



# GETTING STARTED IN VENTURE PHILANTHROPY IN ASIA

## LEGAL FRAMEWORK PROFILE for INDIA

Download from : [www.avpn.asia/startVPO](http://www.avpn.asia/startVPO)

Compiled with the pro bono support of

**Nishith Desai** Associates  
LEGAL AND TAX COUNSELING WORLDWIDE

# CONTENTS

INTRODUCTION TO THE  
LEGAL FRAMEWORK AND  
COUNTRY PROFILES

LEGAL FRAMEWORK PROFILE  
for INDIA

Published by the Asian Venture Philanthropy Network Limited (AVPN).

This country profile forms part of the second section of the publication  
"GETTING STARTED IN VENTURE PHILANTHROPY IN ASIA"  
Copyright © 2014 AVPN, ISBN : 978-981-09-0425-8

This edition April 2014  
Copyright © 2014 AVPN and Nishith Desai Associates  
Email: [info@avpn.asia](mailto:info@avpn.asia)  
Website: [www.avpn.asia](http://www.avpn.asia)

Creative Commons Attribution-Noncommercial-No Derivative Works 3.0.

You are free to share – to copy, distribute, display, and perform the work – under the following conditions:

- Attribution: You must attribute the work as GETTING STARTED IN VENTURE PHILANTHROPY IN ASIA LEGAL FRAMEWORK INDIA COUNTRY PROFILE Copyright © 2014 AVPN and Nishith Desai Associates.
- Non commercial: You may not use this work for commercial purposes.
- No Derivative Works: You may not alter, transform or build upon this work.
- For any reuse or distribution, you must make clear to others the licence terms of this work.

Authors: Edited by Simon Chadwick  
Design and typesetting: Drummond Printing Pte Ltd ([www.drummond.com.sg](http://www.drummond.com.sg))

## ATTRIBUTION:

AVPN would like to thank Dr. Milind Antani, Ankita Srivastava and Rahul Rishi of Nishith Desai Associates for preparing the information in the specific country profile on a pro bono basis. For more information please contact the contributors listed at the start of the country profile. We would also like to thank Elaine Tan.

## Elaine Tan, Director at BFI @ SMU, contributor to the legal framework profile section:

Elaine joined SMU in August 2012 to spearhead the establishment of BFI @ SMU. Before this she was Chief Executive Officer for Southeast Asia for the international philanthropic advisory organisation, the Charities Aid Foundation (CAF). Elaine also spent more than 12 years both as a litigation lawyer in private practice and then as an in-house corporate and commercial lawyer with Singapore Airlines and then JPMorgan Chase Bank.

## About Business Families Institute @ Singapore Management University (BFI @ SMU):



SMU established BFI @ SMU to be Southeast Asia's first business family centric institute focused on addressing the needs of business families in the region through its vision to facilitate business families to think generations, think growth and think giving. BFI @ SMU intends to serve as an educational, engagement and research platform to bring together business families, drawing on the university's experience to offer insights on issues such as business succession and family ownership. Its mission is to engage and enable business family members to be active, committed and involved stewards, stakeholders and partners through learning and education.

**More information at <http://bfi.smu.edu.sg/>**

Where amounts in the reports have been converted from local currency to US dollars the following exchange rate have been used for reference: US\$1= INR58.50 (source oanda.com average rate for CY 2013, midpoint interbank rate). The amounts will change based on actual exchange rates and changes to the underlying costs, fees and charges from the date of this report.

---

# GETTING STARTED IN VENTURE PHILANTHROPY IN ASIA

## LEGAL FRAMEWORK PROFILE for INDIA

WITH THE SUPPORT OF :



Nishith Desai Associates  
LEGAL AND TAX COUNSELING WORLDWIDE

EDITED BY SIMON CHADWICK | APRIL 2014

---

# INTRODUCTION TO THE LEGAL FRAMEWORK AND COUNTRY PROFILES

The country legal framework profiles are companion booklets to AVPN's "Getting Started in Venture Philanthropy in Asia - a practical guide to establishing and operating a venture philanthropy or social investment organisation". The guide explains the key operational issues and the separate country legal frameworks focus on legal issues to supplement the main guide. The guide and each country profile are available to download from [www.avpn.asia/startVPO](http://www.avpn.asia/startVPO).

### **1. Overview of the Legal Framework**

There are corporate law, charities law, tax law and possibly financial regulatory fund raising and fund management issues, arising at different levels of the venture philanthropy (VP) eco-system. Some venture philanthropy organisations (VPOs) want to attract foreign as well as domestic funds and so factors affecting the cross-border flow of funds in the VP eco-system are critical considerations to these VPOs. As VP investments cover the spectrum from charities to social enterprises, the analysis of funds flows from top level funders to VPOs as intermediaries, and to social purpose organisations (SPOs), needs to consider both donations and a range of other financial instruments. The flow in the return direction of social impact (monitoring and reporting) and financial return (in the case of social investment) is equally important.

Some Asian countries (e.g. Singapore and Hong Kong) are already major financial centres and want to attract regional or offshore philanthropic and social investment funds. They have well developed cross-border fund management laws and regulations and skilled investment practitioners that apply to these activities.

This introduction describes the framework used for each of the five country profiles that have been prepared with the pro bono support of leading law firms. These profiles are available for download in softcopy - see the end of the introduction.

### **2. The Three Level Perspective of the VP Eco-system**

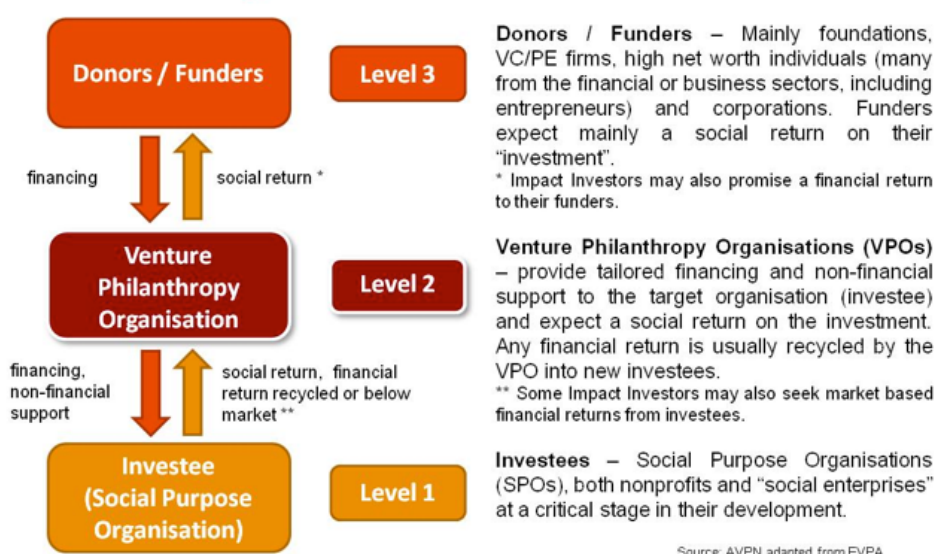
For this legal framework section and the stand alone country profiles our approach is to consider the venture philanthropy eco-system as operating on three same three levels in the main section of the AVPN report "Getting Started in Venture Philanthropy in Asia". The top level (Level 3) comprises the funders seeking social returns, the middle level (Level 2) comprises the VPO intermediaries that raise funds and deploy the funds through various VP strategies and the bottom level (Level 1) comprises SPOs seeking resources (financial, human and intellectual capital) to grow their activities.

These three levels represent a flow from end suppliers (level 3), through specialist intermediary suppliers (level 2) to the demand side (level 1) which serves a range of beneficiaries / customers / service users.

