

SIGNIFICANT BENEFICIAL OWNER

Provisions of Sec.90 of Companies Act, 2013 read with Companies
(Significant Beneficial Owners) Rules, 2019



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20th July, 2019

Significant Beneficial Owner (SBO)

Coverage

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- ❖ **Definitions**
- ❖ **Who is SBO?**
- ❖ **Direct Determination of SBO**
- ❖ **Indirect Determination of SBO**
- ❖ **Declaration, Registers and Return**
- ❖ **Application to Tribunal**
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Importance of SBO Provisions

- ❖ Promote corporate transparency
- ❖ Prevent misuse of corporate vehicle for illicit purposes such as corruption, tax evasion, money laundering ETC.
- ❖ To close the loop on combating Money Laundering
- ❖ To identify the ultimate individual owners
- ❖ Financial Actions Task Force (FATF) developed a series of recommendations on transparency and beneficial ownership of legal persons and arrangements.

Companies (Significant beneficial Owner) Rules 2018 - Definitions

Control means control as defined in section 2(27) of the Act

As per Sec.2(27) control shall 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;-

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

Companies (Significant beneficial Owner) Rules 2018 – Definitions

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

Partnership Entity (PE) means –

- ▶▶ a partnership firm registered under the Indian Partnership Act, 1932 or
- ▶▶ a LLP registered under the Limited Liability Partnership Act, 2008;

Reporting Company (RC) means –

- ▶▶ a company as defined in section 2(20) of the Act, required to
- ▶▶ comply with the requirements of section 90 of the Act;

Who is SBO?

Significant Beneficial Owner (SBO) in relation to a **Reporting Company (RC)**

means –

- ▶▶ 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 (RoE)**
- ▶▶ in such Reporting Company (RC), namely –
 - i) holds indirectly, or together with any direct holdings, not less than 10% of the shares;
 - ii) holds indirectly, or together with any direct holdings, not less than 10% of the voting rights in the shares;
 - iii) has right to receive or participate in not less than 10% of the total

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- distributable dividend, or any other distribution, in a financial year through indirect holdings alone, or together with any direct holdings;
- iv)** has right to exercise, or actually exercises, significant influence or control, in any manner other than through direct-holdings alone:

Note:

- ❖ an Individual shall not to be considered as a SBO, if he does not hold any indirect **RoE** in relation to Shares, voting rights and distributable dividend. (i.e. to become an SBO indirect holding is compulsory) – **Explanation -1**
- ❖ Shares include –
 - ▶▶ Global Depository Receipts,
 - ▶▶ Compulsory Convertible Preference Shares or
 - ▶▶ Compulsorily Convertible Debentures – **Explanation -VI**

Acting to gather: Individual or Individuals acting through any person or trust, act with common intent or purpose shall be deemed as acting to gather

Direct Determination of SBO

Exp.II

an individual shall be considered to hold a RoE directly in the RC, if he satisfies any of the following criteria, namely –

- i) the shares in the RC representing such RoE are held in the name of the individual;
- ii) the individual holds or acquires a beneficial interest in the shares of the RC u/s 89(2), and has made a declaration in this regard to the RC.

ROE: Rights or Entitlements

Indirect Determination of SBO **Exp.III**

	Particulars	Criteria
1	Where the member of the reporting company is – ❖ a body corporate (registered in India or abroad), other than a LLP.	An individual who – a) holds majority stake in that member; or b) holds majority stake in the ultimate holding company (registered in India or abroad) of that member.
2	Where the member of the reporting company is ❖ a Hindu Undivided Family (HUF) (through <i>karta</i>).	An individual who is – the <i>karta</i> of the HUF.

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3	<p>Where the member of the reporting company is –</p> <p>❖ a partnership entity (through itself or a partner).</p>	<p>An individual who –</p> <p>a) is a partner; or</p> <p>b) holds majority stake in the body corporate, which is a partner of the partnership entity; or</p> <p>c) holds majority stake in the ultimate holding company of the body corporate, which is a partner of the partnership entity.</p>
4	<p>Where the member of the reporting company is –</p> <p>❖ a trust (through trustee).</p>	<p>An individual who –</p> <p>a) is a trustee in case of a discretionary trust or a charitable trust;</p> <p>b) is a beneficiary in case of a specific trust;</p> <p>c) is the author or settlor in case of a revocable trust.</p>

