

金钱法度 MONEY RULES



对私募股权投资者而言，中国市场从来都不缺乏机遇。但是基金管理人必须跟上快速完善的监管机制，才能顺利获得珍贵的宝藏。**焦亚惠**报道。

CHINA NEVER LACKS OPPORTUNITIES FOR PRIVATE EQUITY INVESTORS,
BUT FUND MANAGERS MUST NOW KEEP UP WITH A SWIFTLY
MATURING REGULATORY FRAMEWORK, WRITES **JOY JIAO**

虽然全球私募股权及风险投资 (PE/VC) 出现下挫，但是中国的 PE/VC 投资却逆流而上，预计在今年随后的几个月将依然保持出色表现。与此同时，许多领域的监管措施也进一步加强，以便更好地监管这一快速发展的市场。

根据普华永道发布的《中国私募股权及风险投资基金 2016 年回顾与 2017 年展望》，相比 2015 年，2016 年全球 PE/VC 基金募资及投资金额较整体虽有所下降，但是中国市场依然表现强劲，募资及投资金额均创历史新高，投资金额增至 2230 亿美元。

Private equity and venture capital (PE/VC) funds in China have defied global downward trends of late and best predictions are for continued sterling performances for the rest of the year. But with the rapid growth comes also, in many areas, a rapid rate of regulatory development to keep pace and better control fresh markets.

Although the proceeds raised and the amounts invested by PE/VC funds declined globally in 2016, the China market made a strong showing with new highs, as PE/VC-led M&A deal value increased to US\$223 billion, according to *China Private*

展望 2017 年, 普华永道的报告预计中国 PE/VC 基金的资金募集将继续保持上升态势。PE/VC 主导的并购活动, 尤其是海外并购, 将更加频繁。PE/VC 投资活跃的领域预计有高科技、金融科技、文化娱乐、医疗健康、房地产及消费品等行业。不过 2017 年, 基金将继续面对退出的压力。

虽然中国 PE/VC 基金的募投势头依然强劲, 但是基金管理人所面对的是监管机构更严格的要求, 进一步规范和加强监管环境。热门的投资行业都各有其独特的法律问题, 投资一些新兴行业所面对的合规问题尤其复杂。

Equity/Venture Capital 2016 Review and 2017 Outlook, published by PricewaterhouseCoopers (PwC).

Looking ahead to 2017, PwC predicts that the proceeds raised by Chinese PE/VC funds will continue their upward trajectory. M&A led by PE/VC, particularly overseas M&A, will become even more frequent, and PE/VC investment will be active in such industries as high technology, financial technology, culture and entertainment, healthcare, real estate and consumer goods, the multinational accounting firm says. However, funds will continue to face exit challenges this year.

对于新申请的基金管理人, 我们通常会建议客户先与拟设立地工商机关沟通

With respect to fund managers that are applying for the first time, we usually recommend to the client that it first talk with the administration for industry and commerce of the place where it proposes to establish

要想从快速增长中获利, 基金管理人不仅要懂如何投资, 更需要掌握各种监管和合规问题。

登记备案

最近 12 个月以来, 中国证券投资基金业协会 (中基协) 发布了多项与私募基金登记备案相关的问题解答。

根据《私募投资基金登记备案问题解答 (七)》, 私募基金管理人的名称和经营范围中应当包含“基金管理”“投资管理”“资产管理”“股权投资”“创业投资”等相关字样。

“但是, 目前全国范围尚未完全放开对于金融类企业登记的限制。”中伦律师事务所上海办公室合伙人龚乐凡说。“对于新申请的基金管理人, 我们通常会建议客户先与拟设立地工商机关沟通, 确保按照协会 [中基协] 要求完成基金管理公司工商登记。”

其他比较重要的还包括《私募基金登记备案相关问题解答 (十二)》和《私募基金登记备案相关问题解答 (十三)》。解答十二要求私募基金管理人的高级管理人员不得在非关联的私募机构兼职。“实践中, 规范高管任职



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But despite the strong growth patterns, fund managers are facing more stringent requirements from authorities as the sector moves towards a better controlled and regulated environment. And each of the favoured industries for investment presents its own legal issues, with the compliance matters faced by investors in certain emerging sectors being particularly complex. So to glean the profits from rapid growth, fund managers now not only need to understand how to invest, but they must stay ahead of the curve on regulatory and compliance issues.

REGISTRATION AND RECORDAL

In the past 12 months, the Asset Management Association of China (AMAC) issued several sets of questions and answers relating to the registration and recordal of private funds. According to AMAC's answer No. 7, the name and scope of business of a private fund manager is required to contain such words as “fund management”, “investment management”, “asset management”, “equity investment”, “venture capital”, etc.

