

Fiduciary duties: a preconditions for enforcement

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A director ,whether as the company's agent or trustee, has certain powers in the company's management and external affairs on behalf of the company, so the directors must undertake corresponding civil obligations. To sum up, these obligations are duty of loyalty and duty of care. In exercising their powers, the directors of a company must be in good faith and maximize the benefits from the company point of view, otherwise the abuse of power.

Duty of loyalty

To assume the duty of loyalty, the directors must be loyal to the interests of the company, and the personal interests of directors or associated persons should not be above the interests of the company. If there are conflicts of interests between themselves and the company, directors must be based on the company's best interests at heart.

The duty of loyalty were clearly defined in China's "Company Law" amended in 2005: (1)It was summarized in the No. 148 article of the Act: that is, directors, supervisors, senior management should abide by laws and administrative regulations, and statute of company. They have a duty of loyalty and diligence obligations. They must not use of their authorities to accept bribes or

other illegal income, or to seize the property of the company.

(2)The Article 149 of "Company Law" also lists the prohibited ways, including not to misappropriate company funds; not to deposit company funds in one's own name or other personal accounts; not to violate the provisions of the company charter to loan the company funds to another person or provide security as the property of a company for others, without the agreement of the General Meeting of Shareholders or the Board of Directors; not to enter into a contract or trade with the company without the agreement of the General Meeting of Shareholders or the Board of Directors, etc.

In addition to the "Company Law", the China Securities Regulatory Commission also made a more detailed requirements on duty of loyalty in its rules and regulations.

Duty of Care

Duty of Care is more abstract obligations. In China, the provisions on it are scattered among a number of departmental regulations, such as "Corporate Governance Code". It is not appeared in "Company Law".

Apart from the clear legal provisions, the training also plays an important role in promoting the directors, supervisors and executives to fully understand their fiduciary duties. In recent years, the CSRC, The China Securities Industry Association and Shanghai and Shenzhen Stock Exchange have made a lot of efforts in this regard.

In China, on the base of the current legal system, the company directors' liabilities are divided into three types based on their behavior in violation of the law, that is criminal, administrative and civil responsibility. The main punishment is fine with administrative features. As for civil liability and criminal punishment, there is still lack of effective implementation mechanisms, therefore, resulting in the provision and implementation of the law rely heavily on the administrative measures, but neglected the civil liability and criminal liability.

Administrative responsibility

The administrative liability of company directors means that the State Administrative Department will bring the directors to account for their violation of the law and regulations, which include administrative punishment and administrative penalties. In China, there are no specific provisions on administrative punishment in the "Company Law", and in the chapter of "legal responsibility", it has made a detailed specific provision on the form of administrative penalties including the fine; the confiscation of illegal income; disqualification; ordered to end the breach; ordered to correct the violations and so on. There are also such detailed provisions in China "Securities Act" and a large number of regulations of CSRC. For example, to ban the lawbreaking directors enter into the securities market for a period or forever. Overall, in China's laws and regulations, the provisions on administrative responsibility are more abundant, which reflects the Government's administrative control over the preferences of the securities market is strict.

In China, although the administrative punishments on the lawbreaking directors of listed company are constantly increasing, but the fines against individuals, generally speaking, only between 30000-300000 yuan, is too small to take deterrent effect.

Criminal Liability

According to Article 153 of China's "Company Law" revised in 2005, if directors and senior management violate the provisions of laws, administrative regulations or the company charter to damage the interests of shareholders, shareholders can file a lawsuit with the competent people's court. In Article 215, it provides that a company shall bear civil liability and pay a fine if it breaches the provisions of this Law. When its property is insufficient to cover the fine, it should bear civil liability at first. In Article 216, it also stipulates that in violation of the provisions of this Law and committing a crime, the criminal liability should be looked into. But the standard of punishment is not clear, and there is no clear accountability to the specific responsible person.

In 2006 "Criminal Law Amendment (the sixth)", it provides a clear penalty standards. When directors, supervisors, senior management of a listed company breach their duty of loyalty, and make use of their authority to manipulate the company leading to heavy losses, they are subjected to three years imprisonment or criminal detention, or a fine. If their conducts result in especial heavy losses of listed companies, they shall be in prison for three to seven years and fined. If the controlling shareholders or

the actual controllers of listed companies incite a listed company's directors, supervisors, senior management to breach the law, they will be punished in accordance with the above-mentioned penalties.

In Chinese stock market, the main problem is the implement is ineffective. Although a lot of cases such as listing fraud and financial fake have been exposed, it is very rare that directors is therefore subject to criminal punishment; and even if an offense is subject to criminal punishment, the sentence is relatively light.

Civil Liability

There are clear provisions in China's "Company Law" and "Securities Law", that the directors should bear civil liabilities to the company. The Article 150 of "Company Law" provides that when directors, supervisors, senior management violate the provisions of company laws and administrative regulations and company charter in the execution of their duties and cause losses to the company, they should be liable. In "Securities Law", it also makes it clear that the directors should bear the civil liability to public shareholders. However, in judicial practice, few companies assumed the significant civil liability for breaching of fiduciary duties. It is mainly because China's laws and regulations are relatively lack of operability, so there is a big obstacle for the court to accept such civil cases. For example, the principles and methods for the directors to commit civil liability are not clearly stipulated, nor has it provided the standards to judge the causal link between the damage suffered by investors and the breach of directors. The

class-action system has not yet been established until now.

Thus, in the future, China should further clarify the requirement of the nature of directors' duties in laws and regulations; change the government's preference of administrative control, and increase the deterrent effect of punishment; strictly stipulate the provisions of directors' civil and criminal liabilities; introduce the class-action system and other legal mechanisms, eliminate the system obstacles of civil liability of directors.