

ESG Series

ESG Management for PE Funds: Our Responses to Five Common Questions

Introduction

At the global level, funds of funds (FOFs) are playing an increasingly important role in environmental, social and corporate governance (“**ESG**”) by incorporating ESG systems into the risk identification and management systems of their sub-funds. In the field of equity investments, there is a growing demand from USD funds to localize their ESG-related investment systems and from RMB funds to build their own ESG-related investment systems. In this article, we provide our thoughts on some common questions asked by private equity funds (each, a “**fund**”) to help you understand the necessity of building an ESG-related investment system for funds and other investors engaging in equity investments, and certain key issues related thereto.

These views are not intended as legal advice on specific issues, and some of the thoughts may be controversial. By publishing this article, we hope to stimulate more discussion of ESG-related topics.

I. Why is it necessary to build and implement an ESG-related investment system?

ESG is an important tool in measuring the

sustainability of a company. Studies show that companies with higher ESG ratings are more competitive and have a greater potential for returns. This sends positive signals to the market and investors and improves a company’s financing capabilities. It also assists in preventing risks that could reduce the cost of capital, thereby improving the intrinsic value of a company. The control of systemic risks becomes more important in the context of “carbon peaking and carbon neutrality” as well as the improved legislation and stringent governmental regulations in China. The positive correlation between ESG on one hand and the financial performance of the portfolio companies of a fund and the performance of the fund itself on the other hand, is relatively certain in the long run. The establishment and implementation of an ESG-related investment system is a requisite for a fund to fulfill its due diligence obligations in the process of making investments. Therefore it is necessary for both USD and RMB funds to build and implement an ESG-related management system (especially an ESG-related investment system).

II. As a fund, what kind of ESG-related management system do we need to build?

A fund needs to build an ESG-related management system covering the entire

process of its operations including fundraising, investing, post-investment management and exit. As to “investing”, we expect investors to make their investment decisions with ESG considerations in mind, build an appropriate model to determine “what is good”, and establish a full set of ESG-related investment systems to screen potential investment targets. Some funds have already established their own ESG-related investment policies and procedures (such as management guidelines, investment SOPs, lists of the permitted or prohibited industries or projects, due diligence questionnaires and score sheets). In relation to the management of its portfolio companies, a fund should strive to be an active (or responsible) investor, cover ESG issues in their corporate governance policies and practices of its portfolio companies, and influence their corporate governance and operations, even if the fund does not hold majority interests in a portfolio company.

III. As a US fund, can we directly adopt our group's ESG-related investment system for use in China?

No. Limited partners of many USD funds require or expect general partners to have ESG-related investment systems in place, and USD funds therefore have their own ESG-related investment systems. However, the ESG-related systems of US funds and the policies and procedures composing those systems are usually developed based on international standards and laws and the regulatory requirements and conditions of their home countries; therefore they need to be localized in accordance with PRC laws, regulations, policies, regulatory requirements and local characteristics, in order to be used in China. If such localization is not done properly, those ESG-related investment systems will not be able to be implemented correctly nor function properly, and in some cases their effectiveness and function may be reduced.

IV. Can ESG due diligence investigations be conducted by a fund on its own based on the policies and procedures of its ESG-related investment system?

This should be decided on a case-by-case basis. If the ESG-related investment system of a fund is composed of a complete set of policies and procedures, and its team has a deep understanding and rich experience in the identification and management of ESG risks, then we believe the fund can conduct ESG due diligence investigations with respect to its investment projects (other than high-risk projects) by itself based on the policies and procedures of its ESG-related investment system. It is otherwise advisable to engage an ESG attorney or advisor to conduct ESG due diligence investigations with respect to those high-risk projects.

V. How can a fund determine whether the risks of a specific project are high and whether the assistance of an ESG attorney or advisor is needed for a due diligence investigation?

