

*Frequently Asked Questions  
on*

# *SBO Rules*

*-updated as on 26<sup>th</sup> September, 2019*

*Raising the curtain to identify the  
beneficial owners*



## Table of Contents

<b>Glossary .....</b>	<b>6</b>
<b>FAQs on SBO Rules.....</b>	<b>7</b>
<b>Applicability of Section.....</b>	<b>7</b>
1. Which all companies are required to comply with the provisions of Section 90?.....	7
2. Does Section 90 introduce a new concept altogether or is it adopting the practice followed globally, and in India by other Regulators? .....	7
3. What is the intent of Section 90? .....	8
4. What are the significant challenges in identification of UBOs/SBOs? .....	9
5. When does the section become applicable to a company? .....	10
<b>Meaning of beneficial interest and SBO .....</b>	<b>10</b>
6. What is the meaning of beneficial interest? .....	10
7. What are the major differences between the scope and applicability of sec 89 and sec 90? .....	10
<b>Meaning of significant beneficial interest .....</b>	<b>12</b>
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? .....	12
9. What is the meaning of Significant Beneficial Ownership ('SBO') for purpose of sec. 89? .....	12
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? .....	15
<b>Threshold for determination of significant beneficial ownership .....</b>	<b>15</b>
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%? .....	15
12. Is the 10% threshold referring to the shares in the target company, or the holding structure? .....	16
13. Does the expression "shares" mean equity as well as preference shares? .....	16
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? .....	17
15. Will the right to participate in dividend on equity as well as preference be considered while identifying the SBO? .....	18
16. 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? .....	19

17. Who shall be identified as the SBO where the register of members reflects following kinds of members? .....	19
18. In case the register of members comprises of majority of individual members, will there be a natural person identifying oneself as an SBO? .....	20
19. Will the shareholding of the relatives also be considered in determining the SBOs? ...	21
20. 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? .....	21
21. How will the SBO be determined in case member is a person resident outside India? .	22
22. How does the law apply itself to those who are not within Indian jurisdiction? .....	22
23. Once a person is declared as an SBO, does it also automatically bring the person under the scope of section 89? .....	22
24. Are preference shares to be considered while calculating ‘right by virtue of voting rights in shares’ while determining SBO? .....	23
25. Which date for acquisition significant beneficial interest as required to be entered in BEN-2? .....	23
26. Where a Reporting Company receives BEN-1, should it verify the facts of the same? .	23
27. A member of the Reporting Company is a Foreign Company not having FCRN, how shall the Reporting Entity fill in the details since FCRN is mandatory in case the category Foreign Company is entered? .....	24
28. Company is a wholly owned subsidiary of a holding Reporting Company. Does it require to file BEN-2?.....	24
29. Company is not a wholly owned subsidiary of a holding Reporting Company. How will it proceed with filing of BEN-2 .....	24
30. Are the holdings of the Nominee holders considered while determining SBO? .....	24
31. A person directly controls a company. Will he be considered as an SBO of that company? .....	24
32. Who is considered to have beneficial interest in case member of the Reporting Entity is a trust? .....	25
33. Who has the onus to determine SBO or any changes therein in the reporting company? .....	25
34. How shall the reporting company determine whether the persons are acting together? .	25
35. How shall a reporting company file SBO details where an SBO has indirect control through more than nine non-individual members? .....	25
36. Where a group of persons are deemed to be acting together under SAST Regulations, will they also be considered to be acting together for significant beneficial ownership? .....	25
37. Where a company has no SBO, does it mean that there is no individual controlling the company? .....	25

38. Where an unregistered transfer is sent for registration after five years, what will be the date of acquiring beneficial interest? .....	26
39. How to find the individual having control, in case of cross holdings? .....	26
40. How will the Reporting Company have details of PAN of the SBO, since the BEN-1 forms has not such field for PAN details? .....	26
41. What if a person furnishes false or incorrect information or suppresses any material information of which he is aware in Form BEN-1?.....	26
42. How to provide information where the SBOs of the Reporting Company is more than 9? .....	26
43. Whether a minor can be said to be SBO?.....	26
44. How to determine whether persons are acting together? .....	27
45. Who will be the SBOs in a case where there is company ABC Pvt Ltd which wholly owned by a Company PQR Ltd which in turn is wholly owned by EFG Ltd, this company is then held by a LLP where there are 10 partners .....	27
46. Who will be SBO in the case where the ultimate holding company is a society of UK? .....	27
47. In ITR Return 6 (for unlisted Company) for AY 2019-20 there is a TABLE “[OWNERSHIP INFORMATION : In case of unlisted company, particulars of natural persons who were the ULTIMATE BENEFICIAL OWNERS, directly or indirectly, or shares holding not less than 10% of the voting power at any time of the previous year (if available)]. So in this field, details of UBO which are to be given are NAME, PAN & PERCENTAGE HELD. What kind of entries are required to be done in the same? .....	27
48. What shall be the case if no natural person can be identified as the SBO? .....	28
<b>Illustrations for determining SBOs .....</b>	<b>29</b>
<b>Compliance to be ensured by SBOs &amp; Company .....</b>	<b>37</b>
49. What is the timeline for declaration by SBOs? .....	37
50. Is there any requirement of intimating the Registrar of Companies regarding the identification of SBOs?.....	37
51. Will the company have to keep any record of the SBOs?.....	37
52. How will the company seek information from various persons about SBOs?.....	37
53. Are the forms available in e-version? .....	38
<b>Onus of disclosure .....</b>	<b>38</b>
54. 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? .....	38
55. What should be the cut-off date for obtaining disclosure from SBOs? .....	38
<b>Reporting requirements in case of change in SBO holdings.....</b>	<b>38</b>

56.	Whether the reporting / target company is also required to intimate the changes in the SBO? 38	
57.	<i>What should be the trigger point for reporting the changes in the SBO?.....</i>	39
58.	Whether change in partners of an LLP, being one of the member of the reporting company, will be required for holding 10% or more in a reporting entity? .....	40
59.	Change in trustees in case of a member being a discretionary trust holding 10% or more in a reporting entity .....	41
<b>Exemption under SBO Rules .....</b>		41
60.	Is there any exemption provided application of the Rules? .....	41
61.	Is there any exemption provided to equity listed companies or wholly owned subsidiaries of such companies? .....	41
<b>Penal Provisions .....</b>		42
62.	Whether Section 90 provides for penal provisions?.....	42
<b>Nexus between Section 90 and Prohibition of Benami Property Transactions Act, 1988....</b>		43
63.	What is the scope of Prohibition of Benami Property Transactions Act, 1988?.....	43
64.	Is there a nexus between scope of Section 90 of Act, 2013 and the aforesaid Act? .....	44
<b>SBOs as related parties.....</b>		44
65.	Will the SBO identified / SBO controlled entities be regarded as a related party under the Act or the Accounting Standards? .....	44

## 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
Multiplier rule	In case of indirect holdings, computing the shareholding at the target company level multiplying holdings at each level
RBI	Reserve Bank of India
Revised SBO Rules	The Companies (Significant Beneficial Owners) Amendment Rules, 2019 <sup>1</sup>
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

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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)

# 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 entity 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 identifying SBO in a company. The concept of identifying UBO/ SBO is not a new concept. The requirement has already been prescribed by following:

