

CNK & Associates LLP

News Flash – MCA amends Companies (Significant Beneficial Owners) Rules, 2018 & Companies (Incorporation) Rules, 2014

In Brief

On 8th February 2019, the MCA notified Companies (Significant Beneficial Owners) Amendment Rules, 2019 (Amendment Rule) which amends Companies (Significant Beneficial Owners) Rules, 2018. The Amendment Rules, brings out more clarity, and is in alignment with the government's initiative to instill transparency and accountability in the corporate set up.

Synopsis

Definitions

- The definition of 'significant beneficial owner' (SBO) has been amended.

Significant beneficial owner in relation to a reporting company means 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 such reporting company, namely:-

- ♦ holds indirectly, or together with any direct holdings, not less than 10% of the shares;
- ♦ holds indirectly, or together with any direct holdings, not less than 10% of the voting rights in the shares;
- ♦ has right to receive or participate in not less than 10% of the total distributable dividend, or any other distribution, in a financial year (FY) through indirect holdings alone, or together with any direct holdings;
- ♦ has right to exercise, or actually exercises, significant influence or control, in any manner other than through direct holdings alone.

- The Amendment Rules has **introduced** few important definitions.

- ♦ Control means control as defined in clause (27) of Section 2 of the Act. As per Section 2, 'Control' will 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.

- ♦ Majority stake means-

- ▲ holding more than one-half of the equity share capital in the body corporate; or
- ▲ holding more than one-half of the voting rights in the body corporate; or
- ▲ having the right to receive or participate in more than one-half of the distributable dividend or any other distribution by the body corporate.

- ♦ Reporting Company means a company as defined under the Companies Act, 2013 (the Act) which is required to comply with the SBO requirements under the Act.
- ♦ Significant influence means 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

Rules for determining SBO

- An individual who does not hold any of the above right or entitlement will not be considered to be a SBO
- An individual will be considered to hold a right or entitlement **directly** in the reporting company, if he satisfies any of the following criteria, namely.—
 - i. the shares in the reporting company representing such right or entitlement are held in the name of the individual;
 - ii. the individual holds or acquires a beneficial interest in the share of the reporting company under Section 89(2), and has made a declaration in this regard to the reporting company.
- An individual will be considered to hold a right or entitlement **indirectly** in the reporting company, if he satisfies any of the following criteria, in respect of a member of the reporting company, namely:-
 - i. 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 (LLP), and the individual,
 - a) holds majority stake in that member; or
 - b) holds majority stake in the ultimate holding company (whether incorporated or registered in India or abroad) of that member;
 - ii. where the member of the reporting company is a Hindu Undivided Family (HUF) (through karta), and the individual is the karta of the HUF;
 - iii. where the member of the reporting company is a partnership entity (through itself or a partner), and the individual,-
 - a) is a partner; or
 - 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 body corporate which is a partner of the partnership entity.
 - iv. where the member of the reporting company is a trust (through trustee), and the individual,-
 - a) is a trustee in case of a discretionary trust or a charitable trust;
 - b) is a beneficiary in case of a specific trust;
 - c) is the author or settlor in case of a revocable trust.
 - v. 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 Financial Action Task Force (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 (IOSCO), and the individual in relation to the pooled investment vehicle,-
 - 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.

Note: If the pooled investment vehicle or an entity controlled by the pooled investment vehicle is based in a jurisdiction which is not a member State of FATF and IOSCO, then the SBO will be

determined in the same manner as mentioned above either as a body corporate, HUF, partnership or Trust.

- 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, will be deemed to be 'acting together'.

Duty and Disclosures

- Every reporting company will have to take necessary steps to find out if there is any individual who is a SBO and if identified then cause such individual to make a declaration in Form No. BEN-1.
- In all cases where the member (other than an individual), holds not less than 10% ten per cent. of its (i)shares, or (ii)voting rights, or (iii)right to receive or participate in the dividend or any other distribution payable in a FY, the reporting company should give notice to such member, seeking information in Form No.BEN-4.

