

DECLARATION OF SIGNIFICANT BENEFICIAL OWNERSHIP IN A COMPANY

(CA P.N.SHAH)

1. BACK GROUND:

1.1 Section 90 of the Companies Act, 2013, (Act), when enacted, effective from 1.4.2014, provided for investigation of beneficial ownership of shares in certain cases. This section corresponded to section 187 D of the Companies Act, 1956. This original section is replaced by a new section by the Companies (Amendment) Act, 2017 effective 13.06.2018. This new section provides that every individual or trust having significant beneficial ownership of shares in a Company (Private or Public) has to file a declaration for such holding in the manner prescribed in the Rules.

1.2 By a Notification dated 13.06.2018 the Companies (Significant Beneficial owners) Rules, 2018, were notified. These Rules came into force on 13.06.2018. There were lot of ambiguities about some of the provisions in these Rules. Therefore, these Rules were not made operative and have been amended by a Notification dated 8.2.2019. Accordingly, the Companies (Significant Beneficial Owners) Amendment Rules, 2019, have now come into force from 8.2.2019.

1.3 Section 90 has been further amended by the Companies (Amendment) Ordinance, 2018, effective from 2.11.2018. Section 90 and the above Rules contain provisions which require certain Individuals having significant beneficial ownership in shares of a company to make a declaration in the prescribed Form. In this Article some of the important provisions relating to declaration of significant beneficial ownership in a company are discussed.

2. DECLARATION OF BENEFICIAL INTEREST IN ANY SHARE:

2.1 Section 89 of the Companies Act, 2013 provides for declaration to be filed by a shareholder in respect of beneficial interest in any shares of a company (whether public or private). Under this section, if a shareholder of a company has no beneficial interest in the shares of a company held by him/her, such shareholder has to file with the company a declaration in Form No. MGT-4 giving particulars of the beneficial owners of the shares within 30 days of acquiring these shares. Similar declaration is also required to be filed with the company within 30 days whenever there is a change in the particulars of the beneficial owners. Similarly, the person having beneficial ownership in shares of a company held in the name of any other person is required to file a declaration in Form No.MGT-5 within 30 days of acquiring such beneficial interest. On receipt of the above declarations, the company is required to make a note of such declarations in the Register of Members and file Form No.MGT-6 within 30 days with the Registrar of Companies (ROC) with the prescribed filing fees.

2.2 If there is default in filing the above declarations by the shareholder or the beneficial owner of shares within time, section 89(5) provides for levy of fine upto ₹50,000/-. For continuing default further fine upto ₹1,000/- for each day can be levied. Similarly, for default in filing Form. No. MGT-6 in time by the Company a fine will be levied on the company and every officer in default. In this case minimum fine will be ₹500/- subject to maximum of ₹1,000/-. Further, in case of continuing default by the company, a further fine upto ₹1,000/- per day will be levied on the company and on the officers in default.

2.3 Further, if the beneficial owner does not make the declaration u/s 89 he/she or any person claiming through him/her shall not be entitled to claim any right in respect of such shares. Section 89 is amended by the Companies (Amendment) Act, 2017, effective from 13.06.2018. According to this amendment it is provided that, for the purposes of sections 89 and 90, beneficial interest in a share includes, directly or indirectly, through any contract, arrangement or otherwise, the right or entitlement of a person or persons to (a) exercise any or all of the rights attached to such shares or (b) receive or participate in any dividend or other distribution in respect of such shares.

3. **SIGNIFICANT BENEFICIAL OWNER:**

3.1 The term “Significant Beneficial Owner” is defined in section 90(1) of the Act as under:

(i) This term applies to – Every Individual, who acting alone or together, or through one or more persons or Trust (including a Foreign Trust and persons resident outside India).

(ii) Such person holds beneficial interest of not less than 25%, or such other percentage, as may be prescribed (At present the Rules prescribe 10%), in the shares of the company.

(iii) Such person may have right to exercise or may be actually exercising significant influence or control as defined in section 2(27) of the Act.

3.2 In order to further understand who is a “Significant Beneficial Owner” we have to refer to the Companies (Significant Beneficial Owners) Amendment Rules 2019. This term is defined in Rule 2(h) to mean as under.

An Individual referred to in section 90(1), 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.

(i) holds indirectly or together with any direct holdings not less than 10% of (a) shares, (b) voting rights in the shares, or (c) right to receive or participate in the total distributable dividend or any other distribution in a financial year.

