



Research Paper

Research on the application and development of the independent director system in corporate governance under the background of revising the company law¹

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Abstract: As a critical mechanism in the corporate governance of listed companies, independent directors have the internal supervision function to form the decision-making of the board of directors. The draft amendment of the company law amends the provisions concerning independent directors by further enhancing their independence, detailing their diligent and faithful duties and allowing joint-stock companies to choose an audit committee supervision mechanism dominated by independent directors. However, some things could still be improved with the legal rules established by the revised draft. These problems include the gaps in the legislative system of the company law on independent directors, the defects in the legal norms that constitute the independence of independent directors, the deficiencies in responsibility system of the independent director's diligent and faithful duty, and the lack of coordination between the purposes and responsibilities of the establishment of independent directors and the board of supervisors. It is necessary to standardize the independent director system comprehensively in the company law, consolidate the system foundation of the independent director's independence, optimize the responsibility system of the independent director system systematically, and further clarify the duty norms of the independent director for revision.

Keywords: Revision of company law ; Listed company governance; Independent Director; Independence; Duty of diligence and loyalty

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I. Introduction

In order to strengthen the supervision over the lawful performance of the duties of the company's board of directors and promote the orderly development of corporate governance, in 2001, the China Securities Regulatory Commission issued Guidelines on the establishment of independent director system in listed companies, marking the formal launch of China's (mainland) independent director system. Article 123³ of the company law revised in 2005 formally established the system, and the independent director has become an essential part of the board of directors in the corporate governance of listed companies in China. Nowadays, China has formed an independent director regulation legal norm, mainly based on company law and securities law, and supported by the judicial interpretation of the Supreme People's Court⁴ and the regulations of the Securities Regulatory Commission⁵.

¹ The scope of the jurisdiction studied in this article is mainly Law of the People's Republic of China. When referring to law, it refers to the law of the Chinese mainland territory and does not directly include the law of the Hong Kong territory for the time being. If the article needs to refer to the laws of Hong Kong, it will be noted directly.

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³ Article 123 of the Company Law (2005) stipulates that "The specific measures for the establishment of independent directors by listed companies shall be formulated by the State Council."

⁴ The judicial interpretation that directly concerns independent directors is the "Provisions on the hearing of civil compensation cases involving false representation in the securities market" issued by the Supreme People's Court on 21 January 2022. Article 16 of this judicial interpretation clearly stipulates five types of circumstances in which an independent director may be exempted from liability in a case of misrepresentation.

⁵ As a department of the State Council, the CSRC has the statutory administrative duty to supervise and manage the securities market and supervise the compliance of listed companies. In addition to the above-mentioned "Guidance on the establishment of an independent director system in listed companies", the regulations concerning independent directors also include"

After 20 years of development, listed companies have generally established an independent director system. By fulfilling the duty of diligence and using professional knowledge and skills, independent directors constantly improve the corporate governance of listed companies and promote the orderly operation of listed companies. However, many issues have been aroused, such as the independent director's independence is not robust because of the excessive attachment to the controlling shareholder, the independent director and the board of supervisors can't coordinate their supervisory duties, and the independent director assuming too much responsibility after fulfilling the diligent and loyal duty. Therefore, the company law needs to respond to the above-mentioned legal issues.

In order to promote the reform of the market economy system and improve the corporate governance mechanism, combined with the experience of the development of the company system, the Seventh Session of the Standing Committee of the Fourteenth National People's Congress passed the "Company Law (Draft Amendment)" in December 2023. The new "Company Law" has made amendments to important contents such as strengthening the performance of independent directors, optimizing the company's organizational structure, and improving the company's capital system. Among them, what aspects are included in the amendments to the independent director system? In the context of this amendment, how to apply the new provisions on independent directors? Does this amendment to the Company Law respond to the problems of the independent director system exposed in the development of the market, and in what direction should the development of the independent director system be optimized in the future? These issues have become issues that need to be deeply explored in the context of this revision of the Company Law to promote corporate governance and the development of the independent director system. It is also hoped that after the "Company Law" comes into effect and is applied, as the commercial development in the economic society puts forward higher requirements for corporate governance, legal norms can be used to promote the independent director system to complement each other in legislation and practice.