## INTRODUCTION TO THE LEGAL FRAMEWORK AND COUNTRY PROFILES

This is shown in Diagram 1 as follows:

### VPO funding model – three levels



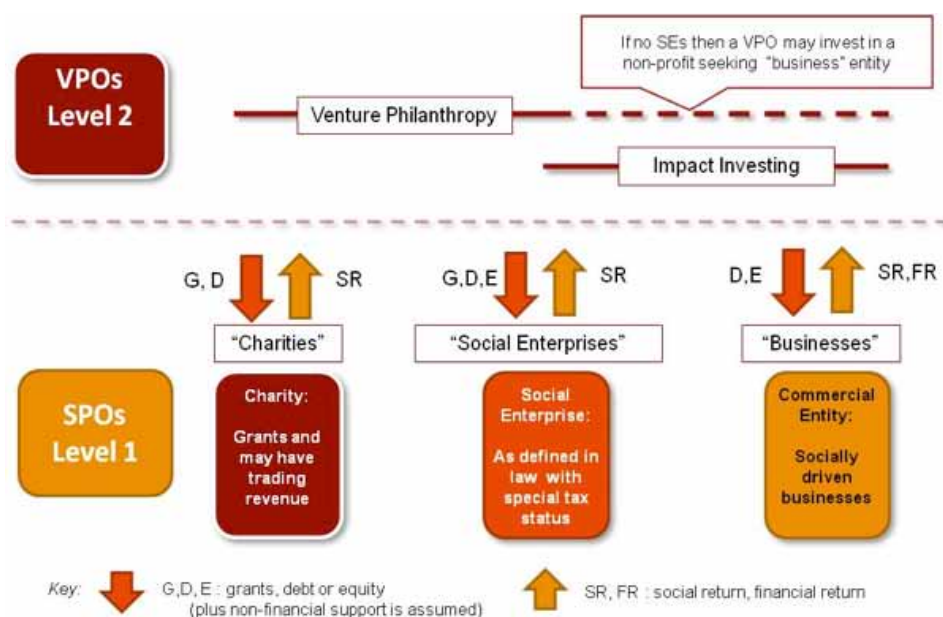
As the primary social impact is generated at the base of the eco-system and flows up, we start the analysis of legal entities at Level 1 which is the investee Social Purpose Organisations (SPOs) that are commonly available in each country. The choices of entity for VPOs at Level 2 of the eco-system are often similar to the entities used by SPOs at Level 1. The sources of funding flowing down from Level 3 may be donations/grants or, depending on the VPO strategy, other financial instruments such as debt and equity. Some VPOs at Level 2 may have a hybrid investment strategy in SPOs (i.e. grants, debt and equity) and so receive hybrid funding. VPOs decide whether they want to re-cycle financial return from their investee SPOs to fund their own costs and make new investments, and/or make distributions to their funders. A related choice is whether the VPO is a limited life organisation, raises new rounds of funding from time-to-time, or is intended as an evergreen vehicle that is self sustaining.

### 3.Choice of Entities for Social Purpose Organisations at Level 1

There are a wide range of legal entities that may be available for SPOs at Level 1 but these can be broadly grouped as Charities, Social Enterprises and Commercial Entities (or Businesses). In the five countries considered by this framework there are no separately defined legal entities that are “Social Enterprises” -that is entities that they have special tax status and are effectively a hybrid between a business entity and a charity.

A list and description of the main types of SPO in a country is a basic building block of the legal framework profiles in the country profile reports.

For each country profile, the simplified investee SPO choices and available financing instruments are shown in Diagram 2 below:



In some countries social businesses (and social entrepreneurs) may be attracting investment for only social return, or for a mix of social and financial returns. These entities are often commercial entities which have a social mission and may adapt their governing documents to prohibit distributions and/or restrict transfers of ownership so that they become social "impact first" or "impact only" organisations.

#### 4. Choice of Entities for Venture Philanthropy Organisations at Level 2

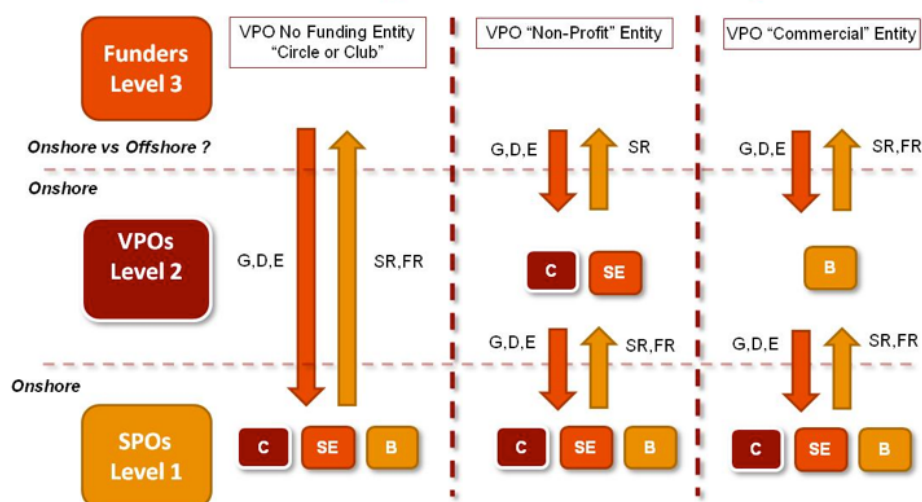
A VPO consists of a management team and a source of funding. These are often contained in a single legal entity but may be separated into a "fund" entity and an advisory (or consulting) entity.

Building on the SPO entity types and financial instruments that can be used to fund them, the legal framework country profiles consider three generic VPO operating models that are adapted and commonly used in Asia. The sponsors of a new VPO will likely choose a variation of one of these three models depending on the resources available to the VPO, its investment strategy and country of operation. The most important decision factor is whether the VPO wants to follow a grant approach, a social investment approach or a hybrid, i.e. whether the VPO will seek investee SPOs that provide both social and financial returns, and whether the VPO offer its funders both social and financial returns.

## INTRODUCTION TO THE LEGAL FRAMEWORK AND COUNTRY PROFILES

The generic flows of funding and target social and/or financial returns are shown for the three models in Diagram 3 below:

### Three basic VPO legal models for analysis



The three operating models (above from left to right) are:

- (1) A "virtual fund" where the fund itself is not a legal entity and the VPO operates as a consulting company. This model may be called a "social impact circle" or "social investor club" or simply a "venture philanthropy advisor". Examples include Dasra (India) and Asia Philanthropic Ventures (Singapore).
- (2) A VPO entity which only offers social return to its funders. This model may be called a "venture philanthropy fund" or a "venture philanthropy foundation" and is often a charity and/or foundation.
- (3) A VPO entity which offers both social and financial return to its funders and operates as an "investment fund" in the form of limited partnership or investment holding company, or other commercial entity, that can tax efficiently receive financial returns from SPOs and provide financial returns to its funders.

One of the main differences between more traditional venture philanthropy "investing" using grants and social investment is the promise and ability of the VPO to transmit a financial return from Level 1 to Level 3 through its activities at Level 2.

#### 5.Executive Summary of the Five Countries Profiled

Given the depth and breadth of information provided by the various law firms for the five jurisdictions, it is useful to provide a high-level observation of some of the key highlights of each country's legal landscape insofar as it relates to establishing a venture philanthropy organisation (VPO) in Asia.



---

## **Singapore**

While there is no legal entity that is a hybrid between a charity and a traditional commercial entity in Singapore, the majority of charities and non-profit organisations in Singapore are established in the form of a company limited by guarantee (CLG) i.e. the liability of its members is limited by its constitutional documents to such amount as the members undertake to guarantee. While a CLG can accept donations and grants, it is unable to receive funding in the form of equity as it does not have share capital. Conversely, a CLG may accept debt funding insofar as it does not contravene the provisions of its constitutional documents although the receipt of debt funding may have implications under the Securities and Futures Act (SFA).

A CLG may be, in turn, registered and regulated as an approved charity in Singapore in order to enjoy full income tax exemption on income and receipts. In relation to the use of charities as a vehicle for venture philanthropy, the guidelines issued by the Office of the Commissioner for Charities (OCC) is relevant as it discourages charities from engaging in activities which exposes the charity's assets to significant risk. As such, although the investment of charity funds is not strictly prohibited, the OCC advises such charities to set up a separate business subsidiary for business activities where such business activities are not related to the primary purpose of the charity.

In relation to Level 2 VPOs in the form of CLGs or otherwise, the restriction is that they cannot distribute profits to its stakeholders (be they founders or members) if the VPO is a registered charity or entities that have special charitable status. Although a VPO may be able to pay interest on loans taken from its members, this is subject to any restrictions provided in its constitutional documents. Further, as a non-profit VPO is supposed to carry out wholly charitable purposes, it is unlikely to be able to make either an offer of securities or carry on business as a regulated activity, both of which will trigger the relevant financial regulatory restrictions or the Moneylenders Act. For these reasons, it is also unlikely to be able to give loans to Level 1 SPOs and expect returns thereon.

