

## Companies Act Series

July 26, 2024

### SHOULD THE BENEFICIAL OWNER UNDER SECTION 89 OF COMPANIES ACT, 2013, BE ONLY A NATURAL PERSON?

- MCA notifies Companies (Management and Administration) Amendment Rules, 2024 to roll out new Web-Form MGT-6.
- E-form MGT 6 is the return to report the declaration received by the registered and beneficial owner in shares of the company.
- Web Form MGT 6 deviates significantly from the previous version of the e-form MGT 6 in terms reporting of beneficial owner under Section 89 of Companies Act, 2013
- This new Web-Form MGT 6 appears to say that the beneficial owner under Section 89 should be a natural person only which is a major shift from the previous reporting

Ministry of Corporate Affairs ("**MCA**") vide its notification dated July 15, 2024 brought amendments to Companies (Management and Administration) Rules, 2014 ("**Principal Rules**") by way of 'Companies (Management and Administration) Amendment Rules, 2024 ("**Amended Rules**") to substitute the *e-form MGT 6*, a return which is filed with Registrar of Companies ("**RoC**") in respect of declaration under Section 89 of the Companies Act, 2013 ("**CA 2013**") received by a company, with the new *web-form MGT 6*.

Section 89 of the CA 2013 deals with the declaration of beneficial interest in shares. It requires individuals who hold shares on behalf of another person or who hold beneficial interest in shares of a company to declare such interest to the company. Section 90 of the CA 2013 deals with the register of significant beneficial owner(s) ("**SBOs**") in a company. It mandates companies to maintain a register of SBOs and file returns of such SBOs with the RoC. Thus, the objective of Section 90 is to identify a natural person who is a *SBO* of the company and whereas Section 89 may have an *artificial person* as '*beneficial owner*' as well.

As far as the reporting of such beneficial ownership is concerned, SBO who is a natural person should submit Form BEN 1 under Section 90 of CA 2013 and company would report the same to RoC in *e-form BEN 2*. Whereas, it is not the same for Section 89 of CA 2013, where even a body corporate can be reported as the holder of beneficial interest in shares, as detailed in Forms MGT 4 and MGT 5 under the Principal Rules.

In this hotline, we analyze the changes introduced in the web-form MGT 6 by the Amended Rules and how such changes are not in harmony with the provisions of Section 89 of the CA 2013, creating practical issues for companies in filing such return with RoC. Alternatively, are these changes an indication of something new that the fraternity needs to comply with?

#### BACKGROUND:

In general, beneficial ownership refers to having a beneficial interest in any property, goods, including securities. This can be defined as "*profit, benefit or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control.*"

Section 89 of CA 2013 requires making of declarations in cases where the registered owner and the beneficial owner of shares in a company are two different persons.

A person whose name is entered in the register of **members** of a **company** as the holder of shares in that **company** but who does not hold the beneficial interest in such shares, such person shall make a declaration in Form MGT 4 within 30 days (*from the date on which his name is entered in the register of member*) to the **company** specifying the name and other particulars of the person who holds the beneficial interest in such shares.

Every person who holds or acquires a beneficial interest in share(s) of a **company** shall make a declaration to the **company** specifying the nature of his interest, particulars of the person in whose name the shares stand registered in the books of the **company** and such other particulars in Form MGT 5 within 30 days of acquisition of beneficial interest.

Where any declaration as mentioned above is made to a company, the **company** shall make a note of such declaration in the register concerned and shall file, within 30 days from the date of receipt of declaration by it, a return in *e-form MGT 6* with RoC.

Section 89(10) of CA 2013 defines 'beneficial interest' for the purpose of Section 89 and 90 of the CA 2013 as – "*beneficial interest in a share includes, directly or indirectly, through any contract, arrangement or otherwise, the right*

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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."

Forms MGT 4 and MGT 5 are manual forms that are submitted by the registered owner and beneficial owner respectively whereas MGT 6 is an electronic return filed by the company with RoC intimating the creation/change of beneficial/registered owner in the shares of the Company.

Declarations under Section 89 of the CA 2013 are mostly made in case of wholly owned subsidiary structures where all the shares except nominal number of shares are held by parent entity and those nominal shares are held by some other person (natural or artificial) in the capacity of nominee to the parent to satisfy the requirement of minimum number of members pursuant to Section 187 of the CA 2013.

