

THE DISTINGUISHING CHARACTERISTICS OF TRUSTEE'S DUTY OF PRUDENT INVESTMENT IN CHINA'S TRUST LAW

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Abstract: *the main theme of fiduciary obligation is the traditional moral concept based on integrity and credit, while the diversity of fiduciary obligation is the specific applications in all fields of private law. Fiduciary obligation in the field of Trust Law is trustee's duty of prudent investment and its duty of loyalty. Fiduciary obligation in the field of Company Law for shareholders, directors, executives and supervisors is the prudent and responsible duty. Fiduciary obligation in the field of Securities Law for the securities manager or fund manager is the prudent and diligent duty. Trustee's duty of prudent investment holds its distinguishing characteristics, since it is different from its duty of loyalty and the prudent duty in the Company Law as well as the prudent duty in the Securities Law.*

Keywords: *Fiduciary Obligation, Prudent Investment Duty, Trustee, China's Trust Law.*

ОТЛИЧИТЕЛЬНЫЕ ХАРАКТЕРИСТИКИ ОБЯЗАННОСТИ ДОВЕРИТЕЛЬНОГО УПРАВЛЯЮЩЕГО ПО РАЗУМНОМУ ИНВЕСТИРОВАНИЮ В ЗАКОНЕ О ТРАСТАХ КНР

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Аннотация: *основной темой фидуциарного обязательства является традиционная концепция, основанная на добросовестности и кредитоспособности, а разнообразные фидуциарные обязательства представлены во всех областях частного права. Фидуциарное обязательство в области Закона о трастах — это обязанность доверительного управляющего разумно инвестировать и соблюдать лояльность. Фидуциарное обязательство по Закону о компаниях является разумной и ответственной обязанностью для акционеров, директоров, руководителей и наблюдателей. Фидуциарное обязательство в области Закона о ценных бумагах для управляющего ценными бумагами или управляющего фондом также является важной обязанностью. Обязанность доверительного собственника разумно инвестировать имеет свои отличительные черты, поскольку она отличается от его обязанности лояльности и осмотрительности в Законе о компаниях, а также от осмотрительности в Законе о ценных бумагах.*

Ключевые слова: *фидуциарное обязательство, благоразумная инвестиционная обязанность, доверительный управляющий, трастовый закон Китая.*

I. Thinking on the Main Theme and Diversity of Fiduciary Obligation

Fiduciary obligation originated in the simple traditional moral concept, since honesty, credit and justice are the moral sources of fiduciary obligation. Such as *estoppel* in legal sayings or *words must believe and*

action in the moral concept, which is an expression of justice and emphasizes integrity and credit in essence. Fiduciary obligation is based on good faith, and it is a new obligation derived from the principle of good faith in the Civil Law, similar to the *implied clause* on the contract [1, p. 56].

Since the twentieth century, the application of fiduciary duty has expanded on a large scale, forming a fiduciary law in a broad sense [2, p. 1573]. In the field of Commercial Law in British and American countries, fiduciary duty can be said to have become a central concept. Fiduciary obligation has experienced the development process from civil relationship to commercial relationship. In the commercial organizations of company, partnership and trust, directors, shareholders, supervisors and executives in the company, partners in the partnership, trustee in the trust, all bear the commitment to the specific subject, as well as bear the specific subject to its trust and expectation, and these people can be defined as the fiduciary, bearing the fiduciary obligation. A fiduciary relationship is an unequal legal relationship between specific parties in a commercial organization, partnership, trust and etc. [1, p. 56]. Typical fiduciary relationships include: trustee-beneficiary relationship, agency relationship, director-company relationship, fund manager-investor relationship, doctor-patient relationship, attorney-client relationship, etc. [3, p. 10]. There are various kinds of fiduciary relationship, and the undertaking subject and specific content of fiduciary obligation continue to develop with the development of social economy and social life, showing its strong vitality.

The main theme of fiduciary obligation is the simple traditional moral concept based on integrity and credit, and the diversity of fiduciary obligation is the specific application in all fields of private law. Does the diversity of fiduciary obligation bring about a conflict or competition between legal norms? Trustee's prudent investment duty is one of the concrete forms of fiduciary obligation in the trust field, but trustee's prudent investment duty is summarized in China's Trust Law, and the distinguishing characteristics of trustee's prudent investment duty is often questioned in theoretical discussion. Trustee's duty of prudent investment is often considered to be the same as the duty of prudence of controlling shareholders, directors, executives, and supervisors in the field of Corporate Law, and considered to be the same as the prudent duty of fund managers and fund trustees in the field of Securities Law. Therefore, how to view the main theme and diversity of fiduciary obligations and whether trustee's duty of prudent investment holds its distinguishing characteristics is the question discussed in this paper.

