

Investment in Education

February 2020

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1. Introduction

Education in India has witnessed a paradigm shift in recent times. Once viewed largely as a charitable or philanthropic activity, it has since metamorphosed into an 'industry' in its own right.

So far, basic primary education and certain technical institutions for higher education, like the Indian Institutes of Technology (IITs) and the Indian Institutes of Management (IIMs) have been the mainstay of Indian education. However, due to an increase in the competitiveness in the marketplace coupled with the increasing need to expand quality education at the grassroots level, policy makers in India have slowly but surely set the Indian education on the reforms track.

Several initiatives are being taken by the government to encourage investments in education including greater participation by Foreign Educational Institutions (“FEI”) and educational service providers. The Public Private Partnership (“PPP”) model has also been introduced to facilitate greater Foreign Direct Investments (“FDI”). In addition to this, efforts have been taken to develop strong collaborations between foreign universities and Indian universities. On the higher education side, Institutes of Eminence are coming up. Further, more autonomy has been provided to universities and colleges under the autonomy regulations. Efforts are also being made to give a formal character to online degree programmes in India. Such progressive development has attracted the eye of private equity players and venture capital funds as well, who have also

shown interest in this unique and emerging opportunity, which balances investor returns with social responsibilities.

Various factors have contributed to growing interest in the education. Some of these are:

I. Market Size

According to a report by rating agency CARE Ltd, the market size of the Indian education industry is pegged around USD 91.7 billion and is expected to reach USD 101.1 billion in 2020.¹ Education is thus attracting sizeable investment, most notably in primary, secondary and higher education.

Further, education has attracted FDI worth USD 2506.52 million during April 2000 to June 2019, according to the data released by the Department of Industrial Policy and Promotion (“DIPP”).²

II. Migration to Quality

Usually, students in private institutes perform better than students in the Government-run institutes. Parents have come to recognize the difference in quality of education provided in the government run-institutes and private institutes. This has resulted in the growth of private schools providing higher quality education.

Needless to say, all these measures go a long way in improving and enhancing India's globally competitive skilled workforce.

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1. Education sector in India, available at: <https://www.ibef.org/industry/education-sector-india.aspx> (last visited on February 05, 2020).
 2. Fact Sheet on Foreign Direct Investment (FDI) From April, 2000 to June, 2019, available at: https://dipp.gov.in/sites/default/files/FDI_Factsheet_4September2019.pdf (last visited on February 05, 2020).

2. The Indian Education System

Education falls in the Concurrent List of the Constitution of India (“**Constitution**”) i.e. both the centre and the states have the authority to legislate on it. In addition, the center has the power to determine standards for higher educational institutions while the states can incorporate and regulate universities through private or state university legislations.

At the centre, the Ministry of Human Resource Development (“**MHRD**”) is the nodal ministry for education. MHRD initiates and frames major policies relating to higher education and provides budgetary grant to the University Grants Commission (“**UGC**”).

The main objectives of MHRD include:³

- Formulating the National Policy on education and to ensure that it is implemented in letter and spirit.
- Planned development, including expanding access and improving quality of educational institutions throughout the country, including in the regions where people do not have easy access to education.
- Paying special attention to disadvantaged groups like the poor, females and the minorities.
- Provide financial help in the form of scholarships, loan subsidies etc. to deserving students from deprived sections of the society.
- Encouraging international cooperation in the field of education, including working closely with the UNESCO and foreign governments as well as Universities, to enhance educational opportunities in the country.

The other regulatory bodies involved in regulating and maintaining standards at the school/ higher education level include the National Council of Educational Research and Training (“**NCERT**”), the UGC, and the

All India Council of Technical Education (“**AICTE**”). State governments are responsible for providing grants and for establishment of state universities and colleges. At the state level, the Department of Education and the State Council of Educational Research and Training (“**SCERT**”) have important roles to play.

Education in India comprises of pre- school, primary and higher secondary education. This is then followed by the higher education segment, which includes professional and technical education. In addition, the segment also comprises of vocational training, coaching classes, distance/ online education through e-learning platforms and the like. With different regulatory bodies governing each segment of education, all such segments are fraught with their unique challenges.

I. Pre-School

The day care and pre-schools segment (also known as kindergarten in India) is currently unregulated in India except in a few states such as Delhi, Karnataka and Tamil Nadu. The National Commission for Protection of Child Rights has, on January 2, 2017, released the “Regulatory Guidelines for Private Play Schools” (“**Guidelines**”). The objective of these Guidelines is to regulate private play schools (referred to by varied names such as play groups, play schools, pre-schools, nursery schools etc.) for children of the age of three to six year.

The Guidelines, inter alia provide:

- that playschools cannot be established without the recognition of the competent authority;
- minimum mandatory requirements to establish and run a play school;
- every private educational institution coming under the purview of these Guidelines is required to include the word ‘play school’ in its name; and

3. See <http://mhrd.gov.in/node/16> (last visited on February 05, 2020).

- fees charged by the play school is to be regulated by the appropriate government, collected on monthly or quarterly basis, and accounts are to be audited.

These Guidelines however provide an option to the states to notify these Guidelines or adopt content of these Guidelines as legislation to regulate private play schools in their respective States. Thus, they are merely recommendatory in nature.

These Guidelines are also not applicable to institutions/organizations/establishments/centres/or any such entity providing any kind of early childhood services to children in the age group of 0-3 years Given the fact that most of the Indian states have not included pre-primary schools within their regulatory ambit, many pre- primary schools have been set up across the country.

Absence of regulatory hurdles, low investment costs, ability to expand in geography using the franchise structures, and high rate of return on investments has led to the establishment of various such schools across the country. Kangaroo Kids, Eurokids, Kidzee are some such names in the pre- school segment which operate in various cities of India.

II. Primary & Secondary Education

Unlike pre-schools, primary & secondary education in India is subject to regulatory control, and educational institutions need to comply with central as well as state-specific regulations.

The first and the foremost step towards providing primary & secondary education is to obtain necessary permissions from government authorities for setting up a school.

Further, affiliation to one of the following key boards/authorities is necessary in order to ensure recognition of education and qualification provided by the school.

- Central Board of Secondary Education
- Council for the Indian School Certificate Examinations
- International Baccalaureate (“IB”) from Geneva
- International General Certificate of Secondary Education (“IGCSE”) by Cambridge Assessment International Education.
- State Boards

A. Central Board of Secondary Education (“CBSE”)

The CBSE functions under the overall supervision of the Department of Education which comes under the MHRD.⁴ It was set up with the view to:

- prescribe conditions of examinations and conducting public examinations at the end of Class X and XII;
- grant qualifying certificates to successful candidates of the affiliated schools;
- prescribe and update the course of instructions of examinations;
- affiliate institutions for the purpose of examinations and to raise the academic standards of the country.⁵

Schools partaking examination pattern prescribed by CBSE are required to be associated or affiliated with them. Affiliation to the CBSE is governed by its affiliation bye-laws⁶ which prescribe certain pre- conditions and requirements.

4. Central Board of Secondary Education, CBSE Overview, available at: <http://cbse.nic.in/newsite/aboutCbse.html> (last visited on February 05, 2020).

5. *Ibid*

6. CBSE Affiliation Bye-Laws 2018, available at http://cbseaff.nic.in/cbse_aff/attachment/onlineservices/affiliation-Bye-Laws.pdf (last visited on February 05, 2020)

B. Council for the Indian School Certificate Examinations (“CISCE”)

CISCE is a private, non-governmental board of school education and conducts two examinations in India: the Indian Certificate of Secondary Education (“ICSE”) and the Indian School Certificate (“ISC”). The ICSE Examination presupposes a school course of ten years duration (Classes I to X). The ISC Examination on the other hand has been designed as an examination after a two-year course of studies beyond the ICSE Examination (Class X) or its equivalent. However, no permission for running a ISC course of study is given unless the school also runs an ICSE programme i.e. Class X.

Similar to the CBSE, schools intending to follow the CISCE course of study and examination are required to be affiliated with the CISCE. Affiliation to the CISCE is also governed by its own guidelines for affiliation much like the CBSE.⁷

C. IB Schools

International Baccalaureate Organization (“IBO”) is a non-profit educational organization based in Geneva, Switzerland. IBO is not associated with any particular country and runs its programme across several nations.⁸ In India, there are more than hundred IB World Schools offering one or more of the three IB programmes. Ninety-seven (97) schools offer the Primary Years Programmes, forty-two (42) schools offer the Middle Years Programme and one-hundred and thirty nine (139) schools offer the Diploma Programmes.⁹

The IB Diploma, at par with +2 stage qualifications, is recognized by the Association of Indian Universities (“AIU”) for equivalence purposes i.e.

a process under which AIU assesses the similarity of studies and grants a certificate recognizing such similarity by issuing an equivalence degree certificate. Since 1983, IB Diploma awarded by the IBO has been equated with +2 stage (Grade 12) qualification of an Indian Board, for the purposes of admitting students to Bachelor’s degree programmes at Indian universities. However, only about two hundred and seventy four (274) universities currently recognize the IB Diploma.¹⁰ Several colleges and universities do not recognize the IB Diploma, despite the fact that it is recognized by AIU.¹¹

D. IGCSE Schools

IGCSE was developed by Cambridge Assessment International Education (formerly known as Cambridge International Examination (“CIE”)) in 1988 and is offered by over 400 international schools in India.¹² AIU recognizes Cambridge IGCSE and provide equivalence to Cambridge IGCSE.¹³

Cambridge IGCSEs are subject-based qualifications, usually taken over a period of two-years and is one of the most popular international qualification conducted after Class 10 level. Cambridge IGCSE offers a flexible curriculum, with a choice of over 70 subjects in any combination. Since there are no compulsory subjects, students have the flexibility to study a range of subjects. Assessment takes place at the end of the course and provides different options that best suit students, including written and oral examinations, coursework and practical assessment.

10. *Ibid.*

11. Not all colleges accept global school diploma, The Times of India (Aug 2, 2011), available at: <http://timesofindia.indiatimes.com/city/chennai/Not-all-colleges-accept-global-school-diploma/articleshow/9450574.cms> (last visited on February 05, 2020); Red signal: IB prog hits roadblock in India, Careers 360 (January 4, 2014), available at: <http://www.university.careers360.com/articles/red-signal-ib-prog-hits-roadblock-in-india> (last visited on February 05, 2020).

12. International Schools in India: IB, IGCSE, CBSE, Boarding, Residential, available at <https://starlim.co.in/files/ischool.htm> (last visited on February 05, 2020)

13. Cambridge Assessment International Education, available at <https://www.cambridgeinternational.org/programmes-and-qualifications/recognition-and-acceptance/country/india/> (last visited on February 05, 2020)

7. CISCE Rules for Affiliation, available at: <http://www.cisce.org/pdf/AffiliationGuidelines.pdf> (last visited on February 05, 2020).

8. Frequently Asked Questions, Amity University, available at: <http://www.amity.edu/ais/aisg2/amitywebsite.pdf> (last visited on February 05, 2020).

9. International Baccalaureate - India, available at: <https://www.ibo.org/about-the-ib/the-ib-by-country/i/india/> (last visited on February 05, 2020).

While the affiliation bye-laws / guidelines of CBSE and ICSE schools require that schools can only be set up by a non-profit entity, no such rules/ bye-laws are prescribed for IB/ IGCSE schools. However, IB/ IGCSE schools are also subject to local compliances. Since the local law of most of the States (except Haryana) require that schools should be set up on a not-for-profit basis, IB/ IGCSE schools would also need to follow these laws (such as The Right of Children to Free and Compulsory Education Act, 2009) incorporating an entity for running schools in India.