#### ANALYSIS AND KEY TAKEAWAYS:

The new Web-Form MGT 6, introduced on July 15, 2024, replaces the erstwhile e-form MGT 6 and includes several noteworthy changes that pose practical issues in filing such forms, understanding Sections 89 and 90 of the CA 2023. These changes have created doubts amongst stakeholders regarding the intent and objectives behind such changes, which are not in line with the legislation, and raise questions about compliance with the new reporting requirements.

Forms MGT 4 and 5, a declaration to be made by the registered owner and person holding beneficial interest provides for below details –

- particulars of the registered owner of the shares;
- particulars of the shares in respect of which declaration is being made; and
- particulars of the person who holds the beneficial interest in such shares.

Interestingly, these forms seek details typical of natural persons (*like date of birth/age, father/spouse name, passport number in case of foreign nationals, nationality, etc.*). Even the language in Section 90 and rules made thereunder specifies words like '*his interest*', '*his name*' for individuals.

The only detail sought for body corporate (*artificial person*) in these forms MGT 5 and MGT 4 is the Corporate Identification Number of such beneficial owner and registered owner.

In practice, both beneficial owner and registered owner fills the details to the extent applicable marking others (*like father's/spouse name*) as '*not applicable*'. The previous e-form MGT 6 required limited details for the beneficial owner—name, address, and nationality.

However, the new Web-Form MGT 6 significantly expands the required details, clearly indicating that the beneficial owner under Section 89 should also be a **natural person and not an artificial person**, marking a major shift from the previous reporting practices.

#### SIGNIFICANT CHANGES IN NEW FORM MGT 6:

- **Point 4** of the new Web-Form MGT 6 seeks details of the registered owner of the shares. The form specifies that either the '**Father's Name/Husband's Name**' or '**Name of the authorized person**' must be provided.

For the identity details, the form offers three options (i) PAN; (ii) Passport; and (iii) other registration number. It also provides for '*date and place of incorporation*' in addition to the '*date of birth and nationality for individuals*'.

Also, the form allows for the inclusion of the name of the authorized person in addition to father/husband name (though '*spouse*' would be a more inclusive term than '*husband*').

All these features in the new MGT 6 clearly indicates that, the registered owner can either *be a natural person or an artificial person*.

- **Point 5** of the new Web-Form MGT 6 seeks details of the beneficial owner of the shares. The update includes a new field for '*Beneficial Owner ID*' ("**BO ID**") if available.

Additionally, the form restricts identity details to two options (i) PAN; and (ii) Passport, excluding other registration numbers. It requests only the '*date of birth*' and '*nationality*', omitting '*date and place of incorporation*'. Lastly, it only requires the father's/husband's without providing an option for '*authorized person*'.

All these features in the new MGT 6 clearly indicates that, the beneficial owner can only be a natural person diverging from previous practices.

**So, the new web-form MGT 6 clearly indicates that, registered owner can be either a natural person or an artificial person, but the beneficial owner should be a natural person only.**

#### CONCLUSION:

With the introduction of new Web-Form MGT 6, it has introduced significant changes that raises several important questions. Apart from the practical issues, there are more theoretical questions, one needs to ponder upon. While these updates aim to streamline reporting, they also create uncertainties and potential conflicts with existing provisions under the CA 2013. Key issues that require attention include:

- **Differentiation of IDs:** The introduction of BO ID raises a question on whether SBO ID under Section 90 is same as BO ID under Section 89 or is it a different ID?
- **Definition and Parameters:** If the intent is to identify a beneficial owner under Section 89 also a natural person (like under Section 90), it is essential to specify the parameters/ definition of beneficial owner for the purpose of Section 89. What specific criteria or characteristics define a beneficial owner for the purpose of Section 89?

- **Purpose of Section 89:** Given that Section 90 already focuses on identifying a natural person, it is important to understand the distinct objectives and outcomes that Section 89 aims to achieve. What additional purpose does Section 89 serve in this context?
- **Impact on Company Structure:** If the beneficial owner is restricted to '*natural person*' only, in such case, can a company still operate as a wholly owned subsidiary? This raises questions about the feasibility and implications for corporate structure mainly for foreign wholly owned subsidiaries in India.
- **Consistency of Forms:** If declaration in Form MGT 5 is to be given by natural person only, then form MGT 5 should also be amended to suit to the new Web-Form MGT 6. Else, there exists conflicts between the forms, leading to practical difficulties in compliance.

To address these concerns and facilitate smoother business operations, it would be prudent if MCA issues clarifications to address the practical as well legal issues. They should aim to resolve both practical and legal issues, ensuring a clear and consistent approach to identifying beneficial owners and simplifying the compliance process.

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You can direct your queries or comments to the relevant member.

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