

Foreign Investment and Technology Transfer Act, 2075 (FITTA)

Investing in Nepal: What a Foreign Investor Need to Know?



Foreign Investment and Technology Transfer Act (FITTA) 2075 (2019)

Background

The Foreign Investment and Technology Transfer Act 2019 (2075) ("FITTA") was promulgated on 27 March 2019 after it received the presidential assent. It has replaced the Foreign Investment and Technology Transfer Act 1992 and is expected to provide impetus to Nepal's quest to attract foreign investment into the country through streamlined and simplified procedures and clarity in the law.

Major takeaways from the FITTA 2075

One of the key highlights of FITTA 2075 is that the definition of foreign investment has been amended to bring into scope other forms of investments such as lease financing and investment in the secondary market through Venture Capital Fund (VCF). With this move the Government of Nepal expects to attract more foreign investors to the secondary market. The secondary market in Nepal has recently been sluggish and the move is highly appreciated by the stakeholders. However, the procedures for setting up VCF are yet to be introduced by SEBON.

Another attractive feature of the FITTA 2075 is the introduction of the Single Point Service Center. Through this facility, the investors can get various services from one place such as approval of foreign investment, registration, visa related services, work permits, etc. This will ease the tedious task of reaching out to multiple departments for clearance and approval.

One of the setbacks of FITTA 2075 is that foreign loans can only be obtained from financial institutions and not from the parent or a private enterprise. This would mean that a company won't be able to obtain a loan from its cash rich parent.

One of the requirements of FITTA 2075 is that it is the duty of the entity to notify any change in ownership including its holding, through the sale of shares or assets in or outside Nepal including change in the beneficial ownership within 30 days to the DOI/IBN. This provision is difficult to comply with by those companies which have multiple layers of companies above them.

1. How can a foreign investor invest in Nepal for recognition as foreign investment?

Foreign investment has been defined to include the following investments made by a foreign investor in Nepal:

- Investment in shares of a company in foreign currency
- Reinvestment of earnings from foreign investment
- Lease financing in airlines, ships, plants, machinery, construction equipment and other similar equipment up to the prescribed threshold. (Section 6)
- Investment in venture capital fund (VCF) by the institutional foreign investor with the approval of the Securities Exchange Board of Nepal (SEBON). The procedures for the operation of the VCF shall be as prescribed. (Section 9)
- Investment in listed securities through the secondary market by Venture Capital Fund as established in Section 9. (Section 10)

- Investment through the acquisition of shares or assets of a company registered in Nepal
- Amount received by public or listed companies (Section 11) through banking channels by issuing securities in the foreign capital market.
- Investment made through technology transfer; in an industry established in Nepal. (Section 7)
- Investment through establishment and expansion of industry in Nepal.

TRU Comments: The FITTA has excluded foreign loans from the definition of Foreign Investment and kept it as a separate instrument under section 12. Additionally, section 12 specifies that foreign loans can only be obtained from financial institutions and not from the parent or a private enterprise. NRB has issued separate guidelines for availing foreign loans. Section 11 covers only loans obtained by public and listed entities by issuing Debenture Certificate, Bond certificates etc.

2. Who are foreign investors?

Foreign investors include any foreign individual, firm, company, Non-Resident Nepali (NRN), foreign government or international agencies or similar organized institutions and include foreign institutional investors. It also includes the ultimate beneficial owner of the foreign company investing in Nepal.

A foreign investor can invest in any permitted industry individually or jointly, or through joint investment with Nepalese citizens or a company established in Nepal. (Section 4)

TRU Comments: The revised definition of foreign investor covers NRN, the ultimate beneficial owner/ultimate holding company of a foreign investing company.

3. How is Technology Transfer defined under this act?

“Technology transfer” means any transfer of technology to be made under an agreement between an industry and a foreign investor on the following matters:

- Patent, design, trademark, goodwill, technological specificity, formula, process,
- User’s license, technological know-how sharing or use of technological knowledge (franchise),
- Provision of foreign technical adviser, management and marketing service, or other technological skill or knowledge.

4. What are the areas where foreign investment is permitted?

Foreign Investment is permitted only in such sectors classified as industries by the Industrial Enterprises Act 2020 except for the following industries included in the negative list.

- Poultry farming,
- Personal Service Business e.g. Hair Cutting, Tailoring, Driving, etc.,
- Arm and ammunition industry, industry producing biological and chemical weapons, industries related to explosives, gunpowder, radio-active materials, atomic energy,
- Real estate businesses (excluding construction industries),
- Retail business,
- Internal courier services, local catering services, money changer, remittance service,
- Travel agency, trekking agency expedition service provider, homestay and rural tourism
- Business related to communication services (newspaper, radio, television, and online newspaper),
- Movies of a national language, and
- Businesses and organizations providing educational consultancy services, language, music and computer training with investments lower than the limit prescribed by the GoN.
- Business having more than 51% foreign investment in management, accountancy, engineering, and legal services by an institutional foreign investor.

