

## SBO Declaration: Whose Responsibility Is It Anyways?

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Section 90 of Companies Act, 2013 mandates significant beneficial owners to make a declaration to the reporting company specifying the nature of his interest and other particulars as provided in Companies (Significant Beneficial Owners) Rules, 2018 (**'SBO Rules'**) within 90 days of February 8, 2019 being date of commencement of the Companies (Significant Beneficial Owners) Amendment Rules, 2019. An important question in this regard is – whose onus is it? Is it the onus of the respective SBOs to come forward to reveal themselves, or is it the obligation of the reporting company to trace its SBOs and bring them, so to say, from behind the shadows? Substantial confusion has been created due to mismatched language of sec. 90 (5), and Rule 2A of the SBO Rules, whereby, lot of corporate professionals have formed a view that there is a primary obligation on the part of the companies to bring out their SBOs.

This article intends to clarify that the provisions of sec. 90 (5) and (6), and those of Rule 2A, are mutually independent, and talk about two different things. Rule 2A is an example, found very commonly these days, where the rule-maker has made a rule for which there is no explicit provision in the law. Therefore, rule 2A should be read as an independent obligation, whereas the genesis of section 90 (5) is the existence of knowledge or reasonable cause to believe, with the company, that there is an SBO who has not come forward to reveal his identity.

In short, this article clarifies the statutory provision about Form Ben 4.

### Scope of Section 90 (5)

Section 90 (5) casts the responsibility on a reporting company to send notice to any person (whether or not a member of the Company) whom the reporting company knows or has reasonable cause to believe:

*(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,*

The format of notice (Form BEN-4) is provided in Rule 6 of SBO Rules.

On receipt of the said notice, the recipient is under an obligation to give the information within a period of 30 days of the date of notice, as per the requirement given in Section 90 (6).

In case of non-receipt of information or in case of information not being satisfactory, the reporting company is under obligation to apply to NCLT within 15 days of expiry of the period specified in the

notice, for an order directing that the shares in question be subject to restrictions with regard to transfer of interest, suspension of all rights attached to the shares.

### Scope of Rule 2A

Rule 2A of SBO Rules casts the responsibility on the reporting companies to take necessary steps to find out SBO and cause such individual identified as SBO to submit declaration in Form BEN-1. Sub-rule 2 of Rule 2A of SBO Rules mandates every reporting company to send notice in Form BEN-4 to every non-individual member holding not less than 10% of the shares or voting rights or right to receive or participate in the dividend or any other distribution payable in a financial year, seeking information in accordance with Section 90 (5).

Given the exclusions provided in Rule 8 of SBO Rules, the notice should be sent only to such non-individual members holding shares of the reporting company to whom the SBO rules are made applicable.

Refer Annexure I for the flow chart.

### Section 90 (5) v/s Rule 2A

Parameter	Notice under Section 90 (5)	Notice under Rule 2A
<b>Recipient of notice</b>	Given to a person (member or non-member)	Given only to members other than individuals holding 10% of shares, voting rights or right to receive or participate in the dividend or any other distribution payable in a financial year.
<b>Pre-requisite/ criteria for sending notice</b>	Where a reporting company knows or has reasonable cause to believe that the recipient of the notice is the SBO or has knowledge of the SBO or another person who is likely to have such knowledge or has been the SBO during 3 years immediately preceding sending of notice.	Given pursuant to mandatory requirement under law and not because the reporting company knows or has reasonable cause to believe recipient is/ has been SBO or has knowledge of SBO.
<b>Timeline for responding to the notice</b>	30 days from the date of notice, pursuant to the provisions of Section 90 (6).	Nothing specified in SBO Rules. An SBO has time till 90 days from February 8, 2019 to declare.
<b>Consequence of non-receipt of response from the notice</b>	Reporting company shall make an application to NCLT pursuant to Section 90 (7) read with Rule 7 of SBO Rules.	No action shall be taken against the recipient as no reference to Rule 2A made in Rule 7. Therefore, no consequence in case of non-receipt of information unless the reporting company knows or has reasonable cause to believe that recipient is/ has been SBO or has knowledge of SBO.

## Conclusion

As evident from the comparison above, provisions of sec. 90 (5) and (6), and those of Rule 2A, are mutually independent. A reporting company is not required to approach NCLT in case of non-receipt of information from the non-individual members as a response to Form BEN-4 sent under Rule 2A. The obligation of a reporting company is to ensure sending of Form BEN-4 under Rule 2A and thereafter, under Section 90 (5), if situation warrants.

Further, every SBO is under an obligation to declare within 90 days of commencement of the SBO Rules if he/she indirectly, together with direct holdings, alone or together with persons acting in concert:

- (i) holds indirectly, or together with any direct holdings, not less than ten per cent. of the shares;*
- (ii) holds indirectly, or together with any direct holdings, 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 cent. of the total distributable dividend, or any other distribution, in a financial year through indirect holdings alone, or together with any direct holdings;*
- (iv) has right to exercise, or actually exercises, significant influence or control, in any manner other than through direct-holdings alone.*

### ***Other articles on SBO:***

Illustrations under revised SBO Rules: <http://vinodkothari.com/2019/02/new-sbo-rules-illustrations/>

MCA revisits SBO Rules: <http://vinodkothari.com/2019/02/mca-revisits-sbo-rule/>

FAQs on SBO Rules: <http://vinodkothari.com/2018/07/faqs-on-sbo-rules/>

## Annexure I

