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Mr A Hermans
Portfolio Committee of Trade and Industry

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Dear Mr Hermans,

**Broad-Based Black Economic Empowerment Amendment Bill, published in
Government Gazette No. 35907 (dated 23 November 2012)**

The Banking Association welcomes the opportunity to review and comment on the Amendment Bill as published.

The Banking Association recognises that the Amendment Bill is about the promotion and implementation of economic transformation and empowerment. We recognise the Bill also has the intent of aligning all other legislation dealing with B-BBEE to expedite the transformation of the economy. The main aims of the Bill are:

- To insert certain definitions and to amend others;
- To clarify interpretation;
- To provide for the remuneration of Council members;
- To promote compliance by organs of state and public entities and to strengthen the evaluation and monitoring of compliance;
- To include the creation of incentive schemes to support black-owned and managed enterprises in the strategy for Broad-Based Black Economic Empowerment;
- To provide for the cancellation of a contract or authorisation;
- To establish the Broad-Based Black Economic Empowerment Commission to deal with compliance of Broad-Based Black Economic Empowerment;
- To provide for offences and penalties.

Summary of Comments

The Banking Association welcomes and supports the Amendment Bill, specifically:

- Dealing decisively with fronting, which will go a long way to make the transformation process more transparent and ensure transformation is implemented in an equitable way across all sectors.
- The regulation of the verification industry will bring consistency and credibility to the verification regime, which is needed.
- The inclusion of organs of state and public entities is a positive development.
- The clarification on the remuneration of commissioners on the Broad-Based Black Economic Empowerment Commission.
- The monitoring of Broad-Based Black Economic Empowerment. There is a need for a comprehensive B-BBEE status report which encompasses all the elements that could give the country and potential foreign direct investors a good indication of progress with economic transformation. It should be cautioned though that the reporting should move beyond a numbers and "tick box" approach, and must ensure:
 - that the numbers be placed in proper context;
 - that the qualitative impact of the transformation effort is reported on.

Section 1 – Definitions

"Fronting practice" – the definition of fronting practice is supported. We propose, however that (d)(iii), *arm's length* be re-evaluated as it has a potential to impede legitimate and genuine transactions within the same holding company, e.g. black management buyouts.

Section 9(6) – Codes of Good Practice

We support the principle that certain organs of state and public sector institutions be permitted to specify their own qualification criteria that exceeds the Generic Codes. In its current form, however, the sub-section precludes the process for public comment and as a result criteria may be set that may be prejudicial and have unintended consequences in its application. We are of the view that in order for the Minister to give this permission the requested criteria must follow the process for the gazetting of a Sector Code. i.e. a body (sort of a charter council) must be set up which includes relevant stakeholders, the proposed criteria must be issued for public comment, comment must be reviewed, etc before it is permitted by the Minister, since this entity specific qualification criteria is in nature the same as a sector code. We recommend that the Section 9(6) be worded as follows:

“(6) If requested to do so, the Minister may, permit organs of state or public entities to specify qualification criteria for procurement and other economic activities which exceed those set by the Minister in terms of subsection (1), by following the same process to draw up these qualification criteria for the drawing up of Sector Codes as specified under S9 (e) above.

Section 13A - Cancellation of Contract or Authorization

We propose this section allows for recognition of a financial institution that has provided debt or other financing to the enterprise against revenues expected to be generated from the contract in question. This would include amongst others Debtor Finance, Purchase Order Finance and Contract Finance, term lending for the purchase of capital assets, equity financing and hybrid financing instruments.

Section 13B - The Establishment and Status of the B-BEE Commission

The requirement under Clause 15(4), that organs of state assist the Commission, should be qualified to consider legislation imposing confidentiality regarding some information.

In respect of the re-appointment of Commissioners, it is recommended that there should be a limit on how many times a Commissioner can be reappointed. Furthermore, we suggest that a clause be included to preclude Commissioners and employees of the Commission that are beneficiaries of or are part of a consortium that has concluded a BEE ownership transaction this would go a long way to eliminate any conflicts of interest.