TRU Comments: As per FITTA 1992, retail chains with operations in 2 countries were permitted to invest in Nepal. However, the same is not covered in the FITTA 2019. Some sectors such as Bee-Keeping, Fishery and security printing which were on the negative list have been removed from the FITTA indicating that these sectors are open for foreign investment.

5. Has an investment cap been fixed on foreign investment (section 13)?

A minimum threshold for foreign investment of Rs 50 million has been prescribed pursuant to section 13 of FITTA. Additional ceiling may be imposed for investment made through Venture Capital Fund as per Section 10.

6. Can foreign investors invest in an industry through the purchase of shares or property (Section 5)?

Any eligible foreign investor can invest in any permitted industry established in Nepal by acquiring the assets of the industry or shares not exceeding the prescribed percentage.

7. Can an investment be made through lease (Section 6)?

FITTA has introduced lease financing as one of the modes for foreign investment in Nepal. A foreign investor can invest through a lease in airlines, ships, machinery, construction equipment, or similar types of equipment within the prescribed limit. (Lease financing).

8. Are there any restrictions on the transfer of technology and know-how (Section 7)?

A foreign investor can make foreign investments in any industry established in Nepal through the transfer of technology and know-how by entering into an agreement with the Nepali industry. Royalty in excess of the amount as specified in the agreement approved by the DOI/IBN within the threshold specified in FITTA regulations cannot be repatriated.

9. Can a branch be established in Nepal by a foreign investor (Section 8)?

The FITTA has permitted the establishment of a branch office of a foreign company after obtaining approval from the DOI.

10. Can investments be made through the establishment of an equity fund (Section 9)?

Yes, the foreign investor can invest in equity shares in Nepal after obtaining approval from the Securities Board Nepal (SEBON) by establishing a venture capital fund. However, procedures for establishing such funds have not yet been prescribed.

11. Can foreign investors deal in securities transactions (Section 10)?

Entities establishing venture capital funds can transact in securities through the secondary market in the stock exchange after registering with SEBON. The minimum shares to be purchased, investment limit, minimum shareholding period and reserve fund in foreign currency will become effective after GON notification.

12. Who can issue bonds, debentures or securities in foreign currency (Section 11)?

Only public and listed companies established in Nepal or companies obtaining approval for issuing debentures as per relevant act can issue bonds, debentures or securities to obtain loans in foreign currency. Such loan or securities availed shall be invested in Nepal. This provision shall become effective after GON notification.

13. Can foreign investment companies avail loans in foreign currency (Section 12)?

Any company with foreign investment can avail of loans from a foreign institution under the 'Project Loans' or 'Project Financing' arrangement on the recommendation of the Ministry of Industry, Commerce and Supplies and approval of the Nepal Rastra Bank.

TRU Comments: FITTA has not included loans as foreign investment and kept it separate but the approval of DOI is required prior to obtaining approval of Nepal Rastra Bank for availing loans.

14. Who are the approving authorities for foreign investments (Section 17)?

The following are the approving authorities for foreign investments:

- Department of Industries (DOI) for investments up to NRs 6 billion.
- Investment Board, Nepal (IBN) for investments above NRs 6 billion.

Where an industry registered as per the prevailing laws of the province seeks foreign investment, approval of DOI is required. The industry registration certificate in the province and recommendation of the provincial government shall be submitted to DOI with other documents (Section 48) through self-declaration.

'Automatic Approval' and 'Single Point Service Center' are new provisions added in the FITTA. These provisions do not become effective until further gazette notification from the GON.

15. What is the process of setting up an entity with foreign investment (Section 15)?

The process of obtaining approval for foreign investment is as follows:

- File an application in the prescribed form together with the relevant documents for foreign investment approval to the approving authority stated in 14 above. Also, required is the timeline for the investment to be remitted in the entity where the investment will be made.
- Obtain approval letter within 7 days from the date of application, if the application is complete in all respects.
- Approval of reinvestment in the same company or other industries not included in the negative list from profits earned is not required by an industry that has already been granted approval.
- Once approval of foreign investment is obtained, the investor has to incorporate a company under the Companies Act 2006 by submitting the relevant documents.
- Register the entity with the Inland Revenue Department and obtain Permanent Account Number (PAN).
- Register the industry with the DOI and obtain an Industry registration certificate.
- Register the business with the local authority.
- After obtaining approval for foreign investment the foreign investor shall notify NRB that the investment is brought from its legal source for injecting the foreign investment into Nepal through a banking channel in convertible currency except for Indian investors which can be brought in Indian currency. (section 16)

TRU Comments: As per section 16(1) of the FITTA, to remit the proceeds of foreign investments into Nepal, notification of approval from the approving authority to NRB will suffice however, sub-section (2) gives power to NRB to specify the procedures for the same. NRB has streamlined the procedures for infusing capital into the new entity and a notification and recording of such capital is now only required with NRB.

