Entity.

Furthermore, best practice in verification supports the above. Unless otherwise stated in specific B-BBEE Sector Code of Good Practice, Section 10.1.3 of the 2008 Verification Manual reads as follows: 'In order to determine if the Measured Entity is classified correctly the Verification Agency shall obtain the audited financial statements and agree the amount recognised as Revenue to the thresholds set by the Codes.' While this references thresholds as opposed to 'measurement period', an interpretation which divorces the classification of measured entities from the measurement period is absurd as such would violate several principles of the Verification Manual,..."

Some VA's latched on the part that said: **"Unless otherwise stated in specific B-BBEE Sector Code of Good Practice"**.

1.0 Provisions of the Amended Construction Sector Code:

Measurement period is defined as follows (emphasis added):

“Measurement Period”	means, subject to the following, the financial period of the Measured Entity: (a) The financial period of a Measured Entity is a period of 12 consecutive calendar months; (b) Where however the Measured Entity amended its financial reporting period from one year to another the financial period may, for that particular year in question, be more or less than 12 consecutive months. In such exceptional cases the Measured Entity may at its discretion elect to be measured for the amended financial period (however many months it may include) or the 12 months ending on the last day of the amended financial period. For purposes of determining its classification as an EME, QSE or Large Enterprise the Measured Entity must however, irrespective of the election it exercises above, do so with reference to the 12 months ending on the last day of the amended financial period; (c) Measured Entities for which verification is required may not be measured for a Measurement Period that has ended more than 12 months prior to the commencement of the verification thereof; (d) For EME's and QSE's that are allowed to merely make an affidavit, the Measurement Period must be the 12 consecutive calendar months that immediately precedes the last day of the most recently completed financial period; (e) The Measurement Period is the period over which the 'Skills Development', 'Preferential Procurement and Supplier Development' and 'Socio-Economic Development' elements must be measured. This statement does not detract from the requirement that for the purpose of calculating the target for Supplier Development and Socio-Economic Development regard should be had to the financial position of the Measured Entity that precedes the Measurement Period. Only contributions that become payable within the Measurement Period will however be recognised.
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It is the highlighted section in the Construction Sector Code that some Verification Agencies interpret as a particular provision in the Construction Sector Code that allows Measured Entities to use a measurement period that does not align with the Financial Year-End of the Measured Entity.

The Technical Review Committee consisting of the key negotiators and drafters of the amended construction sector score card have providing guidance and clarity to SANAS and Verification Agents on matters of interpretation as the intent (spirit) of a clause is as important as the letter of the clause. As representatives of the TRC, we state categorically that this matter was not referred to the TRC and hereby confirm that the interpretation of this definition by the Verification Agency and the DTI representatives is not in the spirit of the codes. The sections hereinafter will provide context to the definition of the Measurement Period as indicated in the codes.

2.0 Verification Process, circumstances and time frames:

A measured entity (ME) may request verification from a Verification Agent under the following circumstances:

- 2.1 The ME completed a financial period and have audited financial statements available for the VA to use in the verification. This is normally three (3) to six (6) months after the end of the financial period of the measured entity. This is the first certificate under that measurement period and the validity of that certificate is 12 months from the date of issue.

- 2.2 The ME is a start-up entity or a new entity and have never had a verification done. This is the first certificate under that measurement period and the validity of that certificate is 12 months from the date of issue.
- 2.3 The ME holds a valid B-BBEE certificate but had changes in the ME that impact on any element measured based on the status quo at the time of measurement (ownership, management control etc) and not based on expenditure. The certificate issued under these circumstances will be a revised certificate and the expiry date of that certificate may not extend beyond the date of the previous certificate issued based on a specific set of financial records / measurement period.
- 2.4 The ME holds a B-BBEE certificate as an EME or QSE but wish to be measured under the generic score card to compete for tenders that require a generic score card. The certificate issued under these circumstances will be a revised certificate and the expiry date of that certificate may not extend beyond the date of the previous certificate issued based on a specific set of financial records / measurement period.
- 2.5 **Commencement of Verification** – this refers to the date on which the B-BBEE verification audit process begins after the end of the financial measurement period, ie desktop review of data, on-site visit etc. The commencement date must begin on a date to ensure that the resulting scorecard issued after audit, is based on the most recent financial records of the Measured entity, (within 12 months) , as elaborated below. . *Note - this use of the word "commencement" instead of "start" is in no way a reference to the meaning in the SANAS manual, which describes the start of a Company's **first** verification process for a SANAS scorecard.*

It thus means that a B-BBEE certificate based on a particular set of financials, may not extend more than 12 months from the date of the original certificate issued. Once a certificate is issued, there cannot be any extension beyond the original expiry date based on the measured financial period, if any revision of the original audit process, for example a change of ownership, is carried out.