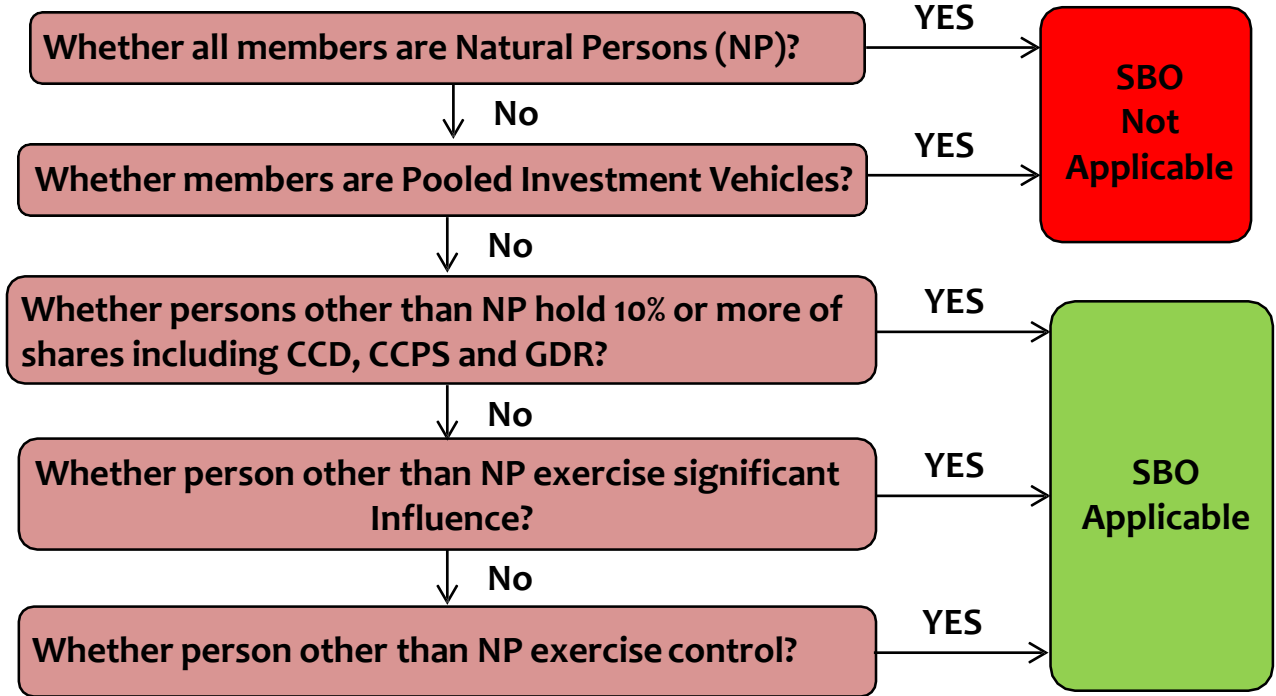
Significant Beneficial Owner (SBO)

5	Where the member of the reporting company is – <ul style="list-style-type: none">❖ a pooled investment vehicle (PIV) or❖ an entity controlled by the PIV, based in a member State of the FATF on Money Laundering, and the regulator of the securities market in such member State is a member of the IOSC	An individual in relation to the PIV, who – <ul style="list-style-type: none">a) is a general partner; orb) is an investment manager; orc) is a Chief Executive Officer where the investment manager of such pooled vehicle is a body corporate or a partnership entity.
6	Where the member of a reporting company is – <ul style="list-style-type: none">❖ a PIV or❖ an entity controlled by PIV, based in a jurisdiction other than mentioned in clause (5) above.	An individual who belongs to any of the clauses in (1) to (4) above.

PE: Partnership Entity PIV: Pooled Investment Vehicle RC : Reporting Company

FATF: Financial Action Task Force, IOSC International Organization of Securities Commissions,

Identifying SBO by Reporting Company (RC)



CCPS: Compulsory convertible preference Shares, CCD: Compulsory Convertible Debentures

Declaration, Registration and Return

SBO – Declaration *Sec.90(1) Rule 2A and 3*

Responsibility of the Reporting Company

- ❖ Every reporting company shall take necessary steps to find out if there is any individual who is a SBO, in relation to that reporting company, and if so, identify him and cause such individual to make a declaration in **Form. BEN-1**

Responsibility of the SBO

Initial Disclosure:

- ❖ Every individual who is a SBO in a RC, is required to file a declaration in **Form No. BEN-1** to the reporting company within 90 days from February 8, 2019.

Continual Disclosure:

- ❖ Every individual, who subsequently becomes a SBO/ or where his significant beneficial ownership undergoes any change shall 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.