It is recommended that the process for receiving and investigating complaints be explained in this section.

We recommend the section be amended to ensure the Commission only investigates transactions, above a certain value, that have to do with fronting. This would clarify the Commission is not to investigate general non-compliance with the Codes.

Section 13F- Functions of the Commission

(g) Notes that one of the functions of the Commission is to receive and analyse reports concerning B-BEE compliance from the state, public entities and private sector enterprises. There is a serious concern around whether the Commission will have the necessary resources to receive and analyse reports from the private sector and public sector, with over 472 companies listed on the JSE, not to mention the 26 national departments.

Section 13G(2) - Reporting

This section appears to exclude major groups not listed at all, or listed on a foreign stock exchange. These are sizable groups making a significant economic impact. We suggest these groups must be included in this section so that they are also monitored.

We are acutely aware that in a competitive business environment, much of the information provided in BEE/Transformation reports is of a proprietary/confidential nature and we therefore propose that an additional bullet point, 13G(2)(c), be added under Section 13G(2) that contains wording to the following effect:

"(c) such information provided to the Commissioner shall not be disclosed by the Commissioner to, amongst others, any person, organisation, body, the general public or Organ of State other than the Office of the Presidency in a manner other than in a consolidated manner so as to ensure that the proprietary and confidential information

of each individual reporting institution contained in these reporting requirement is safeguarded”

Section 13J – Investigations by the Commission

While we support the provision of authority to the Commission to conduct investigations, we must guard against situations that allows for superfluous and voluminous amounts of complaints to be lodged with the Commission. The impact of allowing for this would be extremely negative in that it is likely to cause a drain on the economic, personnel and time resources of the Commission and disrupt the business activities of the entity against whom a complaint has been lodged thereby effectively putting a drain on productive resources in the economy, which could have far reaching effects in terms of productivity, the economy and even on job creation activities, since primary outcome much of the BEE initiatives engaged in are in fact targeted at job creation activities.

In order to discourage the lodgment of superfluous complaints we suggest that section 13J(1)(a) be added to the bill which stipulates that anyone lodging a complaint must pay a “non-refundable complaint lodgment fee”. This fee should be in line with the costs that the Commission will incur in order to make an initial assessment of the complaint to decide whether there are any merits to the complaint and whether the Commission will institute an investigation into the allegations made in the complaint.

In addition, we also propose that Section 13J(1)(b) be added to the Bill which stipulates that complainants will be liable for the costs/portion of the costs of an investigation conducted by the Commission if the investigation leads to a finding that the complaint was unfounded/malicious.

The inclusion of these two additional bullet points will have the effect of deterring against superfluous complaints and will reduce the costs and clutter of the Commissioner’s Office.

Section 13J(7) allows the Commissioner the power to publicise any finding it has made. What if their finding is being disputed? Does this allow the Commissioner to publish a finding or recommendation against an entity even if the finding/recommendation is being disputed by the entity? We are not averse to “naming and shaming” however, it is completely inappropriate to allow the Commissioner to summarily and it seems unilaterally decide an entity’s “innocence/guilt” and to publish these findings without due process of law being followed. We would suggest that in order for the Commissioner to be allowed to publish any findings, these findings must be upheld by a court of law if it is being disputed by the “accused”, This will allow the “accused” parties to a right of dispute for these findings and the right to not be unfairly prejudiced before being “named and shamed” as it were. Otherwise we have a situation of “guilty until proven innocent”, but by the time the “accused” proves its innocence it will be too late because untold reputational and other damage would already be done by the “naming and shaming”

Lastly, we note that the commissioner has the power to institute legal proceedings or to report an entity to appropriate authorities, however it is not clear as to what the legal standing of their findings/recommendations are. Once, they have made a finding/recommendation is the entity legally required to institute these findings/recommendations or is the entity entitled to dispute these

findings/recommendations? Please provide clarity as to the legal standing of these findings/recommendations.