一直是私募基金管理人登记中中基协重点监管的内容，”金杜律师事务所北京办公室合伙人龚牧龙表示。

解答十三要求，私募基金管理人在申请登记时，只能在私募证券投资基金管理人、私募股权/创投基金管理人、其他类私募基金管理人三者之间选择一种类型；私募基金管理人不可管理与本机构已登记业务类型不符的私募基金；同一私募基金管理人不可兼营多种类型的私募基金管理业务。

“这意味着之前的同一管理人对私募股权基金与私募证券投资基金的‘混业经营’已经一去不复返了，原来存在‘混业经营’的私募基金管理人或基金也被要求进行相关调整，”中伦律师事务所北京办公室合伙人张诗伟说。

龚牧龙表示：“解答十三对于市场上从事一、二级市场

规范高管任职一直是私募基金管理人登记中中基协重点监管的内容

Regulation of the service of senior management personnel has consistently been one of the key focal points of regulation of the registration of private fund managers by the AMAC



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同一管理人对私募股权基金与私募证券投资基金的‘混业经营’已经一去不复返了

The past practice of one manager concurrently engaging in private equity fund and private securities fund management business has gone, never to return

“However, the restrictions on the registration of financial enterprises have not yet been fully relaxed everywhere around the country,” says Gong Lefan, a partner at the Shanghai office of Zhong Lun Law Firm. “With respect to fund managers that are applying for the first time, we usually recommend to the client that it first talk with the administration for industry and commerce of the place where it proposes to establish, to ensure completion of business registration of the fund management company in accordance with the AMAC’s requirements.”

Other more important answers include No. 12, which requires senior management personnel of private fund managers not to serve concurrently with non-affiliated private investment firms. “In practice, regulation of the service of senior management personnel has consistently been one of the key focal points of regulation of the registration of private fund managers by the AMAC,” says Gong Mulong, a partner at the Beijing office of King & Wood Mallesons.

Answer No. 13 requires private fund managers applying for registration to choose only one from three types of business: private

联动的基金影响较大,该等基金需要对证券投资和股权投资分别登记不同的管理人和基金进行投资运作。”

根据自身经验,龚牧龙认为,以下问题是拟办理中基协登记备案的PE/VC基金管理人目前需要特别关注的:

(1) 拟办理中基协登记备案的PE/VC基金管理人需在名称和经营范围中包含前述解答七中所要求的用字,否则登记申请可能会被协会拒绝。同时,管理人的经营范围中不得包括民间借贷、民间融资、配资业务、小额理财、小额借贷、P2P/P2B、众筹、保理、担保、房地产开发、交易平台等业务。

(2) 管理人的股东需对管理人进行一定比例的实缴,目前实践中通常为不低于100万元(14.5万美元)或不低于注册资本的25%。

(3) 管理人的关联方从事私募基金管理业务但未办理管理人登记也是中基协关注的问题,因此管理人应在申请登记备案前确保这类关联方已办理或正在办理登记,如未办理登记的原因是该关联方暂未从事相关业务,则可能需要依据中基协的要求出具承诺函甚至注销该等关联方。

(4) 管理人的高管需依据中基协的规定取得基金从业资格,同时,管理人的高管应当与管理人建立正式的劳动关系而非“挂靠”,中基协的申请系统中也需要上传该等高管与管理人的劳动合同或社保公积金缴纳证明。

监管新动态

除了登记备案之外,中国证券监督管理委员会和中基协近期的监管措施或实践操作对PE/VC基金的募集、投资、管理、退出等环节也都产生了广泛影响。

“证监会近期出台了一系列针对二级市场再融资、并购的法规和指导意见,”尚伦律师事务所北京办公室合伙人吕海波说,“在基金层面对于针对二级市场的PE基金造

securities fund manager, PE/VC fund manager, or other private fund manager. A private fund manager may not manage a fund that is not consistent with the type of business for which it registered, and may not concurrently engage in multiple types of private fund management business.

“This signifies that the past practice of one manager concurrently engaging in private equity fund and private securities fund management business has gone, never to return, and private fund managers or funds that currently have such hybrid operations are being required to make the relevant adjustments,” says Zhang Shiwei, a partner at Zhong Lun Law Firm in Beijing.

Gong Mulong says, “Answer No. 13 has a relatively major impact on those funds that deal in both the primary and secondary markets, as such funds are required to register different managers and funds for securities investment and equity investment to carry on their investment operations.”

Based on his own experience, Gong Mulong argues that PE/VC fund managers need to pay particular attention to the following issues when carrying out AMAC registration/recordal:

(1) A PE/VC fund manager is required to include words such as those required by above-mentioned answer No. 7 in its name and scope of business, failing which its application for registration may be rejected. The manager’s scope of business may not include such business as private lending, private financing, margin lending, small amount wealth management, extension of small loans, peer-to-peer (P2P)/person-to-business (P2B) lending, crowd funding, factoring, provision of security, real estate development, and trading platform;

(2) The shareholders of the manager must make a paid-in contribution of a certain percentage to the manager, which, in current



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证监会近期出台了一系列针对二级市场再融资、并购的法规和指导意见

The CSRC recently issued a series of regulations and guiding opinions addressing further financing on the secondary market and acquisitions

成一定冲击,个别基金的业绩受到严重影响,随之也影响到相关类别基金的募资。”

2016年9月,证监会发布了《关于修改〈上市公司重大资产重组管理办法〉的决定》,修订后的新规被业界称为“史上最严的借壳新规”。龚乐凡表示,新规修订了对“重大资产重组”的界定标准。

龚乐凡介绍说,旧规定的界定标准只有两项:一是上市公司发生控制权变更;二是上市公司向收购人及其关联人购买资产总额占比超过100%。就第二点,新规定将考察标准从原先的资产总额这一单项指标,扩大为资产总额、营业收入、净利润、资产净额、发行股份数量五个指标。