- Other applicable approvals may be for environmental clearances where applicable and licenses for specific industries prior to commencement of business.
- Once approval is taken re-approval is not required for reinvestment in the same industry or other industry except mentioned otherwise.

16. What are the responsibilities of the foreign investor?

- Notify the DOI and NRB of any change in ownership of the company.
- Remit the investment amount within the period specified in the approval of foreign investment (Section 18(2)).
- Notify any change in ownership through the sale of shares or assets in or outside Nepal including change in the beneficial ownership within 30 days to the DOI/IBN
- Where by virtue of the sale of assets or shares of a holding company there is a change in ownership of the Nepal entity, the Nepal entity is responsible to notify such transactions to the approving authority.

- Pay taxes as applicable on change in ownership. (section 19)
- Not to act in contravention of FITTA and prevailing laws and conditions of approval.

17. How will the capital and dividend be repatriated (Section 20)?

The foreign investor can repatriate the capital from the sale of its shares or business and dividend earned from its operations in Nepal net of taxes through normal banking channel in the currency or in another convertible currency in which investments were made after obtaining exchange facilities from NRB and approval from the DOI/IBN within 15 days from the date of the application.

In addition, the following amounts can be repatriated by the foreign investor:

- In case of liquidation or cancellation of company amount remaining after fulfilling all obligations.
- Royalty amount received from technology transfer. However, industry producing liquor and liquor product shall not be permitted to repatriate royalty exceeding 5% of the sales net of taxes except for industry exporting 100% of liquor or liquor products.
- Lease rentals.
- Amount received as compensation after settlement of legal disputes or arbitration.
- Amount permitted by their prevailing laws.

TRU Comments: Where approval for foreign investment is granted in 7 days, the repatriation of capital, dividend and other proceeds are given in 15 days plus the time taken by the NRB. It appears that the GON has not considered facilitating the repatriation of capital and profit in a smooth and efficient manner.

18. What service can be availed from Single Point Service Centre (Section 23)?

The Single Point Service Centre is proposed in the new FITTA, as in its predecessor which was never formed, to provide the following concessions, facilities, incentives and services to foreign investors. Industry registration and administrative related work:

- Approval of foreign investment and loan.
- Company registration and administration related work.
- Work permits.
- Visa related facilities.

- Quality measurement and control of goods produced by industry.
- Approval of EIA & IEE reports.
- Focal point for energy and infrastructure development and necessary facilitation.
- Other concessions and facilities provided to industry.
- PAN registration.
- Foreign exchange approval as per GON.
- Others as specified.

19. When does the approved investment be cancelled (Section 43)?

Foreign investment approval shall be effective until the foreign investment is retained in Nepal or where the investor does not make an investment within the prescribed time period without reasonable justification; and/or breaches the rules and regulations, or any conditions imposed during approval after fulfilling procedures set out in the regulations.

The approval of foreign investment is deemed to be cancelled if:

- The approved investment could not be remitted without reasonable justification within 2 years from the approval date.
- The shares are sold or transferred to a Nepali investor.
- The company is liquidated or the industry license is revoked.

20. Can contract manufacturing be undertaken by foreign investors (Section 44)?

Contract manufacturing has been added in FITTA but it has limited such production for a component or part of the main product. The interpretation of the provision indicates that the company with foreign investment cannot manufacture its main product through contract manufacturing.

TRU Comments: The Industrial Enterprises Act 2016 had permitted contract manufacturing and several large companies with foreign investment had been producing their main product through contract manufacturing. Only permitting contract manufacturing for a component or part of the main product does not make business sense and appears that this clause has been incorporated in the law to benefit the importers of finished products, i.e., Nepali traders. The Industrial Enterprises Act 2020 does not permit contract manufacturing of the main products of the industry.

21. What are the dates that the foreign investor should be aware of?

- Approval for foreign investment shall be given within 7 days of submission of the complete application.
- Permission to repatriate income shall be given within 15 days of making such an application.

