

## Companies Act Series

November 13, 2023

### GOVERNMENT STRENGTHENS BENEFICIAL INTEREST DISCLOSURE REGIME

As a part of Government's consistent efforts towards enhancing and strengthening the level of transparency and disclosures in relation to beneficial interest holding in the business structures, recently on October 27, 2023, the Ministry of Corporate Affairs ("MCA") issued 2 (two) key notifications namely, - the Limited Liability Partnership (Third Amendment) Rules, 2023 ("Amended LLP Rules")<sup>1</sup> and the Companies (Management and Administration) Second Amendment Rules, 2023 ("Amended MGT Rules")<sup>2</sup>. Let us analyze the key changes of these amendments and their impact on Limited Liability Partnerships ("LLPs") and the companies.

### ANALYSIS AND KEY TAKEAWAYS:

#### 1. Amended LLP Rules:

##### a) Register of Partners ("RoP") [Rule 22B of Amended LLP Rules]:

- Historically, the LLPs were not required to maintain any statutory register under the law. The concept of RoP has been introduced to LLPs for the first time. As per this, every LLP should henceforth maintain RoP in prescribed Form 4A. For the LLPs incorporated post the notification of Amended LLP Rules (i.e., after October 27, 2023), it needs to be maintained from the date of incorporation and for existing LLPs, to be maintained within 30 (thirty) days of commencement of Amended LLP Rules. The RoP is akin to the register of members ("RoM") maintained by the companies under Section 88 of the Companies Act, 2013 ("CA 2013")<sup>3</sup>. As similar to RoM, the RoP has to contain basic particulars of each partner and the contribution held in an LLP in a prescribed form and any change occurred in those particulars should be updated in RoP within 7 (seven) days of such change.
- As the LLPs are required to maintain statutory register for the first time, there is no jurisprudence available in this area from the LLPs perspective so to address any complex legal and/or practical aspects around this subject in future (beyond the points clarified under Amended LLP Rules), the regulatory framework and jurisprudence for statutory registers established under CA 2013 may be adopted as guiding principles for the LLPs.

##### b) Declaration regarding beneficial interest [Rule 22B of Amended LLP Rules]:

- Apart from RoP concept, new Rule 22B of Amended LLP Rules introduce additional new concepts such as 'Registered partner' and 'Beneficial partner' in relation to beneficial interest in contribution in an LLP, which are similar to 'Registered owner' and 'Beneficial owner' in relation to beneficial interest in shares of a company under Section 89 of CA 2013.

A person whose name is entered in RoP of an LLP but does not hold any beneficial interest fully or partly in contribution is a *Registered partner*. On the other hand, a *Beneficial partner* is person who holds or acquires a beneficial interest in contribution of an LLP, but his name is not registered in RoP.

- Filing of Declaration:** Registered partner should declare with the LLP in Form 4C, the name and other particulars of the person who holds beneficial interest, within 30 (thirty) days of entering his name in the RoP. Similarly, the Beneficial partner should declare nature of his interest and the partner in whose name the contribution stand registered in the RoP in Form 4C within 30 (thirty) days of him acquiring such beneficial interest in LLP's contribution. Further, if any change occurs in beneficial interest, both Registered partner and Beneficial partner will have to declare the same in Form 4B and Form 4C respectively, within 30 days of such change. Upon receipt of such declarations, the concerned LLP should record it in the RoP and file Form 4D to the Registrar within 30 days of receipt of such declarations. Operationally, all these norms mirror the disclosures prescribed under Section 89 of CA 2013 for a registered and beneficial owner in relation to beneficial interest in shares of a company.
- A clarification has also been provided to avoid any confusion that, so long as beneficial interest of Registered partner is limited to the contribution stated against his name in the RoP and he does not hold beneficial interest in contribution against any other Registered partner, he is not required file such declaration.
- Although the compliances similar to Section 89 of CA 2013 are now extended to LLPs and new concepts like Registered partner and Beneficial partner have been introduced for the first time, there is no specific amendment under the Limited Liability Partnership Act, 2008 ("LLP Act")<sup>4</sup> itself. Notably, the charging provision under which these Amended LLP Rules were issued is Section 23 of LLP Act which provides that all mutual rights and duties of the partners and of the LLP should be governed by the LLP agreement. From this, one can deduce that the terms of LLP agreement could have always legally allowed such arrangements since beginning and in case of any such existing arrangements, new compliance actions under Amended LLP Rules should be undertaken immediately.

##### c) Designated Partner for providing information [Rule 22B (4) of Amended LLP Rules]:

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- Rule 22B(4) requires every LLP to specify a designated partner for furnishing and extending co-operation for providing, information with respect to beneficial interest in contribution in the LLP, to the Registrar or any other authorised officer and information of such designated partner should be furnished with the Registrar in Form 4. Until the LLP specify such designated partner, it is clarified that every designated partner of such LLP shall be deemed to be responsible for furnishing such information and to extending requisite co-operation.

- Basis this, one can interpret that it is not strictly mandatory for the LLPs to specify a designated partner by its own and furnish information with the Registrar. This is since, in such cases, every designated partner of that LLP will assume that responsibility by operation of law. Hence, in any case, at all the time, either one person or every designated partner of an LLP will remain responsible to provide information to the Registrar.

In case of any non-compliances under Amended LLP Rules, since there is no specific penalty prescribed under Amended LLP Rules, the general penalties prescribed under Section 79 of the LLP Act should apply.

## 2. Amended MGT Rules [Rule 9 (4) to (8) of Amended MGT Rules]:

- Under Sections 89 and 90 of CA 2013, it is the beneficial owner who is primarily liable to disclose his interest in shares. Now, to legally assign the responsibility of *furnishing and to cooperate in providing the information about beneficial interest in shares of the company* to the Registrar (or any other authorised officer), Amended MGT Rules have come out with a concept of "Designated person". This move is on a similar line to one imposed to the LLPs under Rule 22B (4) of Amended LLP Rules.

- As per Rule 9 (4), from October 27, 2023, every company should identify a Designated person, amongst the persons specified under Rule 9 (5), to take up aforesaid responsibility. Rule 9 (5) provides that the company may designate a company secretary (CS)<sup>5</sup>, if appointed as per CA 2013; or a key managerial personnel (KMP)<sup>6</sup> other than CS; or **every director** (where there is no CS or KMP) as Designated person.

Given the nature of responsibility, the person identified as so is expected to be aware of (or take all the requisite steps to acquire knowledge of) persons holding beneficial interest in the shares of concerned company. From the practice standpoint, the company's board may designate such person by passing a resolution since it generally requires critical evaluation at the board level.

- The intent of law seems to suggest that company has to identify one dedicated person. However, Rule 9 (5) use the word '*every director*' which creates some confusion. By literal interpretation, it implies that mandatorily all directors (and not any one director) should be identified as Designated persons, when there is no CS or KMP. Can the company designate any one director as Designated person remains a question. Important to note that for majority of existing companies, the requirement to appoint a CS or KMP under CA 2013 do not apply and in such cases, all those companies may end up designating all the existing directors (including every non-executive director) for this purpose, which does not seem to be the intent of law. This issue could have been better addressed if Rule 9 (5) had used the word '*any director*' (instead of '*every director*').

- Notably, as per Rule (6), **until the companies** identify Designated person under Rule 9(5), the company secretary (CS), if appointed as per CA 2013; or every Managing Director (MD)<sup>7</sup> or Manager<sup>8</sup> (where there is no CS); or every director (where there is no CS or MD or Manager) **shall be deemed to have been Designated person**. From the combined reading of Rules 9 (4), 9(5) and 9(6), one can infer that, Rules 9 (4) & 9(5) applies only if the company identify Designated person on its own. Since Rule 9 (6) starts with '*Until a person is designated as referred under Rule 9(4)*' and has a deeming provision, it can be argued that appointment of Designated person by the company on its own under Rule 9 (5) is not strictly mandatory. If for any reason, the company choose not to identify anyone as so, then Rule 9 (6) should operate and either CS or every MD or Manager or every director of such company would automatically become deemed Designated person for the purpose of Amended MGT Rules.

- Other noteworthy points being that - every company should furnish details of Designated person in the Annual return [Rule 9 (7)] ; and where the company changes Designated person at any time, the same needs to be informed to the Registrar in E-form GNL-2 [Rule 9 (8)].

- Since Annual return (i.e., E-form MGT-7) should be filed for a particular financial year (FY) under Section 92 of CA 2013 and that, Amended MGT Rules have come into force only from October 27, 2023, details of Designated person, who has been appointed now in the current FY 2023-24, is required to be disclosed only from the Annual return filed for FY 2023-24. To accommodate this new disclosure norm, one can expect MCA to revise Annual return's existing structure in near future. Lastly, since Rule 9 (8) starts with '*If the company changes the designated person at any time*', it is only relatable to a situation where the Designated person appointed by the company on its own under Rule 9 (5) has been changed by that company at a later date. As a result, it is logical to conclude that E-form GNL-2 filing should not apply in case of company having deemed Designated person(s) under Rule 9 (6).

- Any non-compliance of aforesaid requirements under Amended MGT Rules would be subject to general penalties under Section 450 of CA 2013, as there is no specific penalty prescribed.

## CONCLUDING THOUGHTS:

Obligations like maintenance of RoM and disclosure of beneficial interest in shares of a company by the registered and beneficial owners has been in existence under CA 2013 (including previous company laws). Now for the first time, they are extended to the LLPs too. As the LLPs have gradually become a popular business model for many practical reasons, the MCA is now directing its efforts to strengthen disclosure regime in terms of beneficial interests held in an LLP as well.

Introducing the concept of Designated person (for LLPs, Designated partner) has resulted in assigning responsibility and accountability on that person with respect to compliances relating to beneficial interest in shares of the company (for LLPs, beneficial interest in contribution) prescribed under CA 2013 (for LLPs, under LLP Act). This is certainly a welcome move as it is expected to solve practical difficulties for the regulators in tracking down such information. Henceforth, with the Designated person being identified, the Registrar (or other competent authority) can directly approach one dedicated person within the corporate organizations to seek all that crucial information of beneficial ownership without much efforts. This should eventually simplify the process of determining beneficial ownership too.

Section 89 of CA 2013 aims to identify persons (not being the registered owner) but holding beneficial interest in shares whereas, Section 90 aims to identify natural person(s) who is the ultimate significant beneficial owner (SBO) of investments made in a company. While the concept of Designated person is notified under Rule 9 of MGT Rules which relates to Section 89 of CA 2013, the regulators may practically require that person to reveal information pertaining to significant beneficial owner as well. On a similar note, recently, many companies have received advisory emails from the Office of the Registrar, Central Scrutiny Centre to sensitize the corporates about significant beneficial ownership provisions and to take necessary compliance actions thereunder. Overall, the current two notifications which intends to guarantee one-stop assistance to regulators in determining beneficial interest, coupled with the recent advisory emails to corporates clearly reflects the Government's sharp and increased focus towards regulating such beneficial interest holding arrangements.

– Chandrashekar K

You can direct your queries or comments to the authors.

<sup>1</sup>Available at <https://www.mca.gov.in/bin/ebook/dms/getdocument?doc=Mzc2OTA4ODA4&docCategory=NotificationsAndCirculars&type=open>

<sup>2</sup>Available at <https://www.mca.gov.in/bin/ebook/dms/getdocument?doc=Mzc2Nzk4OTY0&docCategory=NotificationsAndCirculars&type=open>

<sup>3</sup>Available at <https://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf>

<sup>4</sup>Available at <https://www.indiacode.nic.in/bitstream/123456789/2023/1/A2009-06.pdf>

<sup>5</sup>Available at <https://e-book.icsi.edu/default.aspx>

<sup>6</sup>Available at <https://e-book.icsi.edu/default.aspx>

<sup>7</sup>Available at <https://e-book.icsi.edu/default.aspx>

<sup>8</sup>Available at <https://e-book.icsi.edu/default.aspx>

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