II. The revision details and application of the Independent Director system in the revision of the company law

2.1 Strengthen the requirements for the independence of independent directors of listed companies

According to the Company Law (Draft Amendment) promulgated by the 13th National People's Congress Standing Committee, the legislators originally put forward requirements for the independence of independent directors in the third draft. According to Article 140 of the Company Law (Draft Amendment), independent directors of listed companies shall not hold any position other than director, nor shall they have any relationship with the company that affects their independent and objective judgment when participating in the decision-making of the board of directors, and further formulate specific requirements and norms for the independence of independent directors from the legal level. Independence is the essential attribute and inherent requirement of independent directors. According to the legal concept of my country's company law and the needs of corporate governance, independent directors are part-time workers, which is different from general directors who are directly employed by the company and participate in important decisions of the board of directors as external supervisory forces. The independence requirements originally determined according to the draft amendment reflect the legislators' firm attitude in requiring independent directors to maintain a neutral and objective position in the governance of listed companies. Therefore, when applying the independent director system, in order to give full play to the independence of independent directors, it is necessary to ensure that independent directors have independent equity relations with the company or shareholders, independence from the company's operations, independence in business relations, and independence in interest relations. Only by fully complying with the above independence requirements when applying the independent director system can the internal supervision of independent directors be truly effective and the governance of listed companies be promoted in an orderly manner.

However, in the new "Company Law" that was finally passed, the legislators deleted the specific requirements for the independence of independent directors in the original third draft, and changed the original rules on independent directors from the State Council to the securities regulatory department of the State Council. The important reason for the legislators to make this decision is that the China Securities Regulatory Commission issued the "Regulations on the Administration of Independent Directors of Listed Companies" (Securities Regulatory Commission [2023] No. 220) in September 2023, which improved the independent director system by refining the specific requirements of each link of the independent director system. For example, the regulations proposed that the independence of independent directors should be refined from the aspects of office, shareholding, major business dealings, etc. After the revision of the new "Company Law", Article 136 became the only legal norm on independent directors in the new "Company Law", and this norm did not provide substantive guidance on the legal rules for independent directors.

2.2 Strengthen the diligence and loyalty obligations of the management personnel of the company, especially independent directors

The main point of revising the company law is to strengthen the director’s responsibility further, making the director's duty of loyalty and diligence clear. According to the current situation of company law in China, there is no distinction between the regulation of independent directors and the general director elected by the shareholders' meeting. Therefore, the independent director, as an essential member of the board of directors, applies the general provisions of the company law on the rights and obligations of directors.

According to Article 180⁶ of the company law, directors may not use their authority to gain improper benefits when performing their duties. As managers, they must diligently safeguard the maximum interests of the company. This provision for the independent director of the duty of loyalty and diligence obligations put forward higher requirements. First of all, as far as the duty of loyalty is concerned, since the mode of appointment of independent directors is part-time. Therefore, the article requires that independent directors shall not engage in any conduct, such as the transfer of benefits or improper related party transactions, with their original work units when the listed company performs its duties as an independent director, not cooperate with a third party for personal gain by their positions as an independent director in a listed company. Moreover, the detailed stipulation of the duty of diligence requires independent directors to fully embody professionalism in performing their duties to safeguard the company's interests to the greatest extent. Specifically, independent directors should use their expertise and skills to review matters the board decides. If independent directors encounter problems outside their expertise, they may seek professional advice from an external professional body⁷ to exercise the supervisory obligation in full compliance with the statutory procedures.

