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REPORT

# ASIA'S
## PRIVATE INVESTMENT LANDSCAPE
TRENDS, STRATEGIES & INSIGHTS

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# ASIA'S PRIVATE INVESTMENT LANDSCAPE: TRENDS, STRATEGIES & INSIGHTS

The Asian private investment market has experienced significant growth in recent years, driven by factors such as regional economic expansion, evolving regulatory landscapes, and increasing investor appetite for alternative assets.

In this compilation of key takeaways from our Asia Private Investment Funds Webinar Series, we examine the following hot topics and key updates to consider while navigating the private investment funds sector in Asia:

- Global environmental, social, and governance (ESG) trends and implementation in Asia
- A practical look at co-investments
- Secondary market developments in Asia
- Launching and operating a successful private credit fund in Asia

## GLOBAL ESG TRENDS AND IMPLEMENTATION IN ASIA

As investors become increasingly global, ESG continues to be at the forefront of investment management strategies. In view of this, we provide a high-level overview of some key ESG regulatory developments in the European Union, the United Kingdom, the United States, and Japan that are relevant for the private funds industry—particularly to asset managers and funds.

### ESG Regulatory Developments

*The European Union*

The EU Sustainable Finance Disclosure Regulation, in effect since March 2021, is designed to combat greenwashing by mandating transparency around fund products and increasing the comparability of disclosures for investors. There are three categories of disclosure-based rules: the first imposes manager-level obligations, the second imposes fund-level obligations applicable to all funds—ESG-related or not—and the last imposes additional obligations specifically on funds that promote ESG characteristics or have sustainability objectives. These requirements are applicable to EU fund managers and non-EU fund managers using national private placement regimes to promote their funds in EU countries.

Another development is the EU Taxonomy Regulation, a classification tool providing clarity for companies, capital markets, and financial market participants on precisely which economic activities are "environmentally sustainable." The phase-in process for this non-obligatory regulation began in January 2022.

The EU Corporate Sustainability Due Diligence Directive (CS3D) received final approval from EU Parliament on April 24, 2024. Once implemented into national law by the EU Member States, in-scope companies, including asset managers and funds, will be obligated to address the negative impacts of their operations on human rights and the environment. The CS3D follows a risk-based due diligence approach in which businesses must identify, prevent, mitigate, and account for adverse human rights and environmental impacts. This in turn requires that adequate governance, management systems, and other measures be put in place. The CS3D also imposes civil liability on companies in case of a breach of their due diligence obligations and permits victims to bring damages claims.

The Corporate Sustainability Reporting Directive (CSRD) came into effect January 5, 2023, significantly updating and expanding the social and environmental reporting requirements for companies. Most large companies will need to report on sustainability, in addition to listed small and medium-sized enterprises and non-EU companies with more than €150 million revenue in the European Union.

The CSRD is significant because investors and others will be able to better assess a company's impact on society and the environment, the intended increased transparency will help investors identify sustainability-related financial risks and opportunities, and reporting costs for companies are expected to eventually decrease due to the standardized requirements.

Companies will need to comply with the CSRD starting with their 2024 financial year report, which must be published in 2025. Companies subject to the CSRD will report using European Sustainability Reporting Standards.

### *The United Kingdom*

The United Kingdom's Financial Conduct Authority (FCA) has cross-referenced the recommendations of its Task Force on Climate-related Financial Disclosures in its own climate-related financial disclosure rulemaking. Since January 2022, these requirements have applied to FCA-regulated asset managers, and since April 2022, to all qualifying companies and businesses regardless of their industry sector.

The new FCA Sustainability Disclosure Requirements (SDR) and investment labels regime for managers of funds launches in July 2024, with a phased application through to December 2026. The SDR and investment labels regime comprise a labelling regime for qualifying sustainable investment funds, consumer-facing disclosures, pre-contractual and ongoing fund disclosures, and fund manager disclosures. The regime not only applies to labelled qualifying sustainable funds, but also to non-labelled funds that use sustainability-related terms in their name/marketing.

There will be four labels: sustainability focus, sustainability improvers, sustainability impact, and sustainability mixed goals. In addition, the FCA introduced a general anti-greenwashing rule applicable to all firms regulated by the FCA, irrespective of industry sector, which is scheduled to commence May 31, 2024.