II. The Concept of Trustee's Prudent Investment Duty

There are different expressions about the connotation of trustee's prudent investment obligation. The United States enacted the Uniformed Prudent Investors Act which provides the *prudent investor duty* of trustee and the *standards of care, skill and caution* of trustees.[4, p. 210]. The article 29 of the current Trust Law of Japan stipulates *the duty of care of the kind manager*, and the specific content is that: *The trustee must handle the trust affairs in accordance with the original trust purpose. The trustee shall proceed with the affairs of the trust with the attention of the good administrator. However, if there are other provisions for the trust act, it shall be noted and dealt with in accordance with the provisions* [5, p. 124]. China's trust scholars have made different statements about trustee's prudent investment obligations. The trustee's duty of prudent investment refers to that the trustee must fulfill the duty of prudence when exercising the investment right, which requires the trustee to consider both the security as well as the effectiveness of the investment of the trust property [6, p. 27]. The duty of prudence in China's Trust Law means that the trustee should handle the trust affairs prudently and thoughtfully according to the trust contract [7, p. 173]. The greatest duty of fiduciary is to treat the interests of the beneficiary as carefully as his own. Trustee must exercise the management of trust affairs with reasonable care and comply with professional knowledge, experience and skills [8, p. 163]. The duty of prudent investment should be based on the realization of the

purpose of the trust and the maximum realization of the interests of the beneficiaries, and a considerable degree of care should be achieved in the management of trust affairs [9, p. 52]. Trustee is an active manager of the trust property and needs to give full play to the professional skills and prudence and diligence to manage and invest the trust property for the interests of the beneficiaries [10, p. 31]. The duty of prudent investment arises from the utmost diligence and extraordinary care in Anglo-American law, and trustee undertakes the duty to manage trust assets with the use of basic or professional skills.

Regarding the concept of prudent investment obligation of trustee, *caution* and *diligence* are the core words, and in the mainland legal countries usually use *good management* and *attention* as the core words to express this concept. In other words, The *prudent investor rules* in the Anglo-American law system are expressed as *good management duty* or *duty of care* in the mainland law system. Summarize the above definitions or expressions of the concept of the prudent investment obligation of trustee, the two basic components of the concept contains: *Standards of prudent and investment obligations*. The standards of prudence includes the most basic duty of care that trustees should fulfill when managing trust assets, combined with management and operation experience and modern financial theory. When the trust is established, it indicates that trustees with professional skills must also use professional skills to manage trust assets. The investment obligations refers to the specific application of trustee's prudence standard in the investment, which is the embodiment of the essence of trust as *entrusted by the trustor to manage financial affairs on behalf of the trustor*. Investment is a broad concept. For example, in a specific economic environment or special period, not investing is more conducive to the protection of trust assets, not investing also belongs to the concept of investment. Based on the two basic elements of trustee's prudent investment obligation, the author expresses the concept as follows: *the trustee must fulfill the basic obligation of care, and use the investment experience and modern financial theory or professional skills to manage or invest the trust assets*.

III. The Difference Between Trustee's Prudent Investment Duty and the Loyalty Duty

About the relationship between trustee's duty of prudent investment and the duty of loyalty, China's Trust Law adopts unified legislative model, that is, the trustee's duty of prudent investment and duty of loyalty are stipulated in the same law. The article 25 of China's Trust Law writes: *when managing the trust property, the trustee must fulfill his duties and perform the obligations of honesty, trustworthiness, prudence and effective management*. What is the difference between *honesty* and *credit*? And what is the difference between *caution* and *effective management*? This article actually contains the duty of trustee. Chinese trust scholars also mainly study trustee's duty of prudent (*caution*) and loyalty (*honesty*). The *credit* and *effective management* in this article are rarely mentioned. In addition, combing the papers and monographs on the trustee's obligations shows that trustee's duty of prudent investment and the duty of loyalty are often mixed together to discussed, that is, in many discussions, the trustee's duty of prudent investment and the duty of loyalty are not differentiated.

However, the legislation of many other countries adopts a separate legislative mode, as trustee's duty of prudent investment and the duty of loyalty are legislated separately. For example, the United States has enacted Uniform Prudent Investor Act that clearly distinguishes trustee's prudent investment duty and loyalty duty. In the academic discourse of the United States, trustee's prudent investment duty and the duty of loyalty are also discussed separately [4, p. 210-220]. The Japanese Trust Act adopts a separate legislative model, providing *the duty of care of a good administrator* in section 29 and *the duty of a trust trustee* in section 30 [5, p. 104-105]. The academic discussion of trust in Japan also discusses these two duties of trustee separately as two rules of obligation independent from each other [11, p. 30-41].

The legal norms or industry regulations on trust issued by China in recent years gradually reflect the

trend of distinguishing the obligation of loyalty and the obligation of prudent investment. In 2018, China Trust Industry Association issued the Guidelines on Fiduciary Responsibilities of Trust Companies, and the Article 31 of the Guidelines stipulates the code of conduct that trustee should follow in managing the trust property. This Article is the code of conduct on the trustee's duty of loyalty. Among this article, subparagraph (1) (2) (4) (6) and (7) belong to the behavior rules of duty of loyalty. The subparagraph (1) is to prohibit the trustee from converting the trust property into its inherent property. The subparagraph (2) is to prohibit the trustee from mutually offset the creditor's rights of the trust property against its own debts and debts of the trust property of different principals. The subparagraph (4) is to prohibit the trustee from misappropriating trust property for trust purposes. The subparagraph (6) is to prohibit the trustee from not conducting self-trading at a fair market price. The subparagraph (7) is to prohibit the trustee from using the trust property to seek improper benefits for himself or others.

(I) The Ideological Basis are Different

The ideological basis of trustee's prudent investment duty depends on the trustor's trust on the trustee's care, attention and professional skills in managing the trust assets. Trustee's prudent investment obligation is to prevent and overcome the trustee's *slack*, *unprofessional* and *unprofessional*. The ideological basis of trustee's loyalty obligation lies in the trustor's trust to trustee's loyalty and honesty. The duty of