

*Frequently Asked Questions
on*

SBO Rules

*Raising the curtain to identify the
beneficial owners*

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Preface

The understanding of any regulations is to align it with its context, and this is increasingly necessary when the language of the regulations becomes less transparent. The provisions in the law regarding self-declaration by significant beneficial owners, maintenance of a register of significant beneficial owners by companies, and the filing of the information with the Registrar, is a part of the global move towards transparency in corporate ownership and India's commitment to the Financial Action Task Force. India is one of the many countries which have enacted similar rules, and as the rules come in wake of the FATF commitment, the interpretation of the rules has to sub serve the intent of FATF. The intent is clear – if corporate vehicles are used to carry criminal activities, the culpability is not of the vehicle but of the person at whose behest or on whose command the company is working. Therefore, it must be possible to know the natural person behind the driving wheel of the vehicle. Evidently, if the rules leave a space for a vehicle where such a driver does not have to be detected or recorded, then we are frustrating the very purpose of the rule, because then all it needs is a bit of dexterity of design of such vehicle where the identity of the significant owner does not have to be known.

This gives us the first and significant clue to understanding the purport of the SBO identification rules – that every corporate vehicle must have an identifiable significant beneficial owner.

Section 90 requiring the identification of significant beneficial owners is placed adjacent to sec. 89 dealing with departure of beneficial ownership from legal owners. Both sections rely on a common definition of beneficial ownership – given in sec. 89 (10). This itself has caused a substantial confusion in the minds of many people. Many people have mixed up section 89 with 90 or vice versa. Section 89 and 90 operate in different fields, though related. Section 89 requires identification of beneficial ownership (irrespective of magnitude) where legal and beneficial ownership are with separate owners. Usually, the legal owner is the beneficial owner, and vice versa. However, in certain situations, where the two are departed, there exists a legal owner whose name appears in the register of members, but who does not hold beneficial interest. Likewise, there is a beneficial owner whose name is not there on the members' register. In that case, section 89 requires reporting by both the legal owner and the beneficial owner. This provision has always been there – it existed in the 1956 Act too. This provision is neither for identification of the *natural person* owning interest in shares, nor is for identification of *significant* beneficial owners. Indirect ownership or beneficial interest has no relevance for sec. 89.

On the contrary, section 90 is all about significant beneficial interest. Whether the beneficial owner for the purpose of section 90 is also the nominal owner, or not, does not matter. Section 90 captures both direct and indirect interest in shares, and relates to beneficial interest, not legal interest. Therefore, the fact that a person identifies himself as significant beneficial owner, say, because of indirect interest through holding structures, does not mean the person will also be regarded as a beneficial owner for the purpose of sec. 89. Indirect interest in shares is nowhere relevant for sec. 89.

Amendment to Section 89 and 90 is one of the key amendments brought in by the Companies (Amendment) Act, 2017 ('Amendment Act'). While, the Amendment Act has been enforced in phases, stakeholders were given the option to provide the public comments on the draft rules¹ in relation to Significant Beneficial Ownership (SBO), which was issued by MCA on Feb 2, 2018. Thereafter, on June 14, 2018, MCA vide its Notification, has enforced the provisions of amended Section 90 of the Companies Act, 2013 and also issued the Companies (Beneficial Interest and Significant Beneficial Interest) Rules, 2019² ('SBO Rules') in relation to the determination of SBO. Thereafter, considering various practical difficulties in implementing the provisions of the SBO Rules, MCA on February 8, 2019³ has notified the revised rules in order to facilitate better implementation of the provisions.

The amended SBO Rules has substantially changed the ambit of "significant beneficial interest". The amended Rules bring two major changes. First, "indirect" holding is recognised only where the individual has majority interest in the body corporate holding stake in the "reporting company", or in the ultimate holding entity of such body corporate. Second, purely direct holding (that is, there being no indirect holding at all), or direct control, or direct significant influence, are not to be reported as significant beneficial interest under the Rules. Therefore, the direct holding of interest by an individual is relevant only if the direct holding may be clubbed with indirect holding. This is irrespective of the magnitude of direct holding.

Our FAQs are an effort to help Corporate India comply with the SBO Rules. We have assimilated these FAQs based on frequent communication with professionals across the country, in different forums and groups. We will continue to refine and expand this booklet. Hence, please do remember to come back to see the latest version of the FAQs. And if you have a generic question which you think may be of general interest, please do feel free to contribute the same by writing an email to corplaw@vinodkothari.com.

Team Vinod Kothari & Company
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¹ http://www.mca.gov.in/Ministry/pdf/DraftRulesBeneficialOwnership_15022018.pdf

² http://www.mca.gov.in/Ministry/pdf/CompaniesSignificantBeneficial1306_14062018.pdf

³ http://www.mca.gov.in/Ministry/pdf/CompaniesOwnersAmendmentRules_08020219.pdf

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Glossary

AML	Anti-money laundering
BO	Beneficial Owner
Companies Act, 2013	Act, 2013
Companies (Amendment) Act, 2017	Amended Act
CRS	Common Standard Reporting
FATCA	The Foreign Account Tax Compliance Act
FATF	Financial Action Task Force
Investing Structure	The entity holding shares in the Target Company
Investing Company	The Investing Structure being a company or body corporate
KYC	Know-your-customer
LLP	Limited Liability Partnership
RBI	Reserve Bank of India
Revised SBO Rules	The Companies (Significant Beneficial Owners) Amendment Rules, 2019 ⁴
SEBI	Securities Exchange Board of India
SBO	Significant beneficial owner, or significant beneficial ownership
Erstwhile SBO Rules	The Companies (Significant Beneficial Owners) Rules, 2018
Revised Rules	The Companies (Significant Beneficial Owners) Rules, 2018
SMO	Senior Managing Official
Reporting Company	The company for which the determination of SBO is being done
UBO	Ultimate beneficial owner

⁴ http://www.mca.gov.in/Ministry/pdf/CompaniesOwnersAmendmentRules_08020219.pdf

FAQs on SBO Rules

Applicability of Section

1. Which all companies are required to comply with the provisions of Section 90?

The provisions are applicable to all companies without exception – i.e., public as well as private companies, listed as well as unlisted companies, small as well as large companies.

The compliance with the SBO identification may be perfunctory in case of OPCs. It may also seem unnecessary in case of Sec 8 companies. However, the law does not seem to make any exception at all.

The whole purpose of sec 90 is to ensure that an artificial legal entity has a natural person responsible for it. If it was possible to think of an artificial legal vehicle that does not have to identify an SBO, the whole purpose of the section will be frustrated, as then, that entity which does not have to identify an SBO will effectively act as a shield to hide the identity of the real owner.

2. Does Section 90 introduce a new concept altogether or is it adopting the practice followed globally, and in India by other Regulators?

Section 90 has been notified with the intent of identify SBO in a company. The concept of identifying UBOs/ SBO is not a new concept. The requirement has already been prescribed by following:

- SEBI under Guidelines on Identification of Beneficial Ownership⁵;
- RBI under Reserve Bank of India (Know Your Customer (KYC)) Directions, 2016⁶;
- Rule 9 of the Prevention of Money-laundering (Maintenance of Records) Rules, 2005⁷;
- Jurisdictions world over have been putting in place mechanisms to identify the natural person controlling a corporate entity.
 - UK: The Register of People with Significant Control Regulations 2016⁸;
 - Ireland: European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016⁹;
 - Guernsey: Beneficial Ownership of Legal Persons (Guernsey) Law, 2017¹⁰

⁵https://www.sebi.gov.in/web/?file=https://www.sebi.gov.in/sebi_data/attachdocs/1359025819903.pdf#page=1&zoom=auto.-23,299

⁶ https://rbi.org.in/SCRIPTS/BS_ViewMasDirections.aspx?id=10292

⁷ https://fiuindia.gov.in/files/AML_Legislation/notifications/rule_9.html

⁸ <https://www.legislation.gov.uk/uksi/2016/339/contents/made>

⁹ <http://www.irishstatutebook.ie/eli/2016/si/560/made/en/print>

¹⁰ <http://www.guernseyregistry.com/CHttpHandler.ashx?id=109195&p=0>

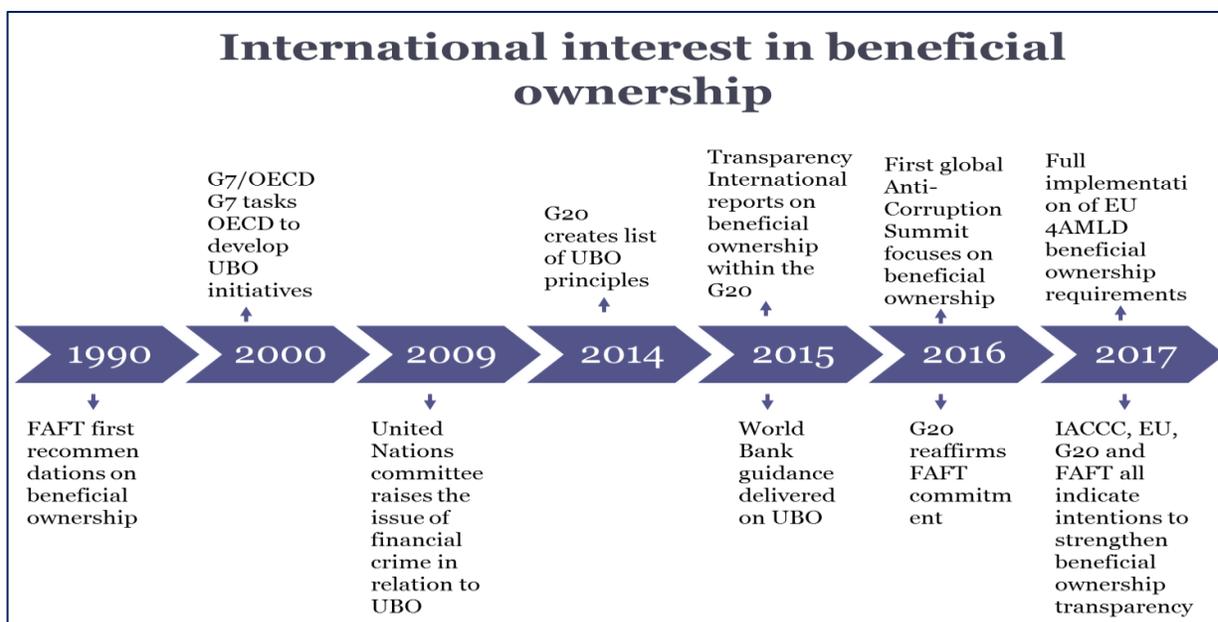


Figure 1: International interest in beneficial ownership¹¹

Therefore, MCA's mandate to companies to identify the SBOs in the manner prescribed in Section 90 read with SBO Rules is a part of India's commitment to the Financial Action Task Force (FATF). Similar rules are there in every FATF-compliant country.

3. What is the intent of Section 90?

Section 90 has been enacted to identify such individual, who directly or indirectly, holds beneficial interest (as mentioned in response to Query 9) over the company.