E. State Boards (under State Acts/ Regulations/ Authorities)

Besides CBSE or ICSE boards which provide affiliation and accreditation to schools across states, at the state level the Department of Education regulates the state specific boards. Thus, schools run by the state government or aided schools that are privately managed but funded by the state are affiliated and accredited to the state boards. Such state boards are formed through state-specific education acts. Thus, schools under state boards have to follow regulations of their respective state governments.

III. Other General Aspects to be Considered While Setting up Schools

A. Regulatory Requirements

Under Indian laws, an educational institution can only be set up in the form of a non-profit entity i.e. either as a charitable trust or a society or a Section 8 Company (a non-profit company under the Companies Act, 2013), which are of a not-for-profit character, except in the state of Haryana (as discussed below).

Once established, the schools have to seek affiliation from one of the boards (mentioned above), for which they need to comply with the specific conditions set out in the affiliation rules/ bye laws. For instance, there

is a requirement to obtain a 'No Objection Certificate' ("NOC") from the concerned State Education Department before the school can be granted affiliation. NOC is a formal prior recognition which the education department grants to any school independent of its affiliation status. Further the schools also have to comply with certain infrastructure and financial requirements, as set out in the relevant affiliation rules/ bye laws.

In addition to obtaining an affiliation from one of the state or school boards, additional requirements include obtaining number of approvals from different public authorities as well. This would include the procurement of water testing reports, health certificates, an essentiality certificate, a land use permission certificate (in case of rented land), etc.

In addition, there are certain state specific requirements as well. For example, Section 30 of the Karnataka Education Act, 1983 ("KEA") prescribes registration with the appropriate authority (as authorized by the state government) of every private educational institution and prohibits the establishment, administration or maintenance of any such institution unless the requisite registration has been obtained.

The registration is also subject to additional requirement of maintaining minimum infrastructure and financial requirements. Similarly, Section 4 of the Delhi State Education Act, 1973 ("DSEA") makes registration with the appropriate authority, authorized by the Delhi government, compulsory for all schools notwithstanding the board with which the institute is affiliated. Further, Section 2(e) of the DSEA specifically declares the prescribed authority from which recognition is to be obtained in case the institute does not require affiliation from any other Indian government authority.

In Maharashtra, Maharashtra Self-Financed Schools (Establishment and Regulation) Act, 2012 ("MSSA") mandates permission to be sought from the state government (by moving an application to the Director of Education (Primary Education/Secondary & Higher Education, as the case may be) for opening

or upgrading a self-financed/unaided school. Section 15 of MSSA is applicable to all schools in the state of Maharashtra notwithstanding their affiliation to any board whether domestic or international.

While most of the states grant permission or issue NOC only to non-profit entities imparting or intending to impart primary or secondary education in India, the state of Haryana permits even a company (which may either be for-profit or non-profit) incorporated under the Companies Act to establish and maintain schools. Section 3(1) of the Haryana School Education Act, 1995 (“**Haryana Education Act**”) provides that the state government may regulate education in ‘all schools’, which is wide enough to include private unaided schools not affiliated to any central or state board within its ambit. Rule 29(1) of the Haryana School Education Rules, 2003 permits every individual or association of individual or firm or society registered under Societies Registration Act, 1860 or trust created under the Indian Trusts Act, 1882 or ‘company’ registered under the Indian Companies Act, 1956¹⁴ to apply to the appropriate authority in the prescribed form for setting up primary, middle, high, and senior secondary schools in Haryana. Thus, unlike other states’ regulations and central board bye-laws, this rule does not expressly require that a school must be established purely by a non-profit entity. Thus, under the Haryana Education Act, for-profit companies could set up IB affiliated schools.

B. Regulation of Fee and Capitation

Under the existing laws, private unaided schools are free to determine their own fee structure, provided that the fee does not result in profiteering and commercialization.¹⁵ Thus, the freedom to fix fee is not an absolute

right, and is subject to the assessment by the state authorities to ensure reasonableness of the fees charged.

However, legislations regulating fee have been enacted in a few states.

In Maharashtra, the relevant law is the Maharashtra Educational Institutions (Regulation of Fee) Act, 2011 (“**Maharashtra Fee Regulation Act**”) which provides the procedure to be followed for determining school fee.

Maharashtra Fee Regulation Act provides that the management of a private un-aided schools and permanently un-aided schools are competent to propose the fees in private unaided schools.¹⁶ The factors to be considered by the school for deciding fee are set out in Section 9¹⁷ of the Maharashtra Fee Regulation Act which *inter alia* includes infrastructure, location of the school, expenditure on maintenance and administration etc.

16. Section 6(1) of the Maharashtra Fee Regulation Act states that *The management of the private un-aided schools and permanently un-aided schools shall be competent to propose the fees in such schools.*

17. Section 9 of the Maharashtra Fee Regulation Act: *Factors for determination of fee*

(1) *The following factors shall be considered while deciding the fee leviable by a school, namely :*

(a) *the location of the school;*

(a-1) *If the school building is taken on rent or lease, the rent as per the registered agreement or lease, such rent or reasonable rent: Provided that, if such rent found unreasonable, then the rent as per Ready Reckoner or Market Rate shall be considered*

(b) *the expenses in that year for the infrastructure made available to the students for the qualitative education, the facilities provided and as mentioned in the prospectus or web-site of the school;*

(c) *the educational standard of the school as the State Government or the competent authority may prescribe;*

(d) *the expenditure on administration and maintenance;*

(e) *the excess fund generated from non-resident Indians, as a part of charity by the management and contribution by the Government for providing free-ship in fee or for other items under various Government schemes given to the school for the Scheduled Castes, the Scheduled Tribes and Vimukta Jatis and Nomadic Tribes students;*

(f) *qualified teaching and non-teaching staff as per the norms and their salary components;*

(g) *reasonable amount for yearly salary increments;*

(h) *expenditure incurred on the students over total income of the school and the reasonable surplus for qualitative development of the students;*

(i) *any other factor as may be prescribed.*

(2) *The Divisional Fee Regulatory Committee shall indicate the different heads under which the fee shall be levied.*

(3) *Every private school preferring an appeal before the Divisional Fee Regulatory Committee shall place the copy of decision in appeal on its notice board, and if such school has web-site, on its web-site.*

14. Companies Act, 1956 has been replaced with the Companies Act, 2013. Section 8 of the Companies Act, 2013 contains provisions relating to not-for-profit companies that were earlier contained in Section 25 of the Companies Act, 1956.

15. *Vibgyor High School v, The State of Maharashtra*, (2012) 114 BOMLR 270, Para 31.

The proposed fee and the relevant record are to be submitted by the management to the Executive Committee¹⁸ (“EC”) six months before the commencement of the next academic year.¹⁹ If the EC fails to approve the proposed fee within thirty days from the receipt of the details or if the difference between the fee approved by the management and the fee communicated by the EC is more than fifteen percent, the school management may prefer an appeal to the Divisional Fee Regulatory Committee²⁰ (“DFRC”), which is the appellate authority constituted to adjudicate disputes. During the pendency of the referral, the management may, till the final decision of the DFRC, collect the fee of the previous year plus fifteen percent increase in the fee or the proposed increased fee, whichever is less.²¹

However, what is critical is that if the fees decided by EC is higher than the fee collected by the management from the parents, then in such case no penal interest can be recovered from the parents.²²

A fee decided as per the procedure of this act is to remain in force for two academic years.²³

The constitution validity of the Maharashtra Fee Regulation Act has been challenged before the High Court of Mumbai in the case of *Association of International Schools of India and Anr v. State of Maharashtra and Anr.*²⁴ *inter alia* on the ground that the DFRC, being the appellate authority under the Fee Regulation Act was not constituted and the rules under the Maharashtra Fee Regulation Act were not being framed.

In Andhra Pradesh, regulations titled “*Andhra Pradesh Regulation of Fee Structure in Private Unaided School in the State*”²⁵ (“AP State Fee Regulation”) issued under the AP Capitation Fee Act provides for regulation of fee.

As per AP State Fee Regulation, the DFRC is required to approve the fee for each private unaided school within its jurisdiction.²⁶ The fee structure approved by the DFRC will be valid for a period of 3 academic years.²⁷ The management can increase the fee every year, based on increase

18. Section 2(j) of the Maharashtra Fee Regulation Act defines “Executive Committee” to mean the Executive Committee of the Parent-Teachers Association.

19. Section 6(2) of the Maharashtra Fee Regulation Act states that on the formation of the Executive Committee, the management of the school shall submit the details of the proposed fee along with the relevant record to the Executive Committee for its approval at least six months before the commencement of the next academic year. While giving the approval, the Executive Committee shall have the authority to decide the amount of fee afresh.

20. Section 7(1) of the Maharashtra Fee Regulation Act states that the Government, by notification in the Official Gazette, is to constitute a Divisional Fee Regulatory Committee for each Educational Division.

Section 2(h) of the Maharashtra Fee Regulation Act defines “Educational Division” to mean an Educational Division notified by the State Government in the Official Gazette.

21. Section 6(4) of the Maharashtra Fee Regulation Act states that if the Executive Committee fails to decide the fees within the period specified in sub-section (3), the management shall immediately refer the matter to the Divisional Fee Regulatory Committee for its decision under intimation to the Executive Committee in such manner as may be prescribed.

During the pendency of the reference, the management may, till the final decision of the Divisional Fee Regulatory Committee, collect the fee same as that of the previous academic year plus fifteen per cent. increase in such fee, or, the proposed increase fee, whichever is less. Provided that, if the fee is decided under sub-section (4) is higher than the fee collected by the management from the parents, in such case, no penal interest shall be recovered from the parents.

22. Section 6(4) of the Maharashtra Fee Regulation Act.

23. Section 10(4) of the Maharashtra Fee Regulation Act states that No judicial order shall be passed by the Divisional Fee Regulatory Committee in the absence of the Chairperson. The order of the Divisional Fee Regulatory Committee shall be binding on the parties to the proceedings before it for two academic years. It shall not be called in question in any civil court except by way of an appeal before the Revision Committee constituted under this Act.

24. Writ Petition (L) No 3244 of 2011. Association of International Schools of India represented by Nishith Desai Associates

25. Published vide Notification G.O. Ms. 91, Education (SE:PS-I), 6th August, 2009 Published in Andhra Pradesh Gazette No. 37, Part 1, weekly, dated 10-9-2009.

26. Regulation 3 of the AP State Fee Regulation states that:

(i) DFRC shall approve the fee for each private unaided school within its jurisdiction.

(ii) If schools collect fee more than the fee approved by the DFRC, it shall be treated as capitation fee and Management shall be liable for action under the provisions of Andhra Pradesh Educational Institutions (Regulation of Admissions and Prohibition of Capitation Fee) Act, 1983. The recognition granted to the school and NOC issued shall be withdrawn after giving due notice.

27. Regulation 6 of the AP State Fee Regulation: *Validity of the Fee Structure.*- The fee structure approved by District Fee Regulatory Committee shall be valid for a period of 3 academic years but Management may increase fee every year based on the increase in Consumer Price Index. However, District Fee Regulatory Committee also reserves the right to review its decision on reasonable grounds suo-motto or on representation from the parents or management of the school.

in Consumer Price Index.²⁸ What is meant by Consumer Price Index has not been defined under the relevant law or regulations.

Similar fee regulation laws have been framed in other States as well. The recent being the State of Gujarat, wherein the Gujarat High Court upheld the validity of Gujarat Self-Financed Schools (Regulation of Fees) Act, 2017. Subsequently, an appeal was filed before the Supreme Court of India (“**Supreme Court**”) challenging the verdict of the Gujarat High Court. However, the Supreme Court too had upheld the validity of the law and confirmed that fees towards transportations, sports and other activities do not form part of student studies and are strictly optional, therefore these cannot be made mandatory part of the fee package.²⁹

In addition, capitation, being any amount, by whatever name called, whether in cash or kind, in excess of the prescribed fee or, as the case may be, approved, is also a prohibited and punishable under Central and State Laws.