## **Hong Kong**

The legal position in Hong Kong is very similar to that of Singapore in that most charitable organisations are CGLs. As a general observation, most charities in Hong Kong are funded by donations and grants. Debt funding is uncommon (and will depend on any restrictions contained in the constitutional documents) and equity funding is generally inapplicable given that most charities are CGLs, societies or set up as a trust. Similar tax exemptions apply to both Singapore and Hong Kong for Approved Charities that continue to have a charitable purpose. In the context of the proposed VPO models which imply a flow of funds to and/or from a profit-driven commercial entity, this may breach the on-going charitable purpose compliance requirement.

In relation to the "No Funding" Entity Model, this is often the simplest model as there is no intermediate VPO entity and the funding will flow directly from the funder to the SPO. However, funders providing funding to the Level 1 SPO through debt may trigger the requirements of the Money Lenders Ordinance (MLO). Another complication is that the constitutional documents of the Level 1 SPO (assuming that it is an Approved Charity for tax reasons) may and probably should prohibit the distribution of income. Therefore, financial returns to a funder may not be permissible. In relation to the Level 2 VPO "Non-Profit" Model, there are additional twin complications of (a) whether a Level 2 VPO that is an Approved Charity would be permitted to provide funding to a Level 1 SPO, and (b) whether a Level 2 VPO that is an Approved Charity can provide a financial return to the Level 3 Funders. In order to overcome these impediments, the Level 2 VPO "Commercial" Entity Model may be the most viable structure if the flow of financial returns is imperative although such an entity would not have the tax benefits accorded to the an Approved Charity.

---

 INTRODUCTION TO THE LEGAL FRAMEWORK AND COUNTRY PROFILES
 

---

**China**

In China, entities that are able to carry on charitable activities usually take on one of these three structures: social organisations, foundations and private non-enterprise entities. Briefly, a social organisation is membership-driven, whereas foundations are not-for-profit organisations funded by assets donated for public welfare purposes and, lastly, private non-enterprise entities are social institutions established with private capital for the purpose of providing social services. Not-for-profit organisations in these three forms are prohibited from distributing financial returns to their members and sponsors. Further, for these three types of organisations, the key issues center on the legality of the source of funding as well as the use of funds.

As with Singapore and Hong Kong, these not-for-profit organisations in China are usually funded by donations and grants. Further, as these charitable structures do not have share capital, equity funding is not an option. As for debt funding, even where there is no explicit prohibition in the constitutional documents, they do not typically borrow as a matter of practice to fund their charitable activities. To understand this situation further, if these organisations attempted to be a Level 2 VPO “Non-Profit” Entity, the major impediment would be that in China, only banks and qualified financial institutions are able to extend loans. As such, if the Level 2 VPO wanted to extend a loan to a Level 3 SPO, it could only do so through the entrusted loan model where the Level 2 VPO provides funds to a financial institution that is qualified to conduct lending, and that financial institution would extend the loan to the Level 3 SPO as the lender.

**Japan**

Charities in Japan are broadly categorized as (a) non-profits, (b) associations (2 types) and (c) foundations (2 types), all of whom enjoy varying tax benefits on their charitable or authorised activities subject to compliance with applicable requirements. However, these entities are not permitted to distribute profits to their members and/or they are not permitted to return funds to their members or contributors. That said, the legal profile suggests that these entities are permitted to accept debt funding except that for non-profits, they cannot facilitate the profit of a particular person (in this case, it would presumably be the lender). Interestingly, only associations and foundations may accept equity funding although for foundations, equity funding can only be done at incorporation and not subsequently.

The analysis for Level 2 VPO “Non-Profit” Entities is relatively simple as it is generally accepted that charitable organisations in Japan are prohibited from distributing profits and the legal profile implies, by extension, that such charitable entities are not permitted to provide funds to Level 1 SPOs. Further, as with the other jurisdictions, the potential triggering of the Money Lending Business Act is such that it would not be practicable for charitable organisations to apply for the licenses in order to extend loans to the relevant Level SPOs. Further, the legal profile suggests that any return of funds (whether debt or otherwise) by the Level 2 VPO “Non-Profit” Entity would be fraught with obstacles which is understandable as the establishment of VPOs is still a relatively new development in Japan.

---

## India

Various forms of social entrepreneurship models are used in India depending on their areas of operation and business requirements. Thus, social enterprises may opt for the revenue model, hybrid model or the venture capital model depending on the relevant financial viability and desired social outcomes. Interestingly, in India, a Level 1 SPO may be set up pursuant to Section 8 of the Companies Act (2013) as a not-for-profit company or pursuant to the Alternative Investment Fund Regulation (AIF Regulation) where an alternative investment fund (or a social venture fund) can be established or incorporated in India in the form of a trust, a company or a limited liability partnership.

However, these structures have inherent restrictions. For example, the aforementioned not-for-profit company is prohibited from distributing dividends to its shareholders. In comparison, the legal profile suggests that the aforementioned social venture fund may enjoy a “pass through” benefit under the relevant sections of the Income Tax Act such that income accruing to the social venture fund would be deductible in the hands of the investor. In comparing the various structures available to establish a VPO in the various countries, it appears that India’s albeit nascent development in this area is probably gaining the most traction at this point in time.

## 6. The Country Legal Framework Profiles (available for download)

Five country profiles covering the legal frameworks for China, Hong Kong, India, Japan and Singapore are available for download in PDF format. These were prepared on a pro bono basis by leading law firms based on a questionnaire designed by AVPN that addresses the key legal issues when establishing a VPO. The questionnaire uses the ecosystem framework and terminology described above that is consistent with the main section of the AVPN report “Getting Started in Venture Philanthropy in Asia”.

Each country profile is an overview and does not seek to address all the relevant legal, tax and regulatory issues in detail. New sponsors of a VPO should seek specific legal, tax and regulatory advice on the basis of their own circumstances before setting up their operating entity.

The reports are available for download from **[www.avpn.asia/startVPO](http://www.avpn.asia/startVPO)**.

Where amounts in the reports have been converted from local currency to US dollars at the exchange rates shown in each report. The amounts will change based on actual exchange rates and changes to the underlying costs, fees and charges.

---

# LEGAL FRAMEWORK PROFILE for INDIA

## AVPN Report - "Getting Started in Venture Philanthropy in Asia"

### Legal Framework India Country Profile

This briefing paper for India has been prepared for AVPN by Dr. Milind Antani, Ankita Srivastava and Rahul Rishi of Nishith Desai Associates Mumbai office. Contact [milind.antani@nishithdesai.com](mailto:milind.antani@nishithdesai.com), [ankita.srivastava@nishithdesai.com](mailto:ankita.srivastava@nishithdesai.com) or [rahul.rishi@nishithdesai.com](mailto:rahul.rishi@nishithdesai.com) for more information. Descriptions and references to tax are for reference only. Each recipient of this paper should seek their own independent tax and legal advice from their appointed advisors

#### 1 Country Scoping Questions

*1.1 Do "Social Enterprises" exist as a legal entity in your country, as opposed to charities (or their equivalent, e.g. NGOs) and traditional commercial entities (e.g. companies and businesses)?*

Social Enterprises ("SEs"), as we understand, are essentially organizations seeking business solutions to social problems. Social entrepreneurship is still at a very nascent stage in India and social enterprises have assumed many organizational structures in India. As of today, there is no separate legislation on SEs in India.

Various forms of social entrepreneurship models are used in India depending on their area of operation and business requirements. Thus, social enterprises may opt for revenue model, hybrid model or the venture capital model based on the financial viability and desired social outcomes. Such models are primarily necessitated by existing corporate and tax law which differentiates between a charitable activity and a business activity conducted for the purpose of charity. With the passage of Alternative Investment Fund Regulation (2012), venture funding in social enterprise space is gathering pace, which is based on a 'for-profit' model with muted returns. Although there is no specific legislation on social enterprise or social business per se, there are a few important legislations that provide for establishment of various forms of business and/or charitable vehicles, allowability of tax exemptions, funding-raising, investment, maintenance of corpus etc.