“新规出台后,中概股回归之路愈发艰难,PE投资人需要重点关注这些标准,提前与各方顾问沟通,在交易中设计合理、合规的架构,以免触发‘借壳标准’,”他说。

中国证监会2016年底发布了《证券期货投资者适当性管理办法》,将于2017年7月1日正式生效。邦信阳中建中汇律师事务所上海办公室合伙人刘倩表示,这一管理办法适用于境内PE/VC基金的募集环节。

practice, is usually not less than RMB1 million (US\$145,000) or 25% of the registered capital;

(3) The engagement by a connected party of a manager in private fund management business without having carried out manager registration is also an issue that the AMAC keeps a close watch on. Before applying, a manager should ensure that such a connected party has carried out, or is carrying out, registration, and if the reason that it has not carried out registration is that it is provisionally not engaging in the relevant business, it may be necessary to issue a letter of undertaking, or even deregister the connected party as required by the AMAC;

(4) The senior management personnel of a manager are required to secure fund qualifications in accordance with AMAC regulations. Senior management personnel are also required to establish a formal employment relationship with the manager and not merely be “attached” to it. The AMAC’s system also requires the uploading of the management personnel’s employment contracts with the manager, or proof of payment of social insurance and contributions to the housing reserve.



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[基金管理人] 还应进一步根据规定对投资者进行分级管理, 区分专业投资者和普通投资者

A fund manager should place particular attention on managing investors by type ... distinguishing professional investors from ordinary investors

“基金管理人应特别注意, 在核查投资者是否符合合格投资者标准外, 还应进一步根据规定对投资者进行分级管理, 区分专业投资者和普通投资者, 针对普通投资者, 基金管理人在信息告知、风险警示、适当性匹配等方面应履行更严格的尽职义务,” 刘倩说。“基金管理人也可根据专业投资者的业务资格、投资实力、投资经历等因素, 对专业投资者进行细化分类和管理。”

该管理办法出台后, 刘倩表示基金管理人还应对基金产品进行风险分级管理, 根据每个基金产品的特性划分不同的风险等级。基金管理人还应根据对投资者的评估向其推介适合的基金产品。最后她提醒道: “在进行前述适当性管理操作时, 基金管理人应留存全部留痕。”

与证监会一样, 中基协也加强了对私募投资基金的监管。“中基协对私募基金‘投’和‘退’环节监管较少, 更多是涉及商业上的考量或技术上的安排。”汉坤律师事务所北京办公室合伙人张平律师表示。“相比之下, 基金业协会目前对私募投资基金的‘募’和‘管’环节的管理是比较严格的, 尤其是对私募基金管理人的登记、私募投资基金备案以及私募投资基金和管理人相关信息的定期披露等方面要求。”

“基金管理人不仅要根据基金协议向投资人披露, 还要向协会进行信息披露。”《私募投资基金募集行为管理

RECENT REGULATORY TRENDS

In addition to registration/recordal, recent regulatory measures and practical operations from the China Securities Regulatory Commission (CSRC) and AMAC have had a wide-ranging effect on capital raising, investment, management, and exit by PE/VC funds.

“The CSRC recently issued a series of regulations and guiding opinions addressing further financing on the secondary market and acquisitions,” says Lü Haibo, a partner at Sunland Law Firm in Beijing. “At the fund level, these have had a certain impact on PE funds that deal in the secondary market, with the performance of certain of those funds seriously affected, further affecting the fund raising of related types of funds.”

In September 2016, the CSRC issued the Decision on Amending the Administrative Measures for Material Asset Restructurings of Listed Companies. Industry insiders have labelled the amended regulations the most stringent to date on backdoor listings. Gong Lefan states that the new regulations have revised the criteria for defining a “material asset restructuring”.

基金管理人不仅要根据基金协议要向投资人披露, 还要向协会进行信息披露

A fund manager is not only required to disclose information to the investors in accordance with the requirements of the AMAC, but is also required to disclose information to the AMAC



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办法》及《私募投资基金信息披露管理办法》等相关规定对此都有做明确规定。

此外，中基协于2017年3月1日发布《私募投资基金服务业务管理办法》（试行）。龚牧龙表示，根据该管理办法，向私募基金提供基金募集、投资顾问、份额登记、估值核算和信息技术系统等服务业务的机构均属于私募基金服务机构。

“该等服务机构需要在中基协完成登记并成为协会会员，”他说。“从我们的经验来看，由于服务机构登记比私募基金管理人登记要求的申报材料更为复杂，需要建立的业务制度和风控内控制度更为精细，加之相关信息系统的安全性、稳定性要求，因此服务机构的登记难度也更大。”

此外，中国银行业监督管理委员会的一份规定可能对私募基金的资金来源造成影响。中豪律师集团重庆办公室合伙人郑毅表示，近两年，越来越多的银行资金通过资管计划、信托计划等通道投资私募基金或产业基金，增加了银行理财资金投资非标资产的比例，加重了银行自身风险。为此，银监会在2017年4月发布了《关于银行业风险防

He explains that there were only two criteria in the old regulations for defining such restructurings: (1) a change occurs in the control of the listed company; and (2) the proportion of the total amount of assets acquired by the listed company from the acquirer and its connected parties exceeds 100%. With respect to the second point, the new regulations expand the criteria to be examined from the single metric of total asset amount to five metrics – total asset amount, operating revenue, net profit, net asset amount and number of shares issued.

“With the issuance of the new regulations, the route for the return home of Chinese concept stocks overseas has become more difficult, so PE investors need to pay particular attention to these criteria, talk with advisers of the various parties in advance, and design a reasonable and compliant structure in the transaction to avoid triggering the ‘backdoor listing criteria’,” says Gong Lefan.

