

中国法下境外私募基金跨境募集的监管及新进展

作者：张凯南

随着QDLP、私募通、电子围网等机制陆续实施，境外私募基金通往中国金融资管市场的大门一一敞开

实践中，包括跨国集团在内的境外私募基金管理人，出于境内外业务协同及“一站式”服务客户的目的，通常希望能向境内主体募资。本文将针对中国法律是否允许境外主体在境内募集私募基金这一问题，介绍中国法律的监管框架和实践，以及深港私募通、粤港澳大湾区和海南自贸港多功能自由贸易账户及粤港澳大湾区跨境理财通试点政策下的跨境投资机遇。

笔者认为，随着中国金融资管领域对外开放步伐的持续加快，人民币国际化的稳步推进，跨境投资产品和投资渠道也将日益丰富，从而实现跨境资产管理业务与实体经济发展的良性互动和协同发展。

中国法律监管框架

整体而言，中国法律目前尚未对境外私募基金在境内发行、销售、推介、募集私募基金作出具体规定。

《证券法》适用于在中国境内发行和交易股票、公司债券、存托凭证，以及国务院依法认定的其他证券。虽未有明确规定，但笔者倾向于理解，境外私募基金属于该法规定的“国务院依法认定的其他证券”。根据《私募基金监督管理条例》，除国家另有规定外，境外机构不得直接向境内投资者募集资金设立私募基金。因此，未经国务院批准，境外机构不得在中国境内募集基金。

根据现行法律法规，仅经过监管机构及基金业协会登记的主体才可以在境内募集基金。不过，截至目前，该等规定仅适用于境内机构，就境外机构在境内募集基金，中国法律暂未做出明确规定。

跨境募集实践

境外主体通常会为其境外人员的跨境活动制定内部的跨境行为指引，明确在中国法下可以或禁止开展的活动类型。

中国实行外汇管制制度，境内主体进行境外直接投资，包括投资境外股票、非上市公司股权、私募基金、理财产品等，须通过规定的主体和路径并履行必要的监管程序，包括(人民币)合格境内机构投资者((R)QDII)、合格境内有限合伙(QDLP)/合格境内投资企业(QDIE)、沪港通、深港通、内地和香港“债券通”、内地与香港基金互认，以及粤港澳“跨境理财通”等。

上述主体中，仅部分境内机构在履行必要的监管程序后，可投资于境外私募基金，例如QDII/RQDII、QDLP/QDIE。此外，中国主权基金及社保基金(与前述主体合称“适格投资者”)由于其特殊地位，也可进行境外私募基金投资。根据我们对目前中国法律和监管实践的理解，境外机构在一定情况下被允许向适格投

资者以非公开的方式募集基金。

深港私募通

根据2023年7月深圳市人民政府发布的《关于印发贯彻落实金融支持前海深港现代服务业合作区全面深化改革开放意见的实施方案》，有序探索深港私募通机制，优化前海合作区QDIE、QFLP、PFM WFOE试点，降低香港投资者准入门槛，有序拓宽投资范围，简化试点申请流程，优先支持获得QFLP资质的主体直接申请QDIE，同一主体开展QFLP和QDIE，或同一主体开展QDIE和PFM WFOE业务。

该政策将进一步深化深港跨境投资合作，加强两地私募行业互联互通。

EF账户

2023年8月，人民银行广州分行和海口支行同步出台了横琴粤澳深度合作区和海南自由贸易港多功能自由贸易(电子围网)账户业务的征求意见稿。电子围网，即多功能自由贸易账户或“EF账户”，指金融机构根据客户需要，提供规则统一的本外币账户分账核算业务。

根据意见稿，资金在EF账户与境外账户、NRA及EF账户之间可“跨一线”自由划转，EF账户与境内居民普通账户之间“跨二线”划转视同跨境交易管理，遵循“负面清单+额度管理”原则；区内机构EF账户与境外账户之间开展资本项下业务(证券投资及部分理财投资除外)，不受投注差外债、全口径跨境融资、境外放款额度限制。

对于存在较多境外业务收入的区内企业而言，EF账户为其使用海外收入提供了诸多便利。此外，意见稿也反映了横琴和海南有望成为离岸金融中心的趋势。虽然对于境内普通账户内资金划转后的用途仍存在一定限制，不过，随着境外投资试点政策深入推进和发展，可以期待EF账户将为境外主体募资提供更多元化的渠道。

跨境理财通

据统计，自2021年9月10日粤港澳大湾区跨境理财通试点发布至今年9月10日期间，大湾区参试点共逾六万名个人投资者，办理资金跨境汇划金额67亿元。9月28日，人民银行、港澳金融监管机构等七部门决定进一步优化粤港澳大湾区跨境理财通试点，优化投资者准入条件、新增符合要求的证券公司作为参与主体，扩大投资产品范围、适当提高投资额度。

目前南向通的投资范围主要限于中低风险的公募基金和银行固收类产品，且累计投资额度为人民币100万元。相信随着前述相关实施细则和业务指引的落地，将进一步推进大湾区金融市场的互联互通和跨境资产管理业务的发展。

R between domestic and international operations and offer “one-stop” customer services.

