

# NEWSFLASH

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## Major Regulatory Developments:

- New Companies (Significant Beneficial Owners) Amendment Rules, 2019
- Disclosure on sums outstanding to MSEs



## 1. New Companies (Significant Beneficial Owners) Amendment Rules, 2019

With a view to further bringing additional transparency in the Corporate Ownership Structures, Ministry of Corporate Affairs ('MCA') had amended Section 90 of the Companies Act, 2013 ('2013 Act') while also introducing the Companies (Significant Beneficial Owners) Rules, 2018 ('SBO Rules') in June 2018.

Implementation and reporting under SBO Rules however had been kept in abeyance as a result of few ambiguities in interpretation of SBO Rules and stakeholders representations in this regard. Now, in order to bring clarity in interpretation of the said SBO rules and for laying out an appropriate reporting mechanism, MCA has issued a gazette notification on 8<sup>th</sup> Feb 2019 amending the SBO Rules ('Amendment Rules').

### KEY HIGHLIGHTS OF AMENDMENT RULES ARE SET OUT BELOW:

#### 1. Concept of Significant Beneficial Owner ('SBO') – RE-DEFINED

The Amendment Rules have re-defined a SBO to mean and include an Individual Acting either alone or together or through one or more persons who possesses any of the following rights or entitlements in the reporting company.

- i. **indirectly** or **together with direct holdings** holds not less than **10%** of **shares**; or
- ii. **indirectly** or **together with direct holdings** holds not less than **10%** of **voting**; or

- i. **right to receive or participate** in not less than **10%** of the **total distributable dividend**, or any other distribution, in a financial year through **indirect holdings alone, or together with any direct holdings**; or
- ii. who has **right to exercise/actually exercises significant influence/control** in any way other than direct holding.

The new definition makes it clear that for the individual to be considered as a SBO, it is necessary for such individual to hold the interest in reporting company through **indirect holding\***.

Where such individual holds any **direct interest\*\*** in the reporting company with **no indirect interest**, such individual does not fall under the criteria of SBO and thus shall not be required to comply with Rules and related reporting requirements.

***As a thumb rule, it is necessary for an individual to hold Indirect Interest in the reporting company in order to be considered a SBO***

**\*Indirect holding/interest** of right or entitlement by an individual in the reporting company shall include any of the following criteria in respect of a member of the reporting company viz.:

- A. Where the member of the reporting company is a body corporate (whether incorporated or registered in India or abroad), other than limited liability partnership, and the individual:
  - holds majority stake in that member; or

<sup>1</sup>reporting company means a company as defined in clause (20) of section 2 of the Act, required to comply with the requirements of section 90 of the Act;

<sup>2</sup>significant influence means the power to participate, directly or indirectly, in the financial and operating policy decisions of the reporting company but is not control or joint control of those policies'.

<sup>3</sup>significant influence means the power to participate, directly or indirectly, in the financial and operating policy decisions of the reporting company but is not control or joint control of those policies'

- holds majority stake in the ultimate holding company (whether incorporated or registered in India or abroad) of that member;
- B. where the member of the reporting company is a Hindu Undivided Family (HUF) (through karta), and the individual is karta of the HUF;
- C. where the member of the reporting company is a partnership entity (through itself or a partner), and the individual
- i. is a partner; or
  - ii. holds majority stake in the body corporate which is a partner of the partnership entity; or
  - iii. holds majority stake in the ultimate holding company of the body corporate which is a partner of the partnership entity.
- D. where the member of the reporting company is a Trust (through trustee), and the individual:
- i. is a trustee in case of a discretionary Trust or a charitable Trust;
  - ii. is a beneficiary in case of a specific Trust;
  - iii. is the author or settlor in case of a revocable Trust.
- E. where the member of the reporting company is,-
- i. pooled investment vehicle; or
  - ii. an entity controlled by the pooled investment vehicle based in member state of the Financial Action Task Force (FATF) on Money Laundering and the regulator of the securities market in such member state is a member of the International Organisation of Securities Commissions, (IOSCO) and

The individual in relation to the pooled investment vehicle-

- is a general partner; or
- is an investment manager; or
- is a Chief Executive Officer where the investment manager of such pooled vehicle is a body corporate or a partnership entity.