A fund needs to define a high-risk project based on the industry characteristics of its specific project and the size of the investment. Whether a specific project is a high-risk project depends on whether its ESG issues are material. We are of the view that if, among the identified material issues, the high-priority issues are beyond the fund or its investors' knowledge, then the due diligence investigation should be conducted with the assistance of an ESG attorney or advisor (as well as the involvement of the relevant technical consultants and experts if necessary). In addition, various factors should be taken into consideration in order to determine whether an issue is “material.” Please contact your ESG counsel or advisor if further assistance is needed.

We hope that our responses have answered

some of the common questions regarding the ESG-related investment system that a fund/investor might have. We will discuss the importance of the ESG-related investment system for funds and investors from multiple perspectives in subsequent newsletters. We believe that if we can include bespoke ESG investigations in the legal due diligence investigations for M&A transactions and take the findings of the ESG investigations into account when drafting transaction documents, our clients will avoid many investment risks and become “responsible” investors widely recognized by the international community.

We offer various services to establish or improve the ESG-related investment or management systems of funds and investors, as well as legal and ESG due diligence investigations. Additionally, if you need assistance in deal structuring, the drafting and reviewing of transaction documents in relation to your M&A transactions or investment projects, or you need ESG training or any other ESG-related services, please contact us via email: ecoenvpro@junhe.com.

About JunHe’s EHS Practice and ESG Team: JunHe is among the largest,

internationally recognized law firms in China providing a full spectrum of quality legal services, and we have a team of more than 900 professionals. We are a pioneer in the ESG practice area in China and have one of the largest EHS teams in the country, advising clients in the areas of EHS and ESG. With sustainability in mind, JunHe provides EHS compliance reviews for corporations in various sectors either alone or in cooperation with third-party agencies, depending on the particular needs of the client. Our professional legal team provides services including ESG, EHS, labor and employment, intellectual property, trade and data, banking and finance, tax, and compliance. We provide ESG due diligence investigation services for supply chain management and M&A transactions, assist companies and third-party agencies in drafting ESG reports and advise our clients on ESG-related issues arising during their day-to-day operations. We help our clients draft and review ESG-related clauses in contracts with their business partners, help investors and companies build and improve their ESG-related systems, and provide full ESG training and other ESG-related services.

*We appreciate senior translator Mr. Zhenghua Wang's assistance with this article.

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ESG 专题系列（九）：股权投资基金 ESG 管理：您不得不了解的五个问题！

导言：

全球层面，母基金（FOF）逐步加强其在环境、社会和公司治理（ESG）方面的引导作用，将 ESG 体系渗透到子基金风险识别和管理体系中。与此同时，股权投资方面，美元基金关于 ESG 投资体系本地化，人民币基金 ESG 投资体系搭建方面的需求越来越大。在此，我们列出股权投资基金（下称“基金”）惯常提出的一些问题，以便于读者了解基金或其他从事股权投资的投资人搭建 ESG 投资体系的必要性以及一些关键问题。

本文所述观点，并非就具体问题的法律评论，甚至对于个别问题的看法本身存在争议。即便业界可能有不同的看法，我们仍希望能够抛砖引玉，引起对于 ESG 话题更多的思考和交流。

一、为什么需要搭建和贯彻 ESG 投资体系？

ESG 是衡量企业可持续性的重要工具。一些研究发现，ESG 评级高的企业将更有竞争力并获得超常回报的潜能，向市场及投资人传递更积极的信号，进一步提升企业融资能力；同时，其系统性风险防范会降低资金成本，提高企业内在价值。不容忽视的是，系统性风险控制在“碳达峰、碳中和”、国内立法和政府监管日趋完善和加强的背景下尤为重要。长期来看，ESG 和被投资标的的财务绩效和基金业绩的正相关性是比较确定的。ESG 投资体系建立及其落地是基金在投资过程中履行勤勉义务的必然要求。因此，无论是美元基金还是人民币基金，都有必要搭建和贯彻 ESG 管理体系（尤其是 ESG 投资体系）。