C. The Right of Children to Free and Compulsory Education Act, 2009 (“RTE Act”)

The RTE Act, which came into force in the year 2011, seeks to provide free and compulsory elementary education to all children. It thereby gives effect to the principles enshrined in the Constitution, which states that the ‘*State shall provide free and compulsory education to all children between the age of six to fourteen years in such manner as the State may, by law, determine*’.³⁰

The RTE Act, inter alia mandates that the Central/ State Governments, as well as the local authorities, are obligated to provide free and compulsory elementary education to every child.

The following provisions of RTE Act are applicable to private schools:

- An unaided private school not receiving any kind of aid or grants from the Government is required to reserve at least 25% of the strength of a class for children belonging to weaker sections and disadvantaged groups in the neighborhood and provide free and compulsory elementary education to such children.³¹ The expenditure incurred by an unaided school is required to be reimbursed by the Government to the extent of per-child-expenditure incurred by the state or the actual amount charged from the child, whichever is less.
- Schools (including private schools) are prohibited from subjecting any child or its parents to any method of selection for admission of a child, in preference over another, other than a random method.
- The RTE Act completely prohibits the charge of any capitation fee by any private or government school and stipulates imposition of penalty on contravention.
- The Delhi High Court in the case of *Social Jurist, A Civil Rights Group v. Govt. of NCT of Delhi*³² held that the provisions of the RTE Act, which prohibit capitation fee and screening tests and prescribe teacher-pupil ratio, will be applicable on private unaided schools not only with respect to students for whom reservation is made under the Act but on the school as such and hence, would cover all students. However, the Court clarified that the RTE Act is meant to guarantee and regulate elementary education only and hence has no impact on the pre-nursery schools. The Delhi High Court in the above case gave a free hand to the private unaided schools in matters of admission procedure in nursery schools (pre-elementary school) along with screening procedure and capitation fees.

28. *Ibid.*

29. *Federation of Self Finance Schools & Anr. v.. State of Gujarat dated July 11, 2018*

30. *Article 21A of the Constitution provides for Right to education and states that The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.*

31. Section 12(1)(c) of the RTE Act.

32. *AIR 2013 Delhi 52.*

- Most importantly, a certificate of recognition is to be obtained from the concerned authority for the establishment or functioning of a private school.³³ A school in order to obtain the certificate of recognition would have to fulfill the norms and standards set out under the Schedule to the RTE Act. Failure to obtain a certificate of recognition would attract penalties.
- The provision of RTE Act is not applicable to un-aided minority schools.³⁴ The Supreme Court held that the minority aided or unaided schools are exempted from the provisions of the RTE Act,³⁵ including the requirement to reserve 25% seats for weaker sections and disadvantaged groups. However, the Supreme Court has clarified that the provision of the RTE Act including the requirement of 25% seat reservation will be applicable on minority schools whose applications for minority status has been rejected or schools who have not applied for the no objection certificate from the National Commission for the Minority Education Institute.³⁶

also be broadly classified into technical and non-technical education. Technical Education as defined under the AICTE Act means “*programs of education, research and training in engineering technology, architecture, town planning, management, pharmacy and applied arts and crafts and such other programme or areas as the Central Government may, in consultation with the Council, by notification in the Official Gazette, declare*”.³⁷ Non-Technical Education would, thus, refer to the programmes, other than the programmes referred in the definition of Technical Education.

In the last two decades, India has also seen a dramatic increase in the capacity of its higher education. The Gross Enrollment Ratio (GER) in higher education has gone up to 26.3 per cent³⁸ from 8.1 per cent in 2001-02³⁹ The number of unaided higher education institutions is on the rise, and currently almost 77 per cent of higher educational institutions are in the private sector.⁴⁰ Private sector educational institutions have improved access to higher education and accommodate more than 50 per cent share in students’ enrolment.

IV. Higher Education

Higher Education in India comprises of Diploma Courses, Bachelor’s/Undergraduate Degrees, Master’s/Post-graduate Degrees and Pre-Doctoral/ Doctoral programmes. It may

33. Section 18 of the RTE Act

34. *Society for Un-aided Private Schools of Rajasthan v Union of India* [WP(C) No. 95/2010].

35. *Pramati Educational and Cultural Trust and Ors. v Union of India* and Ors. [2014(2)KLT547].

36. *Sandeep Munjyasara v. State of Gujarat C/LPA/453/2018*

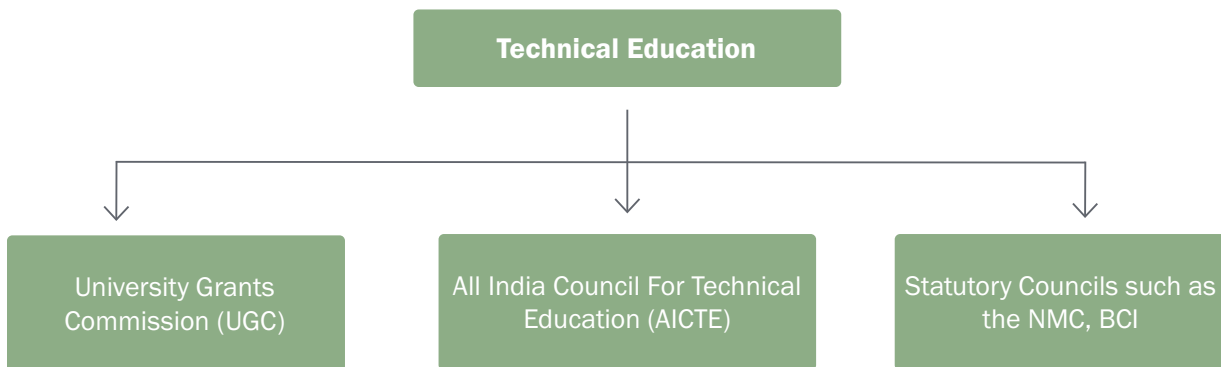
37. Section 2(g) of the, AICTE Act.

38. All India Survey on Higher Education (2018-2019), available at: <http://aishe.nic.in/aishe/viewDocument.action?documentId=263> (last visited on February 05, 2020).

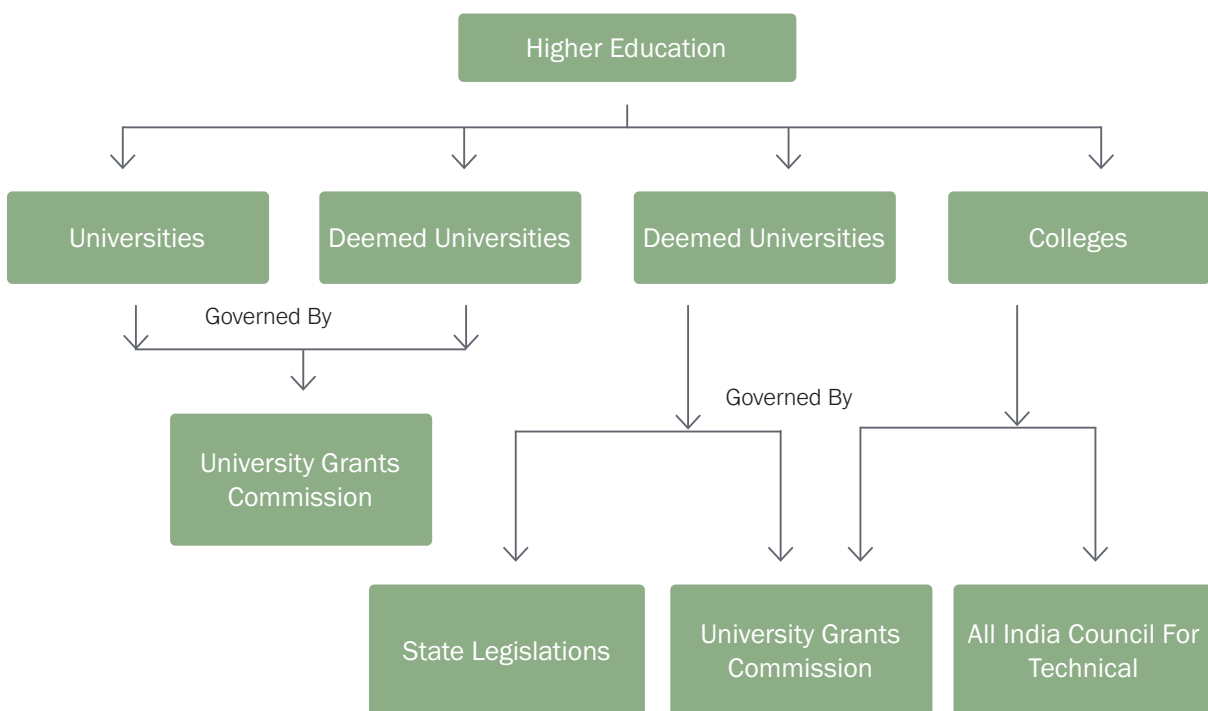
39. Gross Enrolment Ratio in Higher Education in India: A Study From 2001-02 to 2012-13, available at https://www.worldwidejournals.com/paripex/recent_issues_pdf/2015/July/July_2015_1437540363__145.pdf (last visited on February 05, 2020).

40. *Supra Note 32*.

In India, there are different bodies/authorities regulating technical education, as indicated below:



The recognized establishments providing higher education include Universities, Colleges and Deemed Universities. Each of these establishments is governed by different bodies as indicated hereunder:



A. Regulatory Bodies

i. University Grants Commission (“UGC”)

The UGC was set up under the University Grants Commission Act, 1956 (“**UGC Act**”) to make provisions for the co-ordination and determination of standards in universities. Its mandate includes:

- Promoting and coordinating university education;
- Determining and maintaining standards of teaching, examination and research in universities;
- Framing regulations on minimum standards of education;
- Monitoring developments in the field of **collegiate** and university education;

- Disbursing grants to universities and colleges;
- Serving as a vital link between the Central and State Governments and institutions of higher learning;
- Advising the Central and State Governments on measures necessary to improve university education.

The UGC, therefore, prescribes the minimum standards that are to be adhered to by universities and colleges affiliated to such universities. It also has the unique distinction of being the only government agency in the country which has been vested with the responsibility of providing grants to universities in furtherance of its (UGC's) objectives.

The salient features of the UGC Act, apart from stipulating the powers and functions of the UGC, include provisions stipulating the criteria for qualifying as universities, deemed universities, autonomous colleges and provisions dealing with the pre-requisites / eligibility for grants of degrees or diplomas.

ii. All India Council for Technical Education

The AICTE was set up under the All India Council for Technical Education Act, 1987 (“**AICTE Act**”) with a view to ensure proper planning and coordinated development of the technical education system throughout the country; qualitative improvement of such education in relation to planned quantitative growth; the regulation and proper maintenance of norms and standards in the technical education system; and for matters connected therewith.

The AICTE oversees technical education and the functioning of technical institutions within the country. ‘Technical Institution’, under the AICTE Act, refers to *the institutions, other than universities, conducting the courses or programmes in the field of Technical Education*”.

The AICTE has been endowed with a wide array of powers under the AICTE Act such as regulation and proper maintenance of norms and standards in the technical education system, planning, formulation and accreditation of technical institutions etc.

iii. Statutory Professional Councils

Statutory Professional Councils are responsible for recognition of courses, promotion of professional institutions and providing grants to undergraduate programmes and various awards. The National Medical Commission (“**NMC**”) (which replaced the Medical Council of India vide the National Medical Commission Act, 2019 (“**NMC Act**”)), is an umbrella regulatory body for regulating medical education and practices in India. NMC, is *inter alia* empowered to prescribe (i) policies for regulating medical institutions, medical researches and medical professionals (ii) policies for maintaining high standards in medical education in India; (iii) guidelines for determination of fees and all other charges in respect of 50% of seats in private medical institutions and deemed to be universities; and (iv) ensuring compliance by the State Medical Councils with the regulations and guidelines. Further, under the NMC Act, states will have to establish their respective State Medical Council within 3 years from the commencement of the NMC Act. These councils will have a role similar to the NMC, at the state level.