### *The United States*

The US Securities and Exchange Commission (SEC) oversees and regulates the securities market through federal rules, regulations, and enforcement actions. ESG factors are considered material by the SEC, as ESG features have become an important consideration in investment decision-making.

In recent years, ESG has evolved into an area of focus for the SEC because of investor demand for investment products and strategies that further investors' ESG goals. As a result, even tangential, ESG-related disclosures made by firms to investors and clients can be deemed "material" in the SEC's view.

One of the SEC's main concerns is that asset managers might overstate the scope and materiality of their ESG considerations, practices, or strategies, resulting in portfolios and/or practices that are misaligned with disclosures to investors and clients. Therefore, the SEC is scrutinizing internal policies, procedures, and investment practices of firms in light of firms' outward-facing disclosures.

The SEC looks not only at disclosures in required filings but also at disclosures in marketing materials, on websites, in investor-facing documents, and in client presentations to identify potential misstatements or misrepresentations. This approach is not inconsistent with the SEC's practices in other contexts. The SEC has done analogous work for a long time, following principles of fiduciary duty and disclosure.

Investment advisers and sub-advisers should anticipate that any ESG-related statements and claims will be examined and be prepared to substantiate such statements and claims, including those related to the use of third-party service providers. This means that all teams, departments, and lines of business within an organization must be informed and on the same page—from investment management to marketing to compliance and legal. In addition, internal policies and procedures and investor-facing statements and documents must be aligned, consistent, and verifiable. Finally, practices, statements, and policies in this area should be regularly reassessed in light of changes to the business and practices.

The SEC also launched its Enforcement Task Force Focused on Climate and ESG Issues in 2021 to develop initiatives to proactively identify ESG-related misconduct at a rate that is consistent with increasing investor reliance on climate and ESG-related disclosure and investment.

Since March 2021, 41 states have either proposed or enacted laws related to ESG investing. Among these, eight states have enacted "pro-ESG" laws that enforce the consideration of ESG factors or even disincentivize investment in a particular controversial industry or sector (e.g., the fossil fuels industry). Conversely, 20 states have enacted "anti-ESG" laws that seek to disincentivize ESG investing with state assets and prohibit ESG considerations for reasons other than ordinary business or financial purposes. In practice, the biggest potential pitfalls for asset managers and their investors seem to lie within these anti-ESG initiatives.

Despite the varied state legislative landscape, it seems a firm that makes clear that its investment decisions are made first and foremost by considering pecuniary or financial factors relating to the relevant investment may be able to sidestep most anti-ESG minefields, even if it makes ESG-related investments. A firm should make sure to document its investment intent by making express statements and disclosures about such intent.

### *Japan*

Over the last few years, there has been much progress relating to ESG developments in Japan, stimulated by Japan's goal to achieve carbon neutrality by 2050. The trend seemed to kick off when Japan's Financial Services Agency (FSA) established an expert panel on sustainable finance in December 2020. The agency has since published three reports in which the panel has recommended enhancing corporate disclosure and capital market functions and for financial institutions to help their clients manage risks.

In July 2022, Japan Exchange Group Inc. launched its ESG Bond Information Platform, which aggregates information on topics like bond issuances, issuers, strategies, and evaluations. Japan's relevant ministries—such as the Ministry of Economy, Trade and Industry or the Ministry of the Environment—have published many nonbinding guidelines, which market players use as de facto rules.

The Sustainability Standards Board of Japan (SSBJ) was formed in July 2022 to create sustainability reporting guidelines for Japanese businesses. Following the lead of the International Sustainability Standards Board (ISSB), SSBJ released draft standards on March 29, 2024. These drafts outline how companies should report on sustainability and climate-related matters. The ISSB, launched by the International Financial Reporting Standards Foundation, aims to establish a global baseline for environmental disclosures used by companies, governments, and investors.

SSBJ is seeking public feedback on its proposal to mandate these disclosure standards for major Japanese companies. This consultation period is open through July 31, 2024. SSBJ aims to finalize the standards by March 2025 after incorporating feedback. This initiative represents a significant step toward mandatory sustainability reporting in Japan.