The global move to identify natural persons is the realization that artificial legal entities continue to proliferate; while these entities are owned by natural persons at end of the spectrum; however, the entities are owned through a complex web of holdings and cross-holdings, such that in most cases, the ownership of the entities is opaque. Artificial legal entities are often used for illicit purposes including global crime. It is important to identify individuals behind companies so as to keep tab on the individuals and hold them accountable.

In essence, companies are inanimate; their brain and brawn are natural persons. The idea of identification of the natural persons is to associate companies with natural persons.

There may not be immediate implications of identification of SBOs- for example, the concepts of an officer in default, promoter, related party, etc. do not refer back to SBOs. However, it may be expected that the jurisprudence at some stage will start holding SBOs responsible for deeds of companies.

¹¹ Source: <https://www.lexisnexis.de/whitepaper/beneficial-ownership.pdf>

4. What are the significant challenges in identification of UBOs/SBOs?

Companies may be owned through layers of legal vehicles in different jurisdictions. Corporate structures in different countries differ, and of course, the corporate laws in different countries are widely different. While structuring global holding of entities, one might have taken advantage of liberal laws of many jurisdictions. Therefore, in identifying the real owner behind companies, owned by different jurisdictions, one may face multiple issues. These issues are not related to Indian corporate law – they are based on variegated global laws.

The significant challenges are¹²:

- Complex ownership structures of the legal entities;
- Legal entities established in high secrecy/ high risk jurisdiction (i.e., Samoa, Cayman Islands, Panama);
- False account holder's declarations on UBOs;
- Limited information available on offshore account holders;
- Unqualified staff;
- Insufficient accuracy and accessibility of basic information relating to company registration;
- Less rigorous implementation of customer due diligence (CDD) measures by key gatekeepers such as company formation agents, lawyers, and trust-and-company service providers;
- Lack of sanction on companies which fail to update information held by national company registries, or to keep information about their shareholders or members up-to-date; and
- Obstacles to information sharing such as data protection and privacy laws which impede competent authorities from getting timely access to adequate, accurate and up-to-date basic and beneficial ownership information;
- The BO collection process adds a huge burden on the business's operations;
- The lack of publicly available UBO registry data remains a loophole in the entire AML effort;
- Complexity and broadness of the BO data, with global footprint;
- Non-standard documentation in offshore financial centers (OFCs);
- Flexible change of ownership in OFCs;
- Navigating multiple layers of ownership;
- Non-cooperation, grudging, or boilerplate disclosure;
- Nominee directors – that is, where the director is not acting on his own discretion but has been placed as nominee of a shadow director;
- Corporate directorship – that is, where the director itself is a body corporate.

5. When does the section become applicable to a company?

¹² Compiled by authors from various sources- [source 1](#), [source 2](#) and [source 3](#).

The Section is applicable to all companies. The disclosure under the section by the natural person becomes applicable in case of holding of beneficial interest beyond the threshold as discussed below.

Meaning of beneficial interest and SBO

6. What is the meaning of beneficial interest?

The meaning of the term has been provided in Section 89(10) of the Act, as under:

*“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—*

- (i) exercise or cause to be exercised any or all of the rights attached to such share; or*
- (ii) receive or participate in any dividend or other distribution in respect of such share.”*

MCA issued Notification being Corrigendum¹³ to the commencement notification of the the Amended Act to the effect that in MCA’s notification dated 13.06.2018, regarding commencement of certain provisions of Companies Amendment Act, 2017, enforcement of Section 22 should be read as “Section 21(iii) and Section 22”. Section 21(iii) is based on the definition of “beneficial interest” as per Section 89 (10) of the Act, 2013. Accordingly, the same has been enforced as per the corrigendum issued to the MCA notification dated 13.06.2018.

7. What are the major differences between the scope and applicability of sec 89 and sec 90?

Sec 89 and 90 operate in different, though related, fields. The intent of sec 89 is to identify cases where nominal ownership of shares, as per the register of members, is not backed by beneficial ownership. The classic rule has been that companies do not go behind the nominal owner of shares, and who owns the shares as per the register of members is also presumed to be the beneficial owner. However, sec 89 captures the dichotomy where the legal owner is not the beneficial owner. Thus, there are several differences between the two, tabulated below:

<i>Particulars</i>	<i>Section 89</i>	<i>Section 90</i>
Intent	To take cognition of cases where legal ownership is not backed by beneficial ownership, or vice versa.	To recognize significant beneficial owner, being a natural person, responsible for driving the vehicle.

¹³ http://www.mca.gov.in/Ministry/pdf/Notification2106_22062018.pdf

History	Provision was there in the 1956 Act, as also the 2013 Act prior to amendment by the Amended Act.	Section introduced by the Amended Act.
Stress on natural persons	Section is not limited to natural persons.	Section is limited to identification of natural persons only.
Stress on beneficial ownership	Section arises where there is a dissociation of legal and beneficial interest in the shares.	The section focuses on beneficial ownership only. For computing the significant level of beneficial holding under the section, it does not matter whether the person is beneficial owner only, or nominal as well as beneficial owner. However, a pure nominal owner, not being beneficial owner, is not intended to be covered by the section.
Stress on magnitude	The section is not related to any particular magnitude of beneficial holding. Even one share held, where the conditions of the section apply, will trigger the section.	The section is concerned with significant beneficial holding only.
Indirect ownership	The section is not concerned with indirect ownership. Even though the definition of sub-section (10) refers to indirect holding, but operative provisions in sub-section (1) and (2) do not consider indirect holdings	The section is concerned with both direct and indirect holdings
Relevance to preference shares	Section applies to preference shares as well	Section is applicable only in case of compulsorily convertible preference shares Further, preference shares also come into picture when the dividend is unpaid for two or more years.

Inter-relationship between the two sections	If a person is identified as the beneficial owner u/s 89, it automatically moves to section 90 to see whether the beneficial holding is significant	If a person is identified as the SBO, it nowhere implies the person is also covered by sec 89. Section 89 applies only where beneficial ownership lacks legal ownership
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Table 1: Difference between the scope of Section 89 and Section 90

Meaning of significant beneficial interest

8. The meaning of Beneficial Interest in section 89 (10) is quite wide and includes any of the rights pertaining to a share. To what extent is this wide meaning applicable to sec 89 and sec 90?

The wide definition of sec 89 (10) is quite understandable, as beneficial interest of a share includes entitlement to several benefits due to share ownership. Since it is possible to unbundle such interest, any of them will be a beneficial interest.

The wide definition is relevant for sec. 89 certainly.

Its relevance to section 90 must be seen with great caution. The stress of sec 90 is on control. Some of the beneficial interests enumerated in sec 89 (10) have nothing to do with control – for example, dividend rights. Therefore, if the voting rights are with X, and the dividend rights are with Y, it is only X whose holding of beneficial interest should be considered for the purpose of sec 90, even though both may be beneficial owners for the purpose of sec. 89.

Based on meaning of beneficial interest as provided in Section 89 (10) of the Act, some of the situations where there may be a need to declare beneficial interest for the purpose of sec. 89, and whether such situations are to be covered as beneficial interest for sec. 90 as well, are discussed below:

- (a) **Pledge:** If the pledgee gets the voting rights and can vote at discretion, the pledgee becomes entitled to beneficial interest. Hence, the pledgee may arguably become beneficial owner lacking legal title for the purpose of sec. 89. However, for the purpose of sec. 90, the pledge and retention of voting rights is only a security interest. It is not ownership interest. Hence, it does not seem to be keeping in line with the spirit of sec. 90 to consider a pledgee as a SBO.
- (b) **Transfer pending registration:** Certainly yes, both for sec. 89 as also sec. 90
- (c) **Pooling of voting rights:** Certainly yes, both for sec 89 and sec 90.

9. What is the meaning of Significant Beneficial Ownership ('SBO') for purpose of sec. 90?

The definition in Section 90 may be analysed as follows:

<i>Itemized clauses</i>	<i>Our notes</i>
<ul style="list-style-type: none"> • every individual, who: 	<p>The stress is on individual. The individual may be an Indian resident, or foreign resident.</p>
<ul style="list-style-type: none"> ○ acting alone or together, or 	<p>The section covers both singular holdings, as well as holdings in concert, or together. The section is not referring to joint holdings – the holdings are in separate names of different natural persons, but they act together for the purpose of controlling the target company. The one whose holding is captured together is also a natural person. In that case, the two or more natural persons, who are acting together, will be treated as SBOs together. The intent of capturing the holdings of other</p>
<ul style="list-style-type: none"> ○ through one or more persons or trust, including a trust and persons resident outside India, 	<p>The section covers both direct and indirect holdings. Indirect holdings may be coming through any number of layers, or knitted layers. Eventually, the holding of a natural person should be tracked to the target company. Reference to person outside India makes it clear that irrespective of the organisational structure of a foreign entity, the provisions of section 90 shall be applicable.</p>
<ul style="list-style-type: none"> • Holds beneficial interest 	<p>Clearly, the stress is on beneficial interest, and not ownership.</p>
<ul style="list-style-type: none"> • of 25% or such percentage as prescribed in Final Rules (provided in response to Query 10) in 	<p>The Central Govt had the power to notify the threshold. Accordingly, the Central Govt has notified a threshold of 10% via the SBO Rules.</p>
<ul style="list-style-type: none"> • the shares of a company; 	<p>While the word is “shares”, but read with the Rules, the word will mean equity shares, and will include compulsorily convertible preference shares, compulsorily convertible debentures, and depository receipts indicating de-facto equity shares. Options to get shares, such as optionally convertible shares, or warrants, should not be taken as shares until they get converted or taken as such.</p>
<ul style="list-style-type: none"> • or the right to exercise, or the actual exercising of 	<p>These words signify two things – actual, or contractual exercise of influence or control. The right to exercise or the actual exercise are two alternative scenarios. If the natural person has the right to exercise influence or control, the fact</p>

	that there is no recent evidence of the actual exercise of such influence or control is not relevant. In the same way, if there is an actual exercise of influence or control, whether the right contractually exists or not, does not matter.
<ul style="list-style-type: none"> • significant influence over the company; 	The idea of significant beneficial ownership traverses through the façade of shareholdings. If with or without shareholding, there is an evidence of significant influence, the natural person wielding such influence is the SBO
<ul style="list-style-type: none"> ○ ‘significant influence’ means control of at least 20% of total voting power, or control of or participation in business decisions under an agreement. 	This is the definition of “significant influence” given in sec. 2 (6). However, control of business decisions is not significant influence – that is a case of control. Significant influence is the right of participation in policy-making.
<ul style="list-style-type: none"> • control over the company; 	Irrespective of the holdings, if the natural person is in a position to control the target company, that clearly establishes significant beneficial ownership.
<ul style="list-style-type: none"> ○ ‘control’ 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; 	This is the definition of “control” as given in sec. 2 (27). Control is of two types – voting control, and management control. Normally, these two coincide. However, in case of divergence, both can be indicators of control. Hence, if the natural person is sitting in a position of management control, may be in a case where the directors on board are his nominees (not necessarily meaning nominee directors under the Companies Act), the so-called shadow-director may be regarded as the SBO.
<ul style="list-style-type: none"> • Reading the above definition in light of Rule 2 (h) of the SBO Rules, one may add the following condition: 	
<ul style="list-style-type: none"> ○ The individual should indirectly, or together with any direct holdings, <ul style="list-style-type: none"> (i) hold not less than ten per cent. of the shares; (ii) hold not less than ten per cent. of the voting rights in the shares; (iii) has right to receive or participate in not less than ten per 	The definition clarifies that if an individual does not hold any right or entitlement indirectly as per the clauses, then he should not be considered to be a significant beneficial owner. Therefore, in order to be a SBO, a person must have an indirect right or entitlement and where

<p>cent. of the total distributable dividend, or any other distribution, in a financial year (iv) has right to exercise, or actually exercises, significant influence or control, in any manner other than through direct holdings alone.</p>	<p>the person has only direct holding, he shall not be termed as the SBO.</p> <p>The rights & entitlements can be in four ways:</p> <p>a) Shares only equity shares (or de-facto equities –like CCDs, CCPS, GDR, ADR);</p> <p>b) Voting rights;</p> <p>c) Distributable dividends;</p> <p>d) Indirect control / indirect significant influence.</p>
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Table 2: Analysis of the Clauses provided in Section 90 read with Rule 2 (h) of the SBO Rules.