(ii) Has right to exercise or actively exercises significant influence or control in any manner other than through direct holdings alone. For this purpose "Significant Influence" is defined in Rule 2(i) to mean the power to participate, directly or indirectly, in the financial and operating policy decisions of the company but not control or joint control of those policies. The term "Control" includes 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 shareholding or management rights or shareholders agreements or voting agreements or in any other "manner".

(iii) If an individual does not hold any right or entitlement as stated in para 3.2(i), indirectly, he shall not be considered to be a significant beneficial owner.

3.3 (i) An individual shall be considered to hold a right or entitlement, as stated in Para 3.2(i), directly, if he/ she (a) holds the shares in the company in his own right or (b) holds or acquires a beneficial interest in the shares of the company as provided in section 89(2) and has made declaration required to be made under section 89.

(ii). From the above, it is evident that the provisions of section 90 are applicable to a person only if he/she holds shares in the company indirectly. If he/she holds such shares directly only, he/she has to make the declaration u/s 89 only and not u/s 90.

3.4 Explanation III to Rule 2(4) states that an individual shall be considered to be holding a right or entitlement in the shares of a company indirectly, if he/she satisfies any of the following criteria in respect of the Member of the Company.

(i) Where the member of the company is a body corporate(whether Indian or Foreign), other than a LLP, and the Individual (a) holds majority stake in that member or (b) holds majority state in the ultimate holding company (whether Indian or Foreign) of that Member.

(ii) Where the member of the company is a HUF (through Karta) then the individual who is the karta of the HUF. This will mean that if the individual is only a member of HUF (and not its karta) he/she will not be considered to have indirect interest in the company

(iii) Where the member of the company is a partnership entity (including a LLP) and the individual is (a) a partner, (b) holds majority stake in the body corporate which is a partner of the partnership entity, or (c) holds majority stake in the ultimate holding company of the above body corporate.

(iv) Where the member of the company is a Trust (through its Trustee) and the individual is (a) a Trustee in the case of a Discretionary Trust or a Charitable Trust, (b) a Beneficiary in the case of a Specific Trust or (c) a Author or Settlor in the case of a Revocable Trust. This will mean that a settlor of an irrevocable Trust or a Beneficiary of a Discretionary Trust will not be considered as holding indirect interest in the shares held by a Trust.

(v) Where the member of the company is (a) A pooled Investment Vehicle, or (b) An entity controlled by the pooled Investment Vehicle based in Member State of the Financial Action Task Force on Money Laundering and the Regulator of the Securities Market in such Member State is a member of the International Organization of Securities Commissions, and the Individual in relation to the Pooled Investment Vehicle is (A) a general partner, (B) an Investment Manager, or (C) a Chief Executive Officer, where the Investment Manager is a body corporate or a partnership entity.

It may be noted that if the pooled Investment Vehicle is based in a jurisdiction which does not fulfill the above requirements, the provisions of items (i) to (iv) above will apply.

(vi) Explanation VI clarifies that any financial instruments in the Form of (a) Global Depository Receipts, (b) Compulsorily Convertible Preference Shares or (c) Compulsorily Convertible Debentures will be treated as shares in the company and all the above provisions will apply to such instruments.

(vii) It may be noted that for the above purpose the expression “Majority Stake” is defined in Rule 2(1)(d) to mean (a) holding more than 50% of the equity share capital in the body corporate, (b) holding more that 50% of the voting rights in the body corporate, or (c) having the right to receive or participate in more than 50% of the distributable dividend or any other distribution by the body corporate.

(viii) It may be noted that the above provisions do not apply to the shares of the company held by the following entities.

(a) The Authority constituted under section 125(5) i.e. Investor Education and Protection Fund.

(b) The Holding Company provided that the details of such holding company are reported in Form No.BEN-2.

(c) The Central Government, State Government or any Local Authority.

(d) The Company, Body Corporate or the entity controlled by the Central Government, state Governments or partly by Central and partly by a State Government or Governments.

(e) SEBI registered Investment Vehicles, Mutual Funds, Alternative Investment Funds, Real Estate Investment Trust, Infrastructure Investment Trusts, regulated by SEBI.

(f) Investment Vehicles regulated by RBI, IRDA or Pension Fund Regulatory and Development Authority.