Notice should be given to if the company knows or has reasonable cause to believe that the member is expected —

- ♦ to be a SBO of the company;
 - ♦ to be having knowledge of the identity of a SBO or another person likely to have such knowledge; or
 - ♦ to have been a SBO of the company at any time during the 3 years immediately preceding the date on which the notice is issued, and who is not registered as a SBO with the company.
- Where any person fails to give the information required by the notice in Form No. BEN-4, within the time specified therein; or where the information given is not satisfactory, the reporting company should apply to the Tribunal, within a period of 15 days of the expiry of the period specified in the notice, for an order directing that the shares in question be subject to restrictions including
 - ♦ restrictions on the transfer of interest attached to the shares in question;
 - ♦ suspension of the right to receive dividend or any other distribution in relation to the shares in question;
 - ♦ suspension of voting rights in relation to the shares in question;
 - ♦ any other restriction on all or any of the rights attached with the shares in question.
 - On the date of commencement of the Amendment Rule, every individual who is a SBO in a reporting company should file a declaration in Form No. BEN-1 to the reporting company within 90 days from such commencement.
 - Every individual, who subsequently becomes a SBO or where his significant beneficial ownership undergoes any change, should 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.
 - Where an individual becomes a SBO, or where his significant beneficial ownership undergoes any change, within 90 days of the commencement of the Amendment Rule it will be deemed that such individual became the SBO or any change in the significant beneficial ownership happened on the date of expiry of 90 days from the date of commencement of said Amendment Rule, and the period of 30 days for filing will be reckoned accordingly.
 - Upon receipt of the above declaration, the reporting company should file a return in Form No. BEN-2 with the Registrar in respect of such declaration, within a period of 30 days from the date of receipt of such declaration by it, along with the prescribed fees.

Exemption

These rules will not be applicable to the extent the share of the reporting company is held by

- Investor Education and Protection Fund
- its holding reporting company. Provided the details of the holding company are reported in Form BEN-2.
- the Central Government (CG), State Government (SG) or any local Authority;
- reporting company, or a body corporate, or an entity, controlled by the CG or by any SG or Governments, or partly by the CG and partly by one or more SGs;
- Securities and Exchange Board of India (SEBI) registered Investment Vehicles such as mutual funds, alternative investment funds (AIF), Real Estate Investment Trusts (REITs), Infrastructure Investment Trust (InVITs) regulated by the SEBI
- Investment Vehicles regulated by Reserve Bank of India, or Insurance Regulatory and Development Authority of India, or Pension Fund Regulatory and Development Authority.

Penalties

- If a SBO fails to make a declaration he will be punishable with imprisonment for a term of maximum 1 year or with fine which will not be less than Rs. 1 lakh but which may extend to Rs. 10 lakh or with both and where the failure is a continuing one, with a further fine which may extend to Rs. 1,000 for every day after the first during which the failure continues.
- If a company fails to maintain a register and/or file the returns of SBO with the Registrar, or denies inspection of the register of SBO, the company and every officer of the company who is in default will be punishable with fine which will not be less than Rs. 10 lakh but which may extend to Rs. 50 lakh and where the failure is a continuing one, with a further fine which may extend to Rs. 1,000 for every day after the first during which the failure continues.
- If any person willfully furnishes any false or incorrect information or suppresses any material information of which he is aware in the declaration made, he will be liable to be punished for 'fraud' under Section 447 of the Act.

Effective Date

The Amendment Rules have come into force from the date of their publication in the Official Gazette i.e. 8th February 2019

Immediate Action required

- **Companies will have to take necessary steps to identify SBOs and obtain a declaration from them.**
- **Companies will be required to provide the details of the SBO in a more elaborate manner to the MCA.**

In Brief

The MCA notified Companies (Incorporation) Amendment Rules, 2019 which came into force on 25th February 2019. This stringent move has been taken as an attempt to eliminate bogus companies and restraint malpractices by trying to nip in the bud such attempts.

Synopsis

The MCA has inserted a new Rule 25A - Active Company Tagging Identities and Verification (ACTIVE) thereby amending the Companies (Incorporation) Rules, 2014

Effective Date

Every company incorporated on or before the 31st December 2017 is required to file the particulars of the company and its registered office in e-Form ACTIVE on or before 25th April 2019.

Companies which are required to file e-form ACTIVE

- ♦ Public Company(whether listed or not)
- ♦ Private Company
- ♦ Government Company
- ♦ One Person Company

As per Section 2(20) of the Companies Act, 2013, '*Company*' means a company incorporated under this Act or under any previous company law.

This implies that every Entity which is incorporated under previous applicable laws is also eligible to file the above e-Form

Companies which will be restricted to file e-Form ACTIVE

Any company which has not filed its due financial statements under Section 137 or due Annual Returns under Section 92 or both with the Registrar (RoC) will be restricted from filing e-Form-ACTIVE, unless such company is under management dispute and RoC has recorded the same on the register.