Section 13K – Summonses

We note that the Commissioner may issue summonses to any persons he/she deems necessary as part of the investigation referred to under S13J. We note also that these summonses may be served in the same manner as subpoenas in a criminal case and we note that as per S13(N)(3)(f), it is an offense to refuse to appear after being summoned or refuses to answer any questions (unless it incriminates him) or refuses to produce any documents requested.

This seems to confer the same authority held by a court to the Commission, however the Commission is not a court and is not bound by the same rules and regulations as a court. This being the case we lodge our objection to the notion that the Commission may be conferred with the same authority as a court of law. We do note however that in terms of S13O(3)b and Section 13O(4), it is clear that only a court may impose a penalty of a person is found guilty of any offenses contemplated under Section 13N and Section 13O, what is not clear is as to the process of how a person is charged with an offense under this Act.

The implication is that a person need not be charged under this Act but the Commission still has the power to “name and shame” even if there are never any charges brought against a person. We object to this implication in the strongest possible manner.

Section 13L – Confidential Information

Similar to our comment under S13(K), we note that S13(L) allows the Commissioner to request confidential information and under S13(N)(2)(C) the Commissioner is allowed to unilaterally disclose such information and under S13(N)(2) it is defined as an offense to refuse to produce confidential information at the request of the Commissioner.

We feel that the powers of the Commissioner are totally inappropriate and grossly disproportionate. Not even courts have this type of unilateral and far reaching power:

- The Commissioner can investigate an entity if he receives a complaint or if he wants to whether there is a complaint or not and
- can summon the entity or its representatives (the entity has no right to refuse to appear or it is guilty of an offense and it is unclear whether the entity has a right to legal representation if it does appear),
- the Commissioner can have full access to any confidential information he may request from an entity and the entity has no right to refuse to provide the information or it is guilty of an offense
- the Commissioner can disclose any confidential information it has requested. The entity does not have any right to confidentiality if the Commissioner has requested information
- the Commissioner can make a finding or recommendation and publish this finding. The entity has no right to dispute this finding.



Section 13N – Offenses in Connection with the Commission

We note that S13N(1) makes it an offense to disclose confidential information but S13(2)(c) makes it not an offense to disclose confidential information requested by the Commission or a court. We do not support the intention to allow the Commission to disclose any confidential information, since it does not have the same legal standing as a court. Please refer to our comment under S13(L) above, the powers of the Commission are grossly inappropriate.

Section 13O – Other Offenses and Penalties

It is unclear as to the process to be followed in order to charge, try and convict a person of an offense (either a S13N offense or a S13O offense).

Secondly, we note that the penalties imposed for convictions for offenses under Section 13O(1) can be up to 10 years in prison or a fine of up to 10% of annual turnover or both.

For convictions for offenses under S13N or S13O(2), penalties can be up to 12 months in prison a fine or both.

While we support the notion that the penalties imposed should be sufficiently harsh in order to act as a deterrent, we are of the view that the penalties proposed are grossly inappropriate. We suggest that a fine equal to a maximum of 10% of annual turnover and prohibition from doing business with organs of state and placement on an offenders database for either S13N or S13O subsections 1 and 2 offenses is a sufficient penalty to deter entities from committing such offenses.

Section 13P – Prohibition on business with organs of state following conviction under this Act

We propose the inclusion of a rehabilitation mechanism that can be applied by convicted offenders who wish to get back into the system. We suggest that a convicted offender may only apply for rehabilitation after 5 years have elapsed from the date that they were placed on the offenders database as long as they have not committed any other offenses during that time. Cases here should be considered on their own merits.

We further propose that a person and/or entity should not be prejudiced or disadvantaged during the investigation process. In the case of a guilty verdict, any benefits so derived, should be repaid.