However, if the pooled investment vehicle or an entity controlled by the pooled investment vehicle is based in a jurisdiction which is not a member state of FATF and IOSCO, then the SBO shall be determined in the same manner as mentioned above either as a body corporate, partnership or Trust.

**\*\*Direct holding/interest** of right or entitlement by an individual in the reporting company shall include any of the following:

- Shares in the reporting company representing rights are in the **name of the individual**;
- Individual holds or acquires a beneficial interest in the share of the reporting company under section 89(2) of the 2013 Act and has made a declaration in this regard to the reporting company.

## 2. Changes in Implementation

As mentioned above, the onus to determine SBO and related reporting compliances has now been re-aligned with the Company law provisions to also apply to the reporting Company along with SBOs. The new reporting requirements under the Amendment Rules are set out below:

- ❖ Reporting company to take necessary steps for identifying SBOs and post identification, obtain SBO declaration forms in specified formats from such individual SBOs;

❖ Every reporting company to seek information about SBO in Form BEN-4 (other than individual) where such member holds not less than 10 percent shares or voting rights or right to receive or participate in the dividend or any other distribution payable in financial year. Such information is also to be obtained where reporting company has reasonable cause to believe that such individual is likely:

- 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; and who is not registered as an SBO.

❖ In case of failure to get a response or if the response is not satisfactory, Company may approach NCLT for seeking directions such as freezing / suspension of rights related to shares held by the SBO

❖ SBO to make a declaration to the reporting Company in Form BEN-1:

- within 90 days from the date of commencement of the Amendment Rules, i.e. by 9th May 2019; and
- within 30 days in case of fresh acquisitions or where significant beneficial ownership undergoes any change
- In case an individual becomes SBO or in case of any changes in his ownership **after** the commencement of these rules, then SBO to make declaration within 30 days of 9 May 2019

❖ The reporting Company shall intimate Registrar of Companies ('ROC') in Form BEN-2 within 30 days of receipt of declaration in Form BEN-1 from SBO

❖ Every company is required to maintain a register of SBOs in Form BEN-3 which shall be open for inspection by any member of the company

Further, the class of persons to whom the provisions of Section 90, do not apply has been increased by the by Central Government to include the following:

- Investor Education and Protection Fund Authority;
- Its holding reporting company whose details are disclosed by the reporting company in Form BEN-2;
- Central or state government or any local authority;
- Reporting company / body corporate / entity controlled by the central or state government or governments or partly by the central government and partly by one or more state governments;
- SEBI-registered investment vehicles such as mutual funds, Alternative Investment Funds (AIF), Real Estate Investment Funds (REIT), Infrastructure Investment Trust (InvIT) regulated by SEBI; Investment Vehicles regulated by RBI, IRDAI and PFRDA

## NANGIA'S TAKE

*The Companies (Significant Beneficial Owners) Rules 2018, had thrown up significant interpretational challenges. The real issue involved while identifying significant beneficial ownership was whether the chain of ownership is to be seen right up to the top or only one level above in the ownership chain. It was unclear if one had to look through offshore corporate structures and identify individuals, for determining significant beneficial ownership.*

*The amended rules provides more clarity for identifying significant beneficial owners in case of reporting companies where the member is a body corporate (registered or incorporated in India or abroad), trust or pooled investment vehicle. In case of Indian ownership, one-step reporting by the holding company has been proposed, whereas, in cases of foreign shareholding of over 10 percent, the trigger for rules is set to locate ultimate offshore beneficiary.*