At the end of 2016, the CSRC issued the Administrative Measures for the Suitability of Securities and Futures Investors, which will formally enter into effect on 1 July 2017. Echo Liu, a partner

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控工作的指导意见》，明确指出银行要切实履行自身投资管理职责，不得简单将理财业务作为各类资管产品的资金募集通道。“这表明监管机构对目前许多银行资金投入私募基金或产业基金的模式提出了警告和制止，”郑毅说。

投资热点

人工智能是当下 PE/VC 基金关注的一个投资热点。尚伦所的吕海波表示，投资人工智能 (AI) 需要特别关注的是知识产权问题。“由于一部分创业者是国内外高校、研究机构、大公司出身，其项目所依赖的知识产权归属乃至是

监管机构对目前许多银行资金投入私募基金或产业基金的模式提出了警告和制止

The regulator is giving a warning and proposing putting a stop to the model where significant quantities of bank funds are invested in private funds and industry funds

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Chongqing



in the Shanghai office of Boss & Young, says these administrative measures will apply to PE/VC funds at the offering stage.

“In addition to verifying whether an investor satisfies the criteria for a qualified investor, a fund manager should place particular attention on managing investors by type, in accordance with regulations, distinguishing professional investors from ordinary investors, and in respect of ordinary investors a fund manager is required to perform stricter due diligence obligations in terms of information provision, risk warning, suitability matching, etc.,” says Liu. “A fund manager may also further categorize and manage professional investors based on such factors as their business qualifications, investment strengths, investment experience, etc.”

After the issuance of the administrative measures, Liu says fund managers are required to manage their fund products by risk level, dividing them into risk grades based on their properties. A fund manager is also required to recommend appropriate fund products to investors based on its assessments of such investors. She says, by way of reminder, “when carrying out the above-mentioned suitability management, the fund manager should retain all traces thereof.”

Like the CSRC, the AMAC has strengthened its regulation of private investment funds. “In its oversight, the AMAC’s regulation of private funds’ investment and exit is mostly about commercial considerations and technical arrangements – not putting too much stress,” says Evan Zhang, a partner at Han Kun Law Offices in Beijing. “In contrast, the AMAC’s administration of private investment funds’ offerings and management is currently quite strict, particularly its requirements in respect of the registration of private fund managers, the recordal of private investment funds, and the regular disclosure of relevant information by private investment funds and their managers.

“A fund manager is not only required to disclose information to the investors in accordance with the requirements of the AMAC, but is also required to disclose information to the AMAC,” he adds. The Administrative Measures for Offerings by Private Investment Funds, and the Administrative Measures for the Disclosure of Information by Private Investment Funds set out express provisions in this regard.

On 1 March 2017, the AMAC issued the Administrative Measures for the Private Investment Fund Service Business (for Trial Implementation). Gong Mulong says that, under these measures, firms that provide services to private funds such as fund offering, investment advice, fund unit registration, valuation and accounting, and information technology systems are deemed private fund service firms.

“Such service firms are required to register with, and become members of, the AMAC,” he says. “In our experience, the difficulties involved in the registration of a service firm are greater due to the fact that the application materials for registration of a service

否存在竞业禁止问题都非常重要,”他说。“另外,目前 AI 项目很多都在和产品生产方联合开发,或者采用代工生产 [OEM],其开发相关的知识产权归属也十分重要。”

不过邦信阳中建中汇的刘倩提醒道,很多基金太过于关注热点资产,而很多热点产业的长期盈利能力其实并不是很强,甚至不能产业化。以人工智能为例,去年 AlphaGo 与韩国棋手李世石的人机对弈将 AI 带入到公众的视野。“但是很多情况下,有些仿制品、科技含量并不是很高的产品也号称 AI,混淆大众的视听,”她说。“因此,



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境内 PE/VC 基金投资人工智能及相关产品领域时,应注意甄别 AI 是否具有高技术性及原创性,且在具体产业的应用能否很好地落地实施,是否符合该行业的创新型发展规律,以避免盲目跟随大流的投资陷阱。”

海问律师事务所北京办公室国际合伙人傅鹏认为,以大数据、AI 和泛物联网(包括车联网、自动驾驶、智能硬件等)为代表的领域,是当下投资的新热点。“增值电信业务经营许可领域的牌照体系是以传统互联网业务形态为基础建立的,如何更好、更精准地适用到大数据、AI 和泛物联网领域,是具有挑战的课题,”他说。“例如,以车联网为例,尤其是车联网业务中的前装 TSP[车载远程信息服务提供商]服务领域,结合了传统的增值电信业务领域的许多业务特征,需要同时持有多张牌照才能较好地覆盖业务内容,需要投资人审慎判断。”

傅鹏补充到,近年来中国在网络安全、数据保护领域的立法非常活跃,初步形成了一套基础监管架构,而这套监管体系与大数据、AI 和泛物联网领域行业关系非常密切,值得公司和投资人重点关注。

“例如,大数据行业本身涉及到海量数据的收集、存储、加工、处理、传输、利用,甚至是对外交易或交换,过程本身就关系到中国法律对个人信息保护、数据安全、网络安全的一系列规定和要求,”傅鹏说。“AI 行业虽然以人工智能算法作为核心,但是一个好 AI(尤其在机器深度学习

firm, as compared with the registration of a private fund manager, are more complex, and the business systems and risk control and internal control systems that they are required to establish are more detailed and add to the requirements in respect of the security and stability of the relevant information systems.”

