

# Article

## Identification of SBOs in case of GDRs

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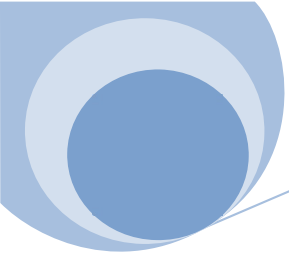
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MCA on 8<sup>th</sup> February, 2019 issued Companies (Significant Beneficial Owners) (Amendment) Rules, 2019<sup>1</sup> amending Companies (Significant Beneficial Owners) Rules, 2018<sup>2</sup> ('SBO Rules') thereby drastically amending the definition of SBO.

As per the recent simplified definition, SBO is referred as:

*"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."*

### Meaning of Shares as per the SBO Rules

As per the simplified SBO Rules, apart from the equity shares, the instruments in the form of **global depository receipts**, compulsorily convertible preference shares or compulsorily convertible debentures shall also be treated as 'shares'.

### Meaning of Depository Receipt

As defined in Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017<sup>3</sup>:

*"Depository Receipt means a foreign currency denominated instrument, whether listed on an international exchange or not, issued by a foreign depository in a permissible jurisdiction on the back of eligible securities issued or transferred to that foreign depository and deposited with a domestic custodian and **includes 'global depository receipt'** as defined in section 2(44) of the Companies Act, 2013."*

### Meaning of Global Depository Receipts

As per Section 2(44) of the Companies Act, 2013, Global Depository Receipt ('GDR') means any instrument in the form of a depository receipt, by whatever name called,

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<sup>1</sup> [http://www.mca.gov.in/Ministry/pdf/CompaniesOwnersAmendmentRules\\_08020219.pdf](http://www.mca.gov.in/Ministry/pdf/CompaniesOwnersAmendmentRules_08020219.pdf)

<sup>2</sup> [http://www.mca.gov.in/Ministry/pdf/CompaniesSignificantBeneficial1306\\_14062018.pdf](http://www.mca.gov.in/Ministry/pdf/CompaniesSignificantBeneficial1306_14062018.pdf)

<sup>3</sup> <https://rbi.org.in/Scripts/NotificationUser.aspx?Id=11161&Mode=0>

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created by a foreign depository outside India and authorised by a company making an issue of such depository receipts.

Process of issuing GDRs by Indian Companies:

The process of issuing GDRs by Indian company involves:

1. Issuance of its equity shares (in Indian currency) to an overseas depository bank, through a domestic custodian bank.
2. The domestic custodian bank acts as the agent of overseas depository bank, and keeps the equity shares in its custody.
3. The overseas depository bank issues GDRs against the said equity shares to the overseas investors (in foreign currency).

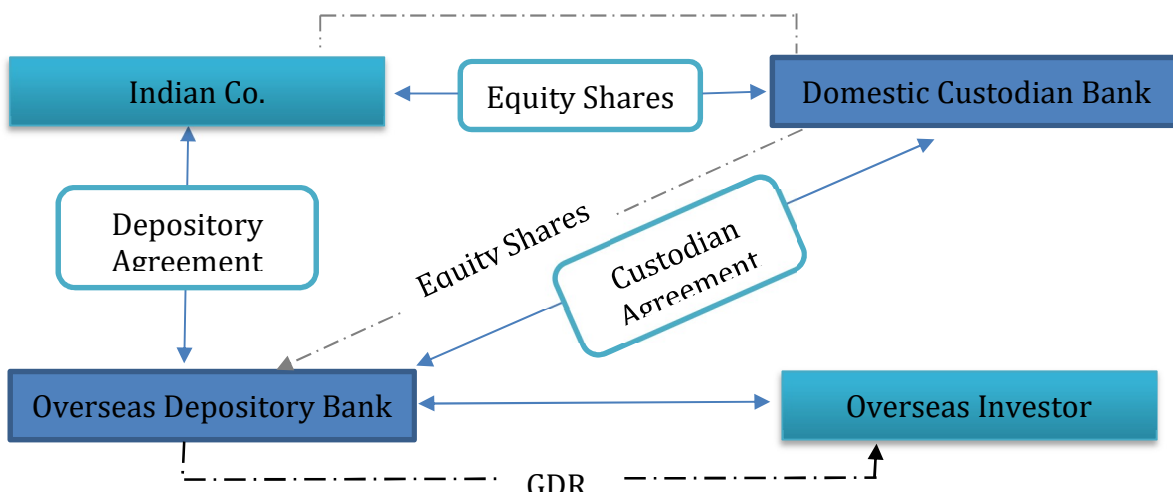


Figure 1: Process of GDR issuance

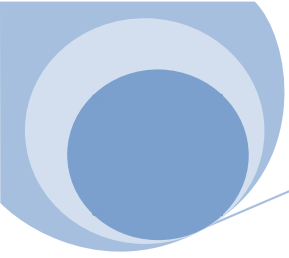
Voting rights of GDR Holders

Companies Act, 2013

As per the Rule 6 of the Companies (Issue of Global Depository Receipts) Rules, 2014:

(1) A holder of depository receipts may become a member of the company and shall be entitled to vote as such only **on conversion of the depository receipts into underlying shares** after following the procedure provided in the Scheme and the provisions of the Companies Act, 2013.