Similarly, Bar Council of India, Dental Council of India,⁴¹ Indian Nursing Council, etc., are some of the notable councils. These councils have been empowered to prescribe standards and formulate regulations with respect to their field of involvement.

41. In January 2020, the Union Ministry of Health and Family Welfare put in the public domain the draft National Dental Commission Bill 2020, a bill aimed at replacing the Dental Council of India and replacing it with National Dental Commission
See the press release here <https://mohfw.gov.in/newshighlights/seeking-comments-draft-national-dental-commission-bill-2020> (last visited on February 05, 2020)

B. Educational Institutes

i. Universities

According to the information available on the website of the UGC, there are about 50 Central universities,⁴² 410 state universities,⁴³ 126 deemed to be universities⁴⁴ and 340 private universities.⁴⁵ Section 2(f) of the UGC Act defines a university as that which is established or incorporated by or under a Central Act, a Provincial Act or a State Act, and includes any such institution as may, in consultation with the University concerned, be recognized by the UGC in accordance with the regulations made in this behalf under the UGC Act.

Universities are set up mostly under State Acts. Private universities are unitary institutions established within a state and cannot run or establish off-campus centre(s) outside their state of incorporation. A private university can, however, open off-campus centre(s) after the completion of five academic years from its date of incorporation and prior approval of the UGC.

All universities are required to adhere to the provisions and directions of the UGC with respect to maintenance of academic norms and standards of teaching. To this end, the UGC has introduced standards and regulations that private universities have to maintain under the UGC (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003 (“**UGC Regulations**”). A Private University, under the UGC Regulations, has been defined as *a university duly established through a State/Central Act by a sponsoring body viz. a Society registered under the Societies Registration Act, 1860 or any other corresponding law for the time being*

*in force in a State or a Public Trust or a Company registered under Section 8 of the Companies Act.*⁴⁶

The right of conferring or granting degrees specified by the UGC can be exercised only by a university or an institution deemed to be a university under Section 3 of the UGC Act or an institution specially empowered by an Act of Parliament to confer or grant degrees. Thus, only universities or institutes deemed to be universities are eligible to grant degrees. Further, it is pertinent to note that Section 23 of the UGC Act provides that no institution, whether a corporate body or not, other than a university established or incorporated by or under a Central Act, a Provincial Act or a State Act shall be entitled to have the word “University” associated with its name in any manner whatsoever. In 2017, the Supreme Court issued direction to the UGC to take steps to restrain deemed to be universities from using the word ‘university’.⁴⁷

Further, the University Grants Commission (Categorization of Universities (only) for Grant of Graded Autonomy) Regulations, 2018 (“**Grant of Graded Autonomy Regulations**”) encourage autonomous universities to collaborate with foreign educational institutions. These regulations also give an impetus to new age and skill courses. The Grant of Graded Autonomy Regulations aim to provide autonomy to the HEIs based on quality benchmarks and categorizes universities into three categories – Category I, II and III based on benchmarks mentioned therein.⁴⁸ Category I & II universities can hire foreign faculty, without approval of the UGC, who have taught at an institution appearing in top five hundred of any of the world renowned ranking frameworks. Further,

42. See https://www.ugc.ac.in/oldpdf/Consolidated_CENTRAL_UNIVERSITIES_List.pdf (last visited on February 05, 2020)

43. See https://www.ugc.ac.in/print_stateuniversity.aspx (last visited on February 05, 2020).

44. See <https://www.ugc.ac.in/oldpdf/Deemed%20University/Institute%20Deemed%20to%20be%20Univ%20List.pdf> (last visited on February 05, 2020)

45. See https://www.ugc.ac.in/oldpdf/Private%20University/Consolidated_List_Private_Universities.pdf (last visited on February 05, 2020).

46. Regulation 2.1. of the UGC (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003

47. Deemed To Be Universities Barred From Offering Courses In Distance Education Mode, available at http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/deemed-to-be-universities-barred-from-offering-courses-in-distance-education-mode.html?no_cache=1&cHash=ff16a836dac3674799ce9e68c360cbod (last visited on February 05, 2020)

48. Government of India Press Release on Grant of Graded Autonomy Regulations available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=180895>, (last accessed on February 05, 2020)

Category I universities may engage in academic collaborations with foreign educational institutions without approval from the UGC.⁴⁹

These regulations are an example of the government's attempt to encourage foreign investment in the higher education space in India.

ii. Deemed Universities

Under Section 3 of the UGC Act, the Central Government may, on the advice of the UGC, declare that any institution for higher education, other than a university, be deemed to be a university for the purposes of the UGC Act, and on such a declaration being made, all the provisions of the said Act, including the power to award degrees under Section 22 of the UGC Act, shall apply to such institution as if it were a university within the meaning of the Act.

The provision for deemed universities under the UGC Act was made in order to bring institutions under the purview of the UGC, which for various reasons did not qualify as universities and yet were carrying out work of high standard in a specialized academic field comparable to that of a university and grant of university status to which would enable them to further contribute to the cause of higher education, which would mutually enrich the institution and the university system.

Regulations for deemed universities are presently covered under the 'UGC (Institutions Deemed to be Universities) Regulation, 2019' ("**Deemed Universities Regulations**"). The Deemed Universities Regulations prescribe certain requirements to qualify for the grant of status as a university such as minimum land area and infrastructure requirements, financial requirements, etc. The institution should have, among its primary objectives, the provision for higher education leading to excellence and innovations in such branches of knowledge as may be deemed fit primarily at post-graduate and research degree levels fully conforming to the standards of a university. The institution *inter alia* should have been (i) in existence for at least

20 years; (ii) accredited with 3.26 CGPA for three consecutive cycles by National Assessment and Accreditation Council ("**NAAC**") or in case of technical institutions, two third of the eligible technical programmes should be accredited by the National Board of Accreditation; and (iii) at the time of application should be in top 50 in any specific category or in top 100 of overall ranking of National Institute Ranking Framework⁵⁰ for being recognized as a deemed university, unless made under the De-novo category (institutions devoted to innovations in teaching and research in unique and emerging areas of knowledge).⁵¹ The status of deemed university granted to such institutions is, initially made for a period of 5 years, on the basis of the satisfactory performance and compliance with the provisions of the Deemed Universities Regulations.⁵²

The advantages of a deemed university when compared to an ordinary institution are many. A deemed university has much more freedom as compared to an ordinary institution in terms of academic, administrative, finance, research, evaluation and extension aspects, etc.

Further, despite being entitled to privileges similar to that of universities, deemed universities are, however, unitary institutions similar to private universities. Thus, they cannot affiliate institutions/ colleges unlike ordinary universities. The colleges or institutes may form constituents of a deemed university only where they belong to the same Trust or Society managing the deemed university. A deemed to be university can also offer courses in the open, distance learning mode or online mode in accordance with the ODL Regulations or Online Education Regulations (*as defined below*).

To elaborate, with respect to deemed universities, the University Grants Commission (Open and Distance Learning) Regulations, 2017 ("**ODL Regulation 2017**"), specifically states that:⁵³

50. Regulation 4.01. of Deemed Universities Regulations

51. Regulation 4.01. of Deemed Universities Regulations

52. Regulation 85.05 of Deemed Universities Regulations

53. Annexure IV, Part B of the ODL Regulation 2017

49. Regulation 4.0, Grant of Graded Autonomy Regulations

- an institute declared to be deemed to be university after May 26, 2010 is not allowed to conduct courses in the distance education mode;
- institute declared to be deemed to be university before May 26, 2010 is not allowed to conduct courses in distance mode from any of its off-campus centres or off-shore campuses approved after 26th May, 2010;
- that a deemed to be university can operate only through its headquarters or from Government approved off-campus or off-shore campuses;
- approval for new courses and extension of approval of the courses already run by the deemed to be university under the distance mode would be granted by the UGC, subject to fulfillment of conditions laid down by the UGC.

iii. College

The difference between a college and university is that colleges facilitate the grant of a degree but does not grant it by itself. A university grants a degree either through its own departments or through colleges affiliated to it. A college's ability to facilitate such grant of degrees by a university is by virtue of its "affiliation" with such university and is governed by the terms and conditions of the affiliation. The UGC (Minimum Standards of Instruction for the Grant of the First Degree through Formal Education) Regulations, 2003 lays down standards for instructions and ensures uniformity in terms of admission, working days, syllabus, examination and evaluation, physical facilities, award of degrees etc., to be followed in all colleges and universities in the country. In India, much like schools, setting up of a college would have to be carried out either by a Trust or a Society under the UGC (Affiliation of Colleges by Universities) Regulations, 2009.

iv. Autonomous Colleges

Autonomous colleges refer to colleges which have been conferred such status by the university with which they are affiliated. Such status is conferred with the concurrence of the state government and the UGC.⁵⁴

Further in 2018 itself, the UGC issued the University Grants Commission (Conferment of Autonomous Status upon Colleges and Measures for Maintenance of Standards in Autonomous Colleges) Regulations, 2018 ("**Autonomous Colleges Regulations**") for regulation of autonomous colleges. Autonomous colleges have the freedom to design their course, curriculum, fix fees of the courses at their own level, have flexible teaching methods and modules, and have complete administrative autonomy, unlike affiliated colleges. Further, an autonomous college is free to start diploma (undergraduate and postgraduate) or certificate courses without approval of the university and can issue diplomas and certificates under the seal of the college. Additionally, an autonomous college can also start a new degree or postgraduate/Ph.D. course or certificate with the approval of the academic council of the college and concerned statutory council, provided that such courses fulfil the minimum standards as prescribed by the university/ UGC. As per the status list of approved autonomous colleges under the UGC Scheme, India has 708 autonomous colleges.⁵⁵

The autonomy granted to them is institutional and they can run undergraduate, post-graduate, and M.Phil. Courses that were being run at the time of conferment of autonomous status. Further, all courses introduced by the colleges after the conferment of autonomous status shall automatically come under the purview of their autonomy.

54. See UGC Guidelines for Autonomous Colleges 2018, available at: https://www.ugc.ac.in/pdfnews/2239254_FinalRevisedGuidelinesAutonomousColleges19-01-2018.pdf (last visited on February 05, 2020)

55. The figure provided by the UGC is updated till 28.06.2019. See https://www.ugc.ac.in/oldpdf/colleges/autonomous_colleges-list.pdf (last visited on February 05, 2020).

v. Institutes Providing Distance Education

Distance education was initially governed by two regulatory bodies in India –

- i. The UGC
- ii. The Distance Education Council (“DEC”) which was set up under the Indira Gandhi National Open University Act, 1985, for the purpose of Co-ordination and determination of standards of teaching, evaluation and standards in the open and distance learning (“ODL”) model of education in India.

While private universities set up under State Acts, were governed by the UGC Regulations, any university that intended to offer programmes and courses via distance education mode were required to take approval from the DEC, and were also governed by the various guidelines and regulations implemented by the DEC in this regard.

However, on May 4, 2013 the DEC was dissolved and all regulations and guidelines enacted by the DEC stood repealed. Subsequently, the Government on May 28, 2013 issued a notification transferring DEC’s responsibilities including the responsibility for regulating ODL in India and developing appropriate regulations governing ODL to the UGC.⁵⁶ This marked a paradigm shift in the governance of higher education in India and also confirmed that going forward UGC would be the central authority for ODL in India excluding technical education which would continue to be under the jurisdiction of the AICTE.