## What to Consider When Implementing Regulations

In the United States, disclosure has been of paramount importance for asset managers. There should be an exact alignment between what is stated as being done and what is actually being done. Policies and procedures should be put in place to provide evidence that documents what is being implemented.

On March 1, 2024, the FCA issued a letter addressed to the chief executives of alternative and mainstream asset management firms under its jurisdiction. The FCA warned managers who promote their ESG credentials to ensure that their governance systems can oversee the resourcing of and management information about those activities, related compliance change programs, claims made, and third-party ESG data providers used. The very existence of a specific anti-greenwashing rule suggests it is likely that the FCA will take a robust supervisory/enforcement approach to promotional material making sustainability claims.

In Japan, the FSA published guidelines for asset managers but only related to publicly offered ESG investment trusts. Therefore, the FSA expects that ESG fund managers will voluntarily disclose sustainability information, including how they evaluate and use ESG factors when making investment decisions. However, the accessibility of such sustainability information could be limited, and the reliability of such information could differ depending on the data provider.

## Looking Ahead

ESG and the associated regulatory frameworks create both challenges and opportunities for industry participants in the Asia-Pacific region and beyond. Fund managers should adhere to strong corporate governance and compliance input on the text of ESG policies and product disclosures to minimize and eliminate the risk of greenwashing.

## Further Reading

- ESG Investing: The US Regulatory Perspective
- UK Sustainability Disclosure Requirements and Investment Labels Regime to Launch in Coming Months
- Corporate Due Diligence: EU Supply Chain Directive Adopted Against All Odds
- Two EU Directives Aim to Shape European Legal Framework for Green Claims and Greenwashing

# UNDERSTANDING AND UTILIZING CO-INVESTMENTS

Co-investments can cover a multitude of investment arrangements. A typical model would be where fund managers create a main fund, and due to limitations around investment in a single asset in the fund documents, the managers are required to find other ways to deal with extra capacity.

Investors' appetites for co-investments have increased in recent years. The vehicle can be a one-off for a single asset, or it can be for a larger fund that executes different types of co-investment opportunities. The common denominator is that typically the investment manager remains the same. In the following sections, we outline the structure of co-investments, pros and cons, and recent trends in this space.

## Special Purpose Vehicles

Co-investments often arise when an investment opportunity has been identified by a fund, and it wants to raise additional capital in order to make that investment. Generally, a special purpose vehicle (SPV) is created by the fund itself to make investments into a target, and it brings co-investors into that SPV.

An SPV is a simplified version of a fund, but less flexible. Because co-investors can be passive, they must ensure the investment is made on the same terms—and at the same price—as the one being made by the leading investor or by the main fund managed by the manager, and that it is acquired and disposed of at the same time. For co-investors, this arrangement usually minimizes the management fee cost paid to the manager and allows them to piggyback on the manager's expertise and connections.

The structure of a fund should be designed in a manner that, should there be a default by a co-investor at the SPV level, the default does not trigger any rights or disadvantages at the target company level. This is particularly relevant to ongoing funding if there are additional funding commitments. Funding should be agreed up to a certain limit, and co-investors should contribute up to that limit. If there is any shortfall, consequences could be triggered at the SPV shareholders' agreement level, which could include buyout at a discount.

## Challenges When Executing Co-Investments

The following are some of the common challenges we see in in the execution of co-investment transactions.

It can be time-consuming putting arrangements for co-investors in place, especially when taking a deal-by-deal approach. Having established relationships with potential co-investors and having a broad understanding of how those relationships may aid the process, while bringing in new co-investors, will lengthen the timeframe. It can be particularly challenging during an auction process, where one must respond under tight timelines.

In a distressed situation (i.e., where there is a distressed investment and the fund is trying to exit that position), there is a higher degree of involvement from the co-investor. The co-investment structure adds a layer of complexity when managing a difficult exit. The exiting process tends to be more involved, as co-investors are likely to be more concerned when there is an exit at a less desirable valuation.

When exiting in volatile circumstances, some funds have the ability to retain a portion of the capital to deal with any claims that may occur post-completion. Warranty and indemnity insurance can also be included in structures to handle any claims that occur post-completion. In Asia, warranty and indemnity insurance is not universally used and does not cover all eventualities.