10. The person whose name is there on the register of members does not have to file the declaration of significant beneficial holdings. What about a case where the name of the person is there on the register of members (say, holding 1% shares), but it is only on aggregation of indirect holdings that the holding becomes significant?

As per the revised SBO Rules, an individual should be considered to hold a right or entitlement directly in the reporting company, if he satisfies any of the following criteria:

- the shares in the reporting company representing such right or entitlement are held in the name of the individual – **this means that the name of such person should be reflected in the register of members of the company.**
- the individual holds or acquires a beneficial interest in the share of the reporting company under sub-section (2) of section 89, and has made a declaration in this regard to the reporting company – **this means that the company must be informed about the details of such person by furnishing form MGT 4 and MGT 5 u/s 89.**

Further, the revised SBO Rules also specifies that if an individual does not hold any right or entitlement indirectly as per the clause (h) of the revised SBO Rules, then he should not be considered to be a SBO.

Since, purely direct holding (that is, there being no indirect holding at all), or direct control, or direct significant influence, are not to be reported as significant beneficial interest under the revised Rules. Therefore, the direct holding of interest by an individual is relevant only if the direct holding may be clubbed with indirect holding. This is irrespective of the magnitude of direct holding.

So, in the instant case, if the person is directly holding 1% shares and indirectly the holding aggregates to 10% through one of the investment companies, such person shall be regarded as the SBO and declaration shall be given by him in BEN-1.

Threshold for determination of significant beneficial ownership

11. Section 90 (1) empowers the government to prescribe other threshold limit for the determination of the SBO. The SBO Rules seem to have fixed a threshold of 10%. Is it permissible for the Central Govt to reduce the statutory percentage from 25% to 10%?

The Ministry has provided a lower threshold limit for the determination of the SBO through the revised SBO Rules, Para 2 (1) (h) of the Rules says:

“Significant Beneficial Owner in relation to a reporting company means an individual referred to in sub-section (1) of section 90, who acting alone or, together, or through one or more persons or trust, who possesses one or more of the following rights or entitlements in such company, namely:-

- *Holds indirectly, or together with any direct holdings, not less than ten percent of the shares;*
- *Holds indirectly, or together with any direct holdings, not less than ten percent of the voting rights in the shares;*
- *Has right to receive or participate in not less than ten percent of the total distributable dividend, or any other distribution, in a financial year through indirect holdings alone, or together with any direct holdings;*
- *Has right to exercise or actually exercises, directly or indirectly, significant influence or control, in any manner other than through direct holdings alone.”*

Therefore, the threshold for determination of SBO has been lowered to 10%.

The question as to whether the power delegated to the executive could have been used to lower the threshold, while the statutory threshold was 25%, may be an arcane legal question. Usually, subordinate law has to operate within the limits of the statutory law. However, it may be argued that in the present case, the Parliament itself did not lay a hard percentage, but empowered the MCA to do so. And the MCA has used that power, and laid a 10% threshold. True, many countries in the world, particularly those with strong and transparent regulatory frameworks such as India, have chosen 25% threshold only. That is also the threshold used by RBI as well as SEBI under the AML laws. However, the MCA has prescribed the 10% threshold.

12. Is the 10% threshold referring to the shares in the target company, or the holding structure?

There should not be any doubt that the determination of significant beneficial holding is being done for the target company – therefore, the threshold of 10% pertains to the target company. That is, eventually, we should be concerned with determination of the holding of the natural person in the target company, aggregating the direct and indirect holdings.

Meaning of Shares

13. Does the expression “shares” mean equity as well as preference shares?

As per Explanation VI to Rule 2 (h) of SBO Rules, following shall be treated as shares:

- Compulsorily Convertible Preference Shares;
- Compulsorily Convertible Debentures;
- Global Depository Receipts.

Beneficial ownership of preference shares or other securities [other than CCPS and CCDs] does not appear to be relevant for Section. 90. Since CCPS and CCDs have been regarded as equity-like instruments, the reference in the section to shares should be read as equity shares. Also, in case the company has CCPS and CCDs, the percentage holding of equity for applying the threshold should be applied on the post-dilution equity share capital.

Illustration:

Capital Structure of X Ltd comprises of

- 10 Equity shares of Rs 10 [Rs 100];
- 10 CCPS of Rs. 10, each CCPS being convertible into 2 equity shares [CCPS Rs. 100]; and
- 10 CCDs of Rs. 10, each CCD being convertible into 1 equity share [CCDs Rs 100].

Mr. A beneficially holds 6 Equity shares in X Ltd. A is not holding the CCPS or CCDs in X Ltd. X Ltd holds 50% of Equity shares in Z Ltd.

Now, we ascertain if Mr. A can be regarded as SBO for Z Ltd.:

We will first compute the post-dilution capital of X Ltd, which is as follows:

Equity shares:	Rs 100
Equity shares upon conversion of CCPS [20 equity shares]	Rs 200
Equity shares upon conversion of CCDs [10 equity shares]	Rs 100
Total capital	Rs 400
Capital held by A	Rs. 60
Holding of A in the post-dilution capital of X Ltd	15%



Figure 2: Computation of post dilution shareholding

So, Mr. A's % of shares held in X Ltd is 15%. The holding of X in Z is 50%, i.e., more than the threshold and hence, Z Ltd should know the SBO behind X Ltd. However, A having only 15% stake is neither having ultimate beneficial ownership nor holds majority in X Ltd.

Therefore, Mr. A will NOT be regarded as SBO of Z Ltd.

How is this interpretation (post-dilution capital computation) explainable? Since the rules regard CCPS and CCD as equity, they need to be translated into their equivalents. That is the only way the denominator (total share capital of the entity) can be taken. Otherwise, there will no way to accommodate into the computation the holding of a person holding CCPS or CCDs.

14. In case of non-convertible preference shares, where dividends have consecutively failed for 2 years, will preference shares also be counted along with equity shares?

The stress of sec 90 and the revised SBO Rules is on voting rights and right to participate in distributable dividends, which is the first evidence of control. Since preference shares on which dividends have not been paid for 2 consecutive years gain voting rights, these preference shares get proportional general voting rights. Hence, they should be counted as a part of total share capital.

15. Should holding of ESOP and warrants be considered as shares while determining significant beneficial interest?

In such cases, the instrument holder has an option not an obligation, like in case of CCPS & CCDs. Therefore, such instruments (unless converted into to equity) should not be considered as shares to determine the significant beneficial interest.

16. In case of joint shareholders, will the joint holders be considered for determining SBO?

The Section as well as the SBO Rules has not referred to joint holdings, however, it is pertinent to note that, in such cases, the holdings are in separate names of different natural persons, but they act together for the purpose of controlling the target company. Therefore, in case of joint holdings, the two or more natural persons, who are acting together, will be treated as SBOs together.

Right to participate in dividend

17. Will the right to participate in dividend on equity as well as preference be considered while identifying the SBO?

One of the criteria to determine significant beneficial ownership is the right to receive or participate in the distributable dividend through direct or indirect holdings.

Though SBO determination may be done with reference to dividends too, but the word dividend will have to be restricted to the meaning of “shares” as per its definition provided in the revised Rules, as per which shares are defined to mean equity shares, CCPS, CCD and instruments like GDR.

Including non-voting shares, such as preference shares, may do a complete violence to the very identification of SBOs, since the amount of dividend payout on equity is variable, while that for preference is fixed, and therefore, the proportion of entitlement to dividend may change every year, which could not be the intent of the law.

Obligation to make a declaration

18. Whose obligation is it to trace the SBOs? Is it the obligation of the SBO to make a self-declaration, or is the Company required to identify its SBOs?

It should be noted that, the obligation of the individual to self-declare his significant beneficial holdings, and the obligation of the company to send notice seeking information from members in terms of Rule 2A, are independent obligations.

As per Sub-rule (2) of Rule 2A of SBO Rules where the reporting company has members (other than individual) holding 10% or more of participating interest [either of shares, voting rights, or right to receive or participate in the dividend or any other distribution], the reporting company shall give notice to such member seeking information about the individual who is significant beneficial owner in the reporting company in Form BEN-4 – in this regard, the company will only send BEN-4 (notice to member seeking information) where it is apparent for the company to know that there is a SBO still undeclared. Company will not be going into an investigating mode to ascertain SBO.

This responsibility of taking necessary step, as per Rule 2A, could possibly be to the extent of sending BEN-4 to the holding vehicle to know if there is any individual holding the ultimate holding company.

19. Will group companies who need shareholding pattern from other group companies to determine SBO, will need to send any official communication in this regard?

As mentioned above, the reporting company shall give notice to members (other than individual) holding 10% or more of participating interest [either of shares, voting rights, or right to receive or participate in the dividend or any other distribution], seeking information about the individual who is significant beneficial owner in the reporting company in Form

BEN-4 and this has to be done at each level of the companies, in order to identify the respective SBO.

Manner of determining SBO

20. Who shall be identified as the SBO where the register of members reflects following kinds of members -

(a) Where the member is an individual?

Only direct holding (that is, there being no indirect holding at all), or direct control, or direct significant influence, are not to be reported as significant beneficial interest under the Rules. Therefore, the direct holding of interest by an individual is relevant only if the direct holding may be clubbed with indirect holding. This is irrespective of the magnitude of direct holding.

Therefore, where the member is an individual, and holds directly and indirectly ultimate beneficial interest of more than 10% in the target company shall be considered as an SBO.

(b) Where the member is a body corporate?

In case where the member of the reporting company is a body corporate (whether incorporated or registered in India or abroad), other than a limited liability partnership, and the SBO shall be the individual who,-

- holds majority stake in that member;
- holds majority stake in the ultimate holding company (whether incorporated or registered in India or abroad) of that member.

(c) Where the member is HUF?