Pursuant to the above, UGC on June 17, 2013 notified that the existing ‘Guidelines of DEC on Minimum Requirements for Recognition of ODL Institutions’ (“DEC Guidelines”), previously implemented by the DEC, will continue to be in force till such time new regulations are notified.⁵⁷

56. Notification number F.3-2/2012 (Admin.I/A&B), dated May 28, 2013.

57. Notification number F. No. 1-4/2013 (CPP-II), dated June 17, 2013.

Finally, on June 23, 2017, the UGC notified the University Grants Commission (Open and Distance Learning) Regulations, 2017 (“ODL Regulation 2017”), setting out minimum standards of instructions required for granting degrees (undergraduate and post-graduate levels) through ODL mode^{58,59} These regulations are applicable to all degree programmes (other than programmes in technical courses, medical, dental, pharmacy and any programme which is not permitted to be offered in distance mode by regulatory body) offered by universities and institutions deemed to be universities.⁶⁰ As per the ODL Regulation 2017, any higher educational institutions already offering⁶¹ or intending⁶² to offer programmes in ODL mode from the academic session 2018-19 onwards have to seek fresh approval for recognition from the UGC.

vi. Institution of Eminence:

As an initiative to evolve into institutions of world class and to improve the quality of higher educational institutions in India, in 2017 the Government introduced a scheme of providing regulatory architecture for setting up/upgrading of 20 institutions as ‘Institutions of Eminence’ (10 public and 10 private institutes) to achieve world class status, from amongst the existing government/private institutions and new institutions from the private sector.⁶³ To give effect to this proposition, the UGC has notified regulations and guidelines pertaining to the same namely, *UGC (Institutions of Eminence*

58. Regulation 2(m) of the ODL Regulation 2017, defines “Open and Distance Learning” mode as a mode of providing flexible learning opportunities by overcoming separation of teacher and learner using a variety of media, including print, electronic, online and occasional interactive face-to-face meetings with the presence of an Higher Educational Institution or Learner Support Services to deliver teaching-learning experiences, including practical or work experiences.

59. Regulation 1(1) of the ODL Regulation 2017, available at <https://www.ugc.ac.in/oldpdf/regulations/distance%20education%20regulations.pdf> (last visited on February 05, 2020)

60. Regulation 1(3) of the ODL Regulation 2017

61. Regulation 3(1) of the ODL Regulation 2017

62. Regulation 3(2) of the ODL Regulation 2017

63. See https://www.ugc.ac.in/pdfnews/4523868_Press-release-IoE-final.pdf (last visited on February 05, 2020)

*Deemed to be Universities) Regulations, 2017*⁶⁴ (“**Institution of Eminence Regulations, 2017**”) for private institutions and UGC (*Declaration of Government Educational Institutions as Institutions of Eminence*) Guidelines, 2017⁶⁵ (“**Institution of Eminence Guidelines, 2017**”) for public institutions. Some of the key incentives under these regulations and guidelines are:

- exemption from Government approval for academic collaboration with foreign higher educational institutions ranked in top 500 in global ranking;⁶⁶
- flexibility in admission of foreign student’s subject to maximum of 30% of the strength of domestic students;⁶⁷
- freedom to fix fees for both foreign⁶⁸ and domestic students;⁶⁹
- freedom to offer courses within a programme, as well as to offer degrees in newer areas after approval from its governing council;⁷⁰
- flexibility to determine course structure in terms of number of credit hours and years to take a degree⁷¹ and in fixing curriculum and syllabus, with no UGC mandated curriculum structure;⁷²
- freedom to offer online courses subject to condition that not more than 20% of the programme should be in online mode. However, certificate courses can be provided entirely through online mode;⁷³

- freedom to hire foreign faculty on tenure or contract basis;⁷⁴

Over 100 universities/ institutions applied for the status of Institute of Eminence. After a tough step-wise process, the government shortlisted 6 institutes for conferring the status of ‘Institute of Eminence’ on July 9, 2018.⁷⁵ Of the six selected, three institutes are from the public sector⁷⁶ and the remaining three from the private sector.⁷⁷ In 2019, based on recommendation made by the UGC, the government has awarded IoE status on 4 public institutes and has issued the letter of intent for granting the IoE status to 6 private institutions.⁷⁸ These institutes will have complete financial autonomy and will be exempted from all UGC norms with respect to admission, fee and course structure, recruitment of faculty, inspection and academic collaborations. The public institutes will also be provided additional financial incentives by the government of up to Rs. 1000 crore over the period of five years, which is subject to its achievement of the financial and physical outcomes.

Institutes of Eminence will also be allowed to collaborate with foreign education institutes ranking in top 500 without requirement to take approval from the UGC. They also have the ability to offer online courses subject to condition that not more than 20% of the programme should be in online mode.

64. See https://www.ugc.ac.in/pdfnews/5403862_Gazette-Institutions-of-Eminence-Deemed-to-be-Universities.pdf (last visited on February 05, 2020)

65. See https://www.ugc.ac.in/pdfnews/2170800_Guidelines-for-Educational-Institutions-as-Institutions-of-Eminence-2017.pdf (last visited on February 05, 2020)

66. Clause 6.1.(j) of the Institution of Eminence Guidelines, 2017

67. Clause 6.1.(a) of the Institution of Eminence Guidelines, 2017

68. Clause 6.1.(b) of the Institution of Eminence Guidelines, 2017

69. Clause 6.1.(c) of the Institution of Eminence Guidelines, 2017

70. Clause 6.1.(d) of the Institution of Eminence Guidelines, 2017

71. Clause 6.1.(e) of the Institution of Eminence Guidelines, 2017

72. Clause 6.1.(f) of the Institution of Eminence Guidelines, 2017

73. Clause 6.1.(g) of the Institution of Eminence Guidelines, 2017

74. Clause 6.1.(m) of the Institution of Eminence Guidelines, 2017

75. See http://mhrd.gov.in/sites/upload_files/mhrd/files/IoE_PR.pdf (last visited on February 05, 2020)

76. (i) Indian Institute of Science, Bangalore, Karnataka; (ii) Indian Institute of Technology, Bombay, Maharashtra; (iii) Indian Institute of Technology, Delhi,

77. (i) Jio Institute (Reliance Foundation), Pune under Green Field Category; (ii) Birla Institute of Technology & Sciences, Pilani, Rajasthan; and (iii) Manipal Academy of Higher Education, Manipal, Karnataka

78. See <https://pib.gov.in/newsite/PrintRelease.aspx?relid=192458> (last visited on February 05, 2020)

3. Participation of Foreign Educational Institutions in Higher Education

The immense opportunity in the Indian education space has not gone unnoticed. Foreign universities have been inking strategic partnerships with educational institutions in the country.

Currently, FEIs are not permitted to establish an independent campus in India for award of degree or diploma. As a step towards liberalization of the higher education, the government on September 10, 2013 had issued a press release⁷⁹ informing various stakeholders about its proposal to allow foreign universities to set up campuses in India as not-for-profit companies (without having to collaborate with domestic educational institutions). However, no action has been taken on this front as of now. Further, a bill titled “The Foreign Educational Institutions (Regulations of Entry and Operations) Bill, 2010⁸⁰” was introduced in the parliament to regulate entry and operation of FEIs in India to impart higher education. However, the bill lapsed in 2014. In 2016, Niti Aayog have submitted a report to the Prime Minister and the Human Resource Development Minister, calling for the invitation of foreign universities to set up campuses in India and their operations should be controlled by law, since the same will help meet the demand for higher education in the country, increase competition and subsequently improve standards of higher education.⁸¹

Some of the options for FEI to collaborate with Indian institutions are discussed below.

I. Tie-ups with Indian Institutions for Twinning Programmes

Twinning arrangement refers to those arrangements wherein students undertake a part of their course study in one institute and spend equivalent duration in the other partnering institute engaged in the twinning programme. Twinning arrangement could have several variations depending on the specific needs between the contracting parties i.e. overseas and Indian institutes. Twinning programme in non-technical sector in India are regulated by the UGC (Promotion and Maintenance of Standards of Academic Collaborations between India and Foreign Educational Institutions) Regulations, 2016 (“**UGC Regulations 2016**”) which allows FEI to collaborate with Indian Educational Institutes (other than technical institutions) upon obtaining approval from the UGC.⁸² Approval is granted for two cycles of the minimum duration of the degree programmes covered under the collaboration.⁸³ These regulations also cover twinning programmes whereby students may complete their course by part study in India and part study in the main campus of the foreign institution.⁸⁴ UGC Regulation 2016 have introduced an e-application process for seeking approvals for collaboration/ twinning programmes.⁸⁵ The key conditions under the regulations include the following:

- The FEI has to be accredited in its home country with the highest grade or its equivalent by an Assessment and Accreditation Agency (“**AAA**”) in its

79. See <http://pib.nic.in/newsite/PrintRelease.aspx?relid=99225> (last visited on February 05, 2020).

80. See <http://pib.nic.in/newsite/PrintRelease.aspx?relid=70050> (last visited on February 05, 2020).

81. See <http://indiatoday.intoday.in/education/story/foreign-university-campuses-in-india/1/644180.html> (last visited on February 05, 2020)

82. Regulation 1(2)(a) of the UGC Regulations 2016, available at [https://www.ugc.ac.in/pdfnews/5003871_Foreign-Collaboration-Regulations-2016-\(1\).pdf](https://www.ugc.ac.in/pdfnews/5003871_Foreign-Collaboration-Regulations-2016-(1).pdf) (last visited on February 05, 2020)

83. Regulation 5(f) of the UGC Regulation 2016

84. Regulation 2(m) of the UGC Regulation 2016

85. Regulation 5(b) of the UGC Regulation 2016

homeland.⁸⁶ The foreign institute also has to abide by other conditions prescribed by the Government statutory bodies;⁸⁷

- the Indian educational institute has to be accredited with grade not less than A or its equivalent by any AAA authorized by the UGC;⁸⁸
- the written memorandum of understanding to be entered into between the foreign and Indian institute after obtaining approval of the UGC;⁸⁹
- the FEI has to submit details about the infrastructure facilities, facilities available for instruction, faculty, specified fee, courses, curricula, availability of requisite funds for operation for a minimum period of three years and other terms and conditions of collaboration,⁹⁰ if any;
- franchise arrangements are not permitted.⁹¹

Further, the AICTE (Grant of Approvals for Technical Institutions) Regulations, 2016, facilitate the entry of foreign institutes in India by way of collaboration with Indian educational universities/institutions, for imparting technical education leading to the award of diplomas, degrees, etc. As per this regulation prior approval of AICTE is required for collaboration and twinning programme between Indian and foreign universities/institutions in the field of technical education, research and training.⁹² Additionally, the AICTE releases an Approval Process Handbook (“APH”) every year which, amongst other things, provides comprehensive information with respect to the requirements of AICTE and the approval process. The 2019-20⁹³ APH provides for a section on “*collaboration and twinning programme between Indian and Foreign*

university/ institution in the field of technical education, research and training”, which *inter alia* states that:

- the FEI has to be approved and accredited with higher grades in its home country;
- the Indian institution has to be an AICTE approved institution and should be affiliated to a university/ board;
- the Indian institution should have a valid NBA accreditation for one year beyond April 10, 2021 in the programme/ courses for which approval is sought;
- the degree / diploma granted to students has to be awarded by the FEI in its parent country;
- for the purpose of collaboration/ twinning arrangement FEI/ Indian institution have to enter in to a bipartite agreement/ Memorandum of Understanding (“MoU”) for this purpose. The Indian institution and the concerned affiliating University/ board also have to enter into a bipartite agreement/ MoU for this purpose. For course(s) where University/ Board approval is not mandatory, the FEI and Indian institution can enter in to a bipartite agreement/ MoU for this purpose;
- the students admitted under the twinning programme should spend at least one semester for two years programme and two semesters for four years of the course work of the programme in the FEI in its parent country; and
- The FEI has to furnish a No Objection Certificate from the concerned Embassy in India with a mention of genuineness of technical institution of the respective country.