If a co-investor is a Chinese entity, an additional level of complexity must be addressed: the original investor must obtain outward direct investment approval. PRC state-owned enterprises or publicly traded companies may be subject to additional requirements. These processes can be time-consuming and place a considerable strain on time frames.

Additionally, consideration must be given to the rules and regulations of the jurisdiction where the investment takes place; for instance, in the United States, an investment may require antitrust analysis, as well as review by the Committee on Foreign Investment in the United States (CFIUS).

## Co-Investment Trends

Big allocators spend a significant amount of time vetting the managers when allocating to the main fund, allowing exposure to opportune assets in the co-investment vehicle. Offering co-investment opportunities

to investors is a key part of fundraising and can improve returns through the lower fee arrangements and allow investors to gain greater visibility and enhance their deal experience.

Oftentimes, family offices from Hong Kong, or other regions in China, begin investing in projects through co-investments with the main fund; once they gain more expertise and have better connections, they may start making direct investments and even set up their own funds later on.

Many real estate and infrastructure funds have co-investment rights. In particular, SPVs are often used for real estate deals in Japan.

In China, investors are active in specific industries, such as the energy and consumer sectors. Many Chinese companies are becoming willing to form a consortium with local and international investors to participate in outbound acquisitions or overseas expansion. Investments are also continuing across Southeast Asia; some jurisdictions are more active than others, such as Malaysia, Vietnam, the Philippines, and India.

# SECONDARY MARKET DEVELOPMENTS IN ASIA

Despite various headwinds, including inflation, interest rate hikes, and geopolitical conflicts, the outlook for the secondary market remains positive for 2024 due to a robust recovery of public markets, pent-up demand, the imperative for investor liquidity, a sluggish mergers and acquisitions (M&A) market, and regulatory considerations.

In this section, we will provide an overview and rationale for secondary transactions, elucidate key considerations, and highlight salient trends and issues.

## Overview of Traditional Limited Partner-Led Secondary Transactions

A traditional limited partner (LP)-led secondary transaction (LP-led secondary) is the sale and purchase of an existing LP interest in a fund. The purchaser acquires the rights to the future cash flow and profits from the fund's underlying portfolio of investments. Trading in LP interests has evolved into a crucial aspect of portfolio management. This transformation is a testament to the industry's maturation and institutionalization.

### *Rationale of LP-Led Secondaries*

There are various reasons for an LP to sell its interests in a fund to another purchaser. Some common reasons for an LP to carry out a secondary transaction could be to secure liquidity, implement strategic or portfolio allocation changes, adjust to new regulatory requirements, or capture early returns.

On the other hand, purchasers of an existing LP interest may do so to mitigate the "J-curve" phenomenon, offering more immediate cash flow compared to primary investments. Buying in the secondary market also provides diversification of strategy and access to information on existing investments of portfolio companies, which enables investors to de-risk on subsequent transactions.

## Trends in LP-Led Secondaries

Two noteworthy trends in LP-led secondaries are increased syndication of larger portfolio sales and a rise in "deferred deals."

### *Increased Syndication*

There has been an increase in the syndication of larger portfolio sales, with multiple purchasers acquiring the interest with the advantage of accessing capital and mitigating risk by spreading it among participants.

### *Increase in 'Deferred Deals'*

"Deferred deal" refers to a transaction where part of the purchase consideration is paid after closing the transaction. Such consideration may at times be more than half the value of the transaction.

The rise of such delayed payment structures is primarily to bridge bid-ask spread disparities.

Deferred deals are also effective when the seller needs to dispose of an asset, but there is not an urgent need for liquidity (e.g., in a sale due to regulatory reasons).

Where a deferred deal is carried out, the seller effectively becomes a creditor of the buyer in relation to the outstanding consideration. Seller protection provisions, including financial covenants and guarantees, are recommended for such transactions.

