

NEW COMPANY RULES TIGHTEN REPORTING OF SIGNIFICANT BENEFICIAL OWNERSHIP

1. INTRODUCTION

In early February, the Ministry of Corporate Affairs introduced the Companies (Significant Beneficial Owners) Amendment Rules, 2019¹ (the “**New Rules**”). The New Rules amend the Companies (Significant Beneficial Owners) Rules, 2018, which were introduced on June 13, 2018 (the “**2018 Rules**”) and have been published in the Official Gazette.

The New Rules have been introduced to identify individuals who have a significant holding or interest in a corporate entity, and to bring clarity to the 2018 Rules.

They take into account different structures that one may adopt to acquire shares or an interest in Indian companies.

2. KEY FEATURES

The key features of the New Rules are highlighted below.

2.1 Definitions

The New Rules include the following key definitions:

- (a) a significant beneficial owner (an “**SBO**”) has been defined as an individual, who acting alone or together, or through one or more persons or trust, possesses one or more of the following rights or entitlements in the company (the “**Reporting Company**”), namely:
 - (i) holding indirectly, or together with any direct holdings, *not less than 10% (ten percent) of the shares;*
 - (ii) holding indirectly, or together with any direct holdings, *not less than 10% (ten percent) of the voting rights* in the shares;
 - (iii) has the right to receive or participate in *not less than 10% (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; or
 - (iv) has the right to exercise, or actually exercises, *significant influence* or control, in any manner other than through direct holdings alone.

¹ http://www.mca.gov.in/Ministry/pdf/CompaniesOwnersAmendmentRules_08020219.pdf

- (b) a majority stake (“**Majority Stake**”) has been defined as:
 - (i) holding more than 50% (*fifty percent*) of the equity share capital in the body corporate; or
 - (ii) holding more than 50% (*fifty percent*) of the voting rights in the body corporate; or
 - (iii) having the right to receive or participate in more than 50% (*fifty percent*) of the distributable dividend or any other distribution by the body corporate.
- (c) a “**significant influence**” has been defined as the *power to participate*, directly or indirectly, in the financial and operating policy decisions of the Reporting Company but is not control or joint control of those policies.

2.2 Who is an SBO?

An individual who satisfies any of the criteria set out in the definition of an SBO will qualify as an SBO. In the event an individual does not hold any right or entitlement indirectly under sub-clauses (i), (ii) or (iii) of the definition of an SBO, he shall not be considered to be a significant beneficial owner.

The New Rules also clarify how the ‘direct holding’ and the ‘indirect holding’ of an individual should be determined. This is examined below.

2.3 Direct holding in the Reporting Company

An individual is considered to hold a right or an entitlement directly in the Reporting Company, if he holds the shares in his name or holds it as a beneficial owner under Section 89 of the Act.

2.4 Indirect holding in the Reporting Company

Under the New Rules, in cases where the shares in the Reporting Company are held through different kinds of entities, an SBO can be determined in the following contexts:

- (a) Body corporate: An individual who holds a Majority Stake in the body corporate or its holding company;
- (b) Hindu undivided family: An individual who is a *karta*;
- (c) Partnership firm: An individual who is a partner or a holder of the Majority Stake in a body corporate which is a partner or in the holding company of such body corporate;
- (d) Trust (through a trustee): An individual who is a trustee in a discretionary or a charitable trust, is a beneficiary in a specific trust, or is an author or a settlor in a revocable trust;

- (e) Pooled investment vehicle or an entity controlled by it: An individual who is a general partner or an investment manager or a chief executive officer of the investment manager (in case the investment manager is a body corporate).

If the pooled investment vehicle is *not* based in a member state of the Financial Action Task Force (“**FATF**”) on money laundering and the regulator of the securities market in such a member State is *not* a member of the International Organization of Securities, clauses (a) to (d) above shall apply for determining an SBO.

2.5 Filing obligations under the New Rules

- (a) Every SBO is required to make a declaration in the form BEN-1 to the Reporting Company within 90 days of the New Rules coming into effect. After the expiry of the 90 day period, any person becoming an SBO or any change in the SBO status will have to be reported within 30 days of such an event.
- (b) The New Rules also clarify that if within the 90 day period of its commencement, any one acquires any new interest in the Reporting Company or there is a change in the interest held in the Reporting Company, then such acquisition or change shall be deemed to be on the date of expiry of the 90 days, and the period of 30 days for filing will be calculated accordingly.
- (c) In an effort to identify an SBO, every Reporting Company is bound to give notice in the form BEN-4 to all its shareholders who are not individuals and hold not less than 10% of the shares, voting rights, or right to participate in the dividends or distribution.
- (d) Once a declaration is received from an SBO, the Reporting Company has to report to the relevant registrar of companies in the form BEN-2 within 30 (thirty) days of receiving such a declaration.
- (e) Each Reporting Company shall maintain a register of SBOs in the form BEN-3, which shall be available for inspection to the shareholders.

2.6 Exemptions

The exemptions remain largely in line with the 2018 Rules. The entities held by the government or regulated by financial regulators like SEBI, IRDA, and RBI, among others, are exempt from the New Rules.

3. **INDUSLAW VIEW**

The New Rules provide much needed clarity to help identify individuals who hold significant shares or interest indirectly. The New Rules have also addressed what appeared to be a loophole in the 2018 Rules, which could have enabled an individual to hold significant interest by way of small holdings held through multiple entities.

Further, the New Rules take into account the unique management structure of a pooled investment vehicle by disregarding the shareholding test in such entities. However, this is limited to pooled investment vehicles set up in the FATF member countries.

Lastly, it also remains to be seen how the term '*power to participate*' will be interpreted by the regulators in the coming months.

Authors: Pallavi Kanakagiri | Khusnuma Nagwaswalla | Suvarna Swain

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Practice Areas: Corporate & Commercial | Private Equity & Venture Capital

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