

STATEMENT 102

CONVENTIONAL vs UNCONVENTIONAL

By: Stella Nolan

The Ownership element is possibly the most contentious component of the B-BBEE Scorecard. Apart from meeting the Ownership Scorecard requirements, a transaction must make good business sense. Conventional Ownership transactions are the sale of shares directly to ‘Black’ People or indirectly through ‘Black’-owned businesses. However, conventional does not always make good business sense. The Ownership Scorecard considers this. Thus, it allows for the recognition of Ownership through alternate avenues. Enter Statement 102 | Sale of Assets, Equity Instruments and Other Businesses in the Generic Codes of Good Practice (Codes), whereby an organisation entering into such a transaction is referred to as the ‘Seller’.

Statement 102 awards Ownership points in exchange for an organisation selling an asset, an equity instrument or a business that is a “separately identifiable related business”. The latter is defined as a “business that is related to the Seller by virtue of being a Subsidiary, Joint Venture, Associate, Business Division, Business Unit, or any other similar related arrangements within the Ownership structure of the Seller”.

Some aspects of Statement 102 qualify as a claim under Enterprise Development and Supplier Development. The principle of no double-claiming applies; therefore, once an organisation claims points under Statement 102, they cannot claim the same under any other element.

Which transactions qualify for recognition under Statement 102?

It provides that it will find an application regarding a “qualifying transaction” which is a transaction that may involve the sale of:

- > An asset which is not defined;
- > A business that is not defined; or
- > Equity Instruments, which are defined in the Generic Codes as “the instrument by which a Participant holds Rights of Ownership in an Entity”.

What are the criteria for claiming against Statement 102?

The qualifying transaction must result in the following:

- > The creation of viable and sustainable businesses or business opportunities in the hands of ‘Black’ People; and
- > Transfer of critical and specialised skills, managerial skills and productive capacity to ‘Black’ People.

Moreover, the transaction must have:

- > No unreasonable limitations or conditions with regard to its clients or customers;
- > Clients, customers or suppliers other than the Seller; and
- > B-BBEE shareholders, or their successors if the B-BBEE shareholding is the same or improved, holding the asset for a minimum of three years.

It further provides that:

- > Any operational outsourcing arrangements between the Seller and the ‘separately identifiable related business’ must be negotiated at arms-length on a fair and reasonable basis; and
- > The transaction should be subject to an independent evaluation to determine the value by a competent person.

Are there any exclusions to Statement 102?

A transaction does not qualify in the case of:

- > Transfers of business rights by way of license, lease or other similar legal arrangements not conferring unrestricted ownership; and
- > Sales of franchises by franchisors to franchisees. If a franchisor assists a ‘Black’ Participant to invest in a franchise, this would not be considered a Sale of Assets or business, but rather an Enterprise Development claim.

Is there a timeframe attached to Statement 102?

Another crucial point to note is that the Generic Codes provide that “No Qualifying Transaction could be claimed as B-BBEE Ownership if a repurchase transaction is entered into within three years after the transaction implementation, even if - the repurchase - transaction implementation is deferred post Year Three. A Seller cannot have any right to enforce such a repurchase.”

How are Ownership points measured?

Net Value

- > The total value of the transaction;
- > The value of Equity Instruments held by ‘Black’ People in the separately identifiable related business; and
- > Carrying value of the Acquisition Debt of ‘Black’ People in the ‘separate identifiable related business’. An organisation must use a Standard Valuation method when calculating the values previously described.

When applying Statement 102, the Seller must comply with the sub-minimum requirement for Ownership, namely 40% of the Net Value points. It will further comply with all other Priority Elements as per the Generic Codes. However, it is only to the extent of the transaction involving the ‘separately identifiable related business’.

Acquisition Debt

Defined as “the debts of (a) ‘Black’ Participants incurred in financing the purchase of their equity instruments in the Measured Entity; (b) Juristic persons or trust found in the chain of Ownership between the eventual ‘Black’ Participants and the Measured Entity for the same purpose as that in (a).”

Voting Rights and Economic Interest

Regarding Voting Rights and Economic Interest, the Seller must include the equivalency percentages in its Ownership Scorecard as if the percentages arose from a sale of Equity Instruments to ‘Black’ People. The calculation derives from the formula set out in Annexe 102(A).

How is the value of a ‘separately identifiable related business’ calculated for ‘Black’ Shareholders?

- > It must form part of the same chain of ownership, thus owned by the Seller.
- > The recognisable Economic Interest will be a percentage of the total value sold.
- > The percentage of Exercisable Voting Rights held by the new owners represents the recognisable right to Exercisable Voting Rights held by ‘Black’ People.
- > The Rights of Ownership granted to ‘Black’ People are comparable to rights that would have accrued had the sale or transaction taken place at the Seller’s level.

How is the sale of an asset, equity instruments or business recognised?

For the first three years after the transaction, the Seller can claim Ownership points on the date of measurement according to the value of the following:

- > The Seller; and

- > ‘Separately identifiable related business’. Such recognition is in respect of each year of the three years. On each measurement date following the third year, the Seller can recognise Ownership points based on the ownership indicator percentages achieved in Year Three following the transaction. However, the Codes do not provide an end date for such recognition.

How is the value of a transaction confirmed?

A Competent Person must evaluate the transaction, providing a comprehensive report on the fairness of the transaction’s value. Continued recognition is subject to the opinion of the independent expert supporting the transaction value.

Example of Annexe 102(A) Calculation:

The following is an illustration of the calculation based on: ABC Traders sells a division of its business, in other words, a ‘separately identifiable related business’ to XYZ Inc.

The total value of ABC Traders is R100 million. The value of the portion of the business to be sold to XYZ Inc is R25 million, which is 25% of the total value.