## Key Considerations When Carrying Out Secondary Transactions

### *General Partner Familiarity Considerations*

The general partner (GP) of a fund typically has broad discretion to approve or refuse the transfer of interests in the fund. As such, obtaining the GP's consent for a proposed secondary transaction is a key consideration. This may be more so when a GP prefers to deal with reputable or familiar parties. For example, a GP may only agree to a transaction with buyers that the GPs has transacted with in the past. Strong communication between the parties, as well as obtaining a reputable broker or law firm, can mitigate the GP's concerns in such circumstances.

### *Timing Considerations*

Timing poses another challenge. Secondary deals are often timed to close on a quarter-end or year-end for ease of fund administration. Due consideration should be given to ensuring that there is sufficient buffer time built into a secondary deal to guarantee the contemplated closing date can be met.

### *Tax and Regulatory Considerations*

Tax and regulatory considerations should also be taken into consideration. For example, effective January 2023, tax withholding under US law may be required on the sale of certain interests by non-US sellers (e.g., certain sales of interests in partnerships with income effectively connected to the United States or where the underlying asset is in real property). Parties should understand withholding obligations and make timely disclosures as appropriate. In a complex fund structure with numerous alternative investment vehicles, substantial time and effort could be necessary to assess the likelihood and magnitude of any such withholding, which also affect the consideration paid for the transaction.

On the regulatory front, corresponding assessments must be made for any prior consent or notification obligations where there will be, or has been, a change in ownership or control of the portfolio companies. Acquisitions of assets in sensitive industries may be more challenging and may draw the scrutiny of regulatory authorities, such as the US Federal Communications Commission, in relation to ownership of key media assets, and CFIUS, which reviews dispositions to ensure regulation compliance.

In the UK, the National Security and Investment Act came into force in January 2022 and gives the UK government powers to scrutinize and intervene in business transactions to protect national security.

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Similarly, the EU's Foreign Direct Investment Regulation, effective since October 2020, provides a framework for screening foreign investments into the EU for their impact on security and public order.

## Overview of GP-Led Secondary Transactions

Another related-but-distinct trend in the secondary market is the rapid proliferation in GP-led secondary transactions (GP-led secondaries). Over the last few years, GP-led secondaries have become a significant driver of overall secondary market dynamics. A GP-led secondary involves the GP initiating a transaction to sell an asset or a portfolio, with the approval of existing investors, to a newly formed continuation fund with a new set of investors. Existing investors may also have the option to roll over to the new continuation fund.

### *Rationale of GP-Led Secondaries*

A GP initiates a secondary transaction to, among other things, (1) provide additional time to maximize the value of assets held within a fund, potentially supported by follow-on capital; (2) provide liquidity to an exiting LP before the fund's term ends; (3) accelerate and lock in fund returns; and (4) align interests of employees involved in active fund management.

While LP consent is typically required to carry out a GP-led secondary, LPs may also be incentivized to consent to such transactions, particularly if the term of the fund is coming to a close. In such cases, the GP may need to (1) procure a quick disposal of assets at a discount, which can adversely affect an LP's returns, or (b) distribute the assets in-kind to the LP (not all LPs are able to handle distributions other than in cash).

### *Conflicts in GP-Led Secondaries*

GP-led deals can give rise to conflicts of interest, stemming from the fact that GPs are on both sides of a deal to sell and acquire the portfolio assets. Several factors may help mitigate conflicts of interest, including: (1) a third-party buyer, selected from the initial open bidding process; (2) a reputable third-party valuer used to determine the price of the deal; and (3) approval of the LP advisory committee for the deal.

## Trends in GP-Led Secondaries

Two notable trends in GP-led secondaries include increased syndication and a rise in single-asset deals.

### *Increase in Syndication*

Like LP-led secondaries, GP-led secondaries have increasingly consisted of syndicated deals, with one to three lead investors and as many as 10 syndicated investors.

### *Rise in Single-Asset Deals*

While multi-asset deals use to constitute the lion's share of GP-led secondaries, single-asset deals are now on a significant rise. This indicates increased tolerance for diversification risk, as incoming LPs are more comfortable investing in a single-asset fund.

## Market Trends in Asia

The global increase in GP-led activity is correspondingly reflected in the Asian markets, particularly in connection with Asian assets and blue-chip Asian managers. Prior to this, most Asian secondary transactions were LP-led by Asian sellers in US interests and non-US interests. The deal size of GP-led secondaries in Asia is also increasing. This rise in GP-led activity could in part be exacerbated by

difficulties in exiting during the COVID-19 pandemic and the current high-interest-rate environment, which compounds the difficulty buyers face in obtaining adequate financing to execute an acquisition.