*While the original rules provided exemption to pooled investment vehicles/ investment funds such as mutual funds, Alternative Investment Funds, Real Estate Investment Trusts, Infrastructure Investment Trusts regulated under SEBI Act, the amended rules also provides exemption to investment vehicles regulated by the RBI, IRDA and PFRDA. Forms Nos BEN 1-4 are now more elaborate in terms of reporting and few forms such as BEN-2 require certification by a practising professional - a requirement which did not exist before"*

*"As India Inc acclimates to the new disclosure regime on SBO, the writing on the wall is clear - this is the onset of a new era of transparency and the corporate veil is no longer unimpeachable or sacrosanct. It would be interesting to note the corresponding impact of SBO rules on other allied corporate legislations such as Income Tax Act, Foreign Exchange Management Act, Prohibition of Benami Property Transactions Act etc"*

## 2. Disclosure on sums outstanding to MSEs

The Ministry of Micro, Small and Medium Enterprises (MSME) has issued Specified Companies (Furnishing of information about payment to micro and small enterprise suppliers) Order, 2019 dated 22<sup>nd</sup> January, 2019 by way of which **ALL COMPANIES** having outstanding sums due to **MICRO AND SMALL ENTERPRISES** and exceeding a period of 45 days from the date of acceptance of goods and services (hereinafter referred to as specified companies) to file in **MSME Form 1\*** details of all such outstanding dues to Micro or small enterprises and reasons of such delays thereof.

The requirements of filing is twofold viz. one time (i.e. immediate filing) and bi-annual submissions as set out below:

- One time filing - The first filing shall be done within 30 days from the date of notification i.e. filing should be done before 21<sup>st</sup> February, 2019\*.
- Bi-annual filings – Form shall be filed by October 31 for the period from April to September and by April 30 for the period from October to March.

Companies failing to comply with the said order shall be punishable with fine which may extend to 25,000 rupees and every officer of the company who is in default, shall be punishable with imprisonment for a term which may extend to 6 months or with fine which shall not be less than 25,000 rupees but which may extend to 3 lakh rupees, or with both.

MSME Act, 2006 defines micro and small enterprises on the basis of capital investment made in plant and machinery, excluding investments in land and building.

Micro Enterprises are classified as manufacturing units having investment below Rs 25 Lakh and for service units having investment below Rs 10 Lakh. While small enterprises are classified as manufacturing units having investment between Rs 25 lakh and Rs 5 crore and for service units having investment between Rs 10 lakh to Rs 2 crore.

**\*Form is yet to be available on MCA website.**

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# ABOUT US

Nangia Advisors LLP is a premier professional services organization offering a diverse range of Taxation, Transaction Advisory and Business Consulting services. Nangia Advisors LLP has presence currently in Noida, Delhi, Gurugram, Mumbai, Dehradun, Bengaluru and Pune. Nangia Advisors LLP has been in existence for more than 38 years and has been consistently rated as one of the best advisory firms in India for entry strategy, taxation, accounting & compliances over the past many years. Nangia Advisors LLP had announced a strategic collaboration agreement with Andersen Global last year in May. Andersen Global is an international association of legally separate, independent member firms comprised of tax and legal professionals around the world. Established in 2013 by US member firm Andersen Tax LLC, Andersen Global now has over 4,000 professionals worldwide and a presence in over 129 locations through its member and collaborating firms.

Quality of our people is the cornerstone of our ability to serve our clients. For this reason, we invest tremendous resources in identifying exceptional people, developing their skills, and creating an environment that fosters their growth as leaders. From our newest staff members through senior partners, exceptional client service represents a dedication to going above and beyond expectations in every working relationship.

We strive to develop a detailed understanding of our clients' business and industry sector to offer insights on market developments and assist our clients develop effective strategies and business models. We have the resources and experience necessary to anticipate and competently serve our clients on issues pertaining to all facets of Tax and Transaction Advisory. We take pride in our ability to provide definite advice to our clients with the shortest turnaround time. The business and tax landscapes have changed dramatically, and the pace and complexity of change continues to increase. We can assist you navigate this shifting landscape.

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