2.3 Allow the joint-stock company to freely choose a single-level supervision mechanism or a double-level supervision mechanism composed of independent directors

Comparison of different supervision patterns of independent directors		
Country/Region	Common law countries/regions e.g. Hong Kong (China) , UK, USA,	Civil Law countries/regions e.g. Taiwan(China), Germany, Japan,
Corporate governance model	A single-layer supervision mechanism	Two-layers supervision mechanism
Characteristics of equity structure	Diversification of equity	Concentration of equity
Core issues of corporate governance	Insider control issues	Large shareholders encroach on the interests of small and medium shareholders
Role positioning of independent directors	Supervision and restriction, ease the conflict of interest	Play an independent role between large and small shareholders

Chart 1: Comparison of different supervision patterns of independent directors⁸

According to the requirements of current company law, the joint-stock company must set up independent directors in the board of directors for internal supervision, and a supervisory committee for external maintenance, thus forming the board of directors of the two-tier supervision mechanism.

The new company law adopts a significant amendment in the normative provision of article 125⁹ (terms about

⁶ Article 180 of the company law (revised draft) : Directors, supervisors and senior managers shall abide by the laws, administrative regulations and articles of association of the company and have the duty of loyalty to the company. They shall not make use of their functions and powers to seek illegitimate interests.

The directors, supervisors and senior managers have a duty of diligence to the company and should exercise due diligence in the best interests of the company.

⁷ Liu, Jingwei. “Comparative Research on Judgment Standards of Directors 'Diligence Obligation.’” Contemporary Law, vol. 3, 2015,pp.25-37.

⁸ The single-level supervision mechanism of independent directors is mostly adopted by common law countries, while the legislation of civil law countries mainly adopts the double-level supervision mechanism. The main differences are shown in sheet 1.

⁹ Article 125 of the company law (Revised Draft) : A Company Limited by shares may, in accordance with the provisions of the Articles of Association of the company, set up special committees in the board of directors, such as an audit committee composed of directors. The audit committee shall supervise the company’s finance and accounting and exercise other functions and powers as stipulated in the articles of the association of the company.

joint-stock company audit committee) which allows the joint-stock company to choose whether to adopt a single-level supervision system with only an audit committee in the board of directors or a double-level supervision mechanism with independent directors and a supervisory board¹⁰.

III. The legal dilemma which still exists in the system of independent directors in corporate governance

The revision draft further consummates the independent director system by enhancing the independent director's independence, refining the requirement of diligent duty and entrusting the independent director with higher supervisory responsibility. However, the revised draft has not responded to the apparent problems of the independent director system, which has aroused the general concern and thinking of legal experts.

3.1 There are still some gaps in the legislative style of the company law concerning independent directors

According to the legislative provisions of the current company law, only Article 122 regulates the system of independent directors directly, the article stipulates that "Listed companies shall have independent directors, and the State Council shall formulate specific measures.". Other legal norms concerning independent directors are scattered in provisions such as the duties and obligations of directors in company law. Up to the release of the revised draft, the State Council has yet to promulgate specific measures for implementing independent directors.

The revised draft amends this article by deleting the provision that "The State Council shall prescribe specific measures". In response, some scholars¹¹ believe that the deletion of the agency's provisions is because legislators have not chosen to directly strengthen the legal provisions on independent directors in the current revision of the company law, but mainly through Securities Regulatory Commission to select the form of departmental regulations to regulate. However, company law and securities law, the two most high-level laws of listed companies, do not have sufficient provisions for independent directors. The legal norms directly related to the system of independent directors are the rules of independent directors of listed companies issued by the Securities Regulatory Commission and the guidelines for the performance of independent directors of listed companies issued by the China Association of listed companies. These departmental regulations and the normative documents issued by the association are of a lower legal rank and need more clarity in the system hierarchy, which is not conducive to the legal regulation of the independent director system through the mandatory and uniform standardization of legislation. Hence, it is urgent to set up independent directors' legislation under the company law's revision.

