



Regulatory Alert Delivering Clarity

Significant Beneficial Ownership – Revealing the real owner!

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Background

- Companies (Amendment) Act, 2017 (the Amendment Act) passed on 3 January 2018 has made several changes to the Companies Act, 2013 (2013 Act). One of the crucial amendments introduced by the Amendment Act is disclosure related to Significant Beneficial Ownership (SBO).
- 2013 Act merely provided for the investigation into the Beneficial Ownership of the company by the central government (CG), if it deems fit. However, section 22 of the Amendment Act contains completely revamped provisions relating to SBO.
- Ministry of Corporate Affairs (MCA) has on 13 June 2018 notified section 22 of the Amendment Act, i.e. amended section 90 of 2013 Act, and also issued Companies (Significant Beneficial Owners) Rules, 2018 (SBO Rules).

The highlights of this amendment and SBO Rules are summarized in this alert.

Key highlights

- "Beneficial interest" in a share includes, directly or indirectly, through any contract, arrangement or otherwise, the right or entitlement of a person alone or together with any other person to:
 - exercise or cause to be exercised any or all of the rights attached to such share; or
 - receive or participate in any dividend or other distribution in respect of such share.
- "Shares" under 2013 Act means a share in the share capital of the company and includes stock. Under the SBO Rules, it is clarified that "share" includes instruments in the form of global depository receipts, compulsorily convertible preference shares or compulsorily convertible debentures.
- "SBO" means every individual who acting alone or together with one or more persons or Trust, including a Trust and persons resident outside India, holds beneficial interests, of at least 10%, in shares of a company or the right to exercise, or the actual exercising of significant influence or control as defined in section 2(27) of 2013 Act, but whose name is not entered in register of members of a company as the holder of such shares.

Rules for determination of SBO

In case of persons other than individuals or natural persons:

- where the member is a company, the SBO is the natural person, who, whether acting alone or together with other natural persons, or through one or more other persons or Trusts, holds at least 10% of share capital of the company or who exercises significant influence or control in the company through other means.
- where the member is a partnership firm, the SBO is the natural person, who, whether acting alone or together with other natural persons, or through one or more other persons or Trusts, holds at least 10% of capital or has entitlement of at least 10% of profits of the partnership.

- where no natural person is identified in case of a member being a company or a partnership firm, the SBO is the relevant natural person who holds the position of senior managing official.
- where the member is a Trust (through trustee), the identification of SBO shall include identification of the author of the Trust, the trustee, the beneficiaries holding at least 10% interest in the Trust and any other natural person exercising ultimate effective control over the Trust through a chain of control or ownership.

Declarations and disclosures

- SBO to make a declaration to the Company in Form BEN-1:
 - within 90 days from 13 June 2018; and
 - within 30 days in case of fresh acquisition or any change in his ownership thereafter.
- The Company shall intimate Registrar of Companies (ROC) in Form BEN-2 within 30 days of receipt of the declaration in Form BEN-1.
- Every company is required to maintain a register of SBO in Form BEN-3 which is open for inspection by any member of the company.

Powers of the company

- Companies are empowered to seek information about SBO from any person (whether or not a member of the company) whom the company knows or has reasonable cause to believe:
 - to be a SBO of the company; or
 - to be having knowledge of the identity of a SBO or another person likely to have such knowledge; or
 - 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.
- In case of failure to get a response or if the response is not satisfactory, the company may approach NCLT to provide directions such as freezing / suspension of rights related to shares etc.

Penalties

- If SBO fails to make declaration, fine in range of INR 0.1 million to INR 1 million and where the failure is a continuing one, a fine which may extend to INR 1,000 per day of default.
- If a company fails to maintain registers and / or file returns with the ROC or denies inspection of the register of SBO, the company and every officer in default is punishable with a fine in range of INR 1 million to INR 5 million and where the failure is a continuing one, a further fine which may extend to INR 1,000 for every day during which the default continues.
- If a person willfully furnishes false or incorrect information, or suppresses any material information of which the declarant was aware of in the declaration made, is liable to be punished for fraud under section 447 of 2013 Act.

Non-applicability

- SBO related provisions do not apply to holding of shares of companies/body corporates by pooled investment vehicles/ investment funds such as Mutual Funds, Alternative Investment Funds (AIF), Real Estate Investment Funds (ReIT), Infrastructure Investment Trust (InvIT) regulated under SEBI Act, 1992.

Conclusion

The spirit of the amendment is in tune with the CG's drive to inculcate transparency and accountability in the corporate set-up. The disclosures relating to SBO are expected to lead to transparency of shareholding structures and help the government to identify benami transactions and prevent money laundering activities.

Source:

- Companies (Amendment) Act 2017 published in the Official Gazette dated 3 January 2018 and
- Notifications No. S.O. 2422(E) and G.S.R. 561(E) dated 13 June 2018 issued by MCA.

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