From the above discussions it is evident that each Individual will have to study the provisions of Section 90 and the Rules carefully to determine whether he/ she along with any other person is holding directly and indirectly 10% or more of the specified rights or entitlements in the shares or financial instruments such as CCPS or CCDS of the company. This is an onerous exercise depending on the facts of each case.

4. **DECLARATION OF SIGNIFICANT BENEFICIAL OWNERSHIP:**

4.1 Section 90(1) further provides that the person who has significant ownership in shares of a company should file with the company the prescribed Form No. BEN-1, specifying the nature of his / her interest and such other particulars as provided in the Rules. This Form is to be filed within the prescribed time limit as under:

(i) In respect of significant beneficial ownership existing on 8.2.2019, within 90 days from the commencement of the Rules i.e. by 7.5.2019

(ii) If the significant beneficial ownership is obtained after 8.2.2019 but before 7.5.2019, the Form should be filed within 30 days after 7.5.2019.

(iii) In all other cases within 30 days of acquiring significant beneficial ownership or changes therein

4.2 Every company has to maintain a Register of Significant Beneficial Ownership in Form No.BEN-3 as prescribed by the Rules. This Register will be open to inspection by every member on payment of the prescribed fees.

4.3 Upon receipt of such declaration in Form BEN-1 from the person who has significant beneficial ownership in shares, the company has to file Form No. BEN -2 with the ROC with the prescribed fees within 30 days of the receipt of such declaration.

4.4 If such declaration is not received by a company, it has to give a notice in Form No. BEN -4 to the person (whether a member of the company or not) if the company has knowledge or has reasonable cause to believe that such person

(i) is a significant beneficial owner of the company,
(ii) Is having knowledge of the identify of a significant beneficial owner or another person who is likely to have such knowledge or

(iii) Has 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.

On receipt of this notice from the company, such person has to give the required information to the company within 30 days of the date of the notice.

4.5 If no information is received by the company from the above person or the information given by such person is not satisfactory, the company has to apply to the National Company Law Tribunal (NCLT) within 15 days. By this application the company can apply for directions from NCLT that the shares in question shall be subject to restrictions, including.

(i) Restrictions on transfer of interest attached to such shares,
(ii) Suspension of the right to receive dividend or any other distribution in relation to such shares;
(iii) Suspension of voting rights in relation to such shares.
(iv) any other restriction on all or any of the rights attached to such shares.

4.6 NCLT has to give notice to all concerned parties and after hearing them pass appropriate order within 60 days or such extended period as may be prescribed. On receipt of the order of NCLT the company or the aggrieved person may apply for modification / relaxation of the restrictions within one year from the date of such order. If no such application is made within one year, the shares will be transferred to the Authority appointed u/s 125(5) of the Act for administration of the Investor Education and Protection Fund.

5. **PUNISHMENT FOR CONTRAVENTION OF SECTION 90:**

Section 90 (10) to 90(12) provides for punishment for contravention of provisions of section 90 as under:

(i) If a person required to file declaration u/s 90(1) does not file the same he shall be punishable with imprisonment for a term which may extend to one year or with fine of ₹One Lakh which may extend to ₹Ten Lakhs or with both. For continuing default, there will be a further fine upto ₹1,000/- per day during which the default continues.

(ii) If a company required to maintain the Register u/s 90(2) and to file information with ROC u/s 90(4) fails to do so in time or denies inspection of relevant records, the company and every officer who is in default shall be punishable with fine which shall not be less than ₹10Lakhs and may extend to ₹50 Lakhs. In case of a continuing default a further fine upto ₹1,000/- per day will be levied for the period of the default.

(iii) If any person willfully furnishes any false or incorrect information or suppresses any material information of which he/she is aware in the declaration filed under section 90, he/she shall be liable to action u/s 447 of the Act (i.e. Punishment for Fraud).

6. **IMPACT OF THE ABOVE PROVISIONS:**

Some practical issues arise from the above provisions relating to declaration of Significant Beneficial Ownership of shares in a Company. As stated earlier, the above declaration is to be made by the Individual who has indirect beneficial interest in the shares of a company held by other person. Further, Section 90 and the applicable Rules provide that the company has to maintain certain records and file the declaration with the ROC. Non compliance with the provisions of the section and the Rules invite stringent penalties. In view of the above, some of the practical issues are discussed below.