二、作为基金，需要搭建哪方面的 ESG 管理体系？

针对“募、投、管、退”各环节，基金均需要搭建 ESG 管理体系。对于基金特别关注的“投”的环节，我们期待投资人的决策纳入 ESG 考虑，建立一个适合自己的“何为善”的模型并基于建立一套完善的筛选有投资标的的 ESG 投资体系。一些基金已经建立了自己的 ESG 投资体系文件（比如：管理办法/指南、投资流程、正面/负面清单、尽调清单、打分表等）。此外，基金在“投”后“管”的环节，即便不掌握多数股权，仍应致力于成为积极（或负责任的）投资人，将 ESG 问题纳入其股权治理政策和实践，影响被投资公司的治理体系及其运行。

三、作为美元基金，我们直接沿用集团 ESG 投资体系即可？

否。很多时候美元基金的 LP 要求或期待 GP 层面有 ESG 投资体系，因此很多美元基金本身有自己的 ESG 投资体系。但是，美元基金的 ESG 体系及其文件往往是根据一些国际标准、所在国法律和监管要求以及当地特征制定，其折射到中国，仍需要结合中国的法律法规、政策、监管要求和本土化特征等进行。如果上述本地化工作没有到位，那么，该等 ESG 投资体系将无法很好地落地及发挥作用或其作用将大打折扣。

四、ESG 尽职调查由基金依据自身 ESG 投资体系文件进行即可？

需视具体情况而定。如基金 ESG 投资体系文件非常完善，且基金团队对于 ESG 风险识别及管理有着深刻的认识以及丰富的实务经验，则我们认为，针对“高风险项目”以外的项目，基金在投资项目时使用 ESG 投资体系文件自行进行 ESG 尽职调查

即可，反之，则应聘请 ESG 律师或外部顾问进行 ESG 尽职调查。

五、基金如何判断风险系数高低，从而判断具体项目中是否需要 ESG 律师或顾问协助尽调？

基金需要结合具体项目的行业特征和投资规模就“高风险项目”给出定义。就特定项目的行业特征是否涉及“高风险项目”的判断，依赖对 ESG “实质性议题”的判断，就识别出的“实质性议题”，如优先级较高的议题超出基金或投资人的知识范畴，则我们认为需要 ESG 律师或顾问协助尽调（必要时，可进一步引入相关技术顾问/专家）。而对“实质性议题”的判断，需要考虑多重因素（如需，请与您的 ESG 律师或顾问联系）。

我们希望，上述问题的探讨能够解答关于基金/投资人在 ESG 投资体系方面的某些问题。我们将在后续简讯中从多重维度探讨 ESG 投资体系对于基金和投资人的重要性。我们相信，我们尝试将并购中的法律尽职调查衍生至定制化的 ESG 尽职调查并将 ESG 尽职调查的发现纳入交易文件层面进行考虑，将有助于帮助我们的客户更好地避免投资风险，成为能够证明自身合理存在价值的，国际社会上能够被普遍认可的“负责任”的投资人！

如您需要搭建或完善基金/投资人 ESG 投资或管理体系，进行并购或投资中的法律尽职调查和 ESG 尽职调查、交易架构设计、交易文件起草/审阅方面的协助，ESG 培训等服务，欢迎邮件联系我们：

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关于君合 EHS 及 ESG 团队：君合是国际公认的、提供优质法律服务的中国大型综合律师事务所之一，拥有逾 900 人的专业团队。君合是开拓中国 ESG 法律业务领域的先驱之一并且有中国最大的 EHS 律师团队之一，为客户在 EHS 和 ESG 领域提供法律服务。君合以可持续性为导向，视客户需求，单独或与第三方机构合作，为不同行业的企业提供 EHS 合规审核，并且依托不同的法律及合规专业团队（ESG、EHS、劳动人事、知识产权、贸易与数据、财税、商业和刑事合规等所有与 ESG 领域相关的专业团队），在供应链管理和并购事宜中，提供 ESG 尽职调查服务，配合企业或第三方机构起草 ESG 报告并结合我们服务不同行业客户的经验在企业日常运营中提供 ESG 相关的专项法律及合规诊断、与商业合作伙伴合同中的 ESG 条款起草及审阅、投资人和企业的 ESG 体系搭建和提升，ESG 培训等一揽子服务。

*感谢君合资深翻译王正华协助本文翻译！

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