- SEBI under Guidelines on Identification of Beneficial Ownership<sup>2</sup>;
- RBI under Reserve Bank of India (Know Your Customer (KYC)) Directions, 2016<sup>3</sup>;
- Rule 9 of the Prevention of Money-laundering (Maintenance of Records) Rules, 2005<sup>4</sup>;
- 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 2016<sup>5</sup>;
  - Ireland: European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016<sup>6</sup>;

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<sup>2</sup>[https://www.sebi.gov.in/web/?file=https://www.sebi.gov.in/sebi\\_data/attachdocs/1359025819903.pdf#page=1&zoom=auto,-23,299](https://www.sebi.gov.in/web/?file=https://www.sebi.gov.in/sebi_data/attachdocs/1359025819903.pdf#page=1&zoom=auto,-23,299)

<sup>3</sup> [https://rbi.org.in/SCRIPTS/BS\\_ViewMasDirections.aspx?id=10292](https://rbi.org.in/SCRIPTS/BS_ViewMasDirections.aspx?id=10292)

<sup>4</sup> [https://fiuindia.gov.in/files/AML\\_Legislation/notifications/rule\\_9.html](https://fiuindia.gov.in/files/AML_Legislation/notifications/rule_9.html)

<sup>5</sup> <https://www.legislation.gov.uk/ukxi/2016/339/contents/made>

<sup>6</sup> <http://www.irishstatutebook.ie/eli/2016/si/560/made/en/print>

- Guernsey: Beneficial Ownership of Legal Persons (Guernsey) Law, 2017<sup>7</sup>

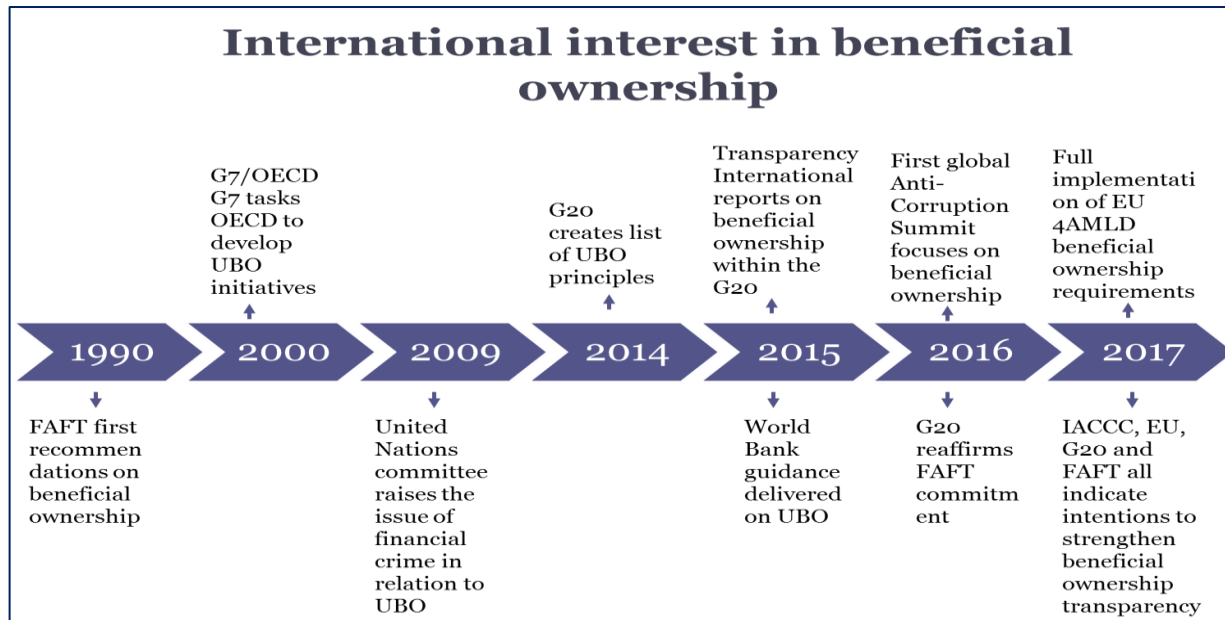


Figure 1: International interest in beneficial ownership<sup>8</sup>

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

<sup>7</sup> <http://www.guernseyregistry.com/CHttpHandler.ashx?id=109195&p=0>

<sup>8</sup> Source: <https://www.lexisnexis.de/whitepaper/beneficial-ownership.pdf>



may be expected that the jurisprudence at some stage will start holding SBOs responsible for deeds of companies.

#### 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 are<sup>9</sup>:

- Complex ownership structures of the legal entities;
- Legal entities established in high secrecy/ high risk jurisdiction (i.e., Samoa, Cayman Islands, Panama);
- False accountholder's declarations on UBOs;
- Limited information available on offshore accountholders;
- 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.

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<sup>9</sup> Compiled by authors from various sources- [source 1](#), [source 2](#) and [source 3](#).

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

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 Corrigendum<sup>10</sup> 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>
<b>Intent</b>	To take cognition of cases where legal ownership is	To recognize significant beneficial owner, being a

<sup>10</sup> [http://www.mca.gov.in/Ministry/pdf/Notification2106\\_22062018.pdf](http://www.mca.gov.in/Ministry/pdf/Notification2106_22062018.pdf)

	not backed by beneficial ownership, or vice versa.	natural person, responsible for driving the vehicle.
<b>History</b>	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.
<b>Stress on natural persons</b>	Section is not limited to natural persons.	Section is limited to identification of natural persons only.
<b>Stress on beneficial ownership</b>	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.
<b>Stress on magnitude</b>	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.
<b>Indirect ownership</b>	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
<b>Relevance to preference shares</b>	Section applies to preference shares as well	Section is applicable only in case of compulsorily convertible preference shares
<b>Inter-relationship between the two sections</b>	If a person is identified as the beneficial owner u/s 89, it automatically moves to section 90 to see whether	If a person is identified as the SBO, it nowhere implies the person is also covered by sec 89. Section 89 applies

	the beneficial holding is significant	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 of the benefits of share ownership, and since it is possible to unbundle those, any of the beneficial interests 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 regard a pledgee as a significant beneficial owner.
- (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. 89?

The definition in Section 90 may be analysed as follows:

Itemized clauses	Our notes
• <b>every individual, who:</b>	The stress is on individual. The individual may be an Indian resident, or foreign resident.

○ <b>acting alone or together, or</b>	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
○ <b>through one or more persons or trust, including a trust and persons resident outside India,</b>	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.
• <b>Holds beneficial interest</b>	Clearly, the stress is on beneficial interest, and not ownership.
• <b>of 25% or such percentage as prescribed in Final Rules (provided in response to Query 10) in</b>	The Central Govt had the power to notify the threshold. Accordingly, the Central Govt has notified a threshold of 10% via the SBO Rules.
• <b>the shares of a company;</b>	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.
• <b>or the right to exercise, or the actual exercising of</b>	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 that there is no recent evidence of the actual exercise of such influence or control is not relevant. In the same vein, 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"> <li>• significant influence <b>over the company</b>;</li> </ul>	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"> <li>○ <b>‘significant influence’ means control of at least 20% of total voting power, or control of or participation in business decisions under an agreement.</b></li> </ul>	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"> <li>• control <b>over the company</b>;</li> </ul>	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"> <li>○ <b>‘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;</b></li> </ul>	<p>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.</p> <p>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.</p>
<ul style="list-style-type: none"> <li>• Reading the above definition in light of Rule 2 (e) of the SBO Rules, one may add the following condition:</li> </ul>	
<ul style="list-style-type: none"> <li>○ <b>And whose name does not appear as a natural person holding significant interest in the register of members.</b></li> </ul>	It is important to understand that the need to file a declaration may not be there where the person is holding significant interest in his own name; however, there is no doubt that the person holding significant beneficial interest in his own name is still the SBO. The significant interest is apparent on the register of members; hence, the need to declare or file does not arise.