One set of regulations of the China Banking Regulatory Commission (CBRC) could have an impact on the capital source of private funds. Ian Zheng, a partner in the Chongqing office of Zhonghao Law Firm, says that in the past two years an increasing

[大数据行业涉及] 对个人信息保护、数据安全、网络安全的一系列规定和要求

[The big data industry] touches upon a series of provisions and requirements ... concerning the protection of personal information, data security and cybersecurity

amount of bank funds have been invested in private funds or industry funds, through such channels as asset management plans and trust plans, increasing the percentage of bank wealth management funds invested in non-standard assets, and heightening banks' own risks.

For this reason, in April 2017, the CBRC issued the Guiding Opinions on the Risk Prevention and Control Work of Banks, stating that banks are required to duly perform their investment management duties and not simply treat their wealth management business as a fundraising channel for various types of asset management products. “This indicates that the regulator is giving a warning and proposing putting a stop to the model where significant quantities of bank funds are invested in private funds and industry funds,” says Zheng.

INVESTMENT HOTSPOTS

Artificial intelligence (AI) is currently a big focus of attention for PE/VC funds. Lü, from Sunland, says that particular attention needs to be paid to the issue of intellectual property (IP) when investing in AI. “For entrepreneurs from universities, research institutions or large companies, it is extremely important to identify the vesting of the IP their projects rely on, and whether a non-compete issue exists,” he says. “Many AI projects are currently being jointly

医疗健康行业具有高度的专业性、较高的行业壁垒与准入门槛

The medical and health industry is highly specialized and has relatively high industry barriers and entry thresholds



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习领域)的前提是有大量数据供AI进行学习演练,这也是数据收集和利用的问题”。

此外,傅鹏认为泛物联网领域的许多具体业务,例如比较热门的车联网和自动驾驶,也涉及到大量数据的收集和和处理,所有这些都特别关注网络安全和数据保护领域的监管要求。

瀚一律师事务所创始合伙人徐云认为医疗健康作为一项刚性需要,在中国城镇化、消费升级以及人口老龄化的大背景下,发展势头愈发迅猛。医疗健康行业可以包括医院、体检中心、药厂、药店、医疗器械、医疗检测用品、中药材等很多细分领域。“医疗健康行业具有高度的专业性、较高的行业壁垒与准入门槛,同时也受到政府的严格监管,投资该行业不仅需要相当的专业知识并付出大量资本,还需要保持对政策法规——尤其是反腐败反贿赂法律——的高度敏感,”他说。

但需要注意的是,即使一个基金的中资成分占了绝大多数,其含有的外资成分仍可能会妨碍其对外资受限的领域进行投资。汉坤所的张平律师表示,科技、媒体及电信(TMT)和医疗机构等行业都存在这一问题。在TMT领域,有些行业仍然对外资有所限制。根据张平律师的经验,

developed with product producers, or use the OEM [original equipment manufacturer] model, so the vesting of the relevant IP developed by them is also extremely important.”

However, Liu, from Boss & Young, has observed that many funds pay too much attention to popular assets, and that many favoured industries, for example AI, do not have strong long-term profitability, and may not even be commercially successful.

“In many cases, some counterfeit products with a relatively low technical content are also being called AI, confusing the public,” Liu says. “Accordingly, when a domestic PE/VC fund invests in the AI and related product sector, it needs to discriminate whether the AI is truly high-tech and original, whether it can actually be implemented in specific industrial applications, and whether it is in keeping with the innovative development pace of the industry in question, to avoid blindly following the flow into an investment trap.”

Victor Fu, an international partner in the Beijing office of Haiwen & Partners, believes that the sector represented by big data, AI and the internet of things is the new investment hotspot. “However, the licensing regime in the value-added telecommunications service business permit sector was established on the basis of the traditional internet business form, so how to better and more precisely apply it to the big data, AI and the internet of things sector is a challenging issue,” he says.

“Taking the internet of vehicles as an example, particularly the pre-installed TSP [telematics service provider] service sector in the internet of vehicles business, it combines numerous business features of the traditional value-added telecommunications service sector and requires the simultaneous holding of numerous licences to properly cover the services involved. This requires careful consideration by investors.”

Fu adds that legislation in the cybersecurity and data protection fields in recent years has been very active, tentatively giving rise to a basic regulatory framework, and the connection between this regulatory regime and big data, AI and the internet of things sector is extremely close, making it worthwhile for companies and investors to pay close attention.

“For example, the big data industry itself involves the collection, storage, processing, treatment, transmission, use and even the transacting or exchanging with third parties of vast quantities of data, and the process itself touches upon a series of provisions and requirements of Chinese laws concerning the protection of personal information, data security and cybersecurity,” he says. “Although AI algorithms lie at the core of the AI industry, the precondition for good AI, particularly in the machine deep learning field, is having a vast quantity of data available for the AI to learn and drill. This is also a data collection and use issue.”