In case where the member of the reporting company is a Hindu Undivided Family (HUF) (through karta), the SBO shall be the individual who is the Karta of the HUF.

(d) Where the member is a partnership entity?

In case, where the member of the reporting company is a partnership entity (through itself or a partner), SBO shall be the individual who -

- Is a partner; or
- Holds majority stake in the body corporate which is a partner of the partnership firm;
- Holds majority stake in the ultimate holding company of the body corporate which is a partner of the partnership firm.

(e) Where the member is a trust?

In case, where the member of the reporting company is a trust (through trustee), the SBO shall be the individual who–

- is a trustee in case of a discretionary trust or a charitable trust;
- is a beneficiary in case of a specific trust;
- is the author or settlor in case the trust is a revocable trust.

(f) Where the member is a pooled investment vehicle?

In case, where the member of the reporting company is,-

- a pooled investment vehicle; or
- an entity controlled by the pooled investment vehicle, based in member State of the FATF on Money Laundering and the regulator of the securities market in such member State is a member of the International Organization of Securities Commissions,

the SBO shall be the individual in relation to the pooled investment vehicle, who,-

(A) is a general partner; or

(B) is an investment manager; or

(C) is a Chief Executive Officer where the investment manager of such pooled vehicle is a body corporate or a partnership entity.

21. What are the ways through which a natural person can be an SBO by virtue of holding?

A natural person may be an SBO by virtue of holding in the following manner:

(a) Indirectly holding alone: An individual having indirect holding, by virtue of control over the holding vehicle, or ultimate holding entity of such holding vehicle, being 10% or more of the “participating interest” (shares, voting rights, or distributable dividends) needs to declare himself as the SBO.

(b) Indirect and direct holdings: An individual holding direct stake in the reporting entity (irrespective of whether significant or insignificant), and holding indirect stake as well (as discussed above), will need to aggregate the direct and indirect holding, and if the aggregate is 10% or more of the participating interest, the individual is an SBO.

(c) Singular holdings or holding “together with” one or more persons: In order to compute the holdings of an individual, the participating interest of the individual has to be aggregated with that of other individuals, who he may be acting in “togetherness”. The meaning of togetherness is circumstantial; there are no numerical or objective standards for determination. However, generally, the objective of being together for the purpose of control over a reporting entity will be so visible in reality that it is not necessary to bring

any such rules. The togetherness required is for the participating interest in the reporting entity, and not general economic resources or wealth of the two individuals. Notably, even in case of holdings aggregated on account of togetherness, the rules as discussed above will apply – that is, pure direct holdings will be disregarded.

(d) Indirect control and indirect significant influence: Control and significant influence are defined largely in line with the accounting standards: control is the right to direct policy making, and significant influence is the right to participate in policy making. Both rights usually come from shareholding, but there may be cases of control or influence by virtue of agreements, such as JV agreement, shareholders' agreement, or provisions in the constitutional documents. Here again, direct control or direct significant influence does not matter. However, if the individual has indirect control [control over a vehicle (or vehicles) which control(s) the reporting entity] or indirect significant influence [control over a vehicle (or vehicles) which has (have) significant influence over the reporting entity], this is also a case of being an SBO.

22. Is it possible for an influenced company to exert significant influence on another company?

In case of indirect significance influence, the company is not the decision maker or has a right to be heard only, which means, it is in relatively a minority position. However, it can indirectly influence the reporting entity only via “controlled” entity.

Para 6 dealing with the meaning of Significant Influence provided in Ind AS 28 states the following:

*“If an investor holds, directly or indirectly (**eg through subsidiaries**), 20 per cent or more of the voting power of the investee, **it is presumed that the investor has significant influence**, unless it can be clearly demonstrated that this is not the case. Conversely, if the investor holds, directly or indirectly (*eg through subsidiaries*), less than 20 per cent of the voting power of the investee, it is presumed that the investor does not have significant influence, unless such influence can be clearly demonstrated. A substantial or majority ownership by another investor does not necessarily preclude an investor from having significant influence.”*

Therefore, it becomes clear that significant influence cannot be exercised through an influenced entity. Only a controlled entity can exercise significant influence.

23. Will the shareholding of the relatives also be considered in determining the SBOs?

The erstwhile rules did not specify the meaning of this phrase and hence, the same was left for different interpretations. In this regard, the revised SBO Rules prescribes the meaning of the phrase, as per which:

If any individual, or individuals acting through any person or trust, act with a:

- common intent; or
- purpose of exercising any rights or entitlements; or
- exercising control; or
- significant influence,

over a reporting company, pursuant to an agreement or understanding, formal or informal, such individual, or individuals, acting through any person or trust, as the case may be, shall be deemed to be 'acting together'.

It is pertinent to note that merely being blood relatives shall not be deemed to be 'acting together', rather the same is circumstantial. Also, there need not be anything in writing always, there might be apparent indicators and these indicators can be rebutted, in any case, the SBO needs to come forward and declare the real status of his holding along with the people acting together with him for the purpose of controlling the entity.

24. For counting the holdings of several individuals together, on the ground that they are acting together, are we contending that the economic interests of such persons are completely together, or are we limiting ourselves to the Target Company?

We need to understand the context – which is clearly the control over the Target Company. For two or more individuals to be regarded as holding control together, it is surely not necessary to contend that the economic interests of such persons are completely united. Such persons may hold diverse economic interests. They may be owning separate businesses, separate properties. However, what matters is, whether the shareholding in the Target Company is held together by these individuals, with a common objective.

There are several practical indicators:

- (a) It is not relevant whether the shares were acquired all at a single point of time.
- (b) It is not relevant whether the shares were acquired out of common funds.
- (c) However, it is mostly that the persons in question have a common understanding – whether formally documented or not. They may share directorship in the company. They normally have proportional holdings among themselves. If one contests for the

office of directorship, the other does not oppose. Their voting is mostly exercised together.

(d) One person may be usually acting as proxy for all.

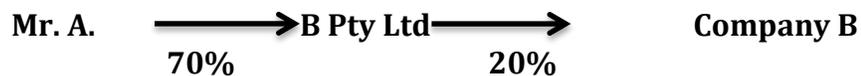
(e) If there are close familial relationships such as husband/wife, father/son, one would presume togetherness, unless rebutted.

25. In case of joint declaration by persons acting together, who shall sign the declaration of beneficial ownership?

In case of joint declaration by the persons acting together as the SBO, any one of them may sign the form on behalf of all of the persons acting together. While the person signing the form should provide his details in the form requiring various details such as – name, age, occupation, nationality etc., the details of the rest of the SBOs may be given as an Annexure (which may be signed by all of them verifying their details) to the said form.

26. How will the SBO be determined in case member is a person resident outside India?

Example:



Given the meaning of SBOs in Section 90 (1), the intent is to identify natural persons who may hold shares through persons resident outside India as well. Therefore, there is no reason for the company to exclude shareholders that are companies incorporated outside India from identifying the natural persons and providing declaration to the companies from such persons.

Accordingly, the test that applies when a member is a company should equally extend in case of persons resident outside India too.

Further, as per Explanation III of Rule 2 (h) of the revised SBO Rules, provides that where the member of the reporting company is a body corporate (**whether incorporated or registered in India or abroad**), other than a limited liability partnership, and the individual,–

a) holds majority stake in that member;

b) holds majority stake in the ultimate holding company (whether incorporated or registered in India or abroad) of that member.

27. How does the law apply itself to those who are not within Indian jurisdiction?

As per Section 90(5), the obligation is not only on the holder, but also on the companies, as they have to seek information from the person whom the company knows or has reasonable cause to believe to be:

a) to be a significant beneficial owner of the company;

- b) to be having knowledge of the identity of a significant beneficial owner or another person likely to have such knowledge; or
- c) to have been a significant beneficial owner of the company at any time during the three years immediately preceding the date on which the notice is issued,

and who is not registered as SBO with the company as required under this section.

28. Once a person is declared as an SBO, does it also automatically bring the person under the scope of section 89?

Section 89 mandates identifying beneficial owner and does not mandate the same should be a natural person. The intent of Section 89 is to ensure that the registered holders beneficially hold the shares and if not, then appropriate declaration is obtained from the registered and the beneficial holder for the same. Further, there is no particular threshold provided as a pre-requisite for identification of registered holder and beneficial holder.

Whereas, Section 90 emphasizes on identification of natural persons having ultimate beneficial interest of 10% of shares on fully diluted basis exercised directly or indirectly.

While section 89 talks about disclosure of nominal and beneficial interest thereby providing duality / dichotomy of ownership, section 90 indicates to the magnitude of holding.

Therefore, it cannot be inferred that with the identification of the SBO the existing beneficial owner(s) (member which is a company/ firm/ trust/ another natural person) become registered holder (s).

Also, please refer our FAQ no. 7, stating the difference between both the Sections.

Non-identification of SBOs

29. What shall be the case if no natural person can be identified as the SBO?

The erstwhile SBO Rules required the companies to identify its senior management officials as the SBO, where no SBO could be determined as per the provisions of the Rules. However, there is no such requirement as per the revised SBO Rules.

Compliance to be ensured by SBOs & Company

30. What is the timeline for declaration by SBOs?

Initial Disclosure:

Every individual who is a SBO in a reporting company, is required to file a declaration in Form No. BEN-1 to the reporting company within 90 days from February 8, 2019.

Continual Disclosure:

Every individual, who subsequently becomes a SBO/ or where his significant beneficial ownership undergoes any change shall file a declaration in Form No. BEN-1 to the reporting company, within 30 days of acquiring such significant beneficial ownership or any change therein.

Clarification wrt becoming the SBO or any change therein during the transition time

Where an individual becomes a SBO, or where his significant beneficial ownership undergoes any change, within 90 days of the commencement of the Companies (Significant Beneficial Owners) Amendment Rules, 2019, it shall be deemed that such individual became the significant beneficial owner or any change therein happened on the date of **expiry** of ninety days from the date of commencement of said rules, and the period of 30 days for filing will be reckoned accordingly.

31. What should be the cut-off date for obtaining disclosure from SBOs?

The revised SBO Rules has come into force on the date of their publication in the Official Gazette, i.e., on February 8, 2019. Therefore, the cut-off date for determining the status of the beneficial interest should be the date of commencement of the revised SBO Rules.

32. Is there any requirement of intimating the Registrar of Companies regarding the identification of SBOs?

The declaration of beneficial interest received by the company, is required to be filed in **Form No. BEN-2** with the Registrar in respect of such declaration, within a period of thirty days from the date of receipt of declaration by it, by the company.

33. Will the company have to keep any record of the SBOs?

Every company is required to maintain a register of SBOs in **Form No. BEN-3**.

Also, this register shall be open to for inspection during business hours, at such reasonable time of not less than two hours, on every working day as the board may decide, by any member of the company on payment of such fee as may be specified by the company but not exceeding fifty rupees for each inspection.

34. How will the company seek information from various persons about SBOs?

Company is required to give notice seeking information in accordance with Section 90 (5) of the Act, in **Form No. BEN-4**.

35. Are the forms available in e-version?

The format of the forms has been provided in the revised SBO Rules. However, the e-version of the forms are still awaited as on 17th March, 2019.