The total Rights of Ownership that incorporates Voting Rights and Economic Interest in XYZ Inc in the hands of ‘Black’ People totals 80%.

Following the transaction of ABC Traders’ sale of the business, XYZ Inc is entitled to an Equity Equivalency percentage calculated using the following formula:

$$A = \frac{B}{C} \times D$$

- Where:
- A. Is the Equivalency Percentage for each indicator in paragraphs 2.1 and 2.2 of the Ownership Scorecard.
 - B. Is the value of the Qualifying Transaction to the ‘separately identifiable related business’ determined using a Standard Valuation method.
 - C. Is the value of the Seller determined using a Standard Valuation method.
 - D. Is the indicator percentage of the ‘separately identifiable related business’.

A = B divided by C multiplied by D
A = R25m divided by R100m multiplied by 80%
A = 20% ‘Black’ Ownership

Therefore, without any ‘Black’ Shareholding in year one, ABC Traders would be deemed to have 20% notional ‘Black’ Shareholding.

ABC Traders will repeat the calculation in years two and three following the transaction. After that, the score achieved in year three continues to apply to ABC Traders’ Ownership Scorecard.

The table below illustrates ABC Traders’ Ownership Scorecard based on the recognisable percentage when applying Statement 102.

The total Ownership points will fluctuate based on the type of ‘Black’ Shareholders incorporated into ABC Traders’ ownership structure.

	XYZ Inc		ABC Traders
	‘Black’ Shareholding based on a detailed scorecard	Recognisable percentage based on Statement 102	‘Black’ Ownership %
	(A)	(B)	(A x B)
Voting Rights in the hands of ‘Black’ People	80%	25%	20%
Voting Rights in the hands of ‘Black’ Women	0%	25%	0%
Economic Interest in the hands of ‘Black’ People	80%	25%	20%
Economic Interest in the hands of ‘Black’ Women	0%	25%	0%
Economic Interest in the hands of ‘Black’ New Entrants	80%	25%	20%

Illustrated solely on Statement 102, in year one, following ABC Traders’ B-BBEE Verification, its Ownership Scorecard based on ‘Black’ New Entrants reflects:

Indicator	Weighting Points	Target	Claim based on Statement 102	Score
Exercisable Voting Rights in the Enterprise in the hands of ‘Black’ People	4	25% + 1 vote	20.00%	3.2
Exercisable Voting Rights in the Enterprise in the hands of ‘Black’ Women	2	10%	0.00%	0.0
Economic Interest in the Enterprise to which ‘Black’ People are entitled	4	25%	20.00%	3.2
Economic Interest in the Enterprise to which ‘Black’ Women are entitled	2	10%	0.00%	0.00
Economic Interest in the Enterprise to which the following natural persons are entitled: > ‘Black’ Designated Groups > ‘Black’ Participants in Employee Ownership Schemes > ‘Black’ Participants in Broad-based Ownership Schemes > ‘Black’ Participants in Co-operatives; and	3	3.00%	0.00%	0.00
‘Black’ New Entrants	2	2%	20.00%	2.00
Net Value: > 2.5% in year one > 5% in year two > 10% in years three and four > 15% in years five and six > 20% in years seven and eight > 25% in years nine and ten	8	2.5%	20.00%	6.4
Total	25			14.8

Suppose XYZ Inc was a ‘Black’ Woman-owned business, using the same calculation their Ownership Scorecard based on ‘Black’ New Entrants would reflect:

Indicator	Weighting Points	Target	Claim based on Statement 102	Score
Exercisable Voting Rights in the Enterprise in the hands of ‘Black’ People	4	25% + 1 vote	20.00%	3.2
Exercisable Voting Rights in the Enterprise in the hands of ‘Black’ Women	2	10%	20.00%	2.00
Economic Interest in the Enterprise to which ‘Black’ People are entitled	4	25%	20.00%	3.2
Economic Interest in the Enterprise to which ‘Black’ Women are entitled	2	10%	20.00%	2.00
Economic Interest in the Enterprise to which the following natural persons are entitled: > ‘Black’ Designated Groups > ‘Black’ Participants in Employee Ownership Schemes > ‘Black’ Participants in Broad-based Ownership Schemes > ‘Black’ Participants in Co-operatives; and	3	3.00%	0.00%	0.00
‘Black’ New Entrants	2	2%	20.00%	2.00
Net Value: > 2.5% in year one > 5% in year two > 10% in years three and four > 15% in years five and six > 20% in years seven and eight > 25% in years nine and ten	8	2.5%	20.00%	6.4
Total	25			14.8

Statement 102 is one of many vehicles available to organisations for aligning their internal structures with the Ownership Scorecard. Although entering into a B-BBEE ownership transaction is generally done with the best intentions, there is a risk of failure. Often this has nothing to do with the human factor, but the Net Value factor, as there is a link between the Net Value calculation and an organisation’s share price and business value. Consequently, a dip in share price and business value may mean a dip in the points earned on the Ownership Scorecard, which may well impact an organisation’s ability to gain and retain business. There have been organisations that have fallen foul of the Net Value calculation. As ownership structures are contractually solidified in terms of finances and B-BBEE commitments, they can result in a no-win situation for all parties.

Apart from the legal side of an ownership transaction, if the expectation is to yield Ownership points, a ten-year forecast by a competent B-BBEE Ownership specialist must form part of the transaction’s due diligence.

Vetted by:
Mariëtte van Wyk
Technical Specialist, BEE Chamber

Source of Reference
<https://www.cliffedekkerhofmeyr.com/export/sites/cclh/en/news/publications/2019/Corporate/downloads/Corporate-Commercial-Alert-29-May-2019.pdf>