*1.2 Is the relevant legislation and regulation of SPOs at the national government (i.e. federal) level or are there substantial State or other lower-tier laws and regulations (including tax) that apply?*

Relevant legislation/ regulation:

At the federal level:

- (i) Companies Act, 2013 and Companies Act, 1956
- (ii) Income-tax Act, 1961
- (iii) Foreign Contribution Regulation Act, 2010
- (iv) Foreign Exchange Management Act, 1999
- (v) Alternative Investment Fund Regulation, 2010
- (vi) Societies Registration Act, 1860
- (vii) Indian Registration Act, 1908
- (viii) Charitable and Religious Trusts Act, 1920

A few notable legislations at the state-level:

- (i) The Bombay Public Trusts Act, 1950 (adopted in the state of Gujarat as well)
- (ii) Karnataka Religious Institutions and Charitable Endowment Act, 1997
- (iii) Madhya Pradesh Public Trusts Act, 1951
- (iv) Rajasthan Public Trust Act, 1959
- (v) Uttar Pradesh Societies Registration Rules, 1976
- (vi) Societies Registration (Bihar Amendment) Act, 1956
- (vii) Madhya Pradesh Society Registration Act, 1973

A Social Purpose Organization (“**SPO**”) in India can be set up as:

**Society:** A registered society is an association of seven or more persons for any literary, scientific, or charitable purpose. A society can be formed for the promotion of science, literature, or the fine arts for instruction, the diffusion of useful knowledge, maintenance of libraries or reading-rooms or public museums and galleries of paintings and other work of art.

Few states have also enacted state-specific legislations to administer registration of charitable societies. For example, the state of Madhya Pradesh governs administration of registered societies through the Madhya Pradesh Societies Registration Act, 1973.

**Trust:** A public trust generally means an expression or constructive trust for either a public, religious or charitable purpose or both and includes any religious or charitable endowments set up for the aforesaid purposes. Several states have enacted state-specific legislation to administer charitable trusts within their states. For example, the Bombay Public Trusts Act, 1950 (“**BPT**”) regulates public trusts in the state of Maharashtra through the office of the Charity Commissioner. Moreover, if the trust property includes immovable property, registration of the documents of title is required under the Indian Registration Act, 1908 (“**Registration Act**”) which is a federal legislation and applicable across India.

**Section 25/Section 8:** Similarly, charitable activities can also be carried out by forming a not-for-profit company in India. Incorporation of a not-for-profit company is governed under the Companies Act, 1956 (“**Companies Act**”). The new Companies Act of 2013 is slated to replace the old Act. Most of the substantive provisions of Section 25 of the old Act have been incorporated into the new Companies Act under Section 8. A Section 8 company can be set up for the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object.<sup>1</sup>

**Social Venture Fund:** Under the Alternative Investment Fund Regulation, 2012 (“**AIF Regulation**”), an alternative investment fund can be established or incorporated in India in the form of a trust or a company or a limited liability partnership. A privately pooled investment vehicle can be created to collect funds for investing in a social venture fund.

Under the AIF Regulation, a social venture means a trust, society or company or venture capital undertaking or limited liability partnership formed with the purpose of promoting social welfare or solving social problems or providing social benefits and includes,-

- (i) public charitable trusts registered with Charity Commissioner;
- (ii) societies registered for charitable purposes or for promotion of science, literature, or fine arts;
- (iii) company registered under Section 25 of the Companies Act, 1956;
- (iv) micro finance institutions;

Other applicable laws:

<sup>1</sup> Please note that Section 8 of the Companies Act, 2013 has not been notified as on February 27, 2014. The aforesaid section shall replace Section 25 of the Companies Act, 1956 on being notified.

### ***Income-tax Act, 1961***

From a tax perspective, the not-for-profit entity could be eligible to the benefits of Sections 11, 12, 12A and 12AA of the Income Tax Act, 1961 ("**Income Tax Act**") which discusses the conditions governing the taxation of charitable entities in India. If the not-for-profit entity obtains registration as a charitable entity under Section 12AA of the Income Tax Act, it is not taxable on its income from the property held for charitable or religious purposes, provided that certain conditions are satisfied.

As per Section 2(15) of the Income tax Act, 'charitable purpose' would include relief of the poor, education, medical relief, preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest and the advancement of any other object of general public utility. It is pertinent to note that the two provisos to section 2(15) of the Income Tax Act do allow an organization that seeks to advance public utility to have incidental business activity provided that the total receipt from such activity does not exceed twenty five lakh rupees per annum (US\$40,245).

### ***Foreign Contribution Regulation Act, 2010***

Foreign Contribution Regulation Act, 2010 ("**FCRA**") is a non-fiscal statute with the object "to consolidate the law relating to the acceptance and utilization of foreign contribution or foreign hospitality by certain individuals or associations or companies and to prohibit acceptance and utilization of foreign hospitality for any activities detrimental to the national interest and for matters concerned therewith or incidental thereto". FCRA covers for-profit, non-profit entities as well as persons in sensitive government position, political parties and persons associated with news media. FCRA regulates transfer of money or asset from a foreign source to an Indian non-profit entity. No foreign contribution can be received by the recipient entity without the prior permission or registration under the FCRA. Approvals for grant of prior permission or registration are to be made before the Ministry of Home Affairs ("**MHA**"), Government of India.

### ***Foreign Exchange Management Act, 1999 ("FEMA")***

Foreign direct investment is permitted in few areas under the non-profit sector. For example, subsequent to Press Note 2 (2000 Series), FDI up to 100% has been allowed under the automatic route in the education sector. The bearing of a not-for-profit character inevitably requires the entity to be either a registered Society or a Trust or a Section 25/Section 8 Company. A Trust or a Society is not eligible to receive foreign investment under the automatic route. Even if investments were to be permitted, the entities being of non-profit nature would not be able to distribute returns on the investment. Further, a Section 25/Section 8 Company being charitable nature, would be required to apply its profits or other income towards the promotion of its objects which could be either commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object of general public utility.

Furthermore, RBI has vide press release dated December 19, 2011 permitted raising of ECB, including ECBs by NGOs engaged in micro finance activities, up to USD 10 million or equivalent during a financial year for permitted end-uses, under the Automatic Route.<sup>2</sup>

As per the circular to the said press note, RBI has issued a notification dated December 19, 2011<sup>3</sup> wherein it has classified the following MFIs engaged in micro finance activities as eligible borrowers to avail of ECBs:-

- MFIs registered under the Societies Registration Act, 1860;

<sup>2</sup> RBI Press Release: 2011-2012/965 - [http://rbi.org.in/scripts/BS\\_PressReleaseDisplay.aspx?prid=25619](http://rbi.org.in/scripts/BS_PressReleaseDisplay.aspx?prid=25619)

<sup>3</sup> RBI Circular RBI/2011-12/304A.P. (DIR Series) Circular No. 59 - [http://rbi.org.in/scripts/BS\\_CircularIndexDisplay.aspx?id=6876](http://rbi.org.in/scripts/BS_CircularIndexDisplay.aspx?id=6876)






- MFIs registered under Indian Trust Act, 1882;
- MFIs registered either under the conventional state-level cooperative acts, the national level multi-state cooperative legislation or under the new state-level Mutually Aided Cooperative Acts (“**MACS Act**”) and not being a co-operative bank;
- Non-Banking Financial Companies (NBFCs) categorized as ‘Non-Banking Financial Company-Micro Finance Institutions’ (NBFC-MFIs); and
- Companies registered under Section 25 of the Companies Act and involved in micro finance activity.

**Service Tax:** Service tax is levied on the specified taxable service and the rate of service tax is 12.36 per cent. This rate is computed on the ‘gross amount’ charged by the service provider for the taxable services rendered by him. Service tax is a consumption tax and is typically passed on to the consumer of the service as part of the price. The threshold limit beyond which service tax becomes payable is INR 1,000,000 of income from taxable services.

