

*De Jure*

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**"INSIGNIFICANTLY" SIGNIFICANT BENEFICIAL  
INTEREST?**



**Rajani Associates**  
simple solutions



Section 187C of the erstwhile Companies Act, 1956 which dealt with declaration of beneficial interest was replaced with Section 89 of the Companies Act, 2013 ("**Companies Act, 2013**"). Section 187C was introduced with an objective to declare the beneficial interest held by a person in a company. Likewise, Section 89 of the Companies Act, 2013 is a simple provision as far as compliance is concerned.

Section 90 of the Companies Act, 2013, which is similar to Section 187D of the erstwhile Companies Act, 1956 was substituted by the Companies (Amendment) Act, 2017, four years after the Companies Act, 2013 was notified. The SBO Rules clarifying the stance taken by the substituted Section 90 of the Companies Act, 2013 were only notified recently.

The reason for substitution of Section 90 was to shift the onus from the Central Government (which was originally required to investigate and report the beneficial ownership of shares by any person) to the individuals to make necessary declaration to the company; and the company in turn is required to file the return of such declaration with the Registrar of Companies. This substitution is a welcome move by the Ministry of Corporate Affairs ("**MCA**") to ensure better governance and compliance by companies.

The reason for introduction of the SBO Rules read with Section 90 of the Companies Act, 2013 was to lift the corporate veil on significant beneficial ownership held by individuals by ensuring compliance with disclosure requirements. Yet entities in India are currently struggling to reach a consensus on the implications of such disclosure requirements and their applicability thereto.

While Section 89 of the Companies Act, 2013 deals with the declaration of "beneficial interest" in shares by the registered owner and the beneficial owner, the substituted Section 90 read with the SBO Rules deals with declaration of "significant beneficial ownership" by an individual. The provisions of Section 90 are also applicable in the event "significant influence" or "control" is exercised by such individuals over a company.

A harmonious interpretation of Section 89 and 90 of the Companies Act, 2013, would imply that Section 89 would be applicable when a person acquires any beneficial interest in the shares of a company irrespective of the holding, whereas Section 90 would become applicable only in the event the beneficial interest acquired by an individual is 10% or more.

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Although the term "significant beneficial interest" is a newly introduced concept under the Companies Act, 2013, the term "beneficial interest" is an already existing concept prevailing under the Prevention of Money-Laundering Act, 2002 ("**PMLA Act**") and the Rules framed thereunder. The PMLA Rules defines the term "beneficial interest" to mean "the natural person who ultimately owns or controls a client and or the person on whose behalf a transaction is being conducted, and includes a person who exercises ultimate effective control over a juridical person". Under the PMLA Rules, the intention of the Legislature for introducing the concept of "beneficial interest" was to include every natural person exercising ultimate effective control over a juridical person under its ambit. This is a slight contrast for the reason the Legislature introduced the concept of "significant beneficial interest" under the Companies Act, 2013.

Upon interpretation of the PMLA Rules and the Companies Act, 2013, it can be observed that even though the PMLA Rules applied to "beneficial interest" held by a natural person in banking companies, financial institutions and intermediaries, thereby widening the scope of persons under its ambit, the term "significant beneficial interest" under the Companies Act, 2013 has narrowed down the term "beneficial interest" by setting a minimum holding of 10%, even though the expression refers to "significant" beneficial interest.

While the introduction of such a provision per se would implement the intent of the legislation, there is lack of clarity on the applicability of such a provision for different classes of entities. For instance, whether the provision required to determine the real owner, would apply only upto one level above or the chain would be required to go right to the apex to find an individual or a natural person. Further, the SBO Rules have not provided for clarity in relation to what constitutes "ultimate" beneficial ownership. For instance, Entity A, holds 100% shares in Entity B and Entity B holds 51% shares of (Indian) Company C. In such a scenario, while Entity B would be required to make a declaration of beneficial interest in Company C since it holds more than 10% shares in Company C, the question that remains is whether Entity A too would be required to disclose its ultimate beneficial interest in Company C or any other subsidiaries of Company C? Further, in case Entity A is a listed company (or a broad based fund), who would be the ultimate beneficial ownership – the promoters (if there is one) or the professional managers (if there is no promoter)?

Going by the interpretation of provisions of Section 89 and Section 90 of the Companies Act, 2013 it can be seen that for such provisions to apply the person making the disclosure needs to hold "beneficial interest in shares". The SBO Rules have provided for scenarios to determine who will hold the significant



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beneficial ownership, in case of persons other than individuals or natural persons. While the SBO Rules have made it clear to determine significant beneficial ownership for various entities, there is some ambiguity when it comes to a member holding significant beneficial ownership is a "company". If a shareholder of a target company is also a company or a partnership firm (say, Entity A), the question is whether all the shareholders or partners, as the case may be, of Entity A holding more than 10% shareholding or partnership interest in Entity A are required to make a declaration under Section 90? There are certain individuals who for the purpose of private equity or portfolio investments, hold more than 10% shareholding in multiple companies. Going by the above interpretation, would such individuals be required to make declarations with respect to each company? This exercise in itself would defeat the purpose of a company having legal existence distinct from that of its members.



In addition to the above, the loosely drafted language brought with itself a number of issues such as (a) the reduction of the threshold from 25% of beneficial interest in the Companies Act, 2013 as compared to 10% beneficial interest in the SBO Rules; (b) no clarity in relation to how beneficiaries would be classified as holders of significant beneficial ownership in the event the member holding significant beneficial ownership is an "indeterminate trust"; (c) notification of Form No. BEN-2 and instructions for filing the same since the same does not cover how a non-resident holder of significant beneficial ownership would provide their details since the form requires the input of the PAN details of the individual.

So far there is no clarity in relation to such issues. However, the MCA, by general circular dated September 06, 2018 and September 10, 2018, has extended the due dates for filing Form BEN-2 and Form BEN-1, respectively. Pursuant to this circular, MCA is likely to issue a revised Form BEN-1. For some stakeholders, a plain reading of the provisions of the Companies Act, 2013 and SBO Rules seem to have been substituted /introduced to bring transparency to the manner in which shares of companies are held, certain experts are of the view that the intent of the Legislature could be to go on a wild witch-hunt to determine the ultimate individual natural person that holds significant beneficial interest.

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