

CSRC's new Regulatory Proposal to Balance and Clarify Independent Directors' Duties and Liabilities 中國證監會就平衡及釐清國企獨立董事的權職責 展開公眾諮詢 Tim Yimin LIU 劉一民

The recent Kangmei Pharmaceutical (康美藥業) securities fraud case in 2021, where five independent directors were held jointly liable for billions Chinese Yuan liabilities, has raised significant concerns regarding the risks associated with serving as independent directors at mainland listed companies. In response to these concerns, the China Securities Regulatory Commission (the "CSRC") started the public consultation on the Draft Measures for the Management of Independent Directors of Listed Companies ("The Draft") in April. The Draft introduces constructive changes in terms of director liability and institutional support for independent directors, aiming to enable them to fulfill their duties diligently and safeguard themselves from unwanted liability.

I. No Administrative Penalties if Duties Diligently Performed

The Draft promulgated clear guidelines for assessing the diligence of independent directors in fulfilling their responsibilities. These guidelines encompass various aspects such as independent director's role in the board decision-making process, information acquisition, level of awareness, measures taken to verify information, and such directors' professional and industry backgrounds. These guidelines assist independent directors in performing their daily responsibilities diligently. By adhering to these guidelines, independent directors can demonstrate their diligent performance and preserve evidence to support their



due diligent defense in regulatory investigations.

The Draft also outlined specific circumstances under which independent directors can be exempted from administrative penalties by the CSRC, if they have been:

1. Performing Diligence from Outside Assistance: Independent directors who, after seeking separate and independent professional assistance from specialized professionals such as accountants or lawyers, still unfortunately failed to identify issues outside their professional field.
2. Dissenting by Explicit Objections: Independent directors who have raised specific objections to illegal, non-compliant or suspicious matters, recorded such in board or committee meeting minutes, and voted against or abstain from voting during board meetings.
3. Concealed by a listed company: The listed company or its related parties internationally concealed illegal or non-compliant activities and the independent directors did not have access to relevant information.
4. Obstructed by a listed company: Independent directors were impeded by the listed company from fulfilling their duties, resulting in their inability to assess the accuracy and completeness of information. Such impediments are reported by the independent directors to the CSRC and the stock exchange.

The Draft proposed to lift administrative penalties on the independent directors imposed by the CSRC. However, it is yet to be clarified by the People's Supreme Court on whether the Draft will have any effect in civil litigations with investors.

II. Rights of Engaging Outside Professionals


The Draft proposed to grant independent directors the right to separately engage outside independent professionals (e.g., auditors and lawyers) to carry out audits, provide consultations, or verify specific matters. Moreover, the costs incurred by such engagements should be borne by the listed company. This provision, when implemented, will empower independent directors to enhance their performance capabilities by seeking independent expert advice, conducting thorough reviews, and fulfilling their responsibilities effectively.

III. Directors Liability Insurance

The Draft reiterated that listed companies may purchase director liability insurance so that independent directors could be in a better position to manage potential risks while performing their duties.

However, it is crucial for independent directors to exercise caution and conduct a thorough review of the insurance policy terms and exclusions to ensure the adequacy and effectiveness of the insurance coverage.

Conclusion

The Draft represents a constructive regulatory enhancement to empower independent directors of Mainland listed companies. Looking ahead, we expect to see more clarity in the regulations and implementation guidelines from the authorities to further address the existing challenges faced by independent directors. 

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在 2021年的康美藥業證券虛假陳述民事賠償案件中，5名獨立董事被判決承擔金額高達數億的連帶賠償責任，引發了獨立董事對履職風險的廣泛擔憂。今年4月，中國證券監督管理委員會中國證券監督管理委員會發布了《上市公司獨立董事管理辦法（徵求意見稿）》（“《徵求意見稿》”），現正進行公眾諮詢。該初稿在獨立董事的責任及上市公司如何提供更佳系統性支持方面提出了一些積極建議，旨在支持獨立董事在盡職履責的前提下免除責任。

一、獨立董事盡職履責後免予行政處罰

該初稿為獨立董事履職盡責所需提供明確指引，包括獨立董事在信息形成和決策過程中的作用大小、相關事項信息來源和內容、了解信息的途徑、知情程度及知情後的態度、對異常情況的關注程度、為核驗信息採取的措施、參與相關會議的情況、專業背景和行業背景等。實際上，這為獨立董事如何勤勉地履行日常職責提供了指引，也給獨立董事為將來證明自身的勤勉盡責保存證據、以及發生爭議時如何舉證提供了思路。

在以下幾種情形下，獨立董事依法可以免受行政處罰，包括：

- (1) 盡職審查：在審議或簽署信息披露文件前，對不屬於自身專業領域的相關具體問題，借助會計、法律等專門職業的幫助仍然未能發現問題；
 - (2) 明確異議：對違法違規事項提出具體異議，明確記載於董事會、董事會專門委員會或獨立董事專門會議的會議記錄中，並在董事會會議中投反對票或棄權票；
 - (3) 被隱瞞：上市公司或相關方有意隱瞞，且沒有跡象表明獨立董事知悉或能夠發現違法違規線索；
 - (4) 被阻礙：因上市公司拒絕、阻礙獨立董事履行職責，導致其無法對相關信息披露文件是否真實、準確、完整作出判斷，並及時向中國證監會、證券交易所書面報告的等
- 然而，該初稿雖然明確了獨立董事依法可以不受行政處罰的幾種情形，但並未明確行政處罰和民事責任之間的關係，這也是需要進一步澄清的問題。


二、 聘請專業機構

初稿建議獨立董事有權獨立聘請中介機構，對公司具體事項進行審計、諮詢或核查，費用由上市公司承擔。此項權利可望提高獨立董事的履職能力，發揮獨立董事的監察職能。

三、董責險

《徵求意見稿》重申上市公司可以為獨立董事購買責任保險，以緩解獨立董事履職的風險。

但需要注意的是，在購買董責險時需注意審查保險合同條款的内容，尤其是涉及賠付條件的條款以及除外條款。董責險的賠付條件有時非常苛刻，觸發董責險除外條款的情形也非常多。一份糟糕的董責險對於獨立董事而言，並不能起到非常好的保障作用。因此，在購買董責險之前，建議充分諮詢相關專業人士的建議。

綜上所述，《徵求意見稿》中包含了一些對於獨立董事而言有益的措施，但仍存在一些問題和不足之處。在解決當前獨立董事權責利不平衡的局面，市場期望監管方未來進一步發布更加明確的規定和具體的實施細則。 

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