Companies which are exempt

Following companies will not be required to file e-form ACTIVE

- ♦ Companies incorporated after 31st December, 2017 ; or
- ♦ Companies which have been struck off or are under process of striking off; or
- ♦ Companies under liquidation or amalgamated or dissolved.

Consequences of non-filing/late filing of e-form ACTIVE

If the company which is required to file e-Form ACTIVE, fails to file the same on before 25th April 2019, following consequences will result-

- ♦ The company will be marked as 'ACTIVE-non-compliant'
- ♦ It will be liable for action under Section 12(9)* of the Companies Act, 2013
- ♦ No request for recording the following event based information or changes shall be accepted by the RoC from such companies marked as 'ACTIVE-non-compliant' unless e-Form ACTIVE is filed-
 - ▲ SH-07 (Change in Authorised Capital);
 - ▲ PAS-03 (Change in Paid-up Capital);
 - ▲ DIR- 12 (Changes in Director except cessation);
 - ▲ INC-22 (Change in Registered Office);
 - ▲ INC-28 (Amalgamation, de-merger)

*If the RoC has reasonable cause to believe that the company is not carrying on any business or operations, he may cause a physical verification of the registered office of the company and if there is any default, initiate action for the removal of the name of the company from the register of companies under Chapter XVIII.

Filing e-Form ACTIVE on or after 26th April, 2019

Where a company files e-Form ACTIVE on or after 25th April 2019, the company will be marked as 'ACTIVE Compliant' on payment of fees of Rs. 10,000.

Details required in e-Form ACTIVE

- ♦ Name and Corporate Identity Number (CIN) of the company
- ♦ Address of registered office and Longitude and Latitude of the same
- ♦ Email id of the Company and OTP for email id
- ♦ Listing Status
- ♦ List of Directors along with status of DIN (DIN should be active i.e. KYC of Director should have been filed or he/she must not be a disqualified director u/s 164(2))
- ♦ Details of Statutory Auditor & Cost Auditor
- ♦ Details of Managing Director /Whole Time Director or CEO (if appointed)
- ♦ Details of Chief Financial Officer and Company Secretary (if appointed)
- ♦ Details of SRN of AOC-4 and MGT-7 filed for FY 2017-18

DISCLAIMER AND STATUTORY NOTICE

This e-publication is published by CNK & Associates, LLP, Chartered Accountants, India, solely for the purposes of providing necessary information to employees, clients and other business associates. This publication summarises the Companies (Significant Beneficial Owners) Amendment Rules, 2019 and Companies (Incorporation) Amendment Rules, 2019. Whilst every care has been taken in the preparation of this publication, it may contain inadvertent errors for which we shall not be held responsible.

This document is a proprietary material created and compiled by CNK & Associates LLP. All rights reserved. This newsletter or any portion thereof may not be reproduced or sold in any manner whatsoever without the consent of the publisher.

This publication is not intended for advertisement and/or for solicitation of work.

Our Offices in India

Mumbai

Mistry Bhavan, 3rd Floor,
Dinshaw Vachha Road, Churchgate
Mumbai 400020
Tel No. +91 22 6623 0600

Mumbai (Suburban Office)

501/502, Narain Chambers,
M.G. Road, Vile Parle (East)
Mumbai 400 057
Tel No:91 22 6457 7600/01/02

Ahmedabad

'Hrishikesh',
2nd Floor, Vasantbaug Society,
Opp Water Tank, Gulbai Tekra
Ahmedabad 380 006
Tel. No. +91 79 2630 6530

Bengaluru

96, 7th Cross,
Domlur,
Bengaluru 560 071
Tel. No.+91 80 2535 1353

Chennai

Kochu Bhavan
Ground Floor, Old No 62/1, New No 57,
McNichols Road, Chetpet
Chennai 600 031
Tel No. +91 44 4384 9695

New Delhi

Suite 1101,
KLJ Towers, NSP
New Delhi 110 034
Tel No.+91 11 2735 7350

Pune

4, Kumar Panorama, 1st Floor
45/18 Shankerseth Road
Pune 411 037
Tel No.+ 91 20 2645 7251/52

Vadodara

C-201/202, Shree Siddhi Vinayak Complex,
Faramji Road, Alkapuri,
Vadodara 390 005
Tel. No. +91 265 234 3483

Our Overseas Office

Dubai

Suite#17.06 Dubai World Trade Centre
Shaikh Zayed Road, Dubai, P.O.Box.454442
Tel. No. +971 04 355 9533