Notice to SBO Sec.90(5) read with Rule 2A and Rule 6

1. Every reporting company shall in all cases where its member (other than an individual), holds not less than 10% of its;-
 - a) shares, or
 - b) voting rights, or
 - c) right to receive or participate in the dividend or any other distribution payable in a financial year,
give notice in **Form No. BEN-4** to any person (whether or not a member of the company) whom the company knows or has reasonable cause to believe –
 - (i) to be a SBO of the company;
 - (ii) to be having knowledge of the identity of a SBO or another person likely to have such knowledge; or
 - (iii) 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.

Significant Beneficial Owner (SBO)

2. The SBO shall provide the information required by the notice within a period not exceeding 30 days of the date of the notice – **Sec.90(6)**

Register of SBO – Sec.90(2) Rule 5

1. The company shall maintain a register of significant beneficial owners in **Form No. BEN-3**
2. The register shall be open for inspection during business hours, at such reasonable time of not less than two hours, on every working day as the board may decide, by any member of the company on payment of such fee as may be specified by the company but not exceeding Rs.50 for each inspection.

Return of SBO – Sec.90(4)

- ❖ Upon declaration, the reporting company shall 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 declaration

Application to Tribunal – Sec.90(7) Rule 7

1. The company shall,—
 - a) if that person fails to give the company the information required by the notice within the time specified therein; or
 - b) if the information given is not satisfactory, apply to the Tribunal within 15 days of the expiry of the period specified in the notice, for an order of directions including –
 - (i) restrictions on the transfer of interest attached to the shares in question;
 - (ii) suspension of the right to receive dividend or any other distribution in relation to the shares in question;
 - (iii) suspension of voting rights in relation to the shares in question;
 - (iv) any other restriction on all or any of the rights attached with the shares in question

2. The Tribunal may, after giving an opportunity of being heard, make such order restricting the rights attached with the shares within a period of 60 days of receipt of application or such other period as may be prescribed – **Sec.90(8)**
3. The company or the person aggrieved by the order of the Tribunal may make an application to the Tribunal for relaxation or lifting of the restrictions, within a period of one year from the date of such order – **Sec.90(9)**
4. However if no such application has been filed within a period of one year from the date of the tribunal order, such shares shall be transferred to the IEPF constituted u/s 125(5),

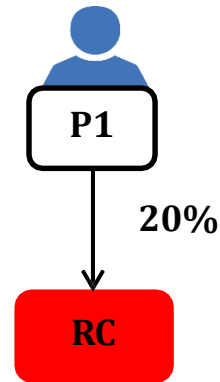
SBO Illustrations

Illustration No.1

P1 holds 20% holding directly in RC.

There are no indirect holdings.

Even though P1 has significant influence over RC,
Unless there are indirect holdings, there
is no case for SBO declaration – **Exp 1 Rule2(1)(h)**



No SBO Declaration is required

Assumptions

RC is the Reporting Company with reference to which SBO is determined,
H1, H2, H3 etc. are companies holding shares in RC,

P1, P2, P3 etc. are individuals holding direct or indirect shareholdings in RC.

Significant Beneficial Owner (SBO)

Illustration No.2

P1 holding 20% in RC and more than 50% in H1

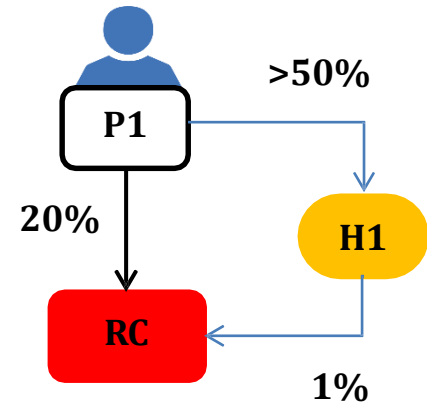
H1 holding 1% in RC.

Hence P1 holding directly 20% indirectly 1%

Both direct and indirect holdings to gather is 21%

For SBO declaration, 10% or more is enough.

Indirect holding is mandatory for SBO declaration.



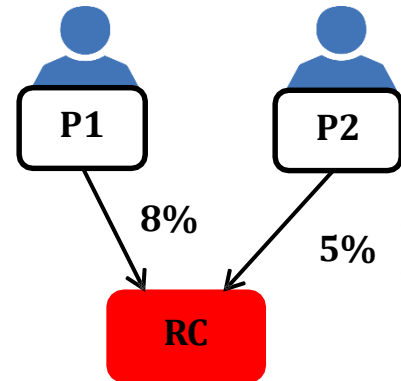
SBO Declaration is required

Illustration No.3

P1 and P2 are holding 8%, 5% in RC

Unless there are indirect holdings,
There is no case for SBO declaration

P1 and P2 may be deemed acting together,
There are no indirect holdings for either P1 or P2.