It is thus a complete misrepresentation of the intent of the codes to interpret commencement as the date when an instruction is issued by the Measured Entity for any revised certificate under a specific set of financials, or the date when a Verification Agency is engaged to carry out a new audit. This interpretation may result in the absurd scenario where a ME issue an instruction for the commencement of a new B-BBEE certificate 1 day before the end of their financial period to obtain a new certificate that is valid for a further 12 months.

3.0 Deliberate use of Previous Financial Data

It has been recognised that deliberate attempts to use outdated financial date has been done specifically in the case of QSE where current turnover exceeds the QSE limit meaning that all elements of the scorecard will now be used, and the ME has not carried out the appropriate interventions and spend to maintain their B-BBEE level.

In other cases it may be assumed that the ME recognised that they failed to achieve the desired expenditure targets on the skills development, procurement and supplier development and socio-economic development elements in their current financial year and would most likely be discounted to a worse B-BBEE level. It may thus be interpreted as a deliberate attempt by the ME (enabled by the VA) to circumvent the B-BBEE Act.

The Construction Sector Codes were gazetted in draft form in 2016 for public commentary, **including this 12 month provision**. All Measured Entities have therefore had sufficient notice to align their financial year-end audit and scorecard audit timing accordingly.

4.0 Legislation and the Legal Status of Amended Construction Sector Codes and Role of Construction Sector Charter Council

The Amended Construction Sector Codes (ACSC) were gazetted on 1 December 2017 in terms of Section 9 (1) of the Broad-Based Black Economic Empowerment Act (Act 53 of 2003) as amended by the B-BBEE Act 46 of 2013.

The Construction Sector Charter Council comprises 14 member organisations and Unions, and has executive oversight into the legal application of the ACSC as referenced under *1.5 Monitoring and Compliance*:

1.5.2 The Construction Sector Charter Council will oversee and monitor the implementation of the Construction Sector Code. It will act with executive authority and provide the necessary links to relevant government institutions at the reporting and compliance levels.

In addition, gazette 41287 contains the following provisions relating to the role of the Construction Sector Charter Council.:

1.5.5 The Construction Sector Charter Council will, in accordance with the BBEE regulations and established working protocols, report all suspected incidents of fronting and fraudulent scorecards credentials to the office of the B-BBEE Commissioner to investigate and prosecute any confirmed fronting and circumvention activities.

Several VAs, have responded to the CSCC on this matter saying that where there is any difference in interpretation between the ACSC and the DTI Generic Codes of Good Practice, that those in the Generic Codes take precedence. Again, this is incorrect and is expressly clarified as follows:

2.9 Where a matter is not expressly dealt with in terms of this Amended Construction Sector Code the Generic Codes of Good Practice as amended will take precedence. In all other matters this Construction Sector Code will take precedence.

It is the considered view of the Construction Sector Charter Council that the current effectiveness of all B-BBEE legislation is marred by blatant forgery, fraud and fronting and therefore it is incumbent on all Sector Councils to partner with both SANAS and the DTi to rectify illegal behaviour.

It should be noted that Act 53, the B-BBEE Act, classifies misrepresentation as "criminal" as emphasised in the ACSC extract below:

2.4 Any misrepresentation or attempt to misrepresent a Measured Entity's true B-BBEE Status is a criminal offence and will be dealt with in accordance with the provisions as set out in the B-BBEE Act as amended, and may lead to the disqualification of the entire scorecard of the entities concerned.

In conclusion the CSCC hereby advises both SANAS and the DTI that all certificates issued that are based on a measurement period in excess of 12 months, must be immediately withdrawn and re-issued based on the scoring achieved on financial statements within 12 months.

All Verification Agencies must be advised that trading with these certificates is an offence in terms of the B-BBEE Act and the 2017 Amended Construction Sector Codes, and their Clients must be advised in cases where this illegal interpretation has been applied.

Authorised for Circulation by the Technical Review Committee on 5 December 2023



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Felix Fongoqa

Chairman – Construction Sector Charter Council

On behalf of **TECHNICAL REVIEW COMMITTEE**