

COMPANY LAW

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Deciphering provisions of 'significant beneficial owners' under the Companies (Amendment) Act, 2017

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The Companies (Amendment) Act, 2017 has replaced section 90 of the Companies Act, 2013 ('the Act'). The substituted section relates to 'register of significant beneficial owners in a company'. This article is a clause by clause analysis of section 90 of the Act, 2013 with necessary references to the Rules which will be notified soon by the Government. The analysis relates to applicability of section 90 of the Act, identifying the significant beneficial owners, obligation of the significant beneficial owners and the company, application to National Company Law Tribunal and penal provisions.

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Investigation of beneficial ownership of shares

1. Section 90 of the Companies Act, 2013 [before amendment by the Companies (Amendment) Act, 2017] related to 'investigation of beneficial ownership of shares in certain cases'. According to the earlier provisions of section 90 the Act, where it appeared to the Central Government that there were reasons to investigate the beneficial ownership of shares, the Central Government may appoint one or more competent persons to investigate and report as to beneficial ownership with regard to any share or class of shares. In such cases, the provisions of section 216 of the Act (relating to 'investigation of ownership of company') shall, as far as may be, apply to such investigation. Such provisions corresponded to sub-section (1) of section 187 of the Companies Act, 1956 Act.

Register of significant beneficial owners in a company

2. Section 90 of the Act was entirely substituted by the Companies (Amendment) Act, 2017 ('Amendment Act'). The provisions now relate to 'register of significant beneficial owners in a company'. The clause by clause analysis of section 90 of the Act is as follows :

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Declaration by significant beneficial owner

2.1 Every individual, who acting alone or together, or through one or more persons or trust, including a trust and persons resident outside India, holding beneficial interests, of not less than 25 per cent (or such other percentage as may be prescribed), in shares of a company or the right to exercise, or the actual exercising of significant influence or control over the company is referred to as significant beneficial owner ('SBO').

Coverage of SBO

2.2 The shareholding by an individual can be alone or together. The shareholding can be through a person or trust. Even the shareholding by a person resident outside India is to be considered. Such individual shall hold beneficial interest of not less than 25 per cent in (a) shares of a company or (b) right to exercise or the actual exercising of significant influence over the company, or (c) right to exercise control over the company.

Significant influence vis-a-vis control

2.3 Interestingly, 'significant influence' is defined in clause (6) of section 2 of the Act (relating to associate company), however, 'significant influence' is not defined in the amended section 90. Though, control is defined in the Act.

Meaning of 'control'

2.4 'Control' has been defined in clause (27) of section 2 of Act. The definition of 'control' is an inclusive definition. Control shall include (a) right to appoint majority of the directors, or (b) right to control the management, or (c) right to control policy decisions exercisable by a person or persons acting individually or in concert (directly or indirectly). Such rights includes by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner.

Responsibility of SBO

2.5 It is the responsibility of the SBO to make a declaration to the company, specifying the nature of his interest and other particulars, in such manner and within such period of acquisition of the beneficial interest or rights and any change thereof, as may be prescribed. Therefore, the Rules will provide for contents and timelines of disclosures for maintenance of register of SBO.

Applicability of section 90

2.6 The Act does not specify the applicability of the section. Based on the interpretation of section 90, the provisions are applicable to all companies – private company and public company (listed or unlisted).

Exemption to section 90

2.7 The Central Government may prescribe class or classes of persons who shall not be required to make the requisite declaration under section 90. Therefore, either the Rules or Notification will provide such exemption.

Maintenance of register of the interest declared by SBO

2.8 Based on the declaration made by the SBO, every company shall maintain a register of the interest declared by SBO. The register shall also contain the changes the SBO with respect to the name of individual, his date of birth, address, details of ownership in the company and such other details as may be prescribed. The rules will provide the format of register of SBO in a company along with other details which may be included in the Register.

Inspection of register of SBO

2.9 The register of SBO shall be open to inspection by any member of the company on payment of such fees as may be prescribed. Therefore, the register can only be inspected by member of the company. The provisions relating to quantum and payment of fees will be provided in the Rules.