Fu says many specific services in the internet of things sector, for example the relatively hot internet of vehicles and autonomous driving, also involve the collection and processing of vast quantities

“即使一个基金只是间接地存在外资成分，而且该外资成分也非常少，这类基金投资 TMT 领域的某些行业还是可能影响被投企业的牌照的更新及上市的申请”。

张平律师表示，医疗领域也存在这类问题。不过，就投资需要医疗许可证的医疗机构而言，对于投资人间接含外资成分、外资实质影响等问题，法规及监管机构的态度目前都不是很明显，有赖于相关法规的进一步完善和地方主管部门的认定，这也给一些基金的设立和投资带来一定的不确定性。

“但是对于有限合伙人(LP)上层股东的股权变动情况，基金管理人甚至 LP 本人都很难有效控制，”张平律师说。“LP 的间接股东发生股权变动，出现外资成分，这对基金管理人是一个不小的挑战。”

另一个 PE/VC 基金投资热点是文娱产业。“这个行业的知识产权问题也非常重要，但是政府管理的策略可能对投资人影响更大，”吕海波说。“由于二级市场对于文娱相关产业的挂牌、上市、重组监管日趋严苛，导致基金投资风险加大；同时，由于文娱产业对于明星个人的依赖性较大，导致对风险的管理和控制难度也较大。”

此外，比较活跃的投资领域还有政府与社会资本合作(PPP)项目。中伦所的张诗伟认为，该领域由于有政府投

of data, and all of these require particular attention to regulatory requirements of the cybersecurity and data protection fields.

Richard Xu, the founding partner of Han Yi Law Offices, says that medicine and health, as a rigid demand, will develop exponentially as China continues to urbanize, consumer demand increases and the population ages. The medical and health industry can include numerous sub-sectors, such as hospitals, health check centres, pharmaceutical producers, pharmacies, medical devices, medical testing articles, and traditional Chinese medicinal materials.

“The medical and health industry is highly specialized and has relatively high industry barriers and entry thresholds, while also being subject to stringent regulation by the government,” he says. “Investing in this industry not only requires substantial specialized knowledge and the expenditure of significant capital, but also maintaining a high degree of sensitivity to policies and regulations, particularly anti-corruption and anti-bribery laws.”

However, one thing that needs to be noted is that even if the Chinese capital portion accounts for the overwhelming majority of a fund, the foreign investment portion that it contains could impede it from investing in sectors in which foreign investment is restricted.

Evan Zhang, from Han Kun, says this issue exists in industries such as technology, media and telecommunication (TMT) and medical institutions. Some industries in the TMT sector still have certain restrictions against foreign investment. “Even if a foreign investment portion exists only indirectly in a fund, and that foreign investment portion is very small, investment by such a fund in certain industries in the TMT sector may affect the updating of the licences and the application for listing of the investee enterprise,” he says.

Evan Zhang says this issue also exists in the medical sector. However, with respect to investments in medical institutions that require medical permits, regulations on, and the attitude of the regulators towards, such issues as investors containing an indirect foreign investment portion, and the actual impact of the foreign investment are currently unclear, and are dependent on the further improvement of regulations and determinations by local authorities. This also presents a degree of uncertainty for the establishment and investment of certain funds.

“However, with respect to changes in the top-level shareholding of limited partners [LPs], it is difficult for the fund managers, even the LPs themselves, to have effective control,” he says. “A change in the equity of an indirect shareholder of an LP, which may introduce foreign capital into the LP, poses a significant challenge for the fund manager.”

Another hotspot for investment by PE/VC funds is the culture and entertainment industry. “The issue of IP is also very important in this industry, but the strategy of government administration may have a greater impact on investors,” says Lü, from Sunland. “As the regulation of the listing and restructuring of culture and entertainment-related industries by secondary markets is becoming more stringent by the day, funds’ investment risks are

境外有限合伙人在中国设立的人民币基金也会被视作外资，并受制于 [对外商投资的规定]

RMB funds set up in China by foreign LPs are considered foreign investors and are subject to [rules on foreign investment]

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基金管理人平台

PLATFORMS FOR FUND MANAGERS

邦信阳中建中汇律师事务所上海办公室合伙人刘倩表示，基金业协会目前对基金管理人的监管日趋严格，并且涉及方方面面，尤其是在基金管理人的信息报送方面。刘倩介绍说，目前仅平台基金业协会就已推出了四个：

1. 资产管理业务综合管理平台。该平台主要是针对基金管理人和基金产品的登记备案管理及定期信息更新。
2. 信息披露备份系统。该系统是后续将针对投资者开放的基金信息披露平台，管理人应定期进行基金的信息报送。
3. 从业人员管理平台。这是针对私募基金从业人员的管理平台，从业人员应通过所任职私募机构申请个人账号。基金管理人应对机构从业人员的个人账号开立、基本信息注册登记及变更、离职备案信息、诚信信息等进行审核与维护。
4. 远程培训系统。这是对已取得基金从业资格的人员的培训系统，相关人员每年度应完成 15 学时的后续培训，以维持基金从业资格的有效性。

Echo Liu, a partner in the Shanghai office of Boss & Young, says the AMAC's regulation of fund managers is increasingly stringent and touches upon numerous aspects, particularly the submission of information by fund managers. The AMAC has already put out four platforms:

1. **Platform for the comprehensive administration of the asset management business.** The main purposes of this platform are administration of the registration, recordal of fund managers and fund products, and the regular updating of information.
2. **Information disclosure backup system.** This is a fund information disclosure platform that will subsequently be opened to investors, and through it, managers are required to regularly carry out the submission of fund information.
3. **Employee administration platform.** This is a platform for the administration of the employees of private funds, and such employees are required to apply for personal accounts through the private investment firm with which they serve. The fund manager is required to carry out the review and maintenance of the opening of personal accounts by the firm's employees, the registration and amendment of basic particulars, information filed in respect of employees who leave the firm, and integrity information.
4. **Remote training system.** This is a system for the training of personnel who have already secured fund qualifications. Relevant persons are required to complete 15 hours of follow-up training each year to maintain the validity of their fund qualifications.

increasing. Also, as this industry is quite reliant on celebrities, the difficulty of managing and controlling risks is greater.”