## 2 Level One Questions

2.1 List in the following table the relevant entities/structures of SPOs that exist in your country:

 Relevant Charity Entities	 Relevant SE Entities [If applicable]	 Relevant Commercial Entities
1.Society	1. Society	1.Society
2.Section 25/Section 8 company	2. Section 25/Section 8 Company	2.Co-operative Society
3.Trust	3. Trust	3.Trust
	4.Non-Banking Financial Companies (“ <b>NBFCs</b> ”) <sup>4</sup>	4. Company limited by shares (private) <sup>5</sup>
	5. Co-operative Societies	5.Company limited by shares (public) <sup>6</sup>
	6. Nidhi Companies (under section 406 of the Companies Act, 2013) <sup>7</sup>	6. Company limited by guarantee <sup>8</sup>
		7. Company with unlimited

<sup>4</sup> As per the Reserve Bank of India FAQ, an NBFC is a company registered under the Companies Act, 1956 and is engaged in the business of loans and advances, acquisition of shares/stock/bonds/debentures/securities issued by Government or local authority or other securities of like marketable nature, leasing, hire-purchase, insurance business, chit business but does not include any institution whose principal business is that of agriculture activity, industrial activity, sale/purchase/construction of immovable property. It is different from a bank to the extent it cannot accept demand deposits; it is not a part of the payment and settlement system and as such cannot issue cheques to its customers; and its depositors cannot avail of deposit insurance facilities like in commercial banks.

<sup>5</sup> Company limited by shares (private) has shareholders whose liability is limited by their shareholding and its shares may not be offered to the general public. It has a minimum paid-up capital of one lakh rupees (US\$1,700); restricts the right to transfer its shares; limits the number of its members to fifty; prohibits any invitation to the public to subscribe for any shares in, or debentures of, the company; and prohibits any invitation or acceptance of deposits from persons other than its members, directors or their relatives. Please visit <http://www.rbi.org.in/scripts/FAQView.aspx?Id=71> for more details. Website last visited on March 4, 2014.

<sup>6</sup> Company limited by shares (public) has shareholders whose liability is limited by their shareholding and its shares may be offered to the general public. It has a minimum paid-up capital of five lakh rupees (US\$8,500). It could also include a private company which is a subsidiary of a company which is not a private company.

<sup>7</sup> “Nidhi” means a company which has been incorporated as a Nidhi with the object of cultivating the habit of thrift and savings amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefit, and which complies with such rules as are prescribed by the Central Government for regulation of such class of companies.

<sup>8</sup> Company with unlimited liability is a company that does not have share capital, but is guaranteed by its members who agree to pay a fixed amount in the event of the company's liquidation



		liability
		8. One Person Company <sup>9</sup> ("OPC")
		9. Partnerships
		10. Limited liability partnerships
		11. Funds registered under the SEBI (AIF) Regulations, 2012 <sup>10</sup>

2.2 For each of the entities in 2.1 (or the most relevant if the list is extensive) please provide:

1. Brief description (definition) of the general legal nature of the entity/structure

i) **Charities:**

Name of the entity	Features
Society registered under Societies Registration Act, 1860	Any voluntary organization can be registered as a society as long as it is for any of the purposes laid out under section 20 of the Societies Registration Act, 1860 <sup>11</sup> , which also includes 'charitable purposes'. A society can be formed for the promotion of science, literature, or the fine arts for instruction, the diffusion of useful knowledge, maintenance of libraries or reading-rooms or public museums and galleries of paintings and other work of art.
Charitable Trust	In order to create a charitable trust, the following certainties are required: (1) a declaration of trust which is binding on the settlor, (2) setting apart definite property and the settlor depriving himself of the ownership thereof; and (3) a statement of the objects for which the property is thereafter to be held, i.e., the beneficiaries.  So long as a clear and unequivocal manifestation of intention to create a charitable or religious trust and there is a formal divesting of the ownership of the property on the part of the donor and vesting of the same in another or even in the donor himself as a trustee, the dedication is complete for the purposes of the ITA.
Section 8 Company (Section 25 Company under the previous Companies Act, 1956)	A Section 8 company is like any other company registered under the Companies Act, 2013 with certain unique features:  i) It cannot distribute dividends to its shareholders; ii) It can only perform certain activities as limited under its charter documents. iii) It can be formed for the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any

<sup>9</sup> Section 2(62) of the Companies Act, 2013 defines OPC as a company with only one person as member. Section 3 of the Companies Act provides a legal sanctity for creating a private limited company in the form of a one person company with only one member.<sup>11</sup>

<sup>10</sup> Being perceived as funds which would have positive spill-over effects on the economy, these funds, as discussed under Section [2.2], can be registered as Category I funds under the SEBI (AIF) Regulations and consequently, they are entitled to 'pass through' benefit under section 10(23FB) read with section 115U of the Income Tax Act; which means that the income accruing to the social venture fund would be deductible in the hands of the investor.

<sup>11</sup> Section 20. To what societies Act applies.-- The following societies may be registered under this Act:- Charitable societies, the military orphan funds or societies established at the several presidencies of India, societies established for the promotion of science, literature, or the fine arts, for instruction, the diffusion of useful knowledge, 2 [ the diffusion of political education] the foundation or maintenance of libraries or reading- rooms for general use among the members or open to the public, or public museums and galleries of paintings and other work of art, collections of natural history, mechanical and philosophical inventions, instruments, or designs.

	such other object;
--	--------------------

i) **Commercial Entities:**

<b><i>Name of the entity</i></b>	<b><i>Features</i></b>
Company	<ul style="list-style-type: none"> <li>• The Companies Act, 2013 sets down rules for the establishment of both public and private companies.</li> <li>• The most commonly used corporate form is the limited company, unlimited companies being relatively uncommon.</li> <li>• Separate legal personality and perpetual succession.</li> <li>• No restriction on transferability of shares from one person to another.</li> <li>• Foreign companies engaged in manufacturing and trading activities abroad are permitted by the Reserve Bank of India to open branch offices, liaison offices, etc. subject to their compliance with FEMA and Foreign Direct Investment policy for the relevant year.</li> </ul>
Partnership	<p>Partnerships in India are governed by the Indian Partnership Act, 1932.</p> <p>The following is the minimum requirements for forming a partnership:</p> <ul style="list-style-type: none"> <li>• An agreement entered into orally or in writing by the persons who desire to form a partnership.</li> <li>• The object of the agreement being to share the profits of business intended to be carried on by the partnership.</li> <li>• Carrying on of business by all the partners or by any of them acting for all of them- mutual agency.</li> </ul>
Limited Liability Partnership (“LLP”)	<p>LLPs are governed by the Limited Liability Partnerships Act, 2008</p> <ul style="list-style-type: none"> <li>• LLP is a separate legal entity from its partners</li> <li>• Unlike corporate shareholders, the partners have the right to manage the business directly</li> <li>• No idea of mutual agency. Liability of the partners is limited to the extent of his contribution in the LLP. No exposure of personal assets of the partner, except in cases of fraud.</li> <li>• A LLP has a perpetual succession</li> <li>• The rights and duties of partners in LLP will be governed by the agreement between partners and the partners have the flexibility to devise the agreement as per their choice.</li> </ul>
Funds registered under the SEBI (AIF) Regulations, 2012	<p>Under the SEBI AIF Regulations, 2012, a social venture has been defined to mean a trust, society or company or venture capital undertaking or limited liability partnership formed with the purpose of promoting social welfare or solving social problems or providing social benefits and includes,-</p> <p>(i) public charitable trusts registered with Charity Commissioner;</p> <p>(ii) societies registered for charitable purposes or for promotion of</p>

	<p>science, literature, or fine arts;</p> <p>(iii) company registered under Section 25<sup>12</sup> of the Companies Act, 1956;</p> <p>(iv) micro finance institutions</p> <p>Further, a social venture fund has been defined as an “<i>Alternative Investment Fund which invests primarily in securities or units of social ventures and which satisfies social performance norms laid down by the fund and whose investors may agree to receive restricted or muted returns</i>”.</p> <p>It falls under Category I (which includes those funds that are generally perceived to have positive spillover effects on economy and for which the Board or Government of India or other regulators in India might consider providing incentives or concession) of the AIF and are hence entitled to ‘pass through’ benefit under section 10(23FB) read with section 115U of the Income Tax Act. Thus, income accruing to the social venture fund would be deductible in the hands of the investor. For this purpose, an Alternative Investment Fund is defined as any fund established or incorporated in India in the form of a trust or a company or a limited liability partnership or a body corporate which is a privately pooled investment vehicle which collects funds from investors, whether Indian or foreign, for investing it in accordance with a defined investment policy for the benefit of its investors and whose fund management activities are otherwise unregulated by the SEBI. It does, however, include within its ambit a Venture Capital Fund (“<b>VCF</b>”) as the SEBI (VCF) Regulations, 1996 stood repealed by the AIF.</p>
--	--