No SBO Declaration is required

Significant Beneficial Owner (SBO)

Illustration No.4

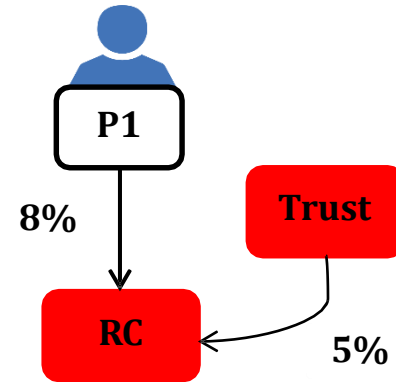
P1 directly holding 8% in RC

P1 is a beneficiary in Trust

Trust is holding 5% in RC

The Trustee has made declaration u/s 89

Stating P1 is the beneficial Owner



When the declaration has been made by the trustee u/s 89 – the individual is regarded as direct owner.

Hence there is no indirect holding for P1



No SBO Declaration is required

Significant Beneficial Owner (SBO)

Illustration No.5

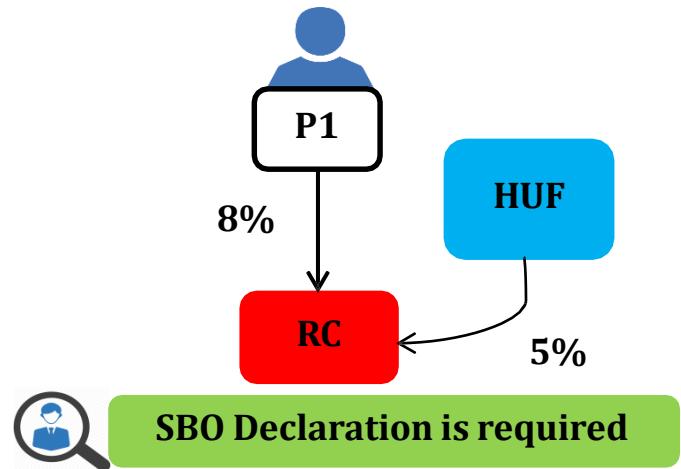
P1 is holding 8% in RC

P1 is the kartha of HUF

HUF holding 5% in RC

Being a kartha of HUF, P1 is indirectly
Holding 5% - **Exp.III**

Hence the direct and indirect holdings
Of P1 is 13% attracting SBO declaration



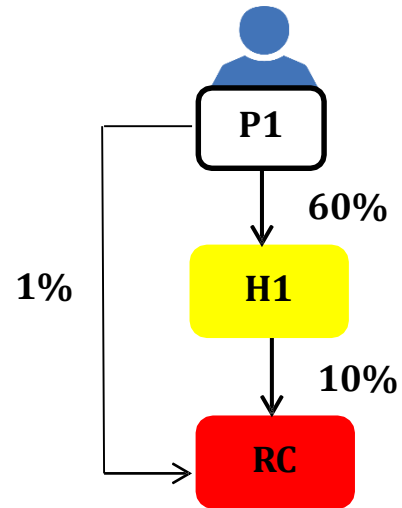
For the same case, If P2, a minor member of HUF holds 8% in RC and P1 is a Kartha, then ?

Even than there is no difference - SBO declaration is required.

Illustration No.6 – Computing Indirect Holding

P1 is directly holds 1% in RC
H1 holds 10% in RC
P1 directly holds 60% in H1

Since P1 holds majority stake in H1,
The holding of H1 in RC is regarded as the indirect holding of P1.
The entire holding of H1 in RC will be attributed to P1.
Hence, P1’s indirect holding in RC is 10%, and his direct holding is 1%, aggregating to 11%



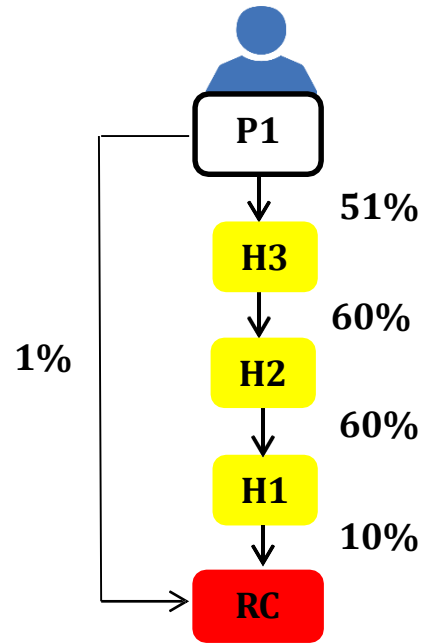
SBO Declaration is required

Illustration No.7

The holding of H1 in RC (10%) will be regarded as indirect holding of P1, because P1 is holding majority stake in the ultimate holding company of H1 (i.e. H3).