36. Is the declaration of beneficial ownership a yearly compliance requirement or a one-time process? Is the SBO required to keep on declaring his shareholding every time it hits 10% mark?

The SBO has to declare his ownership within 90 days of the commencement of the SBO Rules, in BEN-1 to the reporting company.

Further, where beneficial ownership, of such SBO undergoes any change after furnishing the above-mentioned declaration, he shall again file a declaration in Form No. BEN-1 to the reporting company, within 30 days of the change in the significant beneficial ownership.

37. Will the declaration received by the company, required to be noted in the Board Meeting? Further, the e-form to be filed to ROC by the Company needs to be digitally signed by any director of the company or by CS? Are they required to be pre-authorized by the Board for signing and uploading these forms?

Though there is no such requirement for the same to be placed / noted at the board meeting, however, the companies may take note the receipt of the said declarations in every ensuing board meeting or may even delegate the same to operational committee/ MD/CS or any other authorized person.

Further, the electronic version of the form is still awaited to understand the requirement of digitally signing of the e-forms. However, as per the format provided in the SBO Rules, the certification is required by any of the followings - director; or manager or CEO or CFO; or CS. Also, the same requires certification by the practicing professional as well.

In this regard, the Company may provide one-time authorization to the director; or manager or CEO or CFO; or CS, for signing and uploading the information in e-form BEN-2, as per the declarations to be received by the Company in this respect. Alternatively, the general authorization given to the authorized signatory for any filing of e-forms shall also serve the purpose.

38. What are the procedural steps to be taken by the companies to identify the SBOs?

The procedural requirements of the revised SBO Rules has been presented below [with respect to a reporting company ('RC')]:

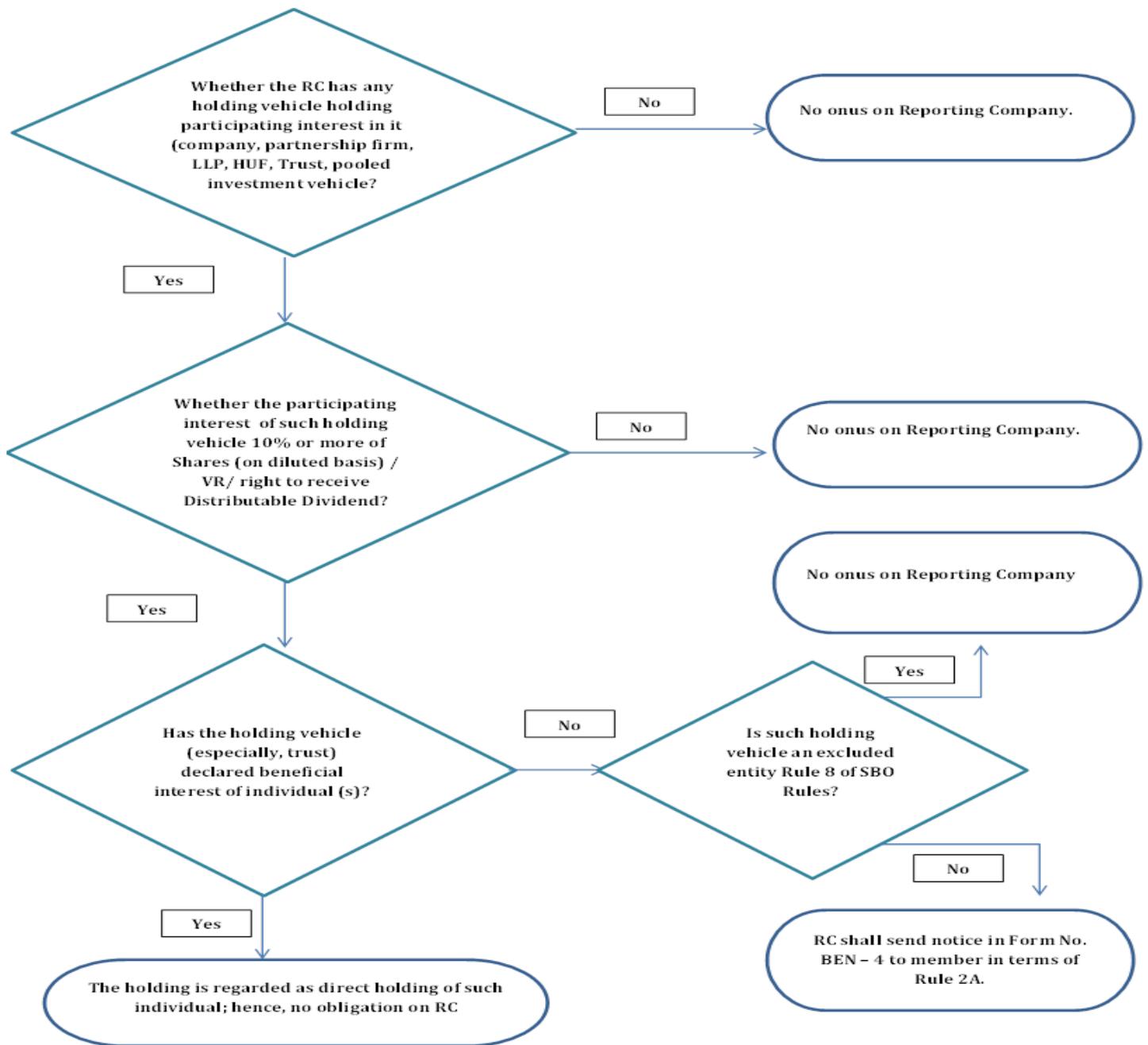


Figure 3: Flow of SBO identification by a company

Onus of disclosure

39. Whether the Companies should first write to all its shareholders, other than natural persons holding beneficial interest and whose names reflect in register of members, holding more than 10% of shares or exercising significant influence or control over it?

It is a logical way to ensure compliance under this Section. It is a collaborative exercise which the Company and the SBO has to ensure.

One option is that the Company waits for its shareholders holding beyond the threshold, to submit declaration in Form BEN-1.

Alternatively, the Company may identify the shareholders, other than natural persons, holding more than 10% of shares (equity + CCPS+CCDs+ GDRs) or exercising significant influence or control as on February 8, 2019 and seek information from them in Form No. BEN -4. This will mandate the shareholders to identify the natural person and obtain declaration from the said natural person in Form No. BEN-1 and submit to the Company within 30 days of receipt of the letter seeking information.

40. At what level, the identification of SBO has to be initiated, at parent company level, or at subsidiary level?

The intent of introducing the provisions governing the identification of SBOs is to identify the undisclosed beneficial holder having significant ownership in the company. For the determination of the SBO, the thresholds mentioned in the Section and the Rules are to be applied in each corporate level, as each and every corporate entity must be having an SBO. Therefore, the identification has to be done at each level i.e. parent as well as subsidiary.

Exemption under SBO Rules

41. Is there any exemption provided application of the Rules?

The rules are not applicable **to the extent the shares of the reporting company is held by:**

- IEPF authority;
- its holding reporting company, however, the details of such holding reporting company shall be reported in Form No. BEN-2;
- the Central Government, State Government or any local Authority;
- reporting company; or a body corporate; or an entity, controlled by the Central Government or by any State Government or Governments or partially 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 Trusts (REITs), Infrastructure Investment Trust (InVITs) regulated by the Securities and Exchange Board of India;
- Investment Vehicles regulated by Reserve Bank of India, or Insurance Regulatory and Development Authority of India, or Pension Fund Regulatory and Development Authority.

42. Is there any exemption provided to equity listed companies or wholly owned subsidiaries of such companies?

The draft rules provided exemption from compliance under the said section where the registered owner was a body corporate whose equity shares were listed on any stock exchange or was a wholly-owned subsidiary of such body corporate. Foreign listed companies were also proposed to be exempted.

However, as per the revised rules no such exemption has been provided to any listed companies, but the rules are not applicable to the extent the shares of the reporting company is held by its holding reporting company, provided, the details of such holding reporting company should be reported in Form No. BEN-2.

43. Whether the exemption provided in Rule 8 of the SBO Rules are applicable to the shareholder exercising significant influence/control in the reporting entity?

The language of the opening lines of Rule 8 provides “*These rules shall not be made applicable to the extent the share of the reporting company is held by XX*”. This implies that exemption has been given to the investing company by virtue of the shares held by them. However, in case of a situation where the entity can exercise control other than through shareholding, then, one may take a view that the said exemption may not be available considering the opaque language in the said rules.

44. What is the meaning of the phrase ‘investment vehicle regulated by RBI’ under clause (f) of Rule 8 of the SBO Rules?

Generally the phrase ‘investment vehicle regulated by RBI’ should mean such investment companies and core investment companies (‘CICs’) which are registered with RBI. Accordingly, the SBO Rules shall apply to those CICs which are not required to be registered with RBI. The intent is to exclude those investment vehicles which are already being monitored by RBI and examine the holdings of an unregulated investment vehicle.

45. Illustration:

X Ltd. has 3 body corporate shareholders i.e., A Ltd., B Ltd., and C Ltd., holding more than 10% shares in X Ltd. There is no other entity holding more than 10% shares in said Co. Further:

a) all the 3 body corporate shareholders are registered CICs.;

b) there is no separate arrangement made between X Ltd Ltd. and any third party through which they may exercise significant influence or control in X Ltd.

So, who shall be regarded as the SBO for X Ltd.?

As per the exemption provided in Rule 8 (f) of the revised SBO Rules, **Investment Vehicles regulated by Reserve Bank of India**, or Insurance Regulatory and Development Authority of India, or Pension Fund Regulatory and Development Authority, are exempted from the applicability of these Rules.

Accordingly, in case the shares of the reporting entity are held by investment vehicles regulated by RBI, then the revised SBO Rules shall not be made applicable on such reporting company to the extent of the shares held by investment vehicles in the reporting entity.

Therefore, A, B & C Ltd., being registered CICs, shall fall under the exemption list provided under Rule 8(f) of the revised SBO Rules and hence, there is no need to go beyond the 3 body corporates shareholders for identification as SBOs. Hence, considering the lacuna in the language of the revised SBO Rules, X Ltd. shall be considered to have no SBOs.

Disclosures in case of holding- subsidiary relationship

46. Where the holding co. does not have any SBO, who shall be the SBO of the subsidiary?

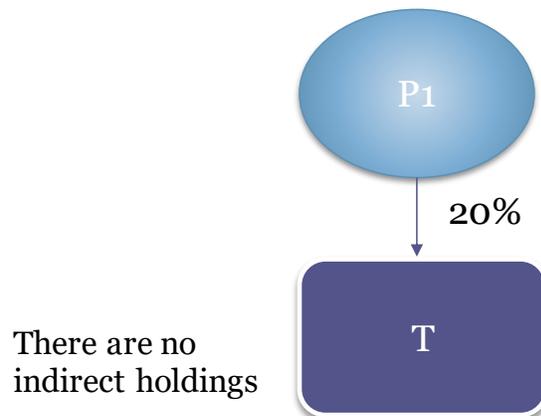
Pursuant to Rule 8 (b) of the revised SBO Rules, the subsidiary is required to report details of the holding reporting company in Form No-BEN-2 -- this should be done where the holding company is a reporting company i.e., where the holding company has an SBO. The SBO of the holding company will be regarded as the SBO of the subsidiary in relation to the shares held by such holding reporting company.