In addition to these key term, other conditions for approval and compliance may also apply, which may be specified by the AICTE in the APH from time to time.

With the expansion of India’s economy, many students have started preferring twinning programmes to full-time overseas courses. Twinning programmes also costs less in comparison to full-time overseas programmes and students benefit substantially as most of the foreign faculties are also typically covered under such partnership programmes.

86. Regulation 3(1)(a) of the UGC Regulations 2016

87. Regulations 3(1)(c) of the UGC Regulations 2016

88. Regulation 3(2)(a) of the UGC Regulations 2016

89. Regulation 4 of the UGC Regulation 2016

90. Regulation 5(b) of the UGC Regulations 2016

91. Regulation 6(a) of the UGC Regulations 2016

92. APH is available at <https://www.aicte-india.org/sites/default/files/APH%202019-20.pdf> (last visited on February 05, 2020)

93. APH is available at <https://www.aicte-india.org/sites/default/files/APH%202019-20.pdf> (last visited on February 05, 2020)

II. Online Programmes

The Online Education Regulation discussed below applies only to Indian institutes. They currently do not extend to programs offered by the foreign education institutions in India. Courses or programmes offered directly through the foreign education institutions from outside India are still not regulated under any education specific regulations in India. While such courses usually award certificate of completion to the successful candidate at the end of the course, some even award a degree from outside India for programmes completed via the online mode. Some of these courses are also self-paced and flexible with programme timing, schedule etc., resulting in higher enrollment ratio. Resultantly, recent trends indicate that such online certification programmes are gaining popularity day by day.

The UGC has introduced University Grants Commission (Online Courses or Programmes) Regulations, 2018⁹⁴ (“**Online Education Regulations**”) to recognize degrees, diplomas and certificates offered by universities and institution deemed to be university, through online mode, delivered through interactive technology using internet.

As per the Online Education Regulations, only non-technical courses can be offered online. Hence, courses or programmes resulting in degree or diploma in the field of engineering, law, medicine, dental, pharmacy, nursing, architecture, physiotherapy, applied arts or any such courses or programmes are not recognized under the Online Education Regulations.⁹⁵ Further, any course or programme which requires a practical or a laboratory course(s) as a part of its curriculum can also not be offered through the online mode.⁹⁶

A higher educational institution can provide one or more academic sessions online each year which begin either in July/August or January/February every year. The duration of the Online Course or Programme as per Online Regulations is:

- For a Certification: The Online Course or Programme should be of minimum of six months’ duration and would have a minimum twenty credits.
- For a Diploma: Online Course or Programme should be of minimum of one-year duration and would have minimum forty credits.
- For a degree: The Online Course or Programme should for the same duration and for the same credits as specified by the UGC under Choice Based Credit System (CBCS).

A higher educational institution⁹⁷ can offer the Online Course or Programme⁹⁸ subject to it obtaining approval by the appropriate statutory authorities or bodies of the higher education institution and the delivery mechanism conforms to the quality standards of the online education as specified under Online Education Regulations. Further, such institute can offer the Online Course or Programme only in those disciplines in which it has been offering the same or similar course or programme in regular mode (i.e. classroom teaching) or in open and distance learning mode and after at least one batch has been passed out. Further, the online courses or programme should be delivered through the SWAYAM portal, which is a Massive Open Online Course (“**MOOC**”) platform initiated by the Indian Government to offer online courses. UGC may also allow other learning platforms if they are verified and approved by the expert committee

94. See https://www.ugc.ac.in/pdfnews/7553683_Online-Courses-or-ProgrammesRegulations_2018.pdf (last visited on February 05, 2020)

95. Regulation 2(2) of the Online Education Regulations.

96. Regulation 4(2) of the Online Education Regulations.

97. Section 2(k) of the Online Education Regulations defines ‘Higher Educational Institution’ to mean *a university covered under clause (f) of section 2 and an institution deemed to be a university under section 3 of the Act, which is imparting higher education or research therein by means of conducting regular classes or through Open and Distance Learning systems or through online education system.*

98. Regulation 2(q) of the Online Education Regulations defines ‘Online Course or Programme’ to mean *the Course or Programme of studies which is delivered through online mode leading to award of a Certificate or Diploma or Degree by an approved Higher Educational Institution and recognised under these Regulations;*

of the UGC. This opens up opportunity for ed-tech platforms. Further, there is also an opportunity for ed-tech platforms to assist with curriculum development, tech support etc.

III. License Arrangement

As FEIs are not allowed to open a campus, or conduct educational programmes independently in India, they enter into license arrangement with Indian educational institutions. Under such an arrangement, the FEIs usually license brand name, curriculum, know-how etc., to the Indian educational institute. Such a license can be granted directly by the FEI to the Indian educational institute, from outside India under an agreement. If the FEI is interested in an India presence, it can even set up an Indian centre (through a private limited company or a limited liability partnership), which offers a license to an Indian educational institute. The Indian educational institute then ends up offering the programmes to students in India. Typically, a certificate of completion is awarded to students at the end of the programme which is usually co-branded in the name of the FEI and Indian educational institute. It is important to note that this structure should be in the nature of a pure licensing arrangement and the FEI should not award any degree or diploma to students in India. Otherwise, the programme may fall under the purview of regulation.

IV. Services Arrangement

In addition to granting a license of the brand, curriculum etc., FEIs may enter into services arrangement with the Indian educational institutes. Under such an arrangement, the FEI may provide services such as advising on standards for evaluation of students, qualification and recruitment of teachers, training teachers, advertising, inputs on infrastructure facilities etc. At times, FEIs also send their teacher and staff to the Indian educational institutes for teacher / student training programmes. The FEIs benefits from such an arrangement as it is able to exercise control over the curriculum, standard of education offered etc. Further, the FEI also earns from the service fee (in addition to license fee). The Indian educational institute benefits from the expertise and experience of the FEIs.

V. Credit Transfer

Another upcoming model is the credit transfer model. In this model, student enrolls with the Indian service provider who provides teaching as part of the programme (using its staff or foreign university staff). The course studied in India is recognized by the FEI by giving credit equivalence to students. The student then transitions to the FEI and completes the course and gets a degree/ diploma. This helps students save costs, allows the FEI to have a brand name in India and the Indian service provider benefits from this model as well.

4. Foreign Investment in Education

The economic reforms launched by the Government of India from 1991 onwards have resulted in substantial economic growth and integration of India into the global economy. The pace of reforms has gained a new momentum due to political stability and strong industrial growth. The Indian capital markets have been opened up for Foreign Institutional Investors in 1993; the Foreign Direct Investment (FDI) regime too has been progressively liberalized over the years.

FDI up to 100% is allowed under the automatic route in education.

Further, vide the revised Consolidated FDI Policy (of 2017), which became effective from August 28, 2017,⁹⁹ construction development activities in the education industry have been exempted from conditions generally applicable to construction-development sector that is the lock-in period of three years from the date of completion of minimum capitalization.

However, despite this liberalized regime, investment in education has been restricted due to the following factors:

- prevailing regulations require the entity setting up a school or college or a deemed university to be of a not-for-profit character. The not-for-profit character inevitably requires the entity to be either a registered as a Society or a Trust (in case of schools, colleges and private/deemed universities) or a Section 8 Company (mostly in case of schools). This “not-for-profit-principle” may become a bottleneck for attracting investments. 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 a non-profit nature would not be able to distribute returns on the investment. Further, a Section 8 Company being of a 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, religion, charity or any other useful object.

- The regulations governing education vary from one state to another and though a few matters have been uniformly regulated by the RTE, there is need for more coordination between the Central and State Government to avoid overlapping of policies and regulations, etc.
- The presence of multiple regulators along with the requirement of numerous approvals and regulatory compliances has also hampered investment in the higher education segment in India. The regulatory uncertainties surrounding the “for profit” ventures have also hampered investment.

While these factors may impact investments in education, this, however, does not deter investments in education services companies or Ed-tech companies, which are currently not subject to any specific education related regulations. Such entities and businesses are not required to be of a not-for-profit character and are also not required to comply with education specific laws.

I. Possible Structure For Schools & Higher Education Institutes

Foreign investments can primarily be made into companies providing educational and construction services to schools run by Trusts, Societies or Section 8 Companies. Consequently, funds and other investors have invested in education services companies which provide services to such Trusts, Societies or Section 8 Companies and in turn receive compensation for it. A wide array of legitimate services, including management services, teacher training, curriculum designing, etc., can be provided to the entity running the school.

99. See http://dipp.nic.in/sites/default/files/CFPC_2017_FINAL_RELEASED_28.8.17.pdf (last visited on February 05, 2020)

The aforesaid structure could be made applicable even with respect to colleges and deemed to be universities as they are also managed either by a Trust or a Society or a Section 8 company.

II. Other Segments of Investment in Education

Investment in education is not limited to only the K-12 and the higher education segments. There are other segments such as vocational training and tutoring services which have been attracting a great amount of interest amongst investors largely due their low regulated environment in which they operate.

A. Vocational Education and Training

A number of studies have indicated that a significant portion of students graduating from colleges are not readily employable in industries such as IT/ITES. Furthermore, a substantial portion of students graduating from schools lack the means to access professional colleges and tend to pursue employment in low level posts/profession. Vocational courses providing employable skills are, thus, in great demand. Private participation occurs mostly in niche training centers relating to IT and hospitality. The IT training market is one of the biggest sections in the vocational course segment and is estimated to run into multi-million USD.

Currently, the National Council for Vocational Education and Training (“**NCVET**”) regulates the functioning of entities engaged in vocational education and training, both long-term and short-term and establish minimum standards for the functioning of such entities.¹⁰⁰ The primary functions of NCVET includes:

- recognition and regulation of awarding bodies, assessment bodies and skill related information providers;-
- approval of qualifications developed

by awarding bodies and Sector Skill Councils (SSCs);

- indirect regulation of vocational training institutes through awarding bodies and assessment agencies;
- research and information dissemination;
- Grievance redressal.

B. Tutoring & Test Preparation Services

Due to the increasing level of competition and the need to succeed at a state/national level to get into colleges of choice, the face of tutoring has undergone a tremendous change from what was once a teacher led, highly local and fragmented delivery model to IP/content led delivery model built around the promise of performance. The promise to provide individual attention and improve the level of performance of the student is what differentiates it from ordinary schooling. However, it is here that the challenge of creating a scalable model lies. The ability to deliver consistent quality of teaching and the ability to cater to the varying needs of each student are key challenges to scalability of the business. Scalability may, however, be achieved by the use of technology to deliver content, for assessment and benchmarking and to enable students undertake self-pace learning. Apart from the challenge of scalability, the industry also faces the problem of being highly fragmented. Scalability and profitability will, thus, require a significant commitment from the investors who understand that to build such a business, significant investments from time to time, and a long investment horizon would be required.

C. Delivering Educational Services to Students on a for-Profit Basis

This model can provide opportunities to formal educational institutions as well as educational entrepreneurs to provide variety of services such as training, skill development, courses on employability enhancements etc. - areas that are presently outside the purview of regulations

¹⁰⁰. See <https://pib.gov.in/newsite/PrintRelease.aspx?relid=184072> (last visited on February 05, 2020)

governing education. For example, National Skill Development Corporation has collaborated with private sector through a PPP programme to provide educational modules on employability.