(2) Until the conversion of depository receipts, **the overseas depository shall be entitled to vote on behalf of the holders of depository receipts** in accordance with



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*the provisions of the **agreement entered into between the depository, holders of depository receipts and the company** in this regard.*

## **Depository Receipts Scheme, 2014**

As per Para 7 of the Depository Scheme, 2014<sup>4</sup>, issued by the Department of Economic Affairs, following are the rights and duties of the GDR holders and the foreign depositories:

1. The foreign depository shall be entitled to exercise voting rights, if any, associated with the permissible securities, whether pursuant to voting instructions from the holder of depository receipts or otherwise;
2. The shares of a company underlying the depository receipts shall form part of the public shareholding of the company under the Securities Contracts (Regulations) Rules 1957, if:
  - the holder of such depository receipts has the right to issue voting instructions; and
  - such depository receipts are listed on an international exchange.
3. In the cases not covered under sub-paragraph 2, shares of the company underlying depository receipts shall not be included in the total shareholding and in the public shareholding for the purpose of computing the public shareholding of the company.
4. A holder of depository receipts issued on the back of equity shares of a company shall have the same obligations as if it is the holder of the underlying equity shares if it has the right to issue voting instruction.

## **RBI Master Directions for Private Sector Banks**

Para 10 of RBI Master Direction – Ownership in Private Sector Banks, Directions, 2016<sup>5</sup> provides that banks shall enter into an agreement with the depository to the effect that the depository shall not exercise voting rights in respect of the shares held by them or they shall exercise voting rights as directed by the Board of Directors of the Bank.

### **In a nutshell**

In case of private sector banks, the voting rights shall be exercised by the depositories depending upon the instructions received by the Board of Directors of the Bank.

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<sup>4</sup> <https://dea.gov.in/sites/default/files/DepositoryReceiptsScheme2014.pdf>

<sup>5</sup> <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=10397&Mode=0>

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In case of non-banks, on the collective reading of the aforesaid requirements, it is evident that when the GDR holders exercise their right to exchange with equity shares, then only the GDR holder becomes the shareholder of the issuer company. Till then, the name of the depository bank reflects in the register of members of the issuer company.

Therefore, until conversion, the voting right is not exercised by the GDR Holder but by the overseas depository pursuant to the agreement between the depository and the issuer.

In case of GDR issued under Companies Act, 2013, the voting right shall be as per the agreement between the GDR holder, depository and the issuer company.

### Right to receive dividend by the GDR holders

Until conversion of the GDR into equity shares, the dividend is paid by the company to the depository bank which further distributes it to the GDR holders.

### Practical difficulties in identifying the SBOs in case of GDRs

As per the SBO Rules<sup>6</sup> notified by MCA, GDR holders will get covered within the ambit of SBO, if any individual through GDR is able to:

- get more than 10% of distributable dividend; or
- exercise 10% of voting rights based on the instruction given to the depository or on conversion of GDRs into shares;
- hold 10% of the equity shares in the company on conversion.

There is a legal right for the GDR holders in Euroclear and Clearstream to remain anonymous if they wish to do so. In many cases the GDR holders choose to withhold their identity. GDR holders with shares held in Euroclear and Clearstream have their anonymity protected by the laws of Brussels and Luxembourg respectively.<sup>7</sup>

Therefore, reporting company cannot identify the GDR holders, especially the ones issued under the erstwhile scheme i.e. *FCCBs and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993*. It was also suggested in the Sahoo Committee Report that issuances should be made in FATF complaint jurisdictions as FATF recommendations prohibit financial institutions from keeping anonymous accounts.<sup>8</sup>

Accordingly, reporting companies will be required to seek information in Form BEN 4 through the depository bank in order to comply with SBO Rules if the quantum of GDR is 10% or more of the shares of the reporting company.