Therefore, in order to ascertain the information of SBO, the subsidiary shall send notice in Form No. BEN-4 to the holding co. Now, since, the holding co. does not have an SBO, the declaration in Form No BEN-1 will not be required to be furnished. Accordingly, the holding co. shall inform to its subsidiary that it has not received any declaration in Form No. BEN-1 from any individual and therefore, the information sought in the notice need not be furnished.

Illustrations for determining SBOs

Illustrations on direct and indirect holdings

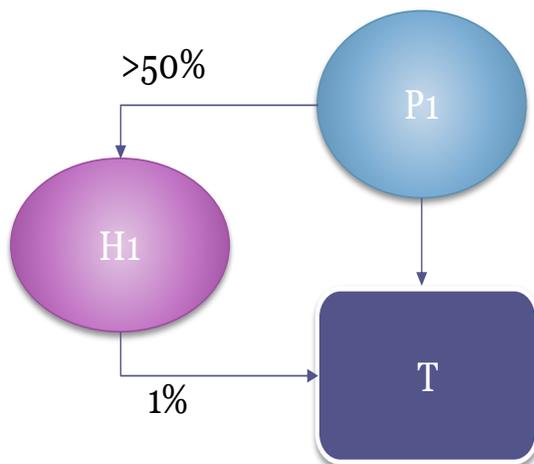
➤ Illustration 1:



Unless there are indirect holdings, there is no case for SBO declaration – Exp 1 to R 2 (1) (h). Even though P1 has significant influence over T, significant influence for the purpose of SBO Rules is relevant only if it is other than through direct holdings – see Rule 2 (1) (h) (iv).

✚ No SBO declaration is required by P1.

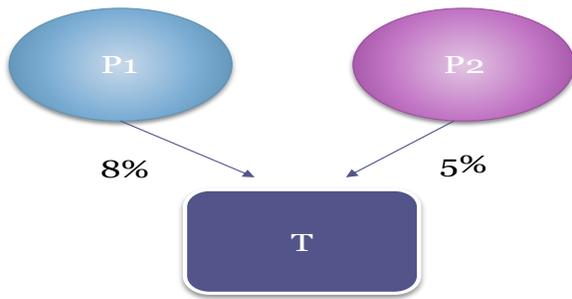
➤ Illustration 2:



Though P1 is a substantial shareholder, there are indirect holdings too. Exp 1 to R 2 (1) (h) is not applicable since there are indirect holdings. The indirect holdings of P1 along with direct holdings are 10% or more.

✚ SBO declaration is required by P1.

➤ Illustration 3:

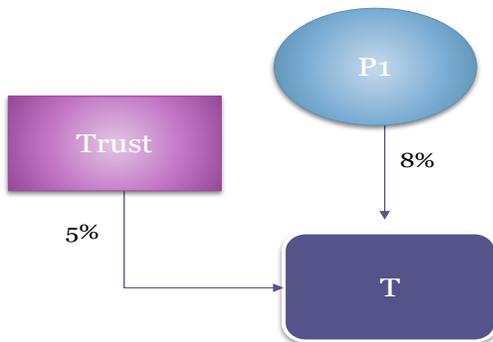


P1 and P2 may be deemed acting together. There are no indirect holdings for either P1 or P2.

Unless there are indirect holdings, there is no case for SBO declaration – Exp 1 to R 2 (1) (h). While the holdings of P1 or P2 are individually less than 10%, but togetherness makes the same more than 10%, however, in view of the language of Exp 1, no disclosure seems required.

✚ No SBO declaration is required by P1 & P2.

➤ **Illustration 4:**

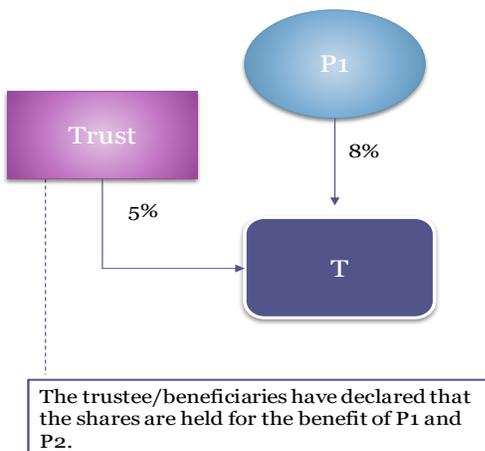


The trustee/P1 have made a declaration u/s 89 declaring P1 to be the beneficial owner.

Where declaration of beneficial holdings in the name of the individual has been done, the individual is regarded as direct owner [Exp II to R 2 (1) (h)].

Since the holding as beneficiary is not regarded as indirect holding, and there is no other indirect holding, there is no case for declaration.

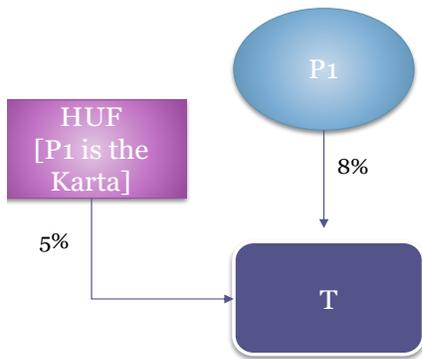
✚ No SBO declaration is required by P1.



The fact that the beneficial holding is with P1 and P2 together does not make a difference. This is not a case of indirect holding. Hence, no declaration required. See previous answers too.

✚ No SBO declaration required is required by P1.

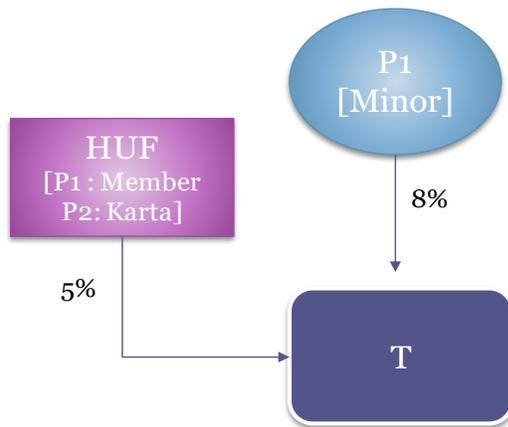
➤ **Illustration 6:**



The holding of shares in case of an HUF is regarded as indirect holding of the Karta – Exp III (ii) to R 2 (1) (h). The direct and indirect holdings are 10% or above.

✚ **SBO declaration is required by P1.**

➤ **Illustration 7:**

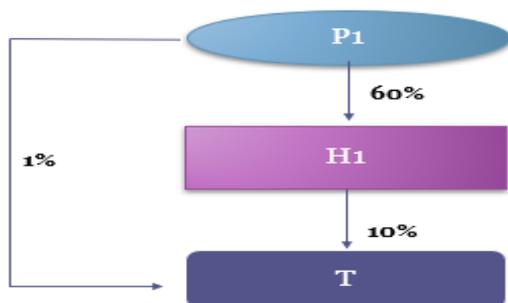


First of all, the fact that P1 is a minor does not make any difference for the purpose of SBO declaration. P2 is the karta of the HUF – therefore, the holding of P2 is in the indirect holding in T1. Being members of the same HUF, P1 and P2 may be deemed to be acting together. Therefore, the direct holding of P1 and indirect holding of P2 need to be aggregated.

✚ **SBO declaration is required by P1.**

Illustrations on manner of computing indirect holdings

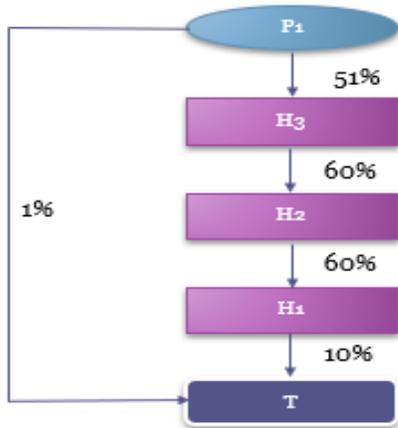
➤ **Illustration 8:**



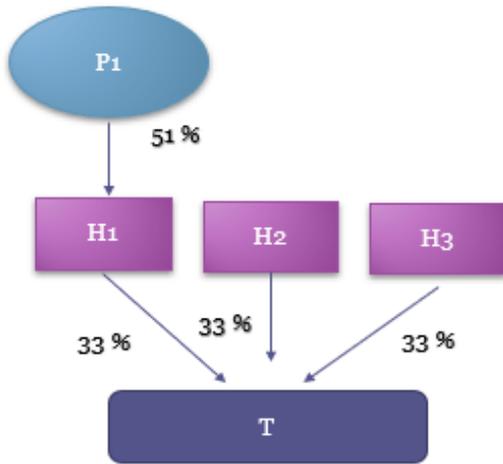
Since P1 holds majority stake in H1, the holding of H1 in T is regarded as the indirect holding of P1. The entire holding of H1 in T will be attributed to P1. Hence, P1's indirect holding in T is 10%, and his direct holding is 1%, aggregating to 11%.

✚ **SBO declaration is required by P1.**

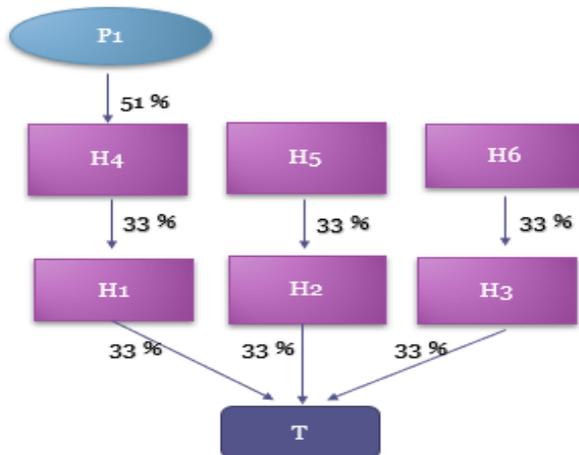
➤ **Illustration 9:**



➤ Illustration 10:



➤ Illustration 11:



The holding of H1 in T (10%) will be regarded as indirect holding of P1, because P1 is holding majority stake in the ultimate holding company of H1 (that is, H3). The indirect holding of P1 in T will be the entire holding of H1 in T, that is, 10%. Hence, together with the direct holding of 1%, the threshold condition is satisfied.

✚ **SBO declaration is required by P1.**

P1 holds majority stake in H1. Therefore, the holding of H1 in T will be regarded as the indirect holding of P1. That holding is 10% or more.