2. *The main considerations when seeking to establishing such an entity (e.g. nature of entity, registration, registration documents to be filed, number of subscribers, governing structure, approval of name, voting rights, types of activities permitted to be carried, annual filings, meetings, income-tax registration, donor benefit, minimum paid-up capital, amendment to the object clause, remuneration or other benefits to members, foreign investment, dividend distribution, foreign directors/trustees, termination etc.)*

i) **Charities:**

	Society	Trust	Section 25/Section 8
<b>The Governing Act</b>	Societies Registration Act, 1860	No central authority for administration of public trusts although some state legislations such as BPT does exist in this regard which require a formal registration before the Charity Commissioner / Inspector General of Registration. If the trust property includes immovable	Companies Act, 1956/Companies Act, 2013

<sup>12</sup> The AIF Regulation, 2012 will have to be amended accordingly to include Section 8 Companies incorporated under the Companies Act, 2013

		property, registration of the documents of title is required to be done under the Registration Act, 1908	
<b>Nature of Entity</b>	Association of seven or more persons for literary, scientific or charitable purposes	A trust is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him for the benefit of another, or of another and the owner. A trust could be a private trust or a charitable trust. A public trust means an express or constructive trust for either a public, religious or charitable purpose of both and registered under the Societies Registration Act, 1860 or the Registration Act, 1908.	A Section 25/Section 8 Company is a legal entity in which the liability of members or subscribers is limited to what they have invested or guaranteed to the company. Such companies are incorporated for the promotion of charitable activities.
<b>Ease of formation and time</b>	Takes 7-10 days to get registered	Relatively simple. A Trust may be set up within a week of the execution of the trust deed	Relatively complicated. Takes 4-5 months for incorporation, license and registration from the Registrar of Companies ("RoC")
<b>Nature of activities to be undertaken</b>	Relief of poverty, education, advancement of religion and other purposes beneficial to the community not coming under any of the preceding heads.	Religious and charitable activities excluding any activities which is political in nature	Commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object

<b>Number of subscribers/trustees</b>	Seven or more members	Only a trustee and a settlor is required to set up as public charitable trust	A minimum number of two shareholder is required for setting up of a Section 25/Section 8 Company.
<b>Governing structure</b>	Two tier structure  (a) General body (b) Board of Directors	Single tier structure as the trustees is the ultimate authority.  The trustee has absolute rights to govern and administer the trust and its activities, subject to the provisions of the trust deed.	Two tier structure  (a) General body (b) Board of Directors The Board of Directors are responsible for administration and management of the company and its operations.
<b>Voting rights</b>	All members have equal voting rights	All trustees have equal voting rights	The voting rights may vary on the basis of share-holding. This provision can be used for control purposes.
<b>Annual Filings</b>	There is no requirement to file annual returns with respect to activities of the Society. However, If the society is registered under the BPT Act, the member is required to prepare and submit the annual budget of the society to the Charity Commissioner, one month before the commencement of the accounting year.  The audited accounts are required to be filed with the income tax authority along with the income tax return. In case foreign contribution is received by the trust, and prior permission or approval under the FCRA has been granted, the balance sheet, statement of receipts and payment account of foreign contributions are also to be separately filed in the prescribed form	There is no requirement to file annual returns with respect to activities of the trust as there is no regulatory authority for trusts except in the states of Maharashtra and Gujarat. If the trust is registered under the BPT Act, the trustee is required to prepare and submit the annual budget of the trust to the Charity Commissioner, one month before the commencement of the accounting year.  The audited accounts are required to be filed with the income tax authority along with the income tax return. In case foreign contribution is received by the trust, and prior permission or approval under the FCRA has been granted, the balance sheet, statement of receipts and payment account of foreign contributions are also to be separately filed in the prescribed form	Annual returns are required to be filed with the RoC. In case foreign contribution is received by the S. 25 company and prior permission or approval under FCRA has been granted, the balance sheet, statement of receipts and payment account of foreign contribution are also to be separately filed in the prescribed form.
	form	be separately filed in the prescribed form	

<b>Income-tax registration</b>	Income tax exemption is available only if conditions under S. 11 and S. 12 of the ITA are fulfilled. Additionally, submission of audited accounts of the company is compulsory if total income of the institution exceeds the maximum amount not chargeable to income tax in any previous year.	Income tax exemption is available only if conditions under S. 11 and S. 12 of the ITA are fulfilled. Additionally, submission of audited accounts of the company is compulsory if total income of the institution exceeds the maximum amount not chargeable to income tax in any previous year.	Income tax exemption is available only if conditions under S. 11 and S. 12 of the ITA are fulfilled. Additionally, submission of audited accounts of the company is compulsory if total income of the institution exceeds the maximum amount not chargeable to income tax in any previous year.
<b>Donor benefit</b>	Under 80G of the ITA, Indian resident donors should be entitled to claim a deduction from their taxable income of up to 50% of the donations made by them if the organization is registered under S. 12A of the ITA.	Under 80G of the ITA, Indian resident donors should be entitled to claim a deduction from their taxable income of up to 50% of the donations made by them if the organization is registered under S. 12A of the ITA.	Under 80G of the ITA, Indian resident donors should be entitled to claim a deduction from their taxable income of up to 50% of the donations made by them if the organization is registered under S. 12A of the ITA.
<b>Remuneration or other benefit to members</b>	Members can draw a “reasonable” compensation from the society fund.	Trustees can draw a “reasonable” compensation from the trust fund for the services they provide to the trust. However, being a trustee in itself is not considered a service.	A Section 25 company/Section 8 Company cannot pay remuneration or other benefit to any of its members.  Any member working for a Section 25 company has to work in an honorary capacity. What can be paid is reimbursement of expenses, interest on loan, rent for premises lent to the company. However, such payments can be made to a member for services rendered by them which are not of the kind ordinarily expected to be rendered by him as member, with the previous approval of the Central Government
<b>Foreign</b>	No foreign investment is	No foreign investment is	No foreign investment is

<b>Investment</b>	permitted in a society	permitted in a public trust.	permitted in a Section 25 Company; however infusion of foreign share capital would be subject to permission sought from the Home Ministry and 'prior permission' or 'registration' under FCRA.
<b>Whether foreigners can be members</b>	<p>There is no restriction under the Societies Registration Act, 1860. From an FCRA perspective, organizations having foreign nationals, other than of Indian origin, as members of their executive committees or governing bodies are generally not permitted to receive foreign contribution.</p> <p>However, it may be possible to seek an exemption in this regard, where there is a justifiable need for such appointment.</p>	<p>In case of a trust registered under the BPT, a prolonged absence of a trustee (which may occur in case of a foreign resident) may be interpreted as "continuous neglect of duty" which is cause for suspension, removal or dismissal of the trustee by the Charity Commissioner.</p> <p>There are no such restrictions in case of a public trust registered under the Registration Act, 1908.</p> <p>From an FCRA perspective, organizations having foreign nationals, other than of Indian origin, as members of their executive committees or governing bodies are generally not permitted to receive foreign contribution.</p> <p>However, it may be possible to seek an exemption in this regard, where there is a justifiable need for such appointment.</p>	<p>Yes. However, a majority of Indian resident directors on the Board is recommended for the practical convenience of attending board meetings.</p> <p>From an FCRA perspective, organizations having foreign nationals, other than of Indian origin, as members of their executive committees or governing bodies are generally not permitted to receive foreign contribution.</p> <p>However, it may be possible to seek an exemption in this regard, where there is a justifiable need for such appointment.</p> <p>Under the Companies Act, 2013, every company should have at least one resident director.</p>