D. PPP Model in Education

Under this model, education is treated as a public good with private sector participation. PPP in education is a marriage between non-profit activities and for-profit administration of such occupations (educational institutions). The Supreme Court has, in the case of *T.M.A Pai Foundation*¹⁰¹ stated that education is a non-profit activity and institutions are under an obligation to not profiteer from such occupation; making reasonable surplus from such occupation is however allowed. In light of the same, PPP in higher education can be used for the following:

- Providing infrastructure and facilities
- Providing investments
- Providing capacities for future expansion

Moreover, several models have also been developed by private players to increase participation in higher education. Few of the models are mentioned herein-below:

Sub-Model I – Basic Infrastructure Model

States in India have disproportionate GDP spending on education. A large part of spending is dedicated to taking care of operational expenses, salaries, allowances etc. thus leaving very little for the government to spend on the infrastructure of the institutes. Private sector can step in and provide infrastructure to government aided schools. Thus, the private sector invests in infrastructure while the government retains the responsibility for operations and management of the institutions and makes annualized payments to the private investors in lieu of the cost incurred in creating the infrastructure.

101. *T.M.A. Pai Foundation v. State of Karnataka* (2002) 8SCC 712

Sub-Model II – Outsourcing Model

The private sector invests in the infrastructure and also has the responsibility of operations and management of the institutions, while the government pays the private investors for the specified services.

Sub-Model III – Equity or Hybrid Model

Investments in infrastructure are shared between the government and the private sector, while operations and management are with the private sector.

Sub-Model IV – Reverse Outsourcing Model

Government invests in infrastructure and the private sector takes the responsibility of operations and management.

E. Impact Investment in Education

Private players are always on a look-out for investment opportunities that guarantee positive financial returns. Impact investors pursue not only financial returns but also focus on making a positive impact and achieving their identified social, economic or environmental milestones. This rise of impact investing has been a timely response to several increasing uncertainties facing the world such as basic education and healthcare. In India, impact investment is gaining momentum and has already grown into a billion-dollar-a-year industry.¹⁰² According to a report by McKinsey & Company, India's demand for purpose-driven finance could grow to USD 6 billion to USD 8 billion by 2025.¹⁰³ The report further states that between 2010 and 2016, India attracted over 50 active impact investors, who poured in more than \$5.2 billion and about \$1.1 billion was invested in 2016 alone.¹⁰⁴

102. <http://www.businessworld.in/article/World-Leaders-In-Impact-Investment-Converge-In-New-Delhi-To-Explore-The-Power-Of-Impact-11-10-2018-162021/>. (Last visited on February 05, 2020).

103. <https://www.mckinsey.com/industries/private-equity-and-principal-investors/our-insights/impact-investing-finds-its-place-in-india>, (last visited on February 05, 2020)

104. <https://www.mckinsey.com/industries/private-equity-and-principal-investors/our-insights/impact-investing-finds-its-place-in-india>, (last visited on February 05, 2020).

Notable social impact investment firms in India include Unitus Ventures, Social Alpha, Lok Capital, Aavishkaar Venture Management, Omidyar Network, Acumen, Accion International and LGT Venture Philanthropy.¹⁰⁵ While IEOF is a USD 1 billion fund aimed at improving the quality of K-12 education in government schools, IIFF will finance impact enterprises focused on social and environmental impact.^{106 107 108}

While there has been considerable amount of experimentation with some success stories in school education and in the vocational-education and skill- development sectors, very few PPP models have been tried out in the field of education. Thus, in order to facilitate models for industry-institute interface and to ensure local and regional development of the areas, large education hubs could be created in different parts of the country anchored by large public/private sector enterprises funded through their allocations for corporate social responsibility with free provision of land and other essentials by the State governments concerned.¹⁰⁹

E. Online Education

Another new space of growth is the online education, which is witnessing investments, and entry of new providers through new initiatives and acquisitions. Since the programmes are offered online, they are not only low cost but

are at times self- paced. It is also preferred by students who are unable to access physical centers. As per a report published by KPMG, India's online education industry is expected to grow almost eight times to hit \$1.96b by 2021.¹¹⁰ The paid user is expected to increase from ~1.6m users in 2016 to ~9.6m in 2021. For example, Byju's- an Indian ed-tech start up founded in 2011 is now one of the largest ed-tech and online tutoring platform valued at USD 8 billion as of January 2020.¹¹¹

Primarily, there are five models which are growing at a rapid pace in ed-tech in India;

- primary and secondary supplement education;
- test preparation;
- reskilling and online certifications;
- higher education and language; and
- casual learning

As per the report published by KPMG, reskilling and online certification has the maximum paid users i.e. approximately 499,000.¹¹²

105. <https://www.vccircle.com/social-impact-firm-unitus-marks-first-close-of-second-fund/> (Last visited on February 05, 2020).

106. https://www.business-standard.com/article/current-affairs/two-india-focused-impact-funds-of-1-bn-each-launched-during-gsg-summit-118101001087_1.html, (last visited on February 05, 2020).

107. NDA has had the pleasure of assisting several of these impact investment firms in setting up social impact funds including social venture funds and category II Alternate Investment Funds. NDA also helped the Global Steering Group for Impact Investments to launch two outcome based funds in India: (i) India Impact Fund of Funds (IIFF); and (ii) the India Education Outcomes Fund (IEOF).

108. Request Impact Investment: innovation for India's Education Sector here http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Impact_Investments.htm (last visited on February 05, 2020).

109. Inclusive and Qualitative Expansion of Higher Education, UGC 12th Fifth Year Plan (2012-17), available at: http://www.ugc.ac.in/Ugcpdf/740315_12FYP.pdf (last visited on February 05, 2020).

110. Online Education In India : 2021, A study by KPMG in India and Google, published on May 2017, available at <https://assets.kpmg.com/content/dam/kpmg/in/pdf/2017/05/Online-Education-in-India-2021.pdf> (last visited on February 05, 2020)

111. See Tiger Global invests \$200M in Byju's at \$8 billion valuation available at <https://tech.economictimes.indiatimes.com/news/internet/tiger-global-invests-200m-in-byjus-at-8-billion-valuation/73169591> (last visited on February 05, 2020)

112. *Ibid.*

5. Taxation

In light of the restrictions on investment into the education industry due to the prevailing regulations which require the entity setting up the school or college or a deemed university to be of a non-profit character, the investments are usually made, as described previously, into an Education Services Company, which could provide services to the entity setting up and running the school / college/ university. In such cases, taxation at multi-levels would have to be considered. The tax implications on the entity setting up the school, the Education Services Company and on the foreign investor are discussed below:

I. On the Entity Setting up the Institution

Educational institutions set up as not-for-profit organizations are thus eligible for certain tax exemptions, as provided under the Income Tax Act, 1961 (“ITA”), subject to satisfaction of certain conditions, such as:

- the educational institution will have to qualify as a trust set up for a charitable purpose; education is covered within the definition of ‘charitable purpose’ as defined under Section 2(15) of the ITA;
- the educational institute will also have to fulfil certain other conditions in respect of utilization of income (i.e., income derived from property held under charitable trust must be used predominantly for charitable purposes), etc., as prescribed under Sections 11 and 12 of the ITA;
- the educational institution should be registered under section 12AA for availing such exemption.

Alternatively, if any university or other educational institution existing solely for educational purposes obtains registration as prescribed under Section 10(23C), it could claim income tax exemption from income earned by it.

In order to prevent a scenario where the entities switch between obtaining tax exemptions under section 11/ 12 and section 10(23C) as per their convenience, the Union Budget 2020 (“Budget”) has proposed to amend the law to provide that the registration for the purposes of section 11/12 shall become inoperative once a registration under section 10(23C) is approved.

II. On the Education Services Company

An Education Services Company, as discussed above, would generally be rendering managerial, administrative and other services to the school. Being a corporate entity, the Education Services Company would be subject to tax on its total income at the applicable rate of corporate tax in India (currently 30% for resident companies).¹¹³ Further, services to be provided by the Education Services Company should be exempt from Goods and Services Tax subject to applicable conditions.¹¹⁴ With respect to personal taxation of faculty or other employee visiting India, there exist a risk of collaboration arrangements constituting an ‘association of persons’ (“AOP”) between the foreign and Indian institutes. An AOP is a separate taxable entity and is considered to be resident in India even if a part of its control and management is situated in India. For example, in case of collaborations between an FEI and an Indian institution where the FEI provides course content, faculty training, etc. and the Indian institution is responsible with respect

¹¹³. All tax rates mentioned herein are exclusive of applicable surcharge and education cess, unless mentioned otherwise; In case of resident companies, surcharge at 7 per cent or 12 per cent is applicable on their income tax liability if their total taxable income in a financial year is in excess of INR 10 million and up to INR 100 million or in excess of INR 100 million, respectively. In case of non-resident companies, a surcharge of 2 per cent or 5 per cent is applicable in similar circumstances. In case of partnerships (including LLPs), a surcharge at 12 per cent is applicable on their income tax liability if their total taxable income in a financial year is in excess of INR 10 million. Health and Education and cess of 4% is applicable on the total of the income-tax and surcharge.

¹¹⁴. Notification No. 12/2017 – Central Tax (Rate).

to infrastructure and other on-ground activities, there is a risk that both entities may jointly be treated as an AOP (depending on the nature of relationship between the entities). As the Indian institution is resident in India, such an AOP would also be treated as a resident of India. AOP classification could lead to significant exposure for FEI as AOPs resident in India are taxable on its worldwide income in India.

Further, the Government of India introduced the Equalisation Levy (Levy) in the year 2016. The Levy has been introduced to achieve the following two objectives:

- equalizing the playing field between resident service providers who pay income taxes in India and non-resident service providers who do not pay taxes in India;
- taxing the untaxed income of non-resident service providers who do not have a physical presence in India

The Levy currently imposes a 6% tax “on consideration received or receivable for any on consideration received or receivable for any specified services” which currently includes “online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement”. As of now, the Levy is only applicable on online advertising industry. Accordingly, if an FEI provides online advertisement services to the Education Services Company, then the consideration paid for it should be subject to the Levy.

Further, through the Finance Act 2018, and as part of India’s commitment to the Base Erosion and Profit Shifting (“**BEPS**”) initiative on digital economy, the ambit of ‘business connection’ under the Income Tax Act, 1961 (“**ITA**”) was expanded to include non-resident companies that have significant economic presence (“**SEP**”) in India. Amongst other things, a non-resident company can form an SEP in India if it carries out certain transactions in respect of digital services including provision of download of data / software in India or carries out systematic and continuous solicitation of its business activities in India through digital means. Accordingly, non-resident ed-tech companies providing

digital services in India may run the risk of constituting a ‘business connection’ in India by virtue of the concept of SEP. Upon forming a business connection in India, the non-resident companies net income to the extent attributable to such ‘business connection’ may be taxable in India at 40%.¹¹⁵ Having said that, treaty relief may be claimed to rely instead on the Permanent Establishment standard to determine taxable nexus with India, the ambit of which is narrower than that of ‘business connection’.

The SEP test introduced through Finance Act 2018 was made applicable from financial year (“**FY**”) 2018-19. However, the Budget has proposed to postpone the applicability of the SEP test from FY 2021-22, i.e. from April 01, 2021. This has been done in light of the evolving global discussions at the OECD and global level with respect to taxation of the digital economy

Further, as per existing laws, in case a ‘business connection’ is constituted in India, only income applicable to such ‘business connection’ is chargeable to tax in India. The Budget seeks to expand the scope of income attributable to Indian operations which is within India’s taxing rights as a source country, primarily in the context of the digital economy and use of data. In this regard, the Budget has proposed that the following activities should be attributable to operations in India (“**Attribution Rules**”):

- Targeted advertisements at customers who reside in India;
- Sale of data collected from a person residing in India;
- Sale of goods or services using data collected from a person residing in India;
- Data collected from a person who uses internet protocol address located in India;
- Sale of goods or services using data collected from a person who uses internet protocol address located in India;
- Advertisements accessed by customers through internet protocol address located in India

¹¹⁵. Exclusive of applicable surcharge and cess.