(i) If Mr. "X" holds 5% of equity shares in XYZ Pvt. Ltd., but he has no beneficial interest in such shares. Mr. M is the beneficial owner of these shares. In this case section 89 is applicable. Mr. X will have to file declaration in Form No. MGT-4 within a period of 30 days from

the date on which his/her name is entered in the Registrar of Members of such Company and Mr. M will have to file declaration in Form No: MGT-5 with the company within 30 days after acquiring such beneficial interest in the shares of the Company. The company will have to file the declaration with ROC in Form No.MGT-6 within 30 days of receipt of the Forms MGT-4 and MGT-5.

(ii) PB Pvt. Ltd., is holding 8% of the equity shares of XYZ Ltd., and Mr. P is holding 4% of the equity shares in XYZ Ltd. Mr. P is also holding 51% of equity shares of PB Pvt. Ltd. In this case Mr. P will be deemed to be holding significant beneficial ownership in shares of XYZ Ltd., as he is indirectly holding interest in 8% equity shares (through PB Pvt. Ltd) and directly holding 4% of equity shares. In this case Mr. P will have to file declaration in Form No.BEN-1 with XYZ Ltd.

(iii) AB Pvt. Ltd., is holding 15% of equity shares of XYZ Ltd., Mr. A is holding 55% of equity shares in AB Pvt. Ltd. In this case Mr. A will be considered as holding Significant Beneficial Ownership of more than 10% of equity shares of XYZ Ltd. This is because Mr. A will be considered to have 15% indirect ownership of shares of XYZ Ltd., through AB Pvt. Ltd. Therefore, Mr. "A" will have to file declaration in Form No.BEN-1.

(iv) ABC (HUF), through its karta Mr. "B", is the owner of 12% equity shares of XYZ Ltd., In this case Mr. B will be considered as indirect owner of these shares and he will have to file declaration in Form No. BEN.1. No other member of HUF has to file this declaration.

(v) Mrs. N is a Trustee of NPS Trust. There are two beneficiaries of the Trust who have equal share. Mrs. N in her capacity of Trustee of the Trust is holding 20% equity Shares in ABC Ltd. In this case each beneficiary will be deemed to have significant beneficial ownership in shares of ABC Ltd. Therefore, each beneficiary will have to file declaration in Form No. BEN-1. If the Trust is a discretionary Trust, the above declaration is to be filed by the Trustee only. If the Trust is a revocable Trust, such declaration is to be filed by the Settlor of the Trust only.

(vi) JDS LLP is holding 25% equity shares of ABC Ltd. Mr. J, Mr. D, Mr. S and JDS Pvt. Ltd are partners of JDS LLP. In this case Mr. J, Mr. D and Mr. S will be deemed to be significant beneficial owners of the shares and each of them will have to file declaration in Form No.BEN-1. There is one Mr. R who holds 60% of equity shares of JDS Pvt. Ltd., (One of the partners of JDS LLP). Therefore, Mr. R will also be considered as significant beneficial owner of shares of ABC Ltd., and he will also be required to file declaration in Form No.BEN-1.

(vii) There are following members in PR Ltd.,

(a)	CD Pvt. Ltd	2%
(b)	ABC (HUF) (Through Karta)	4%
(c)	PDS LLP	3%
(d)	DC (Trust) (Discretionary Trust)	5%
(e)	XYZ & Co., (Partnership Firm) (through its Partner "A")	8%
(f)	Others	78%

		100%
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Mr.A holds 55% equity shares in CD Pvt. Ltd. He is karta of ABC (HUF). He is also a partner of PDS LLP., and XYZ Co and Trustee of DC Trust. All these entities together own 22% of equity shares in P R Ltd. Therefore, Mr. A will be treated as having significant beneficial ownership of more than 10% of equity shares of PR Ltd, and he will have to file declaration in Form No. BEN-1

7. TO SUM UP:

From the analysis of the above provisions of section 90 and the applicable Rules it will be noticed that onerous duty is cast on Individuals who hold indirect together with or without direct interest of 10% or more in the equity shares of a company. Therefore, all individuals who are having investments in shares of companies directly or indirectly will have to study these provisions and file declaration in Form No. BEN-1 within the prescribed time limit. It appears that these provisions are made to locate persons who hold control in a company through Benami holdings. That is the reason why stringent penalties are provided in sections 89 and 90 for non-compliance by the Individuals, company and its defaulting officers. Let us hope that these provisions will curb some unethical practices which are at present adopted by certain individuals and companies for exercising control and influence certain corporate decisions.