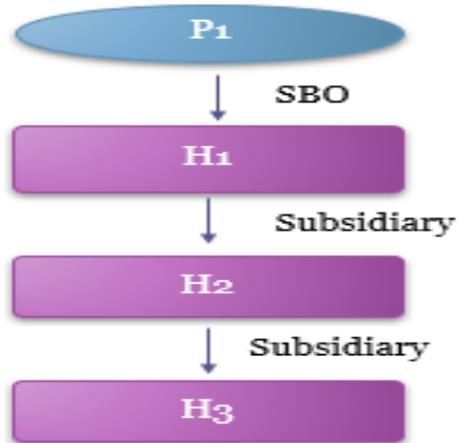
✚ **SBO declaration is required by P1.**

While the answer may seem counter-intuitive, but as per the language of Exp III (i) (b), the holding of an individual is regarded as indirect holding only if the individual either holds majority in the first layer holding company, or the ultimate holding company of the first layer holding company.

In this case, none of the second layer entities (H4, H5 and H6) can be regarded as the holding companies of first layer. Hence, the holding of P1 at the second layer will not be regarded as indirect holding of P1.

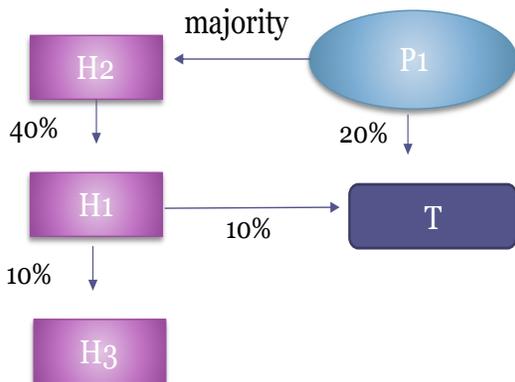
✚ **SBO declaration is not required by P1.**

➤ **Illustration 12:**



P1 is already a declared SBO for H1. Rule 8 (b) provides that the shares held by the holding company shall be excluded from the Rules, provided the SBO has been declared at the holding company level.

✚ **SBO declaration is not required for H2 and H3.**

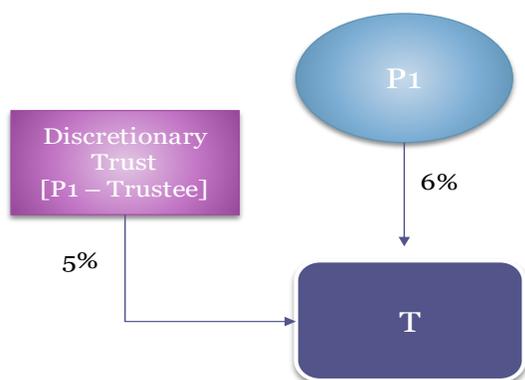


As for T, the position is simple: since P1 is not holding majority either at H1, or ultimate holding company of H1 (note H2, though majority owned by P1, is not the holding company of H1), the holding of H1 will not matter. At H1 level, the holding of H2 is the indirect holding of P1. Hence, P1 is the SBO for H1. In case of H2, it is direct holding entirely – hence, no SBO declaration. In case of H3, there is no majority holding of P1 in H1; H1 does not have any ultimate holding co.

✚ **SBO declaration not required for T. Will be required at H1, not required for H2 and H3.**

Bringing trusts and funds into the picture

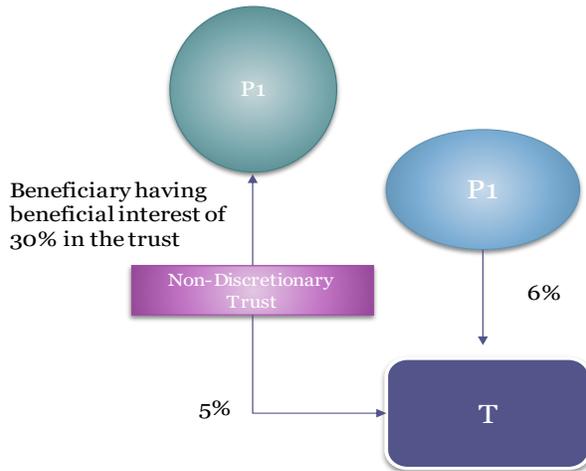
➤ **Illustration 14:**



The holding of shares in T by the trust will be regarded as indirect holding of P1, since P1 is the trustee of a discretionary trust. Along with his direct holdings, the holding is 10% or more.

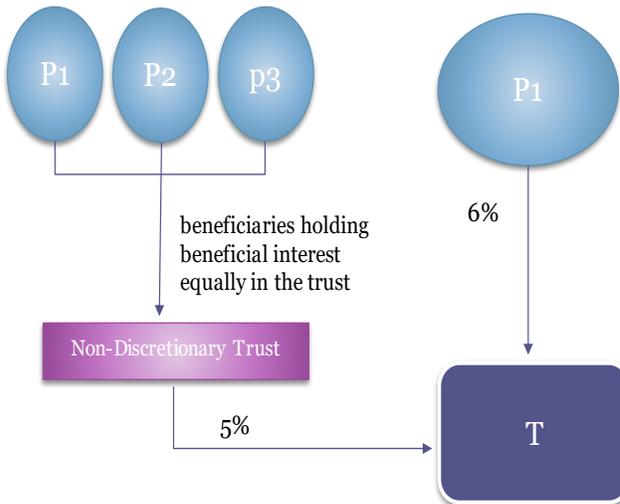
✚ **SBO declaration required by P1**

➤ **Illustration 15:**



In case of non-discretionary trust, the holding of the trust is regarded as indirect holding of the beneficiary. It does not matter how much is the beneficial interest of the beneficiary. See Exp III (iv) (b). Hence, the entire holding of trust will be regarded as indirect holding of P1. Along with his direct holding, P1's holding is 10% or more.

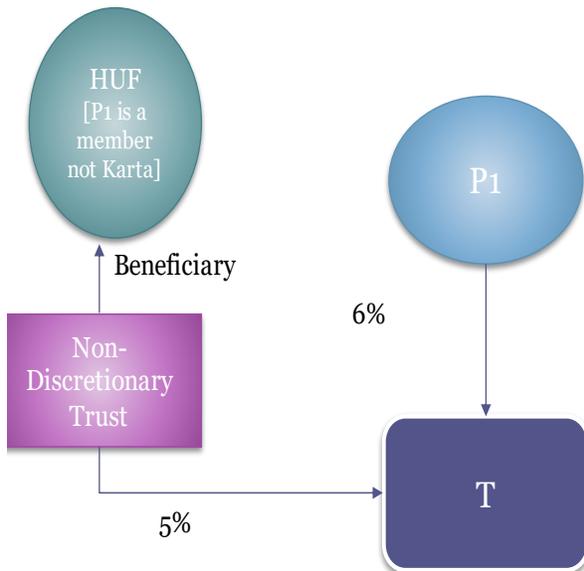
✚ **SBO declaration required by P1**



See previous answer.

The holding of the trust in T is regarded by indirect holding of each of P1, P2 and P3. Additionally, it may be contended that P1, P2 and P3 are acting together. Since P1 has a direct holding too, the answer is clear in case of P1. In case of P2 and P3, declaration may be required based on their direct holdings.

✚ **SBO declaration required by P1, may be required for P2 and P3.**

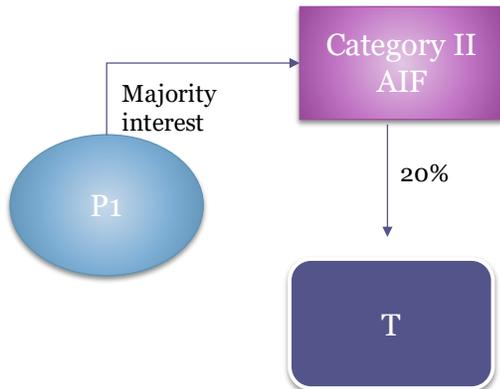


Since the beneficiary of the trust is the HUF, the holding of the trust in T is regarded as indirect holding of HUF. However, in case of HUF, the holding is attributed to the individual only if he is Karta. P1 is not the Karta.

✚ **SBO declaration not required by P1.**

Illustrations on regulated investment vehicles

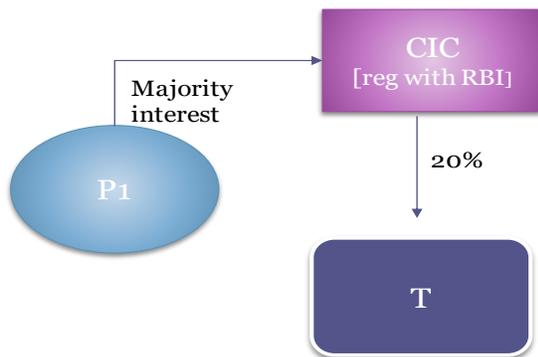
➤ **Illustration 18:**



As per Rule 8, the extent of shares held by RBI-regulated investment vehicles are not to be considered.

✚ **SBO declaration not required by P1.**

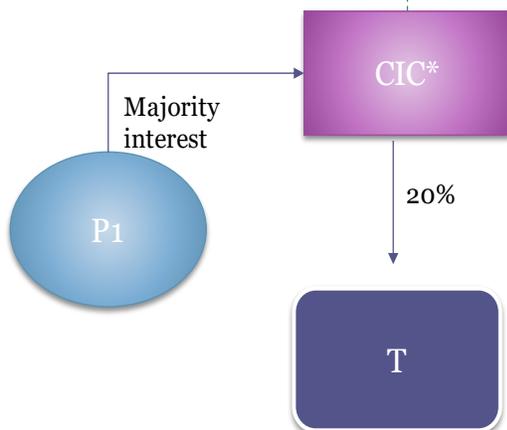
➤ **Illustration 19:**



As per Rule 8, the extent of shares held by RBI-regulated investment vehicles are not to be considered.

✚ **SBO declaration not required by P1.**

In view of its public funds/ asset size, the CIC is exempt from registration requirements of the RBI.



The vehicle in question is not RBI regulated. Hence, the indirect holding rule will apply.