III. On the Foreign Investor

Under the ITA, non-residents are taxable only on income that is

- a. received or is deemed to be received in India; or
- b. accrues or arises or is deemed to accrue or arise in India.

In case of a foreign investor being located in a jurisdiction with which India has a double tax avoidance agreement (“DTAA”), the provisions of the ITA will be subject to relief under such agreement. Therefore, before investing in India, it would be useful to explore various structuring options from the perspective of tax efficiency along with other important considerations such as stability from political perspective, diplomatic ties with India, robustness of the financial sector, corporate law flexibilities from the perspective of re-structuring in future, rights under bilateral investment treaties, ease of raising funds from financial institutions, potential listing in the future, perception as a transparent jurisdiction, etc.

Subject to tax treaty relief, if applicable, the taxation of relevant sources of income of a foreign investor under the ITA would be as follows:

- Budget 2020 has proposed to abolish Dividend Distribution Tax (“DDT”). Accordingly, from April 1, 2020, dividends declared by an Indian company would be subject tax in the hands of the recipient at slab rates and subject to necessary withholding tax in the hands of the Indian payer company. Unlike in case of DDT, the foreign recipients of the dividends should now be able to avail treaty benefits in respect of the taxes paid on dividends. Further, the mechanism to claim foreign tax credit on the taxes paid on the dividends would be much easier as it was in case of payment of DDT. This is because DDT was tax paid by the distribution company and the not the recipient and there needed to be necessary language in the laws of the relevant foreign jurisdiction / applicable treaty on availment of underlying tax credits for availing foreign tax credit in respect of DDT paid in India.

- Interest payable to non-residents on loans taken/debt securities issued in foreign currency are taxable at a beneficial rate of TDS at 5%.¹¹⁶ However this benefit has a sunset clause stating that the benefits would only be available for loan agreements entered into/ bonds issued on or after July 1, 2012 and before July 1, 2020. The said beneficial 5% rate of TDS is also available in relation to Rupee Denominated Bonds (“RDB”) issued until July 1, 2020. Similarly, interest payable to foreign institutional investors (“FII”) on investments made by them in RDBs and government securities is taxable at the rate of 5%. This benefit also has a sunset period and is applicable only in respect of interest payable until July 1, 2020.¹¹⁷
- In all cases above, the Budget has proposed to extend the end of the sunset period, wherever applicable, from July 1, 2020 to July 1, 2023.
- Capital gains arising from the sale of unlisted securities held for 2 years or less are taxable at the rate of 40% and those held for more than 3 years at the rate of 20% in case of public companies & at 10%¹¹⁸ in case of private companies without indexation benefits.
- The consideration received/income generated by foreign institutions collaborating with Indian institutions (as discussed earlier) from granting the Indian partner either a right to use or associate with the brand name of the foreign university/college or access to various course material, curriculum, etc. of the foreign university, may be characterized as royalty income in the hands of the foreign university. Presently, royalty income in the hands of non-residents is taxed at the rate 10% (on a gross basis) under the provisions of ITA, which may be reduced under an applicable tax treaty.

¹¹⁶Section 194LC, Income Tax Act, 1961

¹¹⁷Section 194LD, Income Tax Act, 1961

¹¹⁸The 20% tax rate is applicable on capital gains as adjusted for currency fluctuations (as per prescribed mechanism).

- If collaborations extends to provision of services, depending on the nature of services rendered, the consideration paid thereof may be categorized as fees for technical services. In such a case also, there applies a withholding tax of 10% (on a gross basis) under the ITA, subject to tax treaty relief.

When any of the above-mentioned sources of income is paid to a non-resident (FEI / other foreign investor), which are chargeable to tax India, the payer is under an obligation to withhold prescribed taxes. Further, if a non-resident is considered to have a permanent establishment in India (by having a fixed base, by having an agent in India with the power to contractually bind the non-resident, on account of employees visiting India in excess of prescribed durations, etc.), the non-resident would be taxable in India at 40%¹¹⁹ to the extent of net income attributable to its permanent establishment in India.

It is also important to note that India has introduced general anti-avoidance rules (“GAAR”), which are implemented from April 1, 2017. GAAR provides Indian tax authorities wide discretion with respect to taxation of ‘impermissible avoidance arrangements’. An arrangement would be considered an ‘impermissible avoidance arrangement’ if its main object is to obtain a tax benefit and if it satisfies one or more of the following: (a) non-arm’s length dealings; (b) misuse or abuse of the provisions of the domestic income tax provisions; (c) lack of commercial substance; and (d) arrangement similar to that employed for non- bona fide purposes.

The tax authorities have been given broad powers to subject such arrangement to such tax treatment as they deem appropriate, including

the power to disregard transactions, entities and structures that lack business purpose and commercial substance. Power has also been granted to re-characterize and re-allocate income between parties to the arrangement and to deny treaty benefits. However, GAAR will not be applicable if the tax benefit pertains to income generated from structures put in place up to 31st March, 2017.

Further, invocation of GAAR by the tax authorities, if objected by the taxpayer, is required to be approved by an Approving Panel, which is an independent body chaired by a retired High Court Judge, a senior member of the tax office and a reputed academician or scholar with expertise in taxation or international trade and business.

One of the important risk-mitigation strategies adopted by non-residents, particularly where there is uncertainty as to taxability of a transaction proposed to be entered into by them, is to approach the Authority for Advance Rulings (“AAR”) for a ruling, subject to restrictions as to pendency of regular litigation on the matter and rulings that would require examination of valuation. Recently, availability of AAR rulings has also been extended to questions pertaining to applicability of GAAR and domestic transactions between certain classes of persons. The AAR is an independent quasi-judicial body outside the tax department and its rulings is binding on the tax authorities with respect to the particular transaction on which the ruling has been rendered. However, the ruling of the AAR could be challenged by invoking constitutional remedies before the High Court or the Supreme Court, which have the discretion to admit or reject such applications.

¹¹⁹. Exclusive of applicable surcharge and cess.

6. Identify the right opportunity

Except for a few organizations, most of the educational groups are relatively small and have a low capital base. Therefore, while there are tremendous investment opportunities for strategic investors, one must bear in mind that the deal sizes can often be smaller than in other developed markets.

To do a deal in India, a robust legal due diligence process is very critical given India's complex corporate, securities, exchange control and taxation laws. Conducting thorough due diligence of the target helps determine whether the target presents a good investment opportunity to the investor, and to determine the other important aspects of the deal like valuation of the target, the nature of representations and indemnities to be taken from the target and its founders, etc. Issues such as absence / expiry / revocation of approvals from regulators are typically identified during such process. Investors should also pay attention to compliances related requirements, such as:

- NOCs obtained / affiliation applications made for the school, including for RTE registration;
- details and relevant documents pertaining to any notices/ claim/ litigation/ order received regarding the school / trust/ society/ company in connection with educational activities or school property;

- details of liability of the trust/ society/ company, including tax liability, in connection with the school property;
- any other regulatory approvals. For instance, building NOC, Fire safety, Municipal approval etc;
- compliances with frameworks set up by the state government, UGC or AICTE;
- Insurance details for the school property.

Investors should also check if there are any related party transactions or not, which becomes important from a tax and transaction related perspective.

If such issues crop up, it would become necessary from the investors' perspective to incorporate certain conditions precedent and covenants on the target in the definitive documents. Such conditions precedent and covenants mandating that the target will acquire and maintain the requisite approvals for the running of institutions and comply with the conditions for guaranteeing hassle-free, effective returns on the investment.

7. Conclusion

Although investment in education has some challenges, it offers great opportunity to investors and FIEs. A number of studies and reports indicate that strong returns could be

expected from the industry. There have been a host of reforms in the recent years. Hence, investment in education is likely to see a considerable increase in the current decade.

The following research papers and much more are available on our Knowledge Site: www.nishithdesai.com

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January 2018		November 2019		July 2019	
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NDA Insights

TITLE	TYPE	DATE
Right to access the internet is a part of the fundamental right to Education and Privacy	Education	September 2019
Education Trust denied Tax Exemption Registration sans Charitable Activity	Education	May 2019
Contracting “App”tly	Education	May 2019
Transforming RTE through Impact Investment	Education	March 2019
Changing landscape of confidentiality in international arbitration	Dispute	January 2020
The Arbitration and Conciliation Amendment Act, 2019 – A new dawn or sinking into a morass?	Dispute	January 2020
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Research @ NDA

Research is the DNA of NDA. In early 1980s, our firm emerged from an extensive, and then pioneering, research by Nishith M. Desai on the taxation of cross-border transactions. The research book written by him provided the foundation for our international tax practice. Since then, we have relied upon research to be the cornerstone of our practice development. Today, research is fully ingrained in the firm's culture.

Our dedication to research has been instrumental in creating thought leadership in various areas of law and public policy. Through research, we develop intellectual capital and leverage it actively for both our clients and the development of our associates. We use research to discover new thinking, approaches, skills and reflections on jurisprudence, and ultimately deliver superior value to our clients. Over time, we have embedded a culture and built processes of learning through research that give us a robust edge in providing best quality advices and services to our clients, to our fraternity and to the community at large.

Every member of the firm is required to participate in research activities. The seeds of research are typically sown in hour-long continuing education sessions conducted every day as the first thing in the morning. Free interactions in these sessions help associates identify new legal, regulatory, technological and business trends that require intellectual investigation from the legal and tax perspectives. Then, one or few associates take up an emerging trend or issue under the guidance of seniors and put it through our "Anticipate-Prepare-Deliver" research model.

As the first step, they would conduct a capsule research, which involves a quick analysis of readily available secondary data. Often such basic research provides valuable insights and creates broader understanding of the issue for the involved associates, who in turn would disseminate it to other associates through tacit and explicit knowledge exchange processes. For us, knowledge sharing is as important an attribute as knowledge acquisition.

When the issue requires further investigation, we develop an extensive research paper. Often we collect our own primary data when we feel the issue demands going deep to the root or when we find gaps in secondary data. In some cases, we have even taken up multi-year research projects to investigate every aspect of the topic and build unparalleled mastery. Our TMT practice, IP practice, Pharma & Healthcare/Med-Tech and Medical Device, practice and energy sector practice have emerged from such projects. Research in essence graduates to Knowledge, and finally to *Intellectual Property*.

Over the years, we have produced some outstanding research papers, articles, webinars and talks. Almost on daily basis, we analyze and offer our perspective on latest legal developments through our regular "Hotlines", which go out to our clients and fraternity. These Hotlines provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our Lab Reports dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction. We regularly write extensive research articles and disseminate them through our website. Our research has also contributed to public policy discourse, helped state and central governments in drafting statutes, and provided regulators with much needed comparative research for rule making. Our discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged. Although we invest heavily in terms of time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

As we continue to grow through our research-based approach, we now have established an exclusive four-acre, state-of-the-art research center, just a 45-minute ferry ride from Mumbai but in the middle of verdant hills of reclusive Alibaug-Raigadh district. **Imaginarium AliGunjan** is a platform for creative thinking; an apolitical ecosystem that connects multi-disciplinary threads of ideas, innovation and imagination. Designed to inspire 'blue sky' thinking, research, exploration and synthesis, reflections and communication, it aims to bring in wholeness – that leads to answers to the biggest challenges of our time and beyond. It seeks to be a bridge that connects the futuristic advancements of diverse disciplines. It offers a space, both virtually and literally, for integration and synthesis of knowhow and innovation from various streams and serves as a dais to internationally renowned professionals to share their expertise and experience with our associates and select clients.

We would love to hear your suggestions on our research reports. Please feel free to contact us at research@nishithdesai.com



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