The indirect holding of P1 in RC will be the entire holding of H1 in RC, that is, 10%.

Hence, together with the direct holding of 1%, SBO declaration is attracted (10% or more)

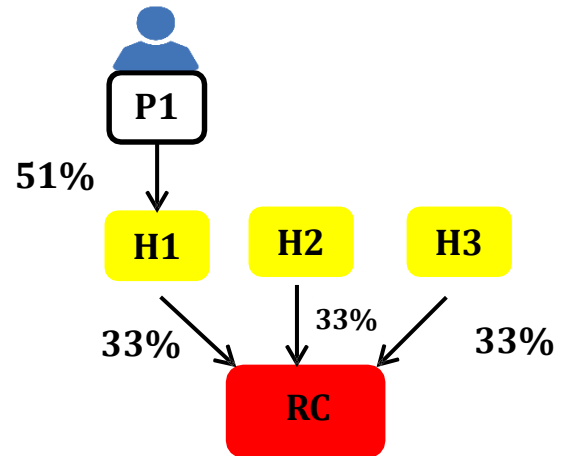


SBO Declaration is required

Illustration No.8

P1 holds majority stake in H1.
Therefore, the holding of H1 in RC
will be regarded as the indirect holding of P1.

Hence P1's indirect holding is 33%



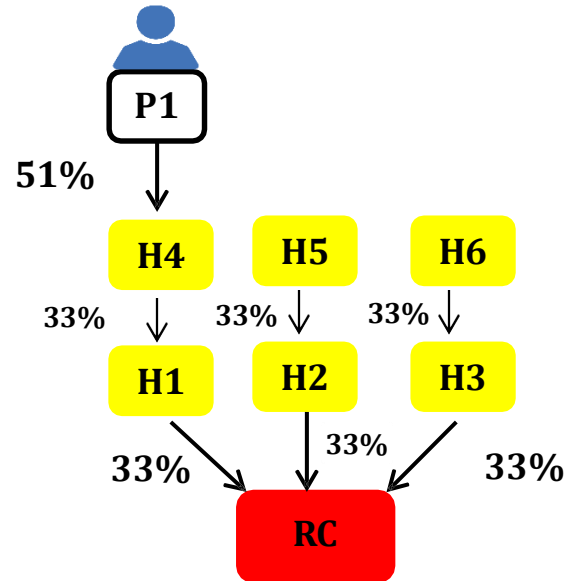
SBO Declaration is required

Illustration No.9

As per, Exp III (i) (b), the holding of an individual is regarded as indirect holding only if the individual either holds majority in the first layer holding company, or the ultimate holding company of the first layer holding company

In this case, none of the second layer entities (H4, H5 and H6) can be regarded as ultimate holding companies of first layer.

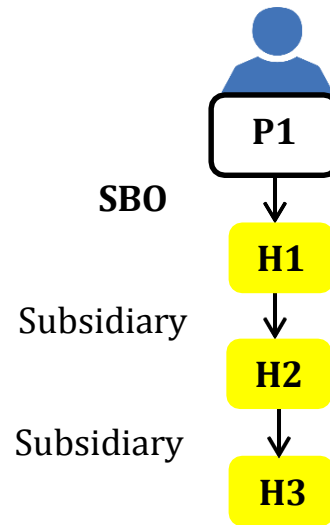
Hence, the holding of P1 at the second layer will not be regarded as indirect holding of P1



No SBO Declaration is required

Illustration No.10

P1 is already a declared SBO for H1.
Rule 8 (b) provides that the shares held by the holding company shall be excluded from the applicability of these Rules, However the details of such shall be reported in BEN-2



No SBO Declaration is required for H2 and H3

Significant Beneficial Owner (SBO)

Illustration No.11

since P1 is not holding majority at either at H1 or ultimate holding company of H1 (note: H2, though majority owned by P1, is not the holding company of H1), the holding of H1 will not matter. At H1 level, the holding of H2 is the indirect holding of P1.

Hence, **P1 is the SBO for H1.**

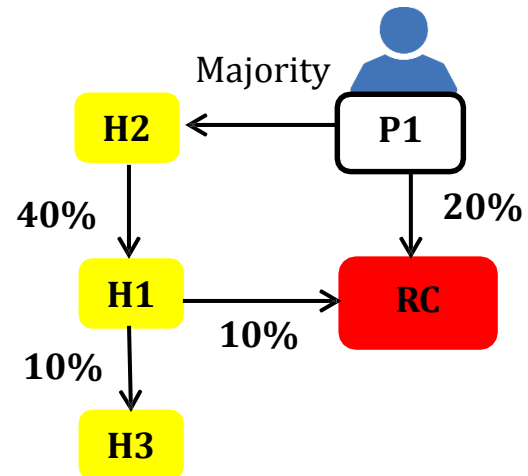
For H2, it is direct holding entirely – hence, no SBO declaration.

For H3, there is no majority holding of P1 in H1. H1 does not have any ultimate holding company –

Hence no SBO declaration

SBO declaration not required for RC

It will be required at H1, not required for H2 and H3



Significant Beneficial Owner (SBO)

Illustration No.12

If, the Trust is Discretionary Trust (i.e. Public)
P1 is Trustee, P1 is holding 8% in RC.

Since P1 is trustee, Trust's holding will be the
Indirect holding of P1

Hence SBO declaration is required

(all other beneficiaries of Trust are out of SBO declaration)

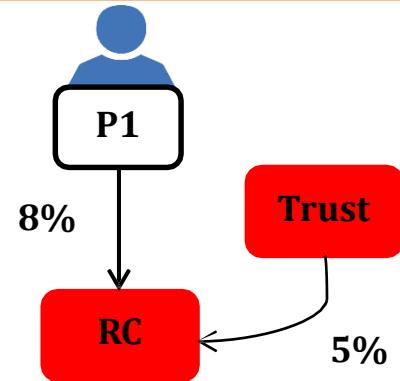
If, the Trust is Specific Trust (i.e. non-discretionary)
P1 is beneficiary, P1 is holding 8% in RC

Since P1 is beneficiary, Trust's holding will be the indirect holding of P1

Hence SBO declaration is required *(here the trustee is out of SBO Declaration)*

If, the Trust is Revocable Trust, and P1 is author, P1 is holding 8% in RC

Since P1 is author, Trust's holding will be the indirect holding of P1 **Hence
SBO declaration is required** *(all other beneficiaries are out of SBO)*



SBO Penal Provisions

1	Default in making Declaration Sec.90(10)	If any person fails to make a declaration u/s 90(1), he shall be punishable – (i) with imprisonment for a term which may extend to one year or (ii) with fine which shall be minimum of Rs.1lakh to maximum of Rs.10Lakhs or with both and (iii) if the failure is a continuing one – with a further fine which may extend to Rs.1000 for every day after the first during which the failure continues.
2	Default in maintaining Register,	If a company fails to maintain the Register of SBO or filing Return and denying inspection, the company and every officer who is in default shall be punishable –

<p>filing Return Sec.90(11)</p>	<p>(i) with fine of Rs.10Lakhs to Rs.50Lakhs and (ii) if the failure is a continuing one – with a further fine which may extend to Rs.1000 for every day after the first during which the failure continues.</p>
<p>3 False Declaration Sec.90(12)</p>	<p>If any person willfully –</p> <ul style="list-style-type: none">▶▶ furnishes any false or incorrect information or▶▶ suppresses any material information of which he is aware in the declaration made under this section,▶▶ he shall be liable to action u/s 447.

SBO Exemptions Rule 8

The rules are not applicable to the extent the shares of the RC is held by:

- a) IEPF Authority
- b) its holding reporting company, however, the details of such holding reporting company shall be reported in Form No. BEN-2
- c) the Central Government, State Government or any local Authority
- d) reporting co; or a body corporate; or an entity, controlled by the CG or by any SG or Gov or partially by the CG and partly by one or more SGs
- e) Investment Vehicles such as Mutual Funds, Alternative Investment Funds (AIF), Real Estate Investment Trusts (REITs), Infrastructure Investment Trust (InVITs) regulated by SEBI
- f) Investment Vehicles regulated by RBI, or IRDA, or Pension Fund Regulatory and Development Authority

| ABOUT US



Professionals at work for...you

You Dream.... We Realise.

PS RAO & ASSOCIATES

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