Table 2: Analysis of the Clauses provided in Section 90.

**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 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 significant beneficial owner. Therefore, to be a SBO, an individual must have indirect holding along with direct holding and the details of the entire shareholding (both direct and indirect) should be furnished by the SBO to the reporting entity.

### **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 II to Rule 2 (e) 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];
- 15 CCPS of Rs. 10, each CCPS being convertible into 2 equity shares [CCPS Rs. 150]; and
- 10 CCDs of Rs. 10, each CCD being convertible into 1 equity share [CCDs Rs 100].

Mr. A beneficially holds 50 shares of Equity 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 [30 equity shares]	Rs 300
Equity shares upon conversion of CCDs [10 equity shares]	Rs 100
Total capital	Rs 400
Capital held by A	Rs. 500
Holding of A in the post-dilution capital of X Ltd	55.5%



*Figure 2: Computation of post dilution shareholding*

So, Mr. A's % of shares held in X Ltd is 55.5%. The holding of X in Z is 50% therefore, A holding majority stake in X Ltd, also holds 50% in Z

**Therefore, Mr. A will 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 is on voting rights, 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.

## **Right to participate in dividend**

### **15. 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**

**16. 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?**

Clearly, looking at the language of sec. 90 (1), the obligation is cast upon the SBO to make a self-declaration. However, as per the Rule 2 of the revised SBO Rules, every co. should take necessary steps to find out if there is any individual who is the SBO as defined in Rule 2 and, identify him and cause him to make the SBO declaration in BEN-1.

Further, the Rules also requires every reporting co. (where its members (other than an individual) holding not less than 10 % of its shares / voting rights/ right to receive or participate in dividend or any other distribution payable in a FY) to give notice in BEN-4 to such person seeking information in accordance with S. 90(5) of the Act.

Therefore, the requirement is on both - the reporting company as well as on the SBO.

**Manner of determining SBO**

**17. Who shall be identified as the SBO where the register of members reflects following kinds of members?**

**(a) Where the member is an individual?**

Where the member is an individual, if holds the ultimate beneficial interest of 10% in the target company, no declaration is required to be filed by the individual. However, such individual is still an SBO, and the name of the SBO reflects in the register of members.

**(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) a pooled investment vehicle; or

(b) 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.

**18. In case the register of members comprises of majority of individual members, will there be a natural person identifying oneself as an SBO?**

Example: Shareholding pattern of X Ltd comprises of following:

Mr. A:	10%
Mr. B:	15%
Mr. C:	20%
Mr. D:	5%
Mr. E:	3%
Mr. F:	2%
Mr. G:	30%
H Pvt Ltd:	5%
J Ltd:	5%
K Ltd:	5%

In the above case, the names of the SBO i.e., natural persons holding more than 10% are already reflecting in the register of members. Therefore, there is no need for such persons to identify themselves as SBO.

The Company is required to maintain a register of SBO under Section 90 (2) based on the declaration received from the SBOs. Where the no declaration is required to be given, the Company does not need to maintain the register of SBO.

#### **19. 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'.

#### **20. 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.

## 21. 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.

## 22. 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.

## 23. 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). The SBO, in the declaration provided in Form BEN No. 1, however, has to disclose details of registered holder and the reasons for not holding shares in his/her own name.

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

**24. Are preference shares to be considered while calculating 'right by virtue of voting rights in shares' while determining SBO?**

Preference shares do not carry voting rights on all matters as in the case of equity shares. Voting on all matters by preference shareholders come only when the company defaults in paying dividend for two years or more. Further, such voting rights are to be given only during the subsistence of the default and is to be discontinued once the default is made good. Therefore, based on the aforesaid discussion, in our view, while the preference shareholders may not fall under the definition of SBO except for the case when the reporting company has defaulted.

**25. Which date for acquisition significant beneficial interest as required to be entered in BEN-2?**

The Rule is silent on the same. However, mentioning the actual date of acquisition, if available or traceable, is desirable. However, where such date is not available with the declarant or not traceable by him, in our view, 8th February, 2019 (i.e. the date of notification of the Rules) may be given as the date of acquisition.

**26. Where a Reporting Company receives BEN-1, should it verify the facts of the same?**

Applicable provisions nowhere mentions regarding verification of information received by the Reporting Company by BEN-1 forms. However, if it has reasons to believe that the facts mentioned are incorrect, it should question and ask for additional information, if required.

**27. A member of the Reporting Company is a Foreign Company not having FCRN, how shall the Reporting Entity fill in the details since FCRN is mandatory in case the category Foreign Company is entered?**

This can be considered to be a technical limitation in the e-Form. The Reporting Company can enter the category as 'Other Body Corporate' and proceed ahead by entering '0' in the Registration Number filed without clicking on prefill.

**28. Company is a wholly owned subsidiary of a holding Reporting Company. Does it require to file BEN-2?**

Yes. Even if the holding Reporting Company has filed BEN-2, the subsidiary company will also be required to file BEN 2 in its individual capacity clicking the radio button 'For declaration of holding reporting company'. In this case, the SBOs of holding company will become SBOs for the subsidiary company.

**29. Company is not a wholly owned subsidiary of a holding Reporting Company. How will it proceed with filing of BEN-2**

In case, where the form is being filed for a company which is a subsidiary but not a wholly owned subsidiary of company, the company has to click on the radio buttons in the form i.e. 'For declaration of holding reporting company' and 'For declaration of Significant Beneficial Ownership under section 90'. The former field is for reporting about the Holding Company and the latter is for SBOs from the remaining shareholding held by someone other than the holding company. Accordingly, this will allow subsidiary company (other than WoS) to provide details of holding company as well as SBOs for the purpose of section 90.

**30. Are the holdings of the Nominee holders considered while determining SBO?**

Holding of nominee shareholders are actually the holdings of the nominator whose name is already reflected in the register of shareholders under Section 88. Hence the same is not to be considered for the purpose of determination of SBO.

**31. A person directly controls a company. Will he be considered as an SBO of that company?**

For determining SBO by virtue of control, only indirect control is to be considered. Having direct control is anyways reflected in the register of members of the Company as holder of majority stake in that company. Hence, the question of reporting in BEN-1 and BEN-2 does not arise.



**32. Who is considered to have beneficial interest in case member of the Reporting Entity is a trust?**

Where member of the Reporting Company is a trust, person having beneficial interest of the trust's shareholding will depend upon the type of trust as follows:

<u>Type of trust</u>	<u>Person having beneficial interest in trust's shareholding</u>
Revocable trust	Settlor
Discretionary trust	Trustee
Specific Trust	Beneficiaries

**33. Who has the onus to determine SBO or any changes therein in the reporting company?**

Onus is on the person himself to determine if he is the SBO or undergoes any changes in interest after being an SBO in the reporting company and make disclosures in Form BEN-1 accordingly.

