

'Significant Beneficial Owners' – provisions warrant significant overhaul

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The [Companies \(Amendment\) Act, 2017](#) ('Amendment Act') has replaced section 90 of the [Companies Act, 2013](#) ('Act'). The substituted section relates to 'Register of significant beneficial owners in a company'. This article is a critical analysis of sub-section (1) of section 90 of the Act. The focus of the article is on the hurdles and interpretation issues in complying with the said provisions.

Sub-section (1) of section 90 of the Act imposes an obligation on an individual holding beneficial interest of more than 25% in the company to make requisite disclosures and declarations. The objective of the provision is to identify the ultimate individual owner of the company. Though the objective is quite clear, there are some important critical issues in the provision.

Applicability: Section 90 of the Act is applicable to all companies – private company or public company (whether listed or unlisted). The provision has not provided for any specific exception.

Who shall make the requisite disclosure? The provision states that every individual, whether acting alone or together, or through one or more persons or trust (including a trust and persons resident outside India) holding requisite shareholding or beneficial interest shall make disclosure. With reference to sub-section (1) of section 90 of the Act holding shares 'together' with an individual needs more clarity. Whether we need to apply the interpretation of 'person acting in concert' (under the provisions of SEBI's Takeover Regulations) or some other parties for calculating the shareholding? To some extent, the provision has given clarity as it would include the shareholding through: (i) One or more person, (ii) One or more Trust, (iii) Persons resident outside India. However, such provision is inclusive in nature, for which there is a need to have more clarity.

Thresholds for making the disclosure: The provision further states that such individual holding beneficial interest shall make requisite declaration to the company in prescribed form. An individual can hold beneficial interest in different forms: (i) Holding not less than 25% (or such other percentage as may be prescribed) in shares of a company, (ii) Holding not less than 25% (or such other percentage as may be prescribed) as the right to exercise, or the actual exercising of significant influence, (iii) Holding not less than 25% (or such other percentage as may be prescribed) as the right to control as defined in clause (27) of section 2 of the Act. Interestingly, 'significant influence' is defined, however, the definition is in relation to 'associate company' (Explanation (a) to sub-section (6) of section 2 of the Act). Therefore, in my view, the term 'significant influence' cannot be referred to and applied to section 90 of the Act. Therefore, 1 out of 3 criteria remains undefined.

Reporting of change in beneficial interest: The provision states that the significant beneficial owner shall make a declaration to the company in a prescribed form within a prescribed period of acquisition of the beneficial interest or rights. The significant beneficial owner shall also make a declaration to the company in case of change in any change thereof. Section 90 of the Act does not prescribe a minimum threshold for reporting of 'change'. Therefore, even a change in shareholding by 1 share (whether purchased or sold) will require a reporting to the company. Interestingly, even a change in shareholding by 1 share (whether purchased or sold by another person falling under 'together', as discussed above) will require a reporting to the company.

Exemption from making declaration: The entire purpose of identifying the real owner of the company is diluted by the proviso to sub-section (1) of section 90 of the Act, which states that the Central Government may prescribe a class or classes of persons who shall not be required to make a requisite declaration. In my view, such exemption should not be provided to any person and for any type of company considering the entire objective of said provision.

The above discussion relates only to the operational difficulties in the compliance of Section 90 of the Act. In my view, the provision will require a major revamp. Though the intention is quite evident that the law is tracing an individual who has significant beneficial ownership in the company, however, the same is not adequately reflected in Section 90 of the Act. As of now, the Ministry of Corporate Affairs has issued draft Rules on the subject matter. However, the draft Rules are not addressing the operational difficulties in the compliance of Section 90 of the Act .

(The views expressed are strictly personal.)

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