3.2 The legal norms that constitute the independence of independent directors have institutional defects

To insist on independence is the prerequisite and necessary requirement for independent directors to perform their supervisory duties. Although the draft revision reinforces the independence of independent directors in their positions, the current company law needs to perfect the system design of essential aspects such as the independent director's appointment, dismissal and salary.

First of all, according to the current legal norms, independent director candidates can be nominated by the board of directors, board of Supervisors, or a merger or a single shareholding of more than 1% of the shareholders to nominate. The nominated independent director candidates eventually become independent directors through the formal election of the general meeting of shareholders. Under this rule, according to the principle of majority capital of the company, whether it is to propose candidates for independent directors or finally vote for independent directors at the general meeting of shareholders, controlling shareholders or large shareholders who hold more shares can have a decisive impact on the composition of independent directors¹². Just think about it, when the majority shareholders of the listed company have control over the creation and appointment of the independent director, will their independence be guaranteed if independent directors want to obtain a long-term qualification¹³? Furthermore, when the board of directors, as the executive body of the

A company limited by shares with an audit committee and a majority of its members are non-executive directors may not have a board of Supervisors or supervisors, and members of the Audit Committee may not be company managers or financial directors.

¹⁰ Hong Kong Stock Exchange. Hong Kong Listing Rules and Guidelines.2022.

¹¹ Lin, Yiyang. "The Talks about Legislative Choice of the Company Law Revision." *Tribune of Political Science and Law*, vol. 40, 2022, pp. 97–124.

¹² Bebchuk, Lucian A., and Assaf Hamdani. "Independent Directors and Controlling Shareholders." *University of Pennsylvania Law Review*, no. 3, 2017, pp. 1271–1315.

¹³ Jiang, Peng. "Relativity of Independent Directors." *Peking University Law Review*, vol. 27, 2015, pp. 1529–1543.

Wang Shi, chairman of the Board of directors of Vanke, has introduced the operation of the independent director system of listed companies, Hua Run, the largest shareholder, "When nominating and electing independent directors, selects the appropriate two independent directors to sit on Vanke's board. When Vanke opens a board, Hua Run requires the two

shareholders' meeting, makes decisions on important business matters of the company, the relevant business matters may be outside the interests of some large shareholders who nominate independent directors. In this case, whether the independent director can also exert their independence to supervise is uncertain.

Second, the listed company can dismiss the independent directors unconditionally through legal procedures before the expiration of the term of office of the independent directors. By giving the listed company the right to dismiss the independent director unconditionally, it is easy to cause abuse the company's ownership of rescission without moral reasons. In practice, there are many cases of disqualifying independent directors from the board of directors because they disapprove of the board's resolution. For example, Xian Feng New Material (Shenzhen stock exchange number SZ300163) announced that it would dismiss Wang Tao, the company's independent director in September 2022 because he abused the right to veto the bill unjustifiably which hurt the company seriously. Wang Tao, the independent director, said the bill posed significant risks to the company's daily operations and was not conducive to protecting shareholders' rights¹⁴. When a listed company has the unconditional disqualification of an independent director, it is difficult for an independent director not to comply with the requirements of the company's board of directors or major shareholders to ensure the position, causing the independence of the independent director to be seriously affected¹⁵.

By the same logic, since the board of directors and the general meeting of shareholders of a company have the right to decide the allowances of independent directors, independent directors are bound to satisfy the requirements of the board of directors and shareholders, to obtain their benefits. As a result, the independence of the independent director is significantly compromised. Through this mechanism, it is difficult for independent directors to exert their professional competence and maintain their independence in the board decision-making process, which also causes adverse effects on realizing the essential purposes of supervising.

3.3 There are some deficiencies in the cognizance standard and responsibility bearing of independent directors' diligent and loyal duty.