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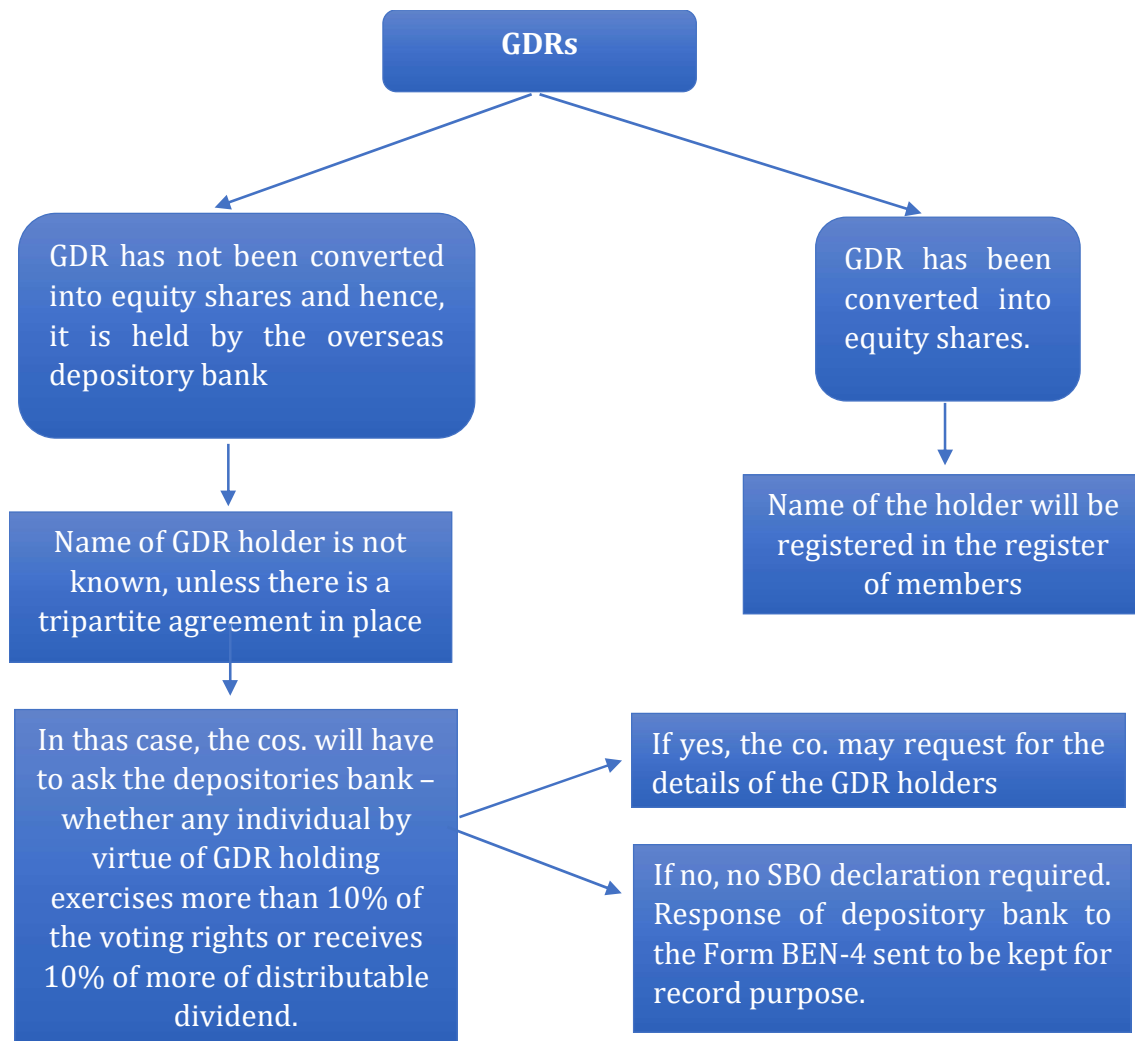
<sup>6</sup> [http://www.mca.gov.in/Ministry/pdf/CompaniesOwnersAmendmentRules\\_08020219.pdf](http://www.mca.gov.in/Ministry/pdf/CompaniesOwnersAmendmentRules_08020219.pdf)

<sup>7</sup> <https://www.adr.db.com/drwebrebrand/resources/faqs#12>

<sup>8</sup> [https://www.finmin.nic.in/sites/default/files/Sahoo\\_Committee\\_Report.pdf](https://www.finmin.nic.in/sites/default/files/Sahoo_Committee_Report.pdf)

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1. Click [here](#) to view the presentation on revised SBO Rules;
2. Article - Amended SBO Rules narrow ambit of beneficial owners, can be viewed [here](#).
3. Click [here](#) to read our other articles on various topics.