**34. How shall the reporting company determine whether the persons are acting together?**

Fact of persons acting together in the reporting company is to be declared by those persons themselves in their declaration in Form BEN-1. Company needs to simply collate the data received in BEN-1 Forms in e-form BEN-2.

**35. How shall a reporting company file SBO details where an SBO has indirect control through more than nine non-individual members?**

Since the e-form BEN-2 allows entering maximum details of nine entities through whom indirect holding or right in reporting company is being exercised by the SBO, the reporting company may provide details of nine members in the form itself and provide the same information for the rest by way of optional attachment along with a clarificatory note referring to technical limitations of the e-form.

**36. Where a group of persons are deemed to be acting together under SAST Regulations, will they also be considered to be acting together for significant beneficial ownership?**

Persons acting together under SAST act together for the purpose of acquiring shares of the company while persons acting together under SBO act together for the purpose of having control over the company. Since, the objective in both cases are different, person acting together under SAST need not always persons acting together under SBO Rules.

**37. Where a company has no SBO, does it mean that there is no individual controlling the company?**

The fact that there is no identifiable SBO in accordance with the SBO Rules, will not mean that there is no one controlling the company. A company may have individual shareholders who by virtue of their direct shareholding, exercise control over the reporting company.

**38. Where an unregistered transfer is sent for registration after five years, what will be the date of acquiring beneficial interest?**

It is a very rare situation where the transfers sent for registration has been kept pending for such a long time. In any event, unless the transfer is registered, it cannot be said that the beneficial interest has been acquired. Hence, the date for acquiring beneficial interest will be the date when the transfer has been registered and the name of the member has been entered in the register of members.

**39. How to find the individual having control, in case of cross holdings?**

Though the law is silent on the same, in our view, cross holdings should be eliminated to find out the natural persons behind the entities.

**40. How will the Reporting Company have details of PAN of the SBO, since the BEN-1 forms has not such field for PAN details?**

The reporting company should ask for the PAN details from the SBO.

**41. What if a person furnishes false or incorrect information or suppresses any material information of which he is aware in Form BEN-1?**

Such person shall be liable to action under Section 447.

**42. How to provide information where the SBOs of the Reporting Company is more than 9?**

In our view, there is a possibility of giving declaration as SBO by any one individual among the entire group of individuals acting together with a declared authority from all of them to represent the entire group. In such a case, even though the names of each of the individuals are not provided as SBO, but they will still be considered as SBO since they will be shown as persons acting together.

**43. Whether a minor can be said to be SBO?**

No. A minor by himself cannot be controlling or exercising significant influence over the Company, this is because a minor is always represented by his/her guardian. Hence, a minor cannot be regarded as a SBO. However, where the minor has any direct holdings, the same should be

aggregated with the indirect holding of the guardian, if any. On the other hand, where the guardian is not an SBO himself, in that case also, the guardian should declare in BEN-1 along with a declaration that the shareholding belongs to concerned minor.

#### **44. How to determine whether persons are acting together?**

Understanding of concept of acting together or acting in concert is upon the SBOs. The concept is circumstantial and there are no numerical or objective standards for determination. This may include family members, partners, friends or any other person who may be regarded as acting together for some economic benefit. Considering, the matter to be very subjective, the onus is on every SBO to determine the persons who can be regarded as acting together for the purpose of control.

#### **45. Who will be the SBOs in a case where there is company ABC Pvt Ltd which wholly owned by a Company PQR Ltd which in turn is wholly owned by EFG Ltd, this company is then held by a LLP where there are 10 partners**

Reporting is to be made at each layer of companies. Therefore, the following would be the reporting requirements:

- a. BEN 2 of ABC will report about PQR;
- b. BEN 2 of PQR will report about EFG;
- c. BEN 2 of EFG will report about the partners of the LLP.

#### **46. Who will be SBO in the case where the ultimate holding company is a society of UK?**

The revised SBO Rules does not specify anything about SBO determination for a foreign society. Therefore, in such case there will be no SBOs.

#### **47. In ITR Return 6 (for unlisted Company) for AY 2019-20 there is a TABLE “[OWNERSHIP INFORMATION : In case of unlisted company, particulars of natural persons who were the ULTIMATE BENEFICIAL OWNERS, directly or indirectly, or shares holding not less than 10% of the voting power at any time of the previous year (if available)]. So in this field, details of UBO which are to be given are NAME, PAN & PERCENTAGE HELD. What kind of entries are required to be done in the same?**

The format of ITR-6 of an unlisted company requires disclosure of 'Ultimate Beneficial Owners' ("UBOs"), which means such "natural persons who were holding directly or indirectly of shares holding 10% of the voting power of the Company any time of the previous year".

In this regard, the Company needs to disclose the details of the following persons, who will be regarded as the UBOs for the purpose of ITR:

- i. Where the natural person holds directly 10% of the voting power of the Reporting Company in any time of the previous year or
- ii. Where the natural person holds indirectly 10% of the voting power of the Reporting Company in any time in the previous financial year.

Further, the manner of identification of SBOs as per SBO Rules and UBOs for ITR are not same as the former provides for certain other concepts such as holding with persons acting together, indirect holding through majority stake etc. while the later is silent on those points. Further, the SBO Rules get triggered only if the natural person holds indirect holding, which is not the case in case of reporting of UBO in ITR. Therefore, for the purpose of ITR, the Reporting Company needs to identify the natural persons who shall be the UBOs by virtue of holding shares equivalent to 10% or more. In absence of any clarity in regard to the manner of computation of indirect holding, in general parlance the same should be through a vehicle (company/ firm/ trust etc.).

## **Non-identification of SBOs**

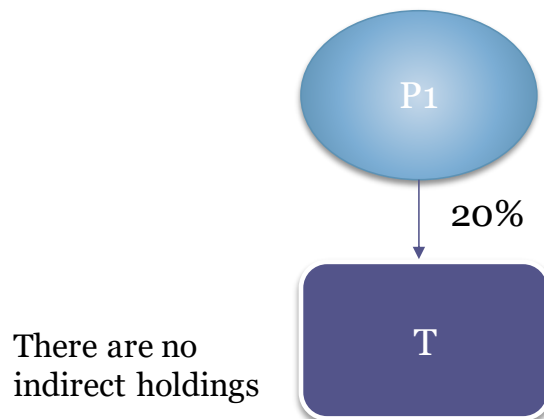
### **48. What shall be the case if no natural person can be identified as the SBO?**

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.

## Illustrations for determining SBOs

### Illustrations on direct and indirect holdings

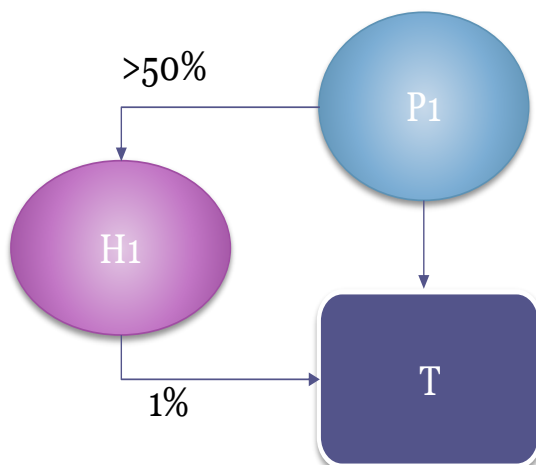
#### ➤ Illustration 1:



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.