Despite the significant growth in recent years, this burgeoning landscape comes with its own set of challenges due to its relative nascency. Some challenges that GPs list are the lack of sophistication and consistency in regulatory environments, which can pose uncertainties for GPs. Ongoing efforts to enhance regulations can pave the way for a more secure investment environment. There are also benchmarking challenges to promote both market transparency and fund performance. On the LP side, there is still a need for increased investor education and protection to ensure that investors are aware of the risks and opportunities associated with investing in Asia, and the foregoing is important for fostering a robust and informed investor base.

While Asian secondary markets exhibit robust growth, challenges persist as they are still relatively new compared to Western markets. Addressing regulatory harmonization, enhancing market transparency, and promoting investor protection are some of the vital steps. While the US secondary market sets a precedent for transparency and liquidity, Asian markets can benefit from adopting best practices in regulatory oversight, market infrastructure development, and investor education.

# ESTABLISHING SUCCESSFUL PRIVATE CREDIT FUNDS IN ASIA

The private credit markets of Asia have grown almost 30-fold in the past two decades, from approximately $3.2 billion in 2000 to more than $90 billion as of June 2022. Private credit investments allocated across Southeast Asia by global GPs as of June 2022 were at approximately $65.4 billion, an increase of 52% since 2020.

There has been tremendous growth in India specifically, with the total private debt assets under management (AUM) managed by India-based GPs sitting at approximately $13.4 billion as of June 2022, an increase of 51% since the end of 2020.

## Private Credit Markets

Private asset class investors have traditionally focused on the US and European markets. However, there has been a significant increase of focus on Asia due to investors looking for the diversification and lower competition that can be found in the Asian markets. Growing Asian economies have driven interest, with countries such as India having a positive macroeconomic outlook.

There are opportunities across the spectrum, ranging from performing credit to special situation investments and distressed credit. The M&A market in India reached nearly $160 billion in 2022, a record, while annual private equity venture capital investments in India stand at about $35–$40 billion—and many of these transactions will require credit financing.

In other regions of Southeast Asia, the credit market was at a relatively nascent stage, but there have been recent developments, credit is becoming more mainstream in Asia. There has been a surge in demand for credit products, from distress strategies to direct lending strategies.

## Managing Private Credit Funds in Asia: Potential Challenges

As Asia is not a homogenous market, managers looking to develop a pan-Asian approach will need to develop local expertise in specific submarkets to successfully implement their strategies. Managers will need to have feet on the ground to understand the dynamics of doing business in the region—selecting the right kinds of deals, understanding the legal and regulatory framework for crafting these structures, and learning to navigate the framework in case of any enforcement.

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Risk-management and mitigation strategies are critical to overcoming potential issues when managing private credit funds in Asia. More resources and capital are being deployed in order to assess and manage risk and provide reassurance to investors. For example, ESG risk management is increasingly becoming a key consideration for managers in Asia. There has been enhanced due diligence from investors, which has increased the cost burden and time that managers take to respond to queries and implement the right systems and processes.

When investing in the Asian markets, managers should articulate what the value propositions are to enable investors to understand the benefits of the market and what they can gain. Managers that can demonstrate a stable track record in the region will provide reassurance for investors.

LPs are often used to execute credit strategies in Asia, and Singapore is increasingly being used as the jurisdiction of choice for credit structures in the region. As the markets mature and more capital flows into Asia, there is growing awareness of private credit and the use of private credit in relation to lending strategies, documentation, and disclosure requirements.

### Looking Ahead

The opportunities across Asia are exponential—India in particular is well positioned to benefit from rising interest in the private credit markets due to its growing middle class, increased infrastructure spending, and adoption of technology.

## CONCLUSION

Asia's private investment market stands poised to play a pivotal role in the region's continued economic rise. Supported by strong fundamentals, evolving regulatory environments, and increasing investor confidence, this dynamic ecosystem offers significant opportunities for both established players and innovative newcomers.

## CONTACTS

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