This article addresses whether Chinese law permits foreign entities to raise private funds within the country. It also introduces the regulatory framework, practical considerations and cross-border investment opportunities under certain pilot policies.

The author believes that as China’s financial asset management sector rapidly opens to the outside world and the internationalisation of the renminbi progresses, we can expect more cross-border investment products. Channels will be made available, paving the way for co-ordinated growth between cross-border asset management businesses, bringing economic advancement.

Regulatory framework

There are no specific provisions in Chinese law for foreign private funds to issue, sell, promote and fundraise in China.

The Securities Law regulates the issuance and trading of various financial instruments including stocks, corporate bonds, depositary receipts and other securities that the State Council recognises under law.

While there is no explicit provision, the author believes foreign private funds fall under the category of “other securities recognised by the State Council”. According to the Regulations on the Supervision and Administration of Private Investment Funds, overseas institutions are prohibited from directly raising funds from investors in China to establish private funds unless specified by Chinese regulations. Therefore, overseas institutions are required to obtain approval from the State Council before raising funds within China.

Only entities registered with the regulatory authorities and the Asset Management Association of China are permitted to raise funds domestically. Regarding the fundraising activities of foreign entities within China, Chinese law has not yet provided explicit guidelines.

Cross-border fundraising

Overseas entities usually establish internal guidelines for the cross-border activities of their foreign personnel, clarifying activities permitted or prohibited under Chinese law.

Under the foreign exchange regulatory regime, domestic entities in China are required to follow specific regulatory procedures when making overseas direct investment such as investing in overseas stocks, unlisted company equities, private funds and wealth management products. These investments must be carried out through prescribed entities and channels, and under regulatory procedures such as: (RMB) Qualified Domestic Institutional Investors ((R)QDII); Qualified Domestic Limited Partnership (QDLP)/Qualified Domestic Investment Enterprise (QDIE); Shanghai-Hong Kong Stock Connect; China Bond Connect; Mutual Recognition of Funds (MRF) between the mainland and Hong Kong; and Cross-border Wealth Management Connect.

A select few domestic institutions (such as QDII/RQDII, QDLP/QDIE) are permitted to invest in overseas private funds on fulfilling regulatory procedures. Additionally, China’s sovereign wealth fund and the National Social Security Fund of China (together with the above-mentioned entities, collectively referred to as “qualified investors”) are also eligible to invest in overseas private funds due to their unique status. Overseas institutions are permitted to raise funds privately from qualified investors under certain circumstances, based on the author’s understanding.

Shenzhen-HK private fund connect

In July 2023, the Shenzhen Municipal People's Government released the Printing and Distributing and Implementing Plan for the Opinion on Financial Support for the Comprehensive Deepening of Reform and Opening Up of the Qianhai Shenzhen-Hong Kong Modern Service Industry Co-operation Zone. It is an effort to explore the Shenzhen-Hong Kong Private Fund Connect mechanism, enhance the efficiency of the Qianhai Co-operation Zone's pilot scheme involving QDIE, QFLP and PFM WFOE, and reduce the access thresholds for Hong Kong investors.

It will gradually expand the investment scope and streamline the application process, enabling entities with QFLP qualifications to directly apply for QDIE qualifications. It will also allow entities to apply for both QFLP and QDIE qualifications, or to commence QDIE and PFM WFOE operations.

This policy aims to foster deeper cross-border investment co-operation between Shenzhen and Hong Kong, while enhancing the interconnection of private fund industries in both regions.

EF account

In August 2023, the Guangzhou branch and Haikou sub-branch of the People's Bank of China both released a draft for public comments on the multifunctional free trade (electronic fence) account business in the Greater Bay Area (GBA) and Hainan Free Trade Port. The term "electronic fence" (EF) refers to a versatile free-trade account that entails financial institutions offering separate accounting services for local and foreign currency accounts with consistent rules.

The proposed regulations allow for unrestricted fund transfers between EF accounts and overseas accounts, as well as between non-resident accounts (NRAs) and EF accounts. However, transfers between EF accounts and ordinary accounts held by domestic residents are considered cross-border transactions, following the "negative list + quota management" principle.

The author expects that EF accounts will offer a broader range of channels for overseas entities to raise funds as the pilot scheme progresses further.

Wealth management connect

Following the launch of the pilot Cross-border Wealth Management Connect Scheme in the GBA, more than 60,000 individual investors participated between September 2021 and 2023.

On 28 September, seven departments, including the People's Bank of China and financial regulators in Hong Kong and Macau, enhanced the scheme by improving investor eligibility criteria, expanding the scope of products and raising the investment quota. It is believed that the introduction of the implementation rules and business guidelines will significantly enhance the interconnection of the financial market in the GBA and bolster the growth of the cross-border asset management business.

*本文首发于《商法》2023年9月刊

2023-11-24