Having legal obligations is a prerequisite for assuming legal responsibility¹⁶. According to the practice of company law, the legal obligation of the independent director should be considered first when determining the legal liability of the independent director. As mentioned above, this revised draft has further clarified the specific requirements of directors' duties of loyalty and diligence and the relevant rules of obligations also apply to independent directors. However, it can be found that the revised draft does not explicitly provide for the standards of conduct and legal responsibilities of independent directors. Because of the general stipulation of the independent director's duty, the market institutions and the supervision department lack clear standards of behavior when they judge whether independent directors perform their duties properly.

In addition, the existing legal system of the independent director the need to bear excessive responsibility, causing the independent director system cannot play the original legislative purpose.

On the one hand, as far as the administrative liability of an independent director is concerned, when the independent director is involved in such illegal acts as illegal disclosure of information, unlawful trading of securities and insider trading, penalties range from tens of thousands to one hundred thousand¹⁷. Moreover, when the independent director carries on the administrative lawsuit regarding the administrative penalty¹⁸, the overwhelming majority of cases are rejected, and cannot obtain judicial relief. According to the principle of adaptation of rights and obligations, independent directors should enjoy the same rights when they bear such heavy duty and legal responsibility¹⁹. However, in the market practice, the allowance for independent directors is only tens of thousands of yuan, and hardly exceeds two hundred thousand yuan²⁰. Thus, when independent directors are subject to administrative penalties for breaching their duties of diligence, the amount of the penalty they are subject to in a single instance already exceeds the annual allowance of the independent director, making the independent director's performance enthusiasm reduces seriously.

independent directors to speak.”

¹⁴ The Economic Observer (2022) “Director's dismissal met with a negative vote, with pioneer new material calling both ‘Incompetent,’ 29 September.

¹⁵ Deloitte Research Report on independent directors of listed companies in China 2018, <http://www.d-long.cn/eWebEditor/uploadfile/2018040509521119628623.pdf>. (visited on 22 November 2022.)

¹⁶ Jurisprudence

¹⁷ For example, according to Article 193 of the securities law, “The person in charge and other persons directly responsible for the illegal act of information disclosure shall be given a warning and shall be fined between 30,000 yuan and three hundred thousand Yuan.”

¹⁸ 15 cases cited Kangmei

¹⁹ The value of independent directors Evidence from China

²⁰ Securities daily (2022). “Nearly 70 percent of independent directors earn less than 100,000 yuan a year, and the gap between the highest and lowest salaries is 20 times”. March 25.

2021 A-share Independent Director Salary Range Statistics						
	Shanghai A-shares	Shenzhen A-shares	STAR Market	Growth Enterprise Market	Total	Overall percentage
Less than ¥20k (inclusive)	413	460	37	196	1106	6.15%
¥20k~¥40K	428	578	72	256	1103	6.13%
¥40k~¥60K	1639	2284	456	1192	5571	30.97%
¥60k~¥80K	1286	1982	789	218	4275	23.77%
¥80k~¥100K	982	1156	106	389	2633	14.64%
¥100k~¥150K	887	975	121	274	2257	12.55%
¥150k~¥300K	522	248	47	49	866	4.81%
More than ¥300K	127	31	11	5	174	0.98%
				SUM	17985	100%

Source: Wind (incomplete statistics, as few listed companies do not disclose the remuneration of independent directors)

Chart 2 Comparison of different supervision patterns of independent directors

On the other hand, it is argued that the civil liability of the independent director is too severe. In November, the Guangzhou Intermediate People's Court adjudicated the financial fraud case against Kangmei Pharmaceutical Co., Ltd., ordering the company to compensate more than 50,000 investors for a loss of 2.459 billion yuan. The company's independent directors were called to take joint and several liabilities up to 10% of the total compensation; that is, the independent directors should take joint and several liabilities of 245.9 million yuan. This judgment quickly triggered the resignation of many independent directors of listed companies²¹. Therefore, the independent director's liability procedure is in serious breach of the norms of his rights and obligations, which fails the independent director system to operate normally.