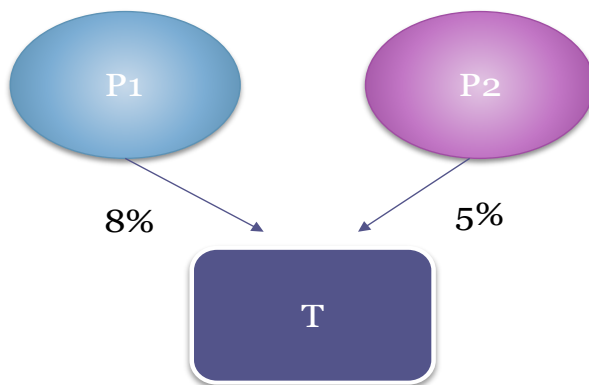
#### ➤ Illustration 2:



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:**

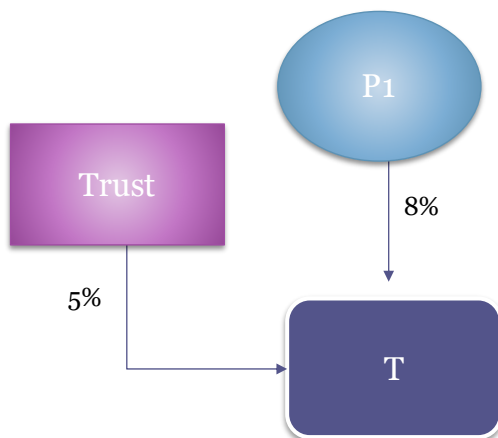


P1 and P2 may be deemed acting together. There are no indirect holdings for either P1 or P2.

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:**



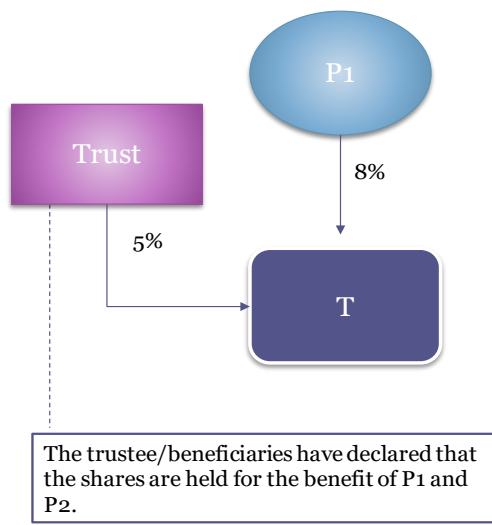
The trustee/P1 have made a declaration u/s 89 declaring P1 to be the beneficial owner.

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.**

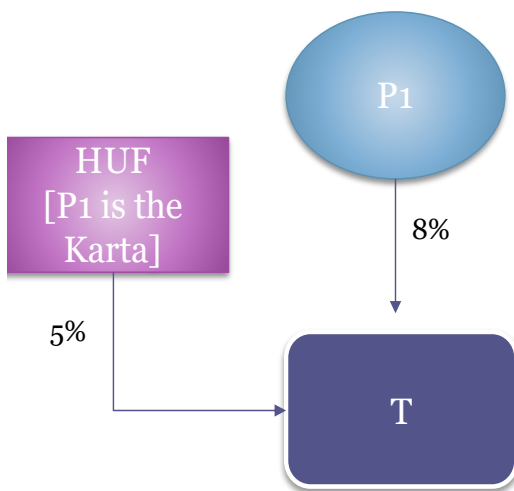
➤ **Illustration 5:**



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.**

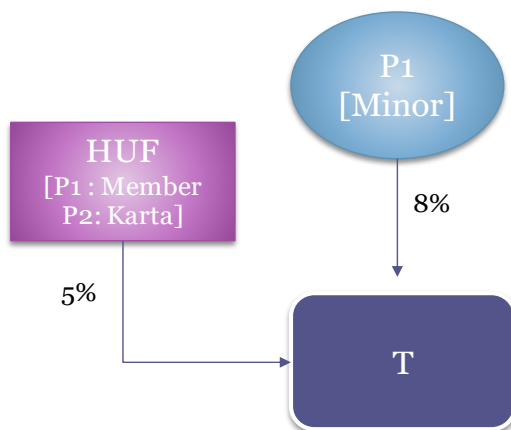
➤ **Illustration 6:**



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:**

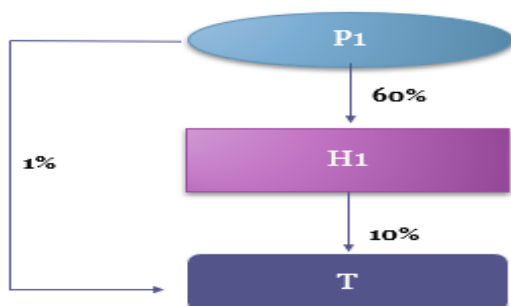


First of all, the fact that P1 is a minor does not make any difference for the purpose of SBO declaration. P2 is the karta of the HUF – therefore, the holding of P2 is in the indirect holding in T1. Being members of the same HUF, P1 and P2 may be deemed to be acting together. Therefore, the direct holding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

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

**Illustrations on manner of computing indirect holdings**

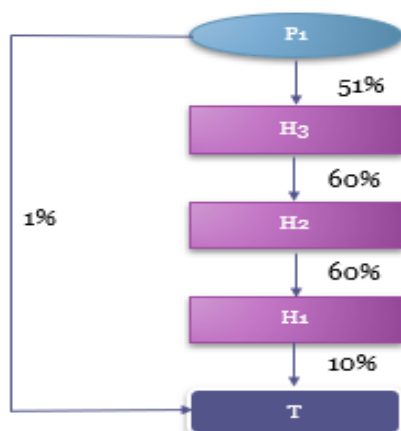
➤ **Illustration 8:**



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:**

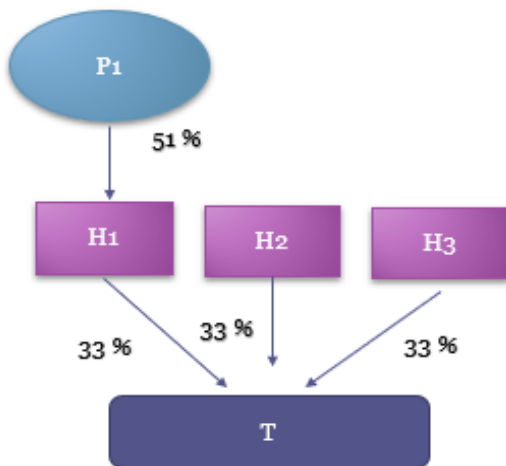


The holding of H1 in T (10%) will be regarded as indirect holding of P1, because P1 is holding majority stake in the ultimate holding company of H1 (that is, H3). The indirect holding of P1 in T will be the entire holding of H1 in T, that is, 10%. Hence, together with the direct holding of 1%, the threshold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