Another relatively active investment sector is public-private partnership (PPP) projects. Zhang Shiwei, from Zhong Lun, says that since this sector involves participation by public investment platforms, when a PE/VC fund is being selected, greater stress will usually be placed on the fund's fundraising capabilities and whether it has experience in government invested projects. “The return rate on investments in such projects may not be as high as those in certain high-tech sectors, but since PPP projects are government-endorsed the risks of default or failure of the investment are relatively small,” he says. “However, as the period required for the development of a PPP project is generally quite long, the major investment difficulties lie in capital chain and leverage pressures.”

INVESTMENT OF FOREIGN FUNDS

The sectors that are most attractive to foreign PE/VC funds include TMT, new services (professional services and modern logistics), healthcare and pharmaceuticals, educational services, tourism and clean energy, says Jeanette Chan, managing partner of the China practice at Paul Weiss Rifkind Wharton & Garrison in Hong Kong.

Philip Li, a partner at Freshfields Bruckhaus Deringer in Hong Kong, has seen that financial investors are attracted by opportunities arising from China's urbanization and growing middle class in sectors such as healthcare, education, financial services and internet. “The key issue for investment in these sectors is that most of them are regulated sectors in China and there are qualification requirements or foreign ownership restrictions that investors need to comply with,” says Li.

Chan says PE/VC investors should be aware that China restricts and prohibits foreign investment in certain sectors while permitting or encouraging foreign investment in other sectors. “RMB funds set up in China by foreign LPs are considered foreign investors and are subject to these rules,” she says.

Telecommunications is such an industry where foreign investment is restricted, and the establishment of a foreign-invested telecommunications enterprise is also very time consuming. Foreign investors therefore may choose not to make a direct onshore investment, but adopt a variable interest entity (VIE) structure for the project.

“Such structuring issues require careful consideration prior to making the actual investment,” says Chan. “Furthermore, given that the [central] government maintains a relatively strict foreign exchange control regime, when designing the investment plan, the foreign PE/VC funds must plan the inflow and outflow of foreign currency funds in advance carefully.”

Lorna Chen, the co-managing partner of Greater China at Shearman & Sterling in Hong Kong, has also noticed that foreign

资平台参与,在选择 PE/VC 基金的时候通常比较关注该基金的募资能力及是否有从事政府投资项目的经验。“投资该等项目的投资收益率可能比不上投资部分高新科技领域,但是因 PPP 项目由政府作背书,因此违约或投资失败风险相对较小,”他说。“但因 PPP 一般建设周期较长,主要投资难点还是在于资金链及杠杆压力。”

外资基金投资

目前中国最吸引外资 PE/VC 基金的行业包括科技、媒体和电信 (TMT)、新兴服务业 (例如专业服务、现代物流)、医疗和制药、教育、旅游及清洁能源等,宝维斯律师事务所香港办公室中国业务管理合伙人陈剑音表示。

富而德律师事务所香港办公室合伙人李谦一表示,随着中国城市化的推进和中产阶级的壮大,医疗健康、教育、金融服务和互联网等领域不断增长的机会也吸引着财务投资者。“对这些行业投资的关键问题是,这些行业大多在中国受到监管,投资者需要符合资质要求或遵守外资所有权限制,”他说。

陈剑音表示,PE/VC 投资者需要留意到,在某些行业中国限制或禁止外国进入,但同时另一些行业允许或鼓励外国投资。“境外有限合伙人在中国设立的人民币基金也会被视为外资,并受制于这些规定,”她说。

例如,陈剑音表示电信就是外资受限制的领域,并且要成立一家外商投资电信企业非常耗时。因此,对于这类项目外国投资者可能不选择进行直接在岸投资,而是采用可变利益实体结构 (VIE)。

exchange has become a critical issue for foreign funds, and currently “funds cannot be smoothly transferred offshore, which significantly affects the foreign funds’ investment and operation”.

Since November 2016, regulators such as the People’s Bank of China (PBOC), the State Administration of Foreign Exchange (SAFE), the National Development and Reform Commission (NDRC) and the Ministry of Commerce (MOFCOM) have publicly and repeatedly expressed their concerns regarding overseas investment risks.

“The regulators have quietly started experimenting with regulatory measures to control outward remittances of foreign exchange,” says Chen, adding that some banks have adjusted their practices for outward remittances of overseas investment funds, including: (1) a regulatory interview will be conducted for any remittance requested after 28 November 2016; and (2) where a single foreign exchange purchase or payment for a capital account item equals or exceeds the equivalent of US\$5 million, it must be submitted to the capital account section of a local SAFE branch through the information exchange platform and may not be effected until the PBOC and SAFE have completed their examination of its authenticity and compliance.