3.4 The purpose and responsibility of the independent director and the Board of Supervisors cannot be fully coordinated

The current draft makes significant adjustments to the company's supervisory system, allowing joint-stock companies to choose a single-tier supervisory mechanism with a single board of directors audit committee when deciding on a company's supervisory agency. Or the company can set up the independent director-based board of directors for internal supervision and external supervision of the board of supervisors of the two-tier mechanism. However, since the separate director system has been used in China for more than 20 years, the double-layer supervision system has been widely adopted by listed companies in determining the corporate governance system. It can be foreseen that many listed companies will still choose to use the dual supervision mechanism of independent directors and board of supervisors.

However, there is an unsolved conflict between independent directors and the board of supervisors in the corporate governance of listed companies. Initially, independent directors and the board of supervisors had the same supervisory purposes. When the independent director is an integral part of the board of directors, supervision safeguards the company's overall interests, especially those of small and medium-sized shareholders. And the board of supervisors is the supervision institution that the listed company must set up, whose goal is to safeguard the legitimate rights and interests of the company and the shareholders. Since small and medium-sized shareholders can be included in the class of all shareholders, which means in essence, listed companies set up independent directors and boards of supervisors for the same purpose; Furthermore, whether the supervision duty of the independent director has the particularity also becomes a fundamental question whether it is necessary to exist. The scope of supervision of independent directors is to company's finance, related transaction and business content of the board, and the board of supervisors is to company's finance, directors and other senior management of the board²². It can be seen that the supervisory duties of independent directors are almost entirely within the scope of the board of directors' responsibilities. Consequently, the necessity of establishing the independent director system comes from where and what scope of the independent director should enjoy becomes the content that the company law needs to respond to.

IV. The perfection path of the independent director system under the revision of company law

4.1 Comprehensively regulate the independent director system in the company law

As an essential law to regulate the organization and behavior of a company, the company law has the most basic

²¹ "The Economic Observer" 2021 November 27 a-share Board chart: 2021 over 460 Market Company Board of directors resign. More than 30 listed companies have announced the resignation of independent directors in the two weeks since the first-instance decision was 2021 on November 11, the report said.

²² Evidence from the independent directors' monitoring effect in China

and critical position in the issue of the responsibility of independent directors²³. Moreover, the company law has systematically stipulated the powers and duties of the shareholders' meeting, the board of directors, and the general shareholders. For the special independent director, it should also stipulate the legal characteristics and the original intention of the system of independent directors directly.

The high-level legislation of the independent director system is in a dilemma after the deletion of the clause "The State Council shall issue specific measures to establish the legal norms of the independent director" in the revised draft. In this background, the revised draft should take the initiative to improve the legal rules of the independent director system. Combined with the reality of the company law legislation, the legislator may add a special provision for independent directors in Chapter 8 of the revised draft, "The qualifications and obligations of company directors, supervisors and senior managers", which systematically clarifies and stipulates the purpose of the independent director system, the conditions of the independent director, the process of its emergence and the procedure of its discharge, as well as the norms of the rights and obligations of the independent director. Meanwhile, company law should link up with the rules of the securities law and respond to the independent director's legislation on organization and corporate behavior. Still, it cannot directly relate to the specific provisions in the field of securities and capital markets²⁴. To those aspects which are not mature to legislate such as the procedure and rules of the independent director in the supervision of the board of directors, it can be provided in principle rules, waiting for the mature time of legislation to make supplementary provisions or judicial interpretation of the general provisions of the detailed provisions²⁵.

4.2 Consolidate the independence of independent directors of the Institutional Foundation through revision

Although the revised draft sets higher demands on independent directors' independence, it is necessary to perfect the independent director's election and disqualification and salary decision mechanism by legislation further to enhance the independence of independent directors' performance.