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



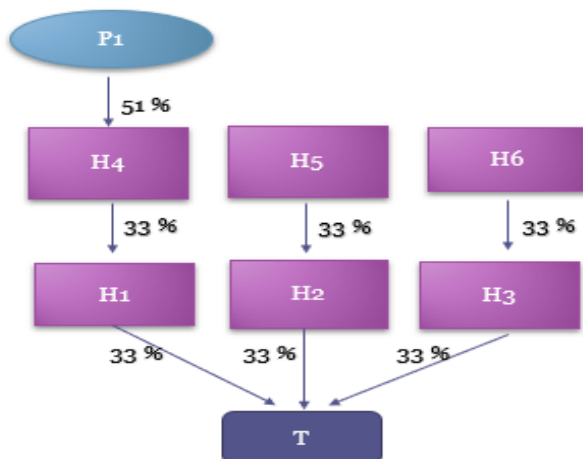
➤ **Illustration 10:**



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.**

➤ **Illustration 11:**

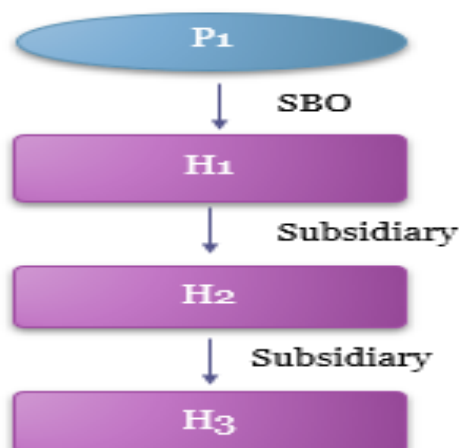


While the answer may seem counter-intuitive, but as per the language of Exp III (i) (b), the holding of an individual is regarded as indirect holding only if the individual either holds majority in the first layer holding company, or the ultimate holding company of the first layer holding company.

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.**

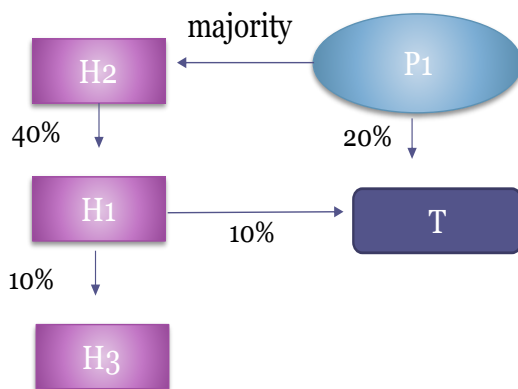
➤ **Illustration 12:**



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.**

➤ **Illustration 13:**

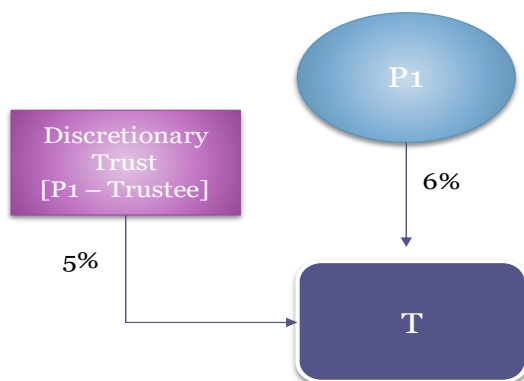


As for T, the position is simple: since P1 is not holding majority either at H1, or ultimate holding company of H1 (note H2, though majority owned by P1, is not the holding company of H1), the holding of H1 will not matter. At H1 level, the holding of H2 is the indirect holding of P1. Hence, P1 is the 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**

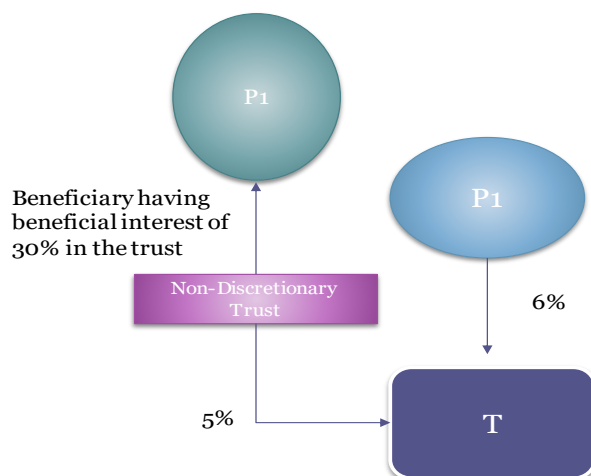
➤ **Illustration 14:**



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**

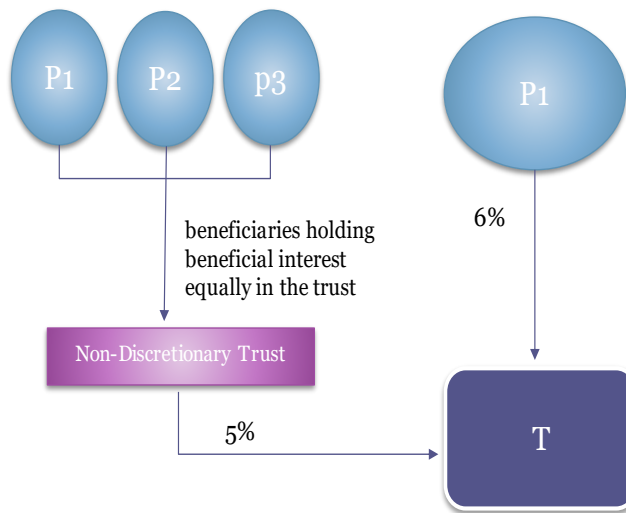
➤ **Illustration 15:**



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**

➤ **Illustration 16:**

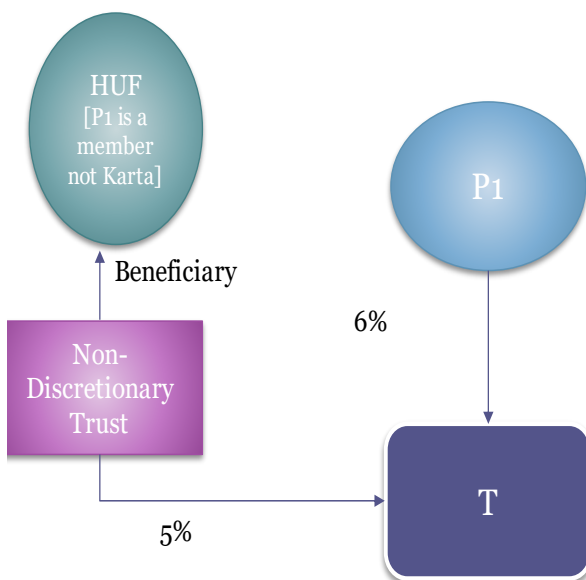


See previous answer.