If a foreign investor is dissatisfied with the decision made by the approval granting entity application can be filed in the ministry. Ministry shall make the decision on such a matter within 30 days of making an application.

22. Is prior approval required for obtaining a foreign loan?

Loans from a foreign country can be availed by companies under the foreign investment and loan management bylaws 2021 issued by NRB as follows:

- As per section 7(1), prior approval should be obtained (unless exempted by any other prevailing laws) from NRB by any Nepalese individual, firm, company, bank & financial institution or association willing to obtain a loan from a foreign country within the purview of provisions mentioned in annexure 10 in Indian currency or convertible foreign currency.
- Application along with the documents and papers as mentioned in annexure 11 should be submitted for obtaining permission as specified in a above.
- NRB shall give written information to the applicant about the application received in accordance with b within 15 working days of such receipt.
- Respective banks or financial institutions should issue the certificate in the format mentioned in Annex 12 for the fund approved and remitted inside Nepal in accordance with d above.

23. Is it necessary to maintain a record of Loan at NRB?

Yes, it is necessary to maintain the record of the loan at NRB otherwise repatriation of the amount of interest or principal will not be permitted. As per section 8, for the recording of the amount of loan remitted inside Nepal in accordance with section 7, the borrower should submit an application to NRB within 6 months of such remittance in the format specified in Annexure 14 along with documents specified in annexure 13.

24. Is foreign currency facilities provided to to foreign loan borrowers?

Yes, banks and financial institutions should provide the facility of conversion of foreign currency to the borrower of foreign loan for repayment of interest and principal as defined in the loan repayment schedule of foreign loans availed and recorded with NRB in accordance with section 7 and section 9, respectively. Further approval from NRB is not required for such a facility.

25. What are the concessions, facilities and incentives available to companies with foreign investment?

Facilities provided by the Industrial Enterprises Act 2016	<p>In addition to the concessions, facilities and incentives or protection granted by FITTA, all other such facilities provided by Industrial Enterprises Act 2016 and other prevailing laws are granted but not facilities available to sick industries.</p>															
Foreign exchange transaction and facilities (Section 25 & 26)	<p>Foreigners and companies can open and operate bank accounts in any of the commercial banks in Nepal and transact in Nepalese currency, foreign currency or both currencies with prior approval of NRB. Foreign investors can avail foreign exchange facilities in the open market for the following purposes:</p> <ul style="list-style-type: none"> • Payment to the experts, highly skilled technicians, managerial level employees • Payment of principal or interest of bond or debenture • To repatriate income invested and earned by entity 															
Hiring expatriates	<p>The hiring of expatriates as experts, in key managerial positions, technical experts, and managerial and technical staff can be made by entities only when qualified Nepali nationals are not available for such positions. The entities have been provided the onus of training and development of Nepali staff to replace the expatriates. Furthermore, the labor law has restricted the number of expatriates that can be hired by an entity to a maximum of 5% of the total workforce.</p> <p>TRU Comments: Restricting the hiring of expatriates in key managerial and technical positions is an impediment to foreign investment. In this globalized world with a moving workforce, Nepal should not restrict employing expatriates as this will impede in development of local managerial and technical capabilities in the long run.</p>															
Industrial Security	<p>Industries established under foreign investment shall be provided security at par with domestic companies.</p>															
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Land	An entity where foreign investment has been approved can acquire land for setting up an industry or can lease land for the purpose. Where land cannot be identified by the investor, or where the land required is in excess of the prescribed ceiling, the approval authority shall provide the necessary arrangement, approval and facilitation to identify the required land.
National treatment	<ul style="list-style-type: none"> • All foreign investors shall be provided national treatment for the management, use, and maintenance of such investment in Nepal except for the following: • Creation of Intellectual Property, their limit and compulsory licensing of the right to use as agreed with the World Trade Organization (WTO). • Concessions and facilities provided to local industry or goods as per the prevailing laws on public procurement. • Grant or concessions provided by the Government of Nepal • Non-commercial services provided by the Government of Nepal • Necessary measures adhered to or framed by the Government of Nepal on financial services on matters such as protection of interests of investors, participants of the securities market, insurance policyholder or person claiming insurance or soundness, integrity and financial responsibility of financial institutions who are in a fiduciary capacity. • Where Nepal is a party to or is a potential party to a regional or multilateral financial, monetary agreement or is associated to a similar organization and because of such arrangement it is obliged to or is required by the provision to give special treatment. • Conditions imposed by regulators in repatriating investment, repayment of loans (principal, interest or fee), service fee, etc. • On matters such as public health, fauna, flora or environmental protection.

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right size
right solutions

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