First, regarding independent directors' selection and allowance determination mechanism, the board of directors has the right to recommend candidates and initial proposals. However, due to the independent director's duty supervision object is the board of directors, and when the board of directors, as the object of supervision, enjoys an essential influence on the selection and allowance of supervisors, the board of directors will inevitably form obstacles to the supervision independence of independent directors²⁶. Therefore, when amending the company law, legislators should consider making it clear that the board of supervisors, as the supervisor of the board of directors, has the duty to propose the independent director's preliminary candidates and salary plan.

Furthermore, the selection and allowance of independent directors are finally approved by the general meeting of shareholders, which conforms to the capital form and governance logic of the company, that is, the shareholders have a decisive role in matters concerning the fundamental interests of the company²⁷. However, when the controlling or the major share significant exert their influence, they can decide on such matters as independent directors, so the small and medium-sized shareholders cannot fully play their role through this voting mechanism. Therefore, it is necessary to further protect the interests of small and medium-sized shareholders by perfecting this mechanism which also enhances the independence of independent directors. Specifically, this paper proposes that the company law should change that independent directors' selection and remuneration shall be subject to a two-vote process at the general meeting of shareholders. Not only is the vote through the general meeting of shareholders needed, but also by holding non-top ten minority shareholders elected by the minority shareholders of the small and medium-sized shareholders to consider the sub-group. By adding this procedure, it can appropriately counterbalance large shareholders' decisions. Thus, the independence of independent directors' performance can be strengthened in the legal system.

The company law stipulates that the listed company may unconditionally disqualify the independent directors, which also hurts the independence of the independent directors. The stability of an independent director's post must be guaranteed clearly at the legislative level²⁸. In particular, since the current company law does not provide for the conditions of the release of independent directors, it is suggested that the conditions of release of independent directors' fault should be clearly stipulated in the company law. Only when independent directors are at fault in the performance of their duties, such as a long-term unjustified negative vote seriously affecting the performance of the board of directors, causing severe losses to the company due to the failure to

²³ The predicament and outlet of China's corporate governance system

²⁴ Independent Director system paradox, the flaw and the solution way in China

²⁵ Zhao lixin, out of the woods: role orientation, responsibility and responsibility of independent directors, Law Press, 2011.

²⁶ On the power structure of shareholders' meeting and board of directors, Politics and law, No. 2,2016

²⁷ Deng Feng, representative corporations: Rights and responsibilities in corporate governance in China, Peking University Press 2015.

²⁸ Research on the critical strategy choice of independent directors performing supervisory function in our country, Li Huicong, financial management research, No. 11,2020

exercise supervision duties prudently, may be removed from positions by a statutory procedure through a general meeting of shareholders.

4.3 Optimize the responsibility system of the independent director system

The revised draft sets higher requirements for the responsibility of independent directors by detailing the director's duty of diligence. Still, it is necessary to optimize the independent director system by defining the independent director's exclusive duty of diligence, establishing the responsibility standard of the independent director's duty of diligence, and determining the independent director's limited joint and several liabilities.

Firstly, the company law should combine the characteristics of independent directors and performance of the actual to clarify the exclusive duty of diligence and loyalty of independent directors. Specifically, the independent directors are required to make full use of their professional knowledge and skills to conduct a comprehensive review of relevant bills when the board of directors supervises and considers various issues. If necessary, full judgment shall be made on the motion submitted to the board of directors utilizing prior investigation, inquiry at the meeting. When the board of directors issues related to matters not in their field of expertise, the company may provide an external body to provide external advice on this matter.

Secondly, the company law should set the responsibility standard of independent directors' diligent duty as "Fault". Article 149 of the company law stipulates that only when the directors violate the law, the administrative regulations or the articles of association should they bear the legal responsibility of violating the duty of diligence. This leads to the fact that, when an independent director intentionally damages the normal agenda of the board of directors of a company but does not constitute a violation of the law, administrative regulations and articles of association, they may invoke article 149 of the company law to exempt himself from liability, which does not favor the independent director to assume the diligent duty. Therefore, it should be clear in the company law to "Fault" as an independent director to bear the responsibility for breach of duty of diligence standards.