ii) **Commercial Entities:**

	<b>Company</b>	<b>Fund registered under the SEBI (AIF) Regulations, 2012</b>	<b>Partnership</b>	<b>LLP</b>
<b>Regulatory Approvals</b>	Application signed by one of the promoters to be filed with the Registrar of Companies (ROC) of the state in which the Registered Office of the proposed Company is to be situated.	No entity or person shall act as an Alternative Investment Fund unless it has obtained a certificate of registration from the Board. The existing fund falling under the definition of Alternative Investment Fund which is not registered with the Board may continue to operate for a period of six months from commencement of AIF Regulation or if it has made an application for registration within the said period of six months.	Registration not compulsory; but a partner of an unregistered firm is denied the right to file a suit against the firm or other partners, enforce contractual rights or claim set off or other proceedings in a dispute with a third party	Registration is compulsory  1. Decide on the partners and the designated partners  2. Obtain Designated Partner Identification Number (DPIN) and a digital signature certificate. 3. Decide on the name of the LLP and check whether it is available. 4. Draft the LLP agreement 5. File the LLP Agreement and incorporation documents with the Registrar of Companies and obtain the Certificate of Incorporation.
<b>Time taken</b>	About 6 months	Under the AIF Regulation, on receipt of Application, if the Board is of the opinion that a certificate should not be granted, it may reject the application after giving a reasonable opportunity of being heard. The decision of the Board to		About 20 days



		reject the application shall be communicated to the applicant within thirty (30) days.		
<b>Documentation</b>	Must contain i) four alternative names for the proposed company; ii) names and addresses of the promoters (Minimum 7 for a public company while 2 for private company); iii) authorized Capital of the proposed company; iv) main objects of the proposed company; and v) names of other group companies.	Such documents as prescribed in Form A annexed to the SEBI (AIF) Regulations depending on the organizational structure of the fund.	Application verified and signed by all partners or their authorized agents filed at any time with the Registrar of firms of the area in which any place of business of the firm is situated along with prescribed fee, prescribed Registration Form for Incorporation of a Company, certified true copy of the Partnership deed entered into and ownership proof of the principal place of business as per section 58 of the Indian Partnership Act, 1932	Form 3 (Information with regard to LLP agreement and changes, if any made therein) and Form-4 (Notice of Appointment of Partner/Designated Partner, his consent etc.) may be filed with the prescribed fee simultaneously at the time of filing Form-2 or within 30 days of the date of incorporation or within 30 days of such subsequent changes.
<b>Tax exemption</b>		Entitled to 'pass through' benefit under section 10(23FB) read with section 115U of the Income Tax Act, much like Venture Capital funds and thus income accruing to the social venture fund would be deductible	No minimum alternate tax or alternate minimum tax which is applicable to Company and LLP respectively.	

		in the hands of the investor.		
--	--	-------------------------------	--	--

### 3. Main ongoing compliance requirements once established

#### i) Charities:

<i>Name of the entity</i>	<i>Post registration compliance Requirements</i>
Society registered under Societies Registration Act	<ul style="list-style-type: none"> <li>An annual list of general and governing body members must be filed with the Registrar of Societies along with the annual audited statements. State laws may impose additional requirements.</li> <li>An application for income tax registration must be made before the Commissioner of Income Tax of the area within one year from the date of registration of society.</li> <li>Annual FC forms to be filed before the MHA every year in the event of receiving foreign contribution</li> </ul>
Charitable Trust	<p>Under BPT, any composition in the trust needs to be mandatorily reported to the Charity Commissioner within ninety (90) days of such change.</p> <ul style="list-style-type: none"> <li>Annual FC forms to be filed before MHA every year in the event of receiving foreign contribution</li> </ul>
Section 25/Section 8 Company	<ul style="list-style-type: none"> <li>Annual return and audited documents must be filed with the Registrar every year.</li> <li>Annual FC forms to be filed before the MHA every year in the event of receiving foreign contribution</li> </ul>

#### ii) Commercial entities:

<i>Name of the entity</i>	<i>Post registration compliance Requirements</i>
Company	<ul style="list-style-type: none"> <li>Annual return and audited documents must be filed with the Registrar every year.</li> </ul>
Fund registered under the SEBI (AIF) Regulations, 2012	<ul style="list-style-type: none"> <li><b>Valuation:</b> Valuations required to be done by an independent valuer appointed by the AIF Valuation exercise once every six months- period may be increased to one year with the approval of 75% investors</li> <li><b>Reporting:</b> annual reports to investors within 180 days from the end of the year</li> </ul>
Partnership	<ul style="list-style-type: none"> <li>No requirement to file audited accounts</li> </ul>
LLP	<ul style="list-style-type: none"> <li>Annual statement of accounts and solvency &amp; Annual Return has to be filed with ROC</li> </ul>

### 4. Benefits / considerations for choosing such an SPO (including tax)

#### i) Charities:

<i>Name of the entity</i>	<i>Benefits</i>
---------------------------	-----------------

Partnership	<ul style="list-style-type: none"> <li>No minimum alternate tax or alternate minimum tax which are applicable to Company and LLP respectively.</li> </ul>
LLP	<ul style="list-style-type: none"> <li>Separate legal personality and limited liability like a company; and yet involves comparatively lower cost of formation and lesser compliance requirements. It is easy to manage and run and also easy to wind-up and dissolve. There is no requirement of minimum capital contributions and partners are not liable for the acts of the other partners, unlike in a general partnership</li> </ul>

Can the entity accept funding in the form of (i) donations/grants, (ii) debt, and (iii) equity?

**i) Charities:**

Name of the entity	Restriction on acceptance of funding
Society registered under Societies Registration Act/ Charitable Trust/ Section 25 Company ("Not-for-profit Entities")	<p>Grant: A non-profit entity registered under Section 12AA of the Income Tax Act can derive funding in the form of donations/ grants, debt and equity. The scope of the term 'property' held for charitable purposes is wide enough to include within its sweep not only voluntary contributions. For the setting up the Not-for-profit Entities may further require compliance with the provisions of the FCRA. The FCRA regulates the acceptance and utilization of foreign contributions or foreign hospitality by certain persons or associations.</p> <p>Debt: a Section 25/Section 8 company can receive debt funding. Equity: since infusion of foreign share capital in equity shares amounts to foreign contribution, approval from MHA will be required before receiving funding in the form of equity.</p>




**ii) Commercial entities:**

Name of the entity	Restriction on acceptance of funding
Company	<ul style="list-style-type: none"> <li>Grants: Since grants under FCRA is towards a definite social, cultural, or educational program and is mostly directed towards non-profit entities, grants to a for-profit company may be an issue.</li> </ul>
Fund registered under the SEBI (AIF) Regulations, 2012	<ul style="list-style-type: none"> <li>In case of a Category I fund i.e. social venture fund may accept grants subject to the condition that at least 75% of corpus is invested in unlisted securities or partnership interest of social ventures</li> </ul>
Partnership	<ul style="list-style-type: none"> <li>The partners can raise equity funds through their own capital contributions, by adding a new partner, or by restructuring the relative ownership interests of the existing partners to reflect new contributions</li> <li>Debt financing and acceptance of grants/ donations allowed</li> </ul>
LLP	<ul style="list-style-type: none"> <li>Same as for a partnership</li> </ul>

### 3 Level Two Questions

3.1 For the three VPO operating models please list the most relevant option choices for entities:

	VPO "non-profit" entity	VPO "commercial" entity
--	-------------------------	-------------------------

No Fund Entity “circle” or “club”  [In this case an entity is only for the VPO consulting function]	 	
	Relevant SE and/or C Entities	Relevant Commercial Entities
1. A registered society	1.NBFCs	1. For-profit company
2. A Charitable Trust	2.MFI-NGOs	2. Partnership
3. A Section 25/Section 8 Company	3.Multi-state co-operative societies	3.Funds registered under AIF Regulation, 2012

### 3.2 Outline the benefits or considerations for each option as a choice for a VPO

Specifically for each VPO business model and entity:

1. *Can the entity distribute financial returns to its stakeholders in the form of grant/donation refunds, debt principal repayment and interest payments, equity dividends and buy-backs.*

A non-profit entity is not permitted to distribute dividends or share profits. The entity being non-profit in nature, income earned by the entity needs to be ploughed back into the charitable activities. Distribution of financial returns in any form to the trustees or subscribers or members is prohibited. Any surplus that is created needs to be replenished back into the business of the entity. Social enterprises also follow the above model and distribution of profit to members is prohibited. There is no restriction placed on a commercial entity to distribute financial returns to its stakeholders. In case of a social venture fund registered under the AIF Regulation, the returns can be muted.