Company's obligation to file return with Registrar

2.10 Every company shall file a return of SBO of the company and changes therein with the Registrar of Companies containing names, addresses. However, the filing of return of SBO and any changes therein is dependent on declaration by the SBO to the company. The other details or disclosures in the return, timelines and format of disclosures will be provided in the Rules. Such information can be accessed by public large through the MCA portal.

Company's obligation to serve notice of SBO

2.11 A company shall give notice, in the prescribed manner, to any person (whether or not a member of the company) whom the company knows or has reasonable cause to believe –

- (a) to be a SBO of the company,
- (b) to be having knowledge of the identity of a SBO or another person likely to have such knowledge, or
- (c) to have been a SBO of the company at any time during the 3 years immediately preceding the date on which the notice is issued, and who is not registered as a SBO with the company as required under section 90.

This provision casts a responsibility on the company to give notice to any person whom the company knows or has reasonable cause to believe.

Therefore, in my view, this decision is required to be taken by the Board of directors of the company for making the requisite declaration under section 90. Interestingly, the notice shall be given whom the company (*i.e.*, Board of directors) knows or has reasonable cause to believe to be SBO. The format of notice will be prescribed in the Rules.

Information by SBO

2.12 The information required by the notice shall be given by the concerned person (*i.e.*, SBO) within a period not exceeding 30 days of the date of the notice.

Application to National Company Law Tribunal

2.13 In the following cases the company apply to the National Company Law Tribunal (NCLT) :

- ▶ Where that person fails to give the company the information required by the notice within the time specified therein.
- ▶ Where the information given is not satisfactory.

The application to NCLT shall be made, within a period of fifteen days of the expiry of the period specified in the notice, for an order directing that the shares in question be subject to restrictions with regard to transfer of interest, suspension of all rights attached to the shares and such other matters as may be prescribed. The Rules relating to NCLT or proposed Rules relating to maintenance of register of significant beneficial owners will provide for more restrictions on such shares.

Restriction on the rights attached to shares

2.14 The NCLT may, after giving an opportunity of being heard to the parties concerned, make such order restricting the rights attached with the shares within a period of 60 days of receipt of application or such other period as may be prescribed. The Rules relating to NCLT or proposed Rules relating to maintenance of register of significant beneficial owners may provide for the period.

Relaxation of restriction on the rights attached to shares

2.15 The company or the person aggrieved by the order of the NCLT may make an application to the NCLT for relaxation or lifting of the restrictions placed.

Penal provisions on SBO

2.16 If any person fails to make a prescribed declaration, he shall be punishable with fine which shall not be less than Rs. 1 lakh but which may

extend to Rs. 10 lakh. Where the failure by the person is a continuing one, with a further fine which may extend to Rs. 1,000 for every day after the first during which the failure continues.

Penal provisions on company

2.17 If a company, required to maintain register in prescribed format and file the requisite information, fails to do so or denies inspection, the company and every officer who is in default shall be punishable with fine which shall not be less than Rs. 10 lakh but which may extend to Rs. 50 lakh. Where the failure is a continuing one, with a further fine which may extend to Rs. 1,000 for every day after the first during which the failure continues.

False or incorrect information of suppression of material information by 'any person'

2.18 If any person wilfully furnishes any false or incorrect information or suppresses any material information of which he is aware in the declaration made under this section, he shall be liable to action under section 447 of the Act. Since the provision relates to 'any person', it can be either the company or any person who is the significant beneficial owner of the shares in the company. Such persons will be liable for action relating to fraud (as prescribed under section 447 of the Companies Act), where any information is false or incorrect information or suppresses any material information.

Proposed rules under section 90

3. After the notification of section 90, the Government will then issue the Rules thereunder. The Rules will provide the applicability, exemptions and compliance procedures under section 90. Since the provisions relating to 'significant beneficial owners' are introduced for the first time in the Act, the compliance may be challenge for corporates and practising professionals. ❖❖❖