✚ **SBO declaration is required by P1.**

Penal Provisions

47. Whether Section 90 provides for penal provisions?

Section	Nature of Violation	Person responsible	Penal provisions								
90(10)	Failure to make declaration	Significant Beneficial Owner	Fine:- <ul style="list-style-type: none"> Rs. 1 Lakh – 10 Lakhs. For continuing default: - Upto Rs. 1000 for every day after the first day of failure. 								
90(11)	Failure to maintain register U/S 90(2) & file information U/S 90(4) and denial of inspection	Company	Fine:- <ul style="list-style-type: none"> For company and every officer in default:- Rs. 10 Lakhs – Rs. 50 Lakhs For Continuing default: - Upto Rs. 1000 for every day after first day of failure. 								
90(12)	Furnishing of false and incorrect information or suppressing any material information	Person declaring Beneficial interest	Liable to action under Section 447 (Fraud) Imprisonment :- <table border="1" data-bbox="824 1066 1377 1598"> <tr> <td>For amount of at least Rs. 10 Lakhs OR 1% of Turnover of the company whichever is lower</td> <td>6 months – 10 years</td> </tr> <tr> <td>For amount of less than Rs. 10 Lakhs OR 1% OF Turnover of the company whichever is lower</td> <td>Upto 5 years</td> </tr> <tr> <td>For fraud involving public interest</td> <td>Not less than 10 years</td> </tr> </table> Fine:- <table border="1" data-bbox="824 1675 1377 1858"> <tr> <td>For amount of at least Rs. 10 Lakhs OR 1% of Turnover of the company</td> <td>Not less than the amount involved in the fraud but which may extend to three times the</td> </tr> </table>	For amount of at least Rs. 10 Lakhs OR 1% of Turnover of the company whichever is lower	6 months – 10 years	For amount of less than Rs. 10 Lakhs OR 1% OF Turnover of the company whichever is lower	Upto 5 years	For fraud involving public interest	Not less than 10 years	For amount of at least Rs. 10 Lakhs OR 1% of Turnover of the company	Not less than the amount involved in the fraud but which may extend to three times the
For amount of at least Rs. 10 Lakhs OR 1% of Turnover of the company whichever is lower	6 months – 10 years										
For amount of less than Rs. 10 Lakhs OR 1% OF Turnover of the company whichever is lower	Upto 5 years										
For fraud involving public interest	Not less than 10 years										
For amount of at least Rs. 10 Lakhs OR 1% of Turnover of the company	Not less than the amount involved in the fraud but which may extend to three times the										

Section	Nature of Violation	Person responsible	Penal provisions	
			whichever is lower	amount involved in the fraud
			For amount of less than Rs. 10 Lakhs OR 1% of Turnover of the company whichever is lower	Upto Rs. 25 Lakhs

Nexus between Section 90 and Prohibition of Benami Property Transactions Act, 1988

48. What is the scope of Prohibition of Benami Property Transactions Act, 1988?

Benami property means property without a legal owner or held in fictitious name (benamidar). The legal owner/ beneficial owner is the person for whose benefit the benamidar holds the property.

It is pertinent to note that property, under the aforesaid act as amended from time to time, means assets of any kind, whether movable or immovable, tangible or intangible, corporeal or incorporeal and includes any right or interest or legal documents or instruments evidencing title to or interest in the property and where the property is capable of conversion into some other form, then the property in the converted form and also includes the proceeds from the property.

Subsequent to the Benami Transactions (Prohibition) (Amendment) Act, 2016¹⁴:

- Any property, which is subject matter of benami transaction, shall be liable to be confiscated by the Central Government;
- Benamidar cannot re-transfer the benami property to the beneficial owner. Any such transaction shall be null and void;
 - Except where such transaction is made in accordance with the provisions of section 190 of the Finance Act, 2016.
- Whoever is found guilty of the offence of benami transaction referred to in sub-section (1) of Section 53¹⁵ shall be punishable with rigorous imprisonment for a term which shall not be less than one year, but which may extend to seven years and shall

¹⁴ <http://www.prsindia.org/uploads/media/Benami/Benami%20Transactions%20Act,%202016.pdf>

¹⁵ (1) Where any person enters into a benami transaction in order to defeat the provisions of any law or to avoid payment of statutory dues or to avoid payment to creditors, the beneficial owner, benamidar and any other person who abets or induces any person to enter into the benami transaction, shall be guilty of the offence of benami transaction.

also be liable to fine which may extend to twenty-five per cent. of the fair market value of the property;

- Any person who is required to furnish information under this Act knowingly gives false information to any authority or furnishes any false document in any proceeding under this Act, shall be punishable with rigorous imprisonment for a term which shall not be less than six months but which may extend to five years and shall also be liable to fine which may extend to ten per cent. of the fair market value of the property.

49. Is there a nexus between scope of Section 90 of Act, 2013 and the aforesaid Act?

Section 90 deals with identification of a natural person, for every company, who is the SBO. Once the SBOs are identified, the Company is only required to maintain a record of the same and file it with the Registrar.

So, the intent is to have the natural person identified who may be held responsible/ accountable in case of suspicious activity/ malafide activities of the Company along with the officers of the Company. Section 90 has been framed more from Prevention of Money Laundering (PML) perspective.

It is highly likely that the natural person declaring himself/ herself as SBO still continues to be benamidar. The real owner/ legal owner may not step forward considering the dreaded consequence under Prohibition of Benami Property Transactions Act, 1988. Such persons were not waiting for Section 90 to become operative to come to the fore and declare their interest.

As a matter of compliance of Section 90, such benamidar will be regarded as SBO.

SBOs as related parties

50. Will the SBO identified / SBO controlled entities be regarded as a related party under the Act or the Accounting Standards?

Under Act, 2013 an SBO, being a natural person, may be regarded as a related party if it is proved that he is the person on whose advice, directions or instructions a director or manager is accustomed to act [Section 2(76) (vii)].

As per IND-AS 24:

A related party is a person or entity that is related to the entity that is preparing its financial statements (in this Standard referred to as the 'reporting entity').

(a) A person or a close member¹⁶ of that person's family is related to a reporting entity if that person:

(i) has control or joint control of the reporting entity;

*(ii) **has significant influence¹⁷ over the reporting entity;** or*

(iii) is a member of the key management personnel of the reporting entity or of a parent of the reporting entity.

(b) An entity is related to a reporting entity if any of the following conditions applies:

*(vii) A person identified in (a)(i) **has significant influence over the entity** or is a member of the key management personnel of the entity (or of a parent of the entity).*

Therefore, SBO exercising significant influence (as defined in IND-AS 28) over the company will be a related party for the purpose of Accounting Standards. And the entity over which the SBO has significant influence shall also be regarded as related party for the reporting entity.

Identification of SBOs in case of GDRs

51. How to identify the SBOs in case of GDRs?

The entire process has been presented below:

¹⁶ Close members of the family of a person are those family members who may be expected to influence, or be influenced by, that person in their dealings with the entity including:

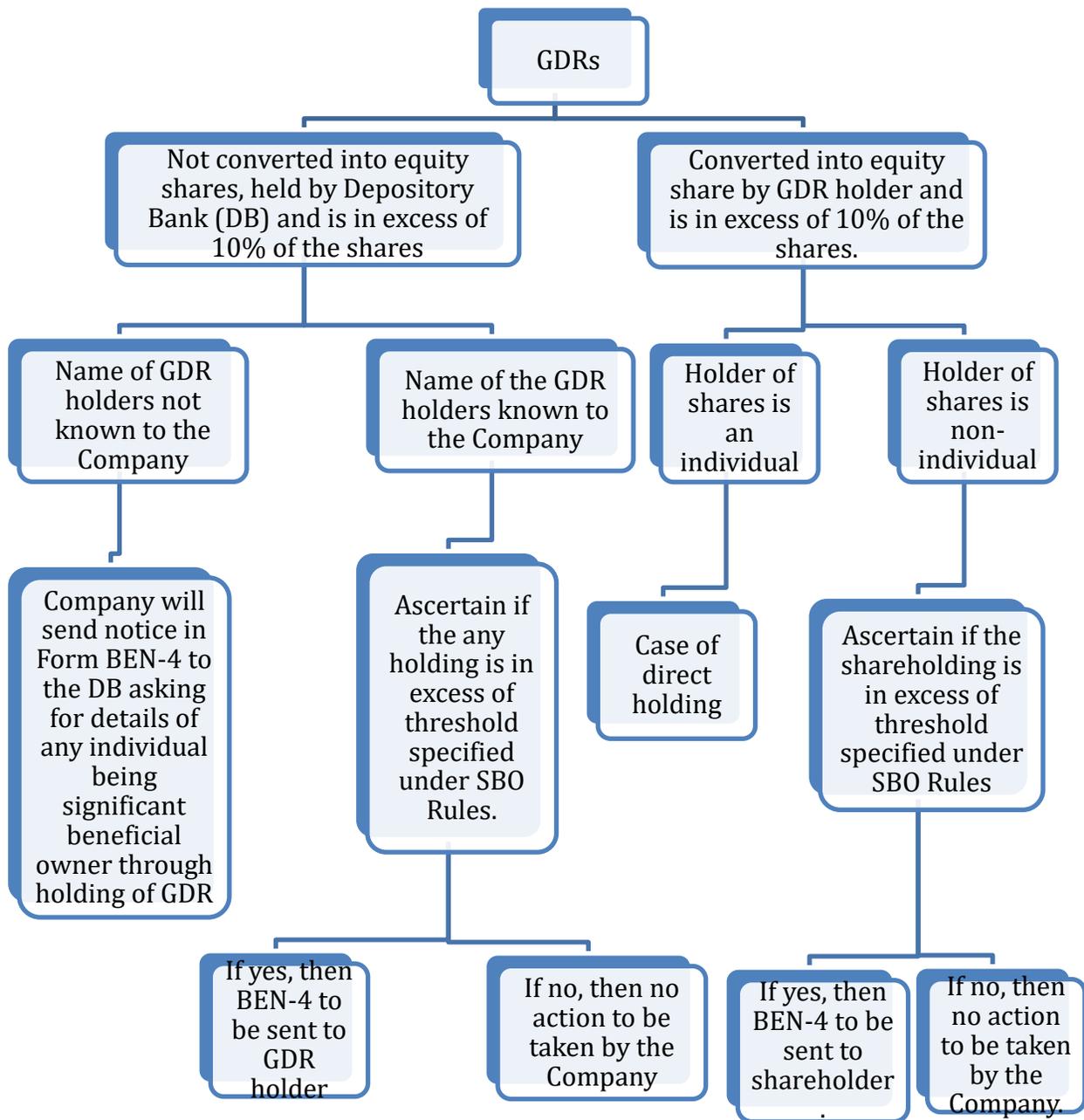
(a) that person's children, spouse or domestic partner, brother, sister, father and mother;

(b) children of that person's spouse or domestic partner; and

(c) dependants of that person or that person's spouse or domestic partner.

¹⁷ 20 per cent or more of the voting power of the investee/ power to participate in the financial and operating policy

decisions of the investee but is not control or joint control of those policies. (IND-AS 28)



SEBI's requirement of SBO reporting

52. Has SEBI prescribed any reporting format of SBOs by the companies?

SEBI vide its Circular¹⁸ dated December 7, 2018, had come out with the format for the disclosure of significant beneficial ownership, which was effective from the quarter ended March 31, 2019. The said format has been inserted in the format of the shareholding pattern of specified securities, which is submitted by the entities under Regulation 31 of the SEBI Listing Regulations, 2015.

However, considering the amendments brought in by the revised SBO Rules and the practical challenges faced by the companies in implementing the revised Rules, SEBI has come out with the revised format for disclosure of SBOs by the listed entities, vide its Notification¹⁹ dated March 12, 2019, which shall be applicable on all listed companies from the quarter ending June 30, 2019.

¹⁸ https://www.sebi.gov.in/web/?file=https://www.sebi.gov.in/sebi_data/attachdocs/dec-2018/1544176092665.pdf#page=1&zoom=auto,-61,792

¹⁹



Other reading materials on the same topic:

1. Presentation explaining the SBO Rules through various illustrations, can be viewed [here](#).
2. Article on 'Amended SBO Rules narrow ambit of beneficial owners', can be viewed [here](#).
3. Article on ' Identification of SBOs in case of GDRs', can be can be viewed [here](#).

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