Finally, the independent director's limited joint and several liabilities are consistent with the principle of rights and obligations in the company law. When determining the legal liability of an independent director for breach of the duty of diligence, it is necessary to make a comprehensive judgment according to the allowance of the independent director, the performance of the independent director's diligent duty and the loss caused by the breach of duty. If the unlimited joint and several liabilities are only applied, it will cause a considerable burden to the independent director, which is not conducive to encouraging them to perform their duties actively. Therefore, the choice of limited joint and several liabilities to determine the share of the responsibility of independent directors will achieve a proper balance. Specifically, if the loss caused by independent directors due to a breach of duty of diligence does not exceed their annual allowance, they shall be liable for the amount of the actual loss incurred. However, if the loss caused by the independent director is numerous times of their annual allowance, there should be limited joint and several liabilities, limited to 3-5 times of their annual allowance.

4.4 Further clarify the responsibility of the independent director norms to coordinate with the supervision mechanism of listed companies

It is still of great value for corporate governance to choose a dual-level supervision mechanism as the corporate structure of the joint-stock company, which is composed of independent directors and supervisory board. By clarifying the responsibility of the independent director in the company law, the independent director and the board of supervisors can cooperate and promote each other as the company supervision mechanism. Specifically, independent directors should be defined as the internal supervision mechanism of the board of directors. Although independent directors are responsible for the proposal, implementation and actual effect of the plans of the board of directors, they should focus on the plan before and during the formation of the board of directors. This is determined by the professional requirements for independent directors to supervise the board through their professional competence, and should be accurately differentiated by legislation. By making it clear that the independent director is the critical force of the board's internal supervision, it can encourage the independent director to give full play to the supervision role when the board's plan is formed, and avoid the board from making improper decisions from the source. At the same time, the legislation should define the board of supervisors as the external supervision institution, and focus on the post-supervision of the implementation effect after the board of directors puts forward the plan, to make the system connection of the corporate governance supervision mechanism.

V. Conclusion

As the critical supervisory mechanism of listed companies, independent directors play an essential role in corporate governance and the sound development of securities market. Just as the company law is being revised, the revised draft that has been published has made more comprehensive changes to the key provisions of the independent directors, it further strengthens the independence of independent director's performance, specifies the

duty of diligence and loyalty of independent director, and allows the company to choose the supervision mechanism of independent director. These legal amendments are of practical significance for strengthening the supervision ability of independent directors and establishing more scientific and efficient supervision mechanisms to promote the corporate governance of listed companies.

As the company law improves the independent director system, it also causes the scholars to think about it and study the key provisions carefully. It is a pity that the revised draft of the company law has yet to respond to the critical problems caused by the independent directors in the legislation, market practice and judicial judgment. In light of the legal norms established in the current company law and the revised draft of the company law, it can be seen that the independent director's legal norms are relatively lacking, the independent director performs the duty of independence insufficiency, the standard independent director diligent faithful duty responsibility has not formed the legal system. Based on the corporate governance rules and market experience of listed companies, and using the comparative law to study the corporate supervision mechanism of common law and civil law countries, this paper puts forward some suggestions for improving the independent director system. As the fundamental organic law of the market subject, the company law should clearly define the rights and obligations of the independent directors, the mechanism of their emergence and withdrawal, and the scope of their other duties. In addition, the company law should not only strengthen the independence of independent directors in performing their duties by improving the mechanism of the selection, dismissal and allowance of independent directors, but it is also necessary to make clear the liability standard of the independent director based on the principle of "Fault" and establish the mode of limited joint and several liabilities to optimize the system of the independent director's liability.

While the revised draft of the company law is still under consideration by the legislature, this paper puts forward these suggestions on the legal revision of the independent director system, hoping to improve the independent director system and provide a long-term and efficient supervision mechanism for the benign governance of listed companies.