SAFE issued two regulations early this year – the Notice on Further Promotion of Foreign Exchange Administration Reform and Improvement of the Authenticity and Compliance Review, and the Circular on the Relevant Issues of Foreign Exchange Risk Management of Foreign Institutional Investors of China’s Inter-bank Bond Market. Chen says the two regulations may give hope to those funds that are affected by China’s foreign exchange issue. “However, these regulations only apply to limited situations, such as Nei Bao Wai Dai [onshore guarantees for offshore indebtedness] and free trade zones,” she says.

The tightened control on foreign exchange may make exit more complex. “Investors have always been wrestling with the choice between an onshore exit, which can deliver better internal rate of return (IRR), and an offshore exit, which gives more deal certainty,” says Li, from Freshfields. “The recent capital control measures adopted by the Chinese authorities only added further complexity to that thought process.”

Li explains that onshore exit means an A-share IPO or a sale to an RMB fund or a domestic corporate, and “in an onshore exit, RMB proceeds need to be converted into US dollars and the recent capital control measures have added uncertainties as to how and when such conversions can be made”.

Meanwhile, offshore exit means exiting at the offshore holding company level, being an IPO in Hong Kong or the US, or a trade sale of the offshore holding company, says Li, and “in an offshore exit, investors will receive US dollar proceeds”.

But there is good news as well – China has made a significant change of its foreign investment approval regime. Thanks to that change, Chan from Paul Weiss says the establishment of, or any



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投资者通过离岸退出可以直接获得美元收益

In an offshore exit, investors will receive US dollar proceeds

“在实际投资之前，需要仔细考虑采用此类 VIE 结构的问题，”她说。“此外，鉴于中国相对严格的外汇管理制度，在制定投资计划时，境外 PE / VC 投资基金必须先仔细规划外币资金的流入和流出。”

谢尔曼思特灵律师事务所香港办公室大中华区联席管理合伙人陈新也留意到，外汇已成为外资基金面对的关键问题，目前“资金不能顺利转到海外，这对外资基金的投资和经营有很大影响。”

自 2016 年 11 月起，中国人民银行、国家外汇管理局、国家发展和改革委员会、商务部等监管机构一再公开表示关注海外投资中存在的风险。

陈新说：“监管机构已开始试行控制外汇汇出的监管措施。”据她介绍，一些银行已调整了对汇出海外投资所需资金的做法，其中包括：(1) 对 2016 年 11 月 28 日以后的任何汇款请求，需进行监管约谈；(2) 单笔购汇或资本项目外汇支付的金额等于或超过 500 万等值美元时，必须通过信息交换平台上报至当地外汇管理局的资本项目管理部门，待中国人民银行和国家外汇管理局完成真实合规性审查后方可生效。

国家外汇管理局今年年初发布了两项法规，《关于进一步推进外汇管理改革完善真实合规性审核的通知》及《关于银行间债券市场境外机构投资者外汇风险管理有关问题的通知》。“然而，这些规定仅适用于有限的情形，如内保外贷和自由贸易区，”她说。

加强外汇管理可能会使基金的退出更加复杂。“投资者总是纠结于选择在岸退出还是离岸退出，在岸退出可以带来更好的内部收益率，离岸退出则可以增加交易的确定性，”富而德律所的李谦一说。“中国政府部门最近采用的资本管控措施，使得上述抉择变得更加复杂。”

李谦一解释说，在岸退出意味着 A 股上市或向人民币基金或境内企业转让股权，“在岸退出意味着需要将人民币买价转换为美元，最近的资本管控措施增加了对于在什么时候、以何种方式可以将人民币兑换成美元这一问题的不确定性”。

离岸退出意味着在离岸控股公司层面实现退出，可以通过在香港或美国上市，或出售离岸控股公司股权，“投资者通过离岸退出可以直接获得美元收益”，李谦一说。

但好消息是，中国的外商投资审批制度发生了重大调整。宝维斯律所的陈剑音表示，在该制度调整后，外商投资企业的设立或变更，如果不涉及外资受限制的业务，无需再经过政府审核，只需记录备案。“无论从时间还是文件要求而言，这将大大简化外资 PE / VC 基金在中国投资的程序，”她说。

陈剑音表示，在以前的制度下，被投资企业也需要协助向政府提交各种支持文件，被投资公司成为外商投资企业之后作出的变更也需要通过核准。“所以在实践中，国内企业往往不愿接受外资 PE / VC 基金的投资，”她说。“随着精简后的新备案制度的实施，外资 PE / VC 基金投资可能会更为国内公司所接受。这样，外资 PE / VC 基金或许能够更好地与中国快速发展的人民币基金竞争。” ▲



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资金不能顺利转到海外，这对外资基金的投资和经营有很大影响

Funds cannot be smoothly transferred offshore, which significantly affects the foreign funds' investment and operation



change to, a foreign-invested enterprise that is not engaged in any type of business for which foreign investment is restricted will no longer need to be approved by the government, but will only require a record-filing. “This will greatly simplify the procedures through which foreign PE/VC funds make investments in China, both in terms of time and also documentation requirements,” she says.

Under the previous regime, she says investee enterprises were also required to assist in submitting various supporting documents to the government and ongoing approvals were required for future changes after the investee companies become foreign-invested enterprises. “Therefore, in practice, domestic enterprises were often unwilling to accept investment from foreign PE/VC funds,” she says. “With the new streamlined filing regime in place, investment made by PE/VC funds may become more acceptable to domestic companies. In this way, foreign PE/VC funds may be able to better compete with the Chinese RMB funds that are rising rapidly in China.” ▲