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.**

➤ **Illustration 17:**

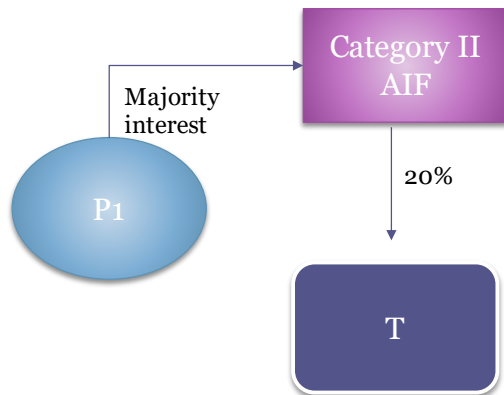


Since the beneficiary of the trust is the HUF, the holding of the trust in T is regarded as indirect holding of HUF. However, in case of HUF, the holding is attributed to the individual only if he is Karta. P1 is not the Karta.

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

## Illustrations on regulated investment vehicles

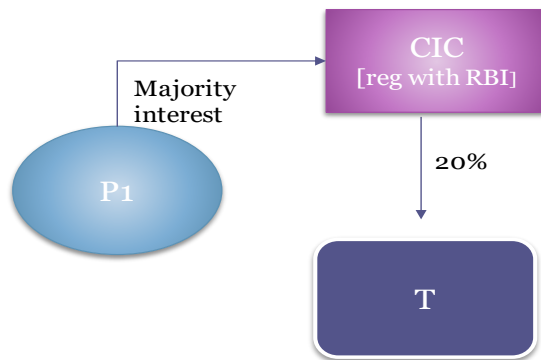
### ➤ Illustration 18:



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.

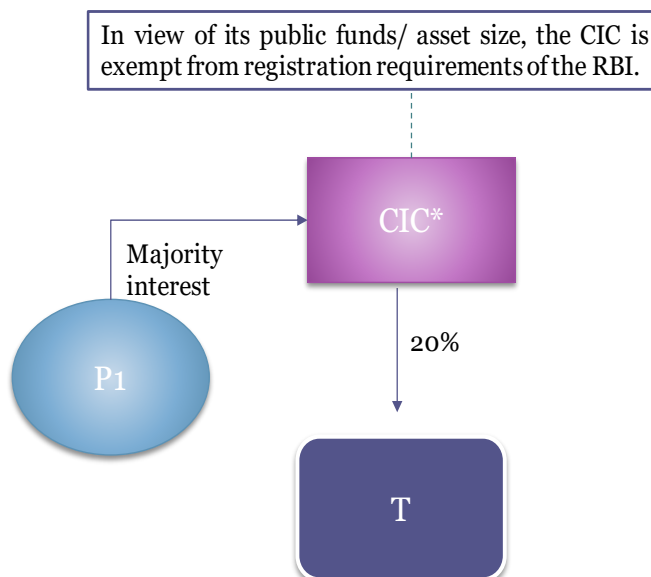
### ➤ Illustration 19:



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.

### ➤ Illustration 20:



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

✚ SBO declaration is required by P1.

## Compliance to be ensured by SBOs & Company

### 49. 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.

### 50. 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.

### 51. 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.

### 52. 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**.

### **53. 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.

### **Onus of disclosure**

### **54. 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 No.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.

### **55. What should be the cut-off date for obtaining disclosure from SBOs?**

Date of notification of the revised SBO Rules i.e., February 8, 2019.

### **Reporting requirements in case of change in SBO holdings**

### **56. Whether the reporting / target company is also required to intimate the changes in the SBO?**

In addition to the requirement of declaration of SBO, the reporting company is also required to intimate the changes in such the SBO.

Section 90 of the Companies Act, 2013 requires an SBO to make a declaration to the company 'specifying the nature of his interest and other particulars, in such manner and within such period of acquisition of the beneficial interest or rights and any change thereof'.

Further, Rule 3 (2) of the SBO Rules, 2018 provides that:

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

### 57. What should be the trigger point for reporting the changes in the SBO?

Plain reading of the language of the aforesaid provisions seems like to require SBO to file BEN 1 for any change in the ownership in the reporting company which inter alia could be change pursuant to any corporate action of the company, change in the intermediary entity through which the SBO is holding ownership in the reporting company.

However, deriving such an interpretation may lead to practical difficulty in terms of compliance. The particulars filed by the SBO might incur change which he might not be even aware about [eg in case of change pursuant to changes in the intermediary companies] or change pursuant to corporate action. If such an interpretation is adopted, companies might end up filing e-form BEN-2 very frequently.

Accordingly, the more rationale interpretation of the same, seemingly should be that the changes should be intimated only in case the SBO of the reporting company itself is incurring any change, so as to say that, either there is a SBO arising or an existing SBO losing its status as such.

For the sake of better understanding, few cases have been discussed taking the illustration given:

#### **Status as on 8<sup>th</sup> February, 2019**

H1 was holding 15% in T, the Reporting Entity. H1 was controlled by Mr. A by virtue of his shareholding of 60%.



In the given case, as per SBO Rules, 2018, Mr. A's indirect holding in T was 15% [exceeding 10% shareholding]. Initial SBO declaration was done by A1 stating his indirect holding to be 15% and accordingly BEN-2 was filed by T.

#### **a) Changes in Significant Beneficial Ownership due to Corporate Actions**

Corporate actions like rights issue, preferential issue etc., in a reporting company may result in dilution of the existing shareholding.

Until such dilution leads to change in any of the following changes, BEN 2 is not required to be filed.

- i) Change in the existing SBO to an extent of ceasing it from remaining an SBO; or
- ii) New SBO arising

**b) Mr. A's holding in H1 changes from 60% to 55% as a result of transfer**

In this case, even though A's shareholding is reduced by 5% in H1, he still continues to be holding majority shares in H1 and its shareholding in T will still be deemed to the indirect holding of Mr. A in T. Hence, BEN-1 and BEN-2 requirements will not arise.

**c) Mr. A's holding in H1 changes from 60% to 45% as a result of transfer**

The decline in shareholding of Mr. A in H1 from 60% to 45% means Mr. A no more holds majority shares in H1. Hence, H1's shareholding will not be considered to be the indirect holding of Mr. A i.e. A ceases to be the SBO in T and accordingly BEN-1 and BEN-2 requirements will arise.

**d) H1's holding in T changed from 15% to 45%**

Significant Beneficial Ownership arises where aggregate of indirect holding and direct holding, if any, is not less than threshold prescribed in the Rules. In the given case, acquisition of additional 30% shares by H1 in T will simultaneously increase the indirect holding of Mr. A's from 15% to 45%. However, since neither any new individual is becoming an SBO nor the existing SBO ceases to be one, no further filing of BEN 2 will be required.

**e) H1's holding in T changed from 15% to 5%**

Dilution of shareholding of H1 in T from 15% to 5% would reduce the indirect holding of Mr. A from 15% to 5%. In case Mr. A has no direct/indirect right/entitlement except through H1, Mr. A's aggregate holding also gets reduced from 15% to 5% i.e. less than 10%. Accordingly, Mr. A will cease to be an SBO and accordingly BEN-1 and BEN-2 requirements will arise.

**f) In addition to Mr. A's holding in H1, Mr. A directly acquires 1% shares in T**

In this case, even though A's aggregate holding gets increased from 15% to 16%, his position as an SBO will not change. Hence, no declaration will be required.

**58. Whether change in partners of an LLP, being one of the member of the reporting company, will be required for holding 10% or more in a reporting entity?**

In such case the new partners will step into the shoes of SBO while exiting partners will cease to be SBO. In this case, SBO declaration will be required by both former and the new partners.



#### **59. Change in trustees in case of a member being a discretionary trust holding 10% or more in a reporting entity**

In case of discretionary trusts, trustees are regarded to be holding beneficial owners to the extent of shares held by such trust. Where the Board of trustees undergo change, the new trustees will step into the shoes of SBO while exiting trustees will cease to become one. Accordingly, filing in BEN 2 will be required.

### **Exemption under SBO Rules**

#### **60. 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.

#### **61. 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, the 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.

## Penal Provisions

### 62. 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"><li>Rs. 1 Lakh – 10 Lakhs.</li><li>For continuing default: - Upto Rs. 1000 for every day after the first day of failure.</li></ul>								
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"><li>For company and every officer in default:- Rs. 10 Lakhs – Rs. 50 Lakhs</li><li>For Continuing default: - Upto Rs. 1000 for every day after first day of failure.</li></ul>								
90(12)	Furnishing of false and incorrect information or suppressing any material information	Person declaring Beneficial interest	<div>Liable to action under Section 447 (Fraud)</div> <div>Imprisonment :-<table><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></div> <div>Fine:-<table><tr><td>For amount of at least Rs. 10 Lakhs OR 1% of Turnover of the company whichever is lower</td><td>Not less than the amount involved in the fraud but which may extend to three times the amount involved in the fraud</td></tr></table></div>	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 whichever is lower	Not less than the amount involved in the fraud but which may extend to three times the amount involved in the fraud
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 whichever is lower	Not less than the amount involved in the fraud but which may extend to three times the amount involved in the fraud										

Section	Nature of Violation	Person responsible	Penal provisions		
			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

### 63. 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, 2016<sup>11</sup>:

- 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 53<sup>12</sup> 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 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

<sup>11</sup> <http://www.prsindia.org/uploads/media/Benami/Benami%20Transactions%20Act,%202016.pdf>

<sup>12</sup> (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.

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.

#### **64. 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. Where no natural person is identified in case of shareholders being other than natural persons, the senior managing official of the Company will be regarded as SBO.

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, either the benamidar or in his absence the senior managing official of the company will be regarded as SBO.

### **SBOs as related parties**

#### **65. 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 member<sup>13</sup> of that person's family is related to a reporting entity if that person:*

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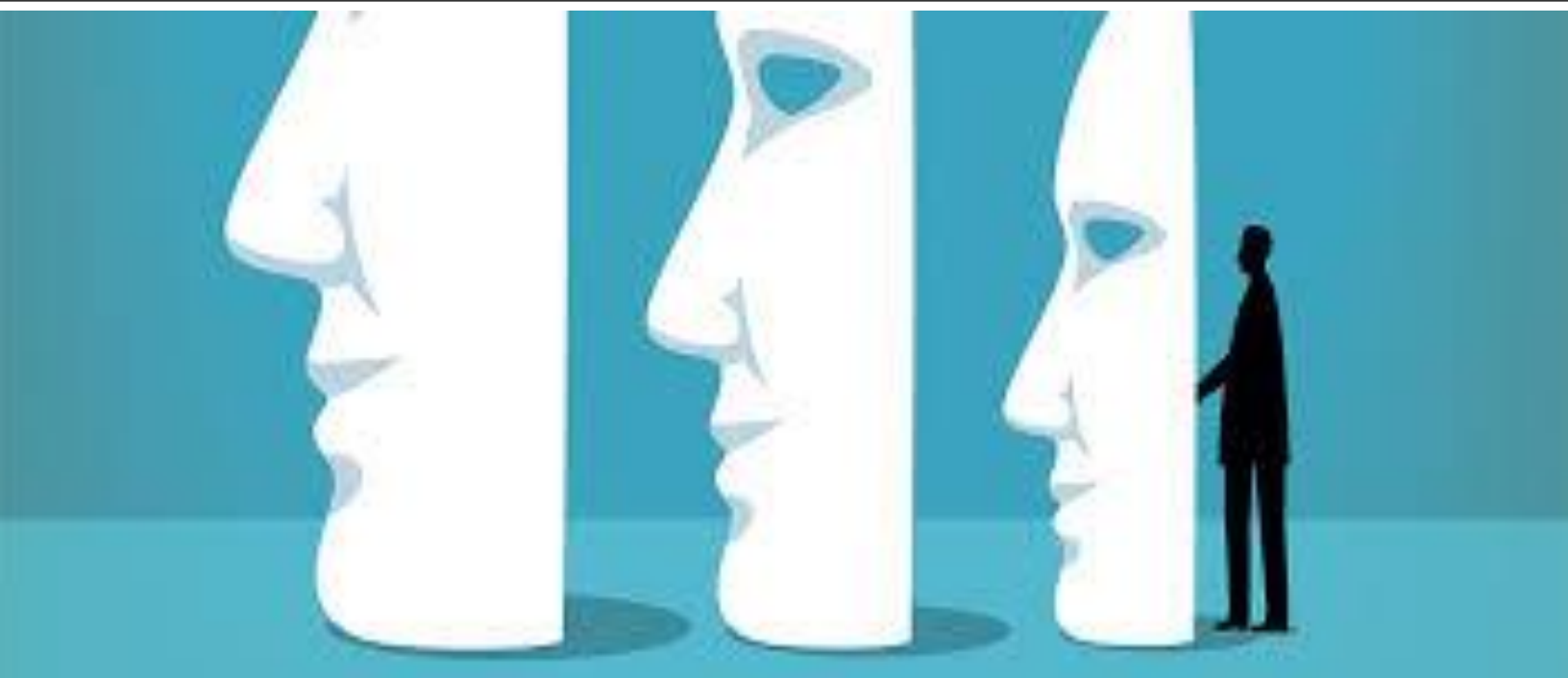
<sup>13</sup> Close members of the family of a person are those family members who may be expected to influence, or be influenced by, that person in their dealings with the entity including:

*(i) has control or joint control of the reporting entity;*  
*(ii) **has significant influence<sup>14</sup> 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.



To know more on the topic, refer the followings:

1. Watch Mr. Vinod Kothari's session on SBOs, covered by Amicus Curiae [ET Now]: <https://www.youtube.com/watch?v=Lo30LGD3Xmc&feature=youtu.be>
2. View Mr. Vinod Kothari's presentation on SBO: <http://vinodkothari.com/30-years/>
3. MCA reduces SBO threshold from 25% to 10%, the Article by CS Vinita Nair, can be viewed at: <http://vinodkothari.com/wp-content/uploads/2018/06/arttivke.pdf>
4. SBO Rules dilute the intent of Section 90 under Companies Act, 2013, the Article by CS Vinita Nair, can be viewed at: <https://blogs.compliancecalendar.in/sbo-rules-dilute-the-intent-of-section-90-under-companies-act-2013-by-cs-vinita-nair-vinod-kothari-co-372>
5. MCA raises curtain on SBO Rules, the Article by CS Vinita Nair & CS Nikita Snehil can be viewed <http://vinodkothari.com/blog/mca-issues-final-rules-on-section-90/>
6. Our other articles on various topics can be read at: <http://vinodkothari.com/>

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