

ARTICLE ON SIGNIFICANT BENEFICIAL OWNERS

Ministry of Corporate Affairs (“MCA”) has introduced concept of “Significant Beneficial Owner (“SBO”) for the first time including Filing of Return, Maintenance of Register, and also specifies fines and penalties for non-compliance by substituting Section 90 of Companies Act, 2013 (“CA 2013”) through Companies Amendment Act, 2017 (“CAA 2017”)

MCA vide notification dated June 13, 2018 notified Section 90 of CA 2013 along with its rules namely Companies (Significant Beneficial Owners) Rules, 2018 (“SBO Rules”).

BRIEF HISTORY:

One more drive of MCA in enhancing transparency and finding the “*real owner*” or controller of the Company, the aforesaid new Section 90 is introduced. This move is due to the risks presented by shell companies and other techniques used to confuse the identity of real owners in corporate sector.

These risks are highlighted by the recent scandals involving Nirav Modi, Gitanjali Gems and PNB.

Hence, new category of person has emerged which is **SIGNIFICANT BENEFICIAL OWNER**.

MEANING OF SBO AS PER SUB SECTION (1) OF SECTION 90 READ WITH SBO RULES, 2018:

➤ Every individual, who acting alone or together, or through one or more persons or trust, including a trust and persons resident outside India shall become SBO with respect to shares in a Company if,

→ **Condition 1:** Any 1 condition of the following,

1. holds **more than 10 % shares** in the Company; OR
2. the right to exercise, or the actual exercising of **significant influence**; OR
3. **Control** as defined in clause (27) of section 2 over the Company

Explanation: Control is defined in Section 2 (27) of CA 2013 as under:

- “it shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner”

AND

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→ **Condition 2:** Whose name is **not entered** in the register of members as a shareholder of the Company

- Individuals (natural person) fulfilling the conditions specified above are termed as **“SBO” of the Company**. In case where member of the Company is not a natural person, the SBO shall be:

Sr. No.	Where Member is	Along with	Percentage
1	Company	SBO is the natural person, who, - Whether acting alone or - together with other natural persons, or - through one or more other persons or trust	Hold atleast 10% of share capital of the Company or Who exercise significant influence or control in the Company through other means.
2	Partnership Firm	SBO is the natural person, who, - Whether acting alone or - together with other natural persons, or - through one or more other persons or trust	Hold atleast 10% of capital or Has entitled of not less than 10% of profits of the partnership firm.
Where there is No Natural person in aforesaid Situation than “Senior Managing Official” will be SBO.			
3	Trust	The beneficial owner shall includes - identification of the author of the trust, and - the trustee, and - the beneficiaries with not less than 10% interest in the trust and - any other natural person exercising ultimate effective control over the trust through a chain of control or ownership.	

SUBMISSION OF DECLARATION:

- A declaration is required to be given to the Company by every SBO, specifying the nature of his interest and other particulars in the manner and time as may be prescribed in **Form No. BEN-1** within,
- 90 days from commencement of SBO Rules (June 13, 2018) and therefore last date for declaration of such significant shareholding is **September 10, 2018**; and
 - 30 days in case of acquiring such significant beneficial ownership or in case of any changes in such ownership.

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- If a person fails to make declaration as stated above he shall be **punishable with minimum fine of Rs. 100,000/- which may extend to Rs. 10,00,000/-**. In addition to this, per day penalty of Rs. 1,000/- will also be applicable for each day of continuing default.

FILING OF RETURNS OF SBO AND MAINTENANCE OF REGISTER:

- A Company is required to file **return** of the SBO in **Form No. BEN-2** with the Registrar of Companies (RoC) within a period of 30 days from the date of receipt of declaration.
- A Company is also required to maintain (and keep available for inspection by any member) a **register** of SBO in **Form No. BEN-3**.
- A Company which fails to maintain the register of SBO or denies its inspection, or fails to file the return, then such Company and every officer of the Company in default is also punishable with minimum fine of Rs. 10,00,000/- which may extend to Rs. 50,00,000/-. In addition to this, per day penalty of Rs. 1,000/- will also be applicable for each day of continuing default.

NOTICE BY COMPANY:

- A Company is required to give notice in **Form No. BEN-4** to any person (whether or not a member of the Company) whom the **Company knows or has reasonable cause to believe to:**
 1. be a SBO of the Company;
 2. have knowledge of the identity of a SBO or another person likely to have such knowledge; or
 3. have been a SBO of the Company at any time during the immediately preceding three (3) years of the notice,and who is not registered as a SBO with the Company.
- The information required by the notice under sub-section (5) is to be given within a period **not exceeding 30 days** from the notice date.

CONSEQUENCES OF NON-COMPLIANCE WITH THE NOTICE:

- Upon failure of the person to either furnish the required information in the notice or upon giving unsatisfactory information, the Company is to apply to the National Company Law Tribunal (NCLT) within a period of **fifteen (15) days** of expiry of the period specified in the notice, for an order directing that the concerned shares be subject to restrictions with regard

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to transfer of interest, suspension of rights attached to shares and such other prescribed matters.

NON APPLICABILITY

- These rules are not made applicable to the holding of shares of companies/body corporates, in case of pooled investment vehicles/investment funds such as Mutual Funds, Alternative Investment Funds (AIFs), Real Estate Investment Trusts (REITs) and Infrastructure Investment Trusts (InvITs) regulated under SEBI Act.

In the backdrop of above provision now, the Company is required to identify and find a person having Significant Beneficial Ownership and if it has any **reason to believe** than it has to ask details from that person and in case it fails then to make an Application to NCLT.

Each Company Secretary or Compliance Department need to review following for compliance of Section 90 of the Companies Act, 2013, for SBO:

1. Have group structure;
2. Send relevant notices in writing to SBO (if known), or to any person who has reasonable cause to believe and who can identify the SBO;
3. Create a Register for making entries of SBO in Form BEN 3.

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Amita Desai & Co.

Company Secretaries

Mumbai Off :

1005, Hubtown Solaris

Landline: + 91-22-2684-5920/21

Off Western Express Highway

Fax: + 91-22-6678-7499

East End of Andheri Flyover

Mobile : + 91-982-017-7691