2. *If a commercial entity is used, do financial regulatory restrictions apply (e.g. for fund raising or fund management)? How can these be avoided? (e.g. private entity, limited solicitation).*

There is no express prohibition on raising funds by a commercial entity for philanthropic activities. In the event of funds being raised for any definite social or charitable program from a foreign source, provisions of FCRA have to be complied with.

## 4 Level Three Questions

These questions relate mainly to the cross-border implications of fundraising by the VPO.

### 4.1 Considering the three VPO business models and entities listed in 3.1 above:

1. *Are there any restrictions on fundraising from onshore funders (as grants/donations, equity or debt)? If so describe the key restrictions if not already covered in 2.2.*

None.

2. *Are there any restrictions on fundraising from offshore funders (e.g. foreign ownership laws, foreign exchange control, different tax treatment, withholdings)*

SEs seeking to raise funds from offshore funders must compulsorily register with the Central Government under Section 11 of the FCRA.

The FCRA regulates the acceptance of contributions or foreign hospitality by certain persons or associations. Certain restrictions also exist regarding the investment of such contributions in speculative activities or the transfer of the same to persons or organizations that have neither registered and obtained certificate under the FCRA nor obtained the prior permission under the FCRA. An application for registration of an organisation for acceptance of foreign

contribution shall be made electronically on-line in Form FC-3, and shall be followed by forwarding the hard copy of the on-line application duly signed by the Chief Functionary of the association together with the required documents:

- i. Form FC-3 in triplicate.
- ii. Audited statement of accounts of past three years.
- iii. Annual Report specifying activities of past three years.
- iv. If the association is a registered Trust or Society a certified copy of the registration certificate.
- v. Copy of the Memorandum of Association and/or the Articles of Association as applicable.
- vi. List of Main objects and definite programmes for which the contribution is to be accepted / utilized.
- vii. Details of names and addresses of the members of the Executive Committee/Governing Council etc. of the Association.
- viii. Copy of any prior permission granted to the organization.
- ix. Copy of resolution of Governing Body of the organisation, authorizing the registration under FCRA.
- x. Copy of Power of Attorney or the resolution of Governing Body by which the Chief Functionary is authorized to submit FC-3.
- xi. List of present members of the Governing Body of the organisation and the office bearers.
- xii. Copy of any Journal or other publication of the organization.
- xiii. If the association is having any parent or sister or subsidiary organisation which is registered under the FCRA then the registration number along with MHA file number should be mentioned.
- xiv. If the association has submitted any application earlier then its reference number should be mentioned.
- xv. If the association has received any foreign contribution with or without the prior approval of the Central Government, then the detail should be given.
- xvi. Details of Bank along through which the foreign contribution shall be received.
- xvii. A recommendation certificate from any competent authority.
- xviii. Copy of certificates of exemption or registration issued by the Income Tax Department u/s80G and 12A.

It is advisable that organizations be registered as legal entities under a relevant legislation before seeking registration under the FCRA.

While submission of 3 years' audited statements is required at the time of making application for registration, it has been held that this requirement is only directory and that a lesser number of years' audited statements may be enclosed. Contributions made by a citizen of India living in another country (i.e., Non-Resident Indian), from his personal savings, through the normal banking channels, is not treated as foreign contribution.

3. *Are there any foreign control or sponsor/promoter issues for the entities (e.g. limit on foreign directors or trustees)*

Features	Society	Charitable Trust	Company
<b>FCRA registration/ prior permission</b>	Mandatory to receive foreign contributions	Mandatory to receive foreign contributions	Mandatory to receive foreign contributions
<b>Whether foreigners can be directors/trustees</b>	Yes. However, a majority of Indian resident directors on the Board is recommended for the practical convenience of attending Board meetings	No specific bar. However, it is not recommended as it leads to excessive scrutiny for FCRA purposes, causing unwarranted delays in being granted FCRA approval.	In case of a Section 25/Section 8 company, presence of any foreign national on the Board is generally discouraged by the MHA.

Other Comments and Explanation:

**Recent Trends:**

Many SEs, as they are understood globally, do operate in India, particularly in the telecommunication, micro-credit, education, health-services and energy sectors.

**1) Microfinance Institutions:**

Micro finance is increasingly recognized in India as an important source of finance both for the generation of social capital and in the not-for-profit sector. The Micro Finance Institutions (Development and Regulations) Bill, 2012, which was introduced in the Lower House of the Parliament on May 22, 2012 and sought to govern Microfinance Institutions (“**MFIs**”) defines one as an entity, not being either a banking company or a co-operative society that is either engaged primarily in agricultural operations, industrial activity or purchase or sale of goods; or which does not accept deposits except from its members having voting rights; and which provides financial services involving small amounts to individuals or groups. Such financial services have been defined to include provision of microcredit, collection of thrift, remittance of funds and provision of pension or insurance services.

An MFI can adopt many organizational structures, some of which have been included in the table below<sup>13</sup>:

Type of entity	Non-profit	Mutual benefit	For-profit
----------------	------------	----------------	------------

<sup>13</sup> Available at [www.nabard.org/pdf/report\\_financial/chap\\_viii.pdf](http://www.nabard.org/pdf/report_financial/chap_viii.pdf)

Association	Society under Societies Registration Act, 1860	Cooperative society under the Cooperative Societies Act, 1912 or under the Multi-State Co-operative Societies Act, 2002	Association of persons
Trusts	Public Charitable Trust	Mutual Benefit Trust	Investment Trust
Company	Section 25 Company	Company incorporated under Section 620A of the Companies Act ( <b>Nidhi company</b> )	NBFCs registered with the RBI

The Bill is currently pending before the lower house of the parliament.

## 2) Community Owned Company (“COC”) Model:

India’s oldest social enterprise, *Fabindia*, however, has been practicing a unique model called the Community Owned Company (“**COC**”) model, under which companies are set up with the help of a venture fund, which is a fully-owned subsidiary of *Fabindia*, and are each owned 49% by the fund, 26% by the artisans, 15% by private investors and 10% by employees of the community-owned company itself.

With Best Compliments

Nishith Desai<sup>Associates</sup>  
LEGAL AND TAX COUNSELING WORLDWIDE

MUMBAI

SILICON VALLEY

BANGALORE

SINGAPORE

MUMBAI BKC

NEW DELHI

MUNICH

[www.nishithdesai.com](http://www.nishithdesai.com)





The Asian Venture Philanthropy Network (AVPN) is building a vibrant and high impact venture philanthropy community across the Asia Pacific region. AVPN has more than 160 members of AVPN from 27 countries and has a Member Directory and listing of Events at [www.avpn.asia](http://www.avpn.asia).

Asian Venture Philanthropy Network Limited  
Registration No : UEN201016116M  
33a Circular Road  
Singapore 049389

[www.avpn.asia](http://www.avpn.asia)

We promote venture philanthropy in the broader philanthropic and social investment communities and provide specific networking and learning services to meet the needs of our members.

AVPN is a non-profit organisation based in Singapore with membership across the Asian region. We are supported by grant funding, sponsors and partner organisations.

We are building a cross-sector network bringing together organisations and individuals from finance, business and the social sector. Our members include venture philanthropy organisations (practicing members) and associates that bring different networks, expertise and experience.

Associate Members include private equity managers, private banks, wealth managers, other financial services organisations, professional service firms, family businesses, corporations through their CSR activities, foundations, universities and government related entities.

We are the hub for news and events focused on venture philanthropy to develop shared learning and best practices. Soon through our new Knowledge Centre we will develop practitioner oriented resources to help scale the practice of venture philanthropy across Asia.

Please visit [www.avpn.asia](http://www.avpn.asia) to learn more and contact us at [info \[at\] avpn.asia](mailto:info@avpn.asia) if you have specific enquiries.

We encourage you to engage with us and support our field building activities through sponsorship, grants, donations, or joining as a member or partner organisation.

Download the "Getting Started in Venture Philanthropy in Asia" guide and legal framework country profiles from [www.avpn.asia/startVPO](http://www.avpn.asia/startVPO)