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26 February 2013

Ms J Fubbs
Chairperson of the Portfolio Committee on Trade and Industry
Parliament
Cape Town

**RE: BUSA SUBMISSION: BROAD-BASED BLACK ECONOMIC EMPOWERMENT AMENDMENT
BILL [B42-2012]**

Dear Ms Fubbs

Please find below the Business Unity South Africa (BUSA's) submission regarding the Broad-Based Black Economic Empowerment Amendment Bill.

BUSA welcomes the call for submission of written input on the amendment Bill.

Should you have any question/s regarding this submission, kindly contact Ms Vanessa Phala: Executive Director Social and Transformation Policy on vanessa.phala@busa.org.za or call her on 071 382 7788

Kind regards,

NOMAXABISO MAJOKWENI
CHIEF EXECUTIVE OFFICER

**SUBMISSION BY BUSA TO THE PARLIAMENTARY PORTFOLIO COMMITTEE ON TRADE AND
INDUSTRY REGARDING THE BROAD BASED-BASED BLACK ECONOMIC EMPOWERMENT
AMENDMENT BILL**

FEBRUARY 2013

1. WHO WE ARE

Business Unity South Africa (BUSA) is a confederation of business organisations including chambers of commerce and industry, professional associations, corporate associations and unisectoral organisations. It represents South African business on macro-economic and high-level issues that affect it at the national and international levels. BUSA's function is to ensure that business plays a constructive role in the country's economic growth, development and transformation and to create an environment in which businesses of all size and in all sectors can thrive, expand and be competitive.

As the principle representative of business in South Africa, BUSA represents the views of its members in a number of national structures and bodies, both statutory and non-statutory. BUSA also represents businesses' interests in the National Economic Development and Labour Council (NEDLAC). Internationally, BUSA is a member of the International Organisation of Employers (IOE), The Pan-African Employers' Confederation (PEC) the Africa Employers' Group and the Southern Africa Development Community (SADC) Employers' Group. BUSA is also the official representative of business at the International Labour Organisation (ILO), the African Union (AU) Social Affairs Commission, the B-20, the Organisation for Economic Cooperation and Development (OECD) and World Trade Organisation.

BUSA aims to be a unified and fully representative organisation that contributes to a vibrant, transforming and growing economy.

2. INTRODUCTORY REMARKS

The Minister of Trade and Industry issued the Amendment Bill on 7 December 2011 and called for public comments, negotiations on the Bill also took place at the National Economic Development and Labour Council (NEDLAC) during May, June and July 2012. The given objectives of the amendments are, to:

- Promote compliance with the Act by Organs of State and Public Entities;
- Strengthen the evaluation and monitoring of compliance with the Act;
- Provide for the regulation of verification agencies by the Independent Regulatory Board of Auditors;
- Establish the B-BBEE Commission to deal with compliance of B-BBEE; and
- Clarify the interpretation of the Act and to provide for offences and penalties.

3. BUSA'S DETAILED PROPOSALS AND COMMENTS ON THE AMENDMENT BILL

The economic transformation of the economy, where the majority of the citizens play a meaningful role in the country's economy, is crucial to the sustainability of our hard fought democracy. As such, the principle of substance over form as well as the spirit and intentions of the Amendment Bill are welcomed by BUSA.

BUSA generally welcomes and supports the Amendment Bill. In general, BUSA is of the view that:

- Decisively dealing with fronting will go a long way in speeding up the implementation of transformation in the country.
- The introduction of penalties is cautiously welcomed but we have to guard against unintended consequences.
- The Regulation of the verification industry will bring consistency and credibility in the verification regime.
- The inclusion of Organs of State and Public Entities is positively viewed;
- The introduction of a BEE Commission, with sufficient enforcement powers, is an excellent development and long overdue.
- The monitoring of any national policy is crucial and transformation cannot be an exception. There is a need for a comprehensive B-BBEE status report which encompasses all the elements that could give the country and potential foreign investors an indication of where the country is in terms of economic transformation.

BUSA supports the majority of amendments as proposed in the Bill specifically the following amendments are endorsed:

Section 1	Definitions
Section 2	Objectives of the Act
Section 3	Interpretation of the Act
Section 9	Code of Good Practice
Section 10	Status of codes of good practice
Section 11	Strategy for broad-based black economic empowerment
Section 13A	Cancellation of contract of authorisation
Section 13 B	Establishment and status of BBBEE Commission
Section 13C	Appointment of Commissioner
Section 13D	Appointment of Deputy Commissioner and Staff of the Commission
Section 13E	Finances of the Commission
Section 13F	Functions of Commission
Section 13G	Reporting
Section 13H	Delegation and assignment
Section 13J	Investigations by Commission
Section 13K	Summons
Section 13L	Confidential Information
Section 13M	Conflicting interests of employees
Section 13N	Offences in connection with Commission

BUSA is unable to support the following sections:

Compliance and Enforcement	
Section 13B	Establishment of the B-BBEE Commission
Section 13O	Other offences and penalties
Substitution of Section 14	Regulations

Section 13B: Establishment of the B-BBEE Commission

The proposal by Government at Nedlac, which was agreed to by the social partners, was to establish the Commission as an independent juristic person. The Bill now proposes differently that that the Commission should be a trading entity within the administration of the Department and that it should be impartial, while not independent. We are concerned that this will inhibit the functioning of the Commission and that it will not achieve the required focus, funding, attention and independence to optimally perform its function. We further note that the revision of s13B in the Bill is now in contradiction to s13E. The Nedlac agreed proposal is preferable.

Section 13O: Other offences and penalties

The introduction of penalties is cautiously welcomed however; we have to guard against unintended consequences. This is specifically so in instances such as where a Company may unknowingly (and in good faith) transact with a B-BBEE "entity" and where that B-BBEE "entity" acts as a front for a third party. An example is where the transaction takes place via the B-BBEE entity (who does not perform any work but "outsources" the work to the third party and takes a commission or finder's fee). The real benefits of the transaction would go not to the B-BBEE entity but to the third party. Theoretically there is a risk that the Company may be liable to a penalty despite unwittingly having become involved in the fronting. Care should be taken that these kinds of unintended consequences are avoided.

We reject fines based on the concept of turnover, as turnover has no direct relationship to offence. The proposed clause 13O(4) which states that the court must take into account the value of the transaction which was derived from, or sought to be derived from, the commission of the offence is a preferable manner in which to link the fine directly to the transgression. There is no need to refer to turnover in this regard. The proposed 10% of annual turnover, however, will result in unintended consequences of discouraging investment and potentially bankrupting companies and this would have a huge negative impact on employment in the country. We suggest that the fine should perhaps be in multiples of the contract value tendered for. E.g. up to a maximum of X amount of the value of the contract..

Section 14: Regulations

As submitted at Nedlac by both Business and Labour, BUSA wishes to reiterate the view that this clause should include a requirement for consultation on the Regulations to be conducted through the structured processes of Nedlac.

4. CONCLUSION

We trust that the above comments clearly articulate our position regarding the amendments, in general we are in full support of the amendments and we look forward to addressing the Portfolio Committee and Trade and Industry to re-iterate our support for this Bill. We thank the Department for taking our comments into consideration and we are grateful for the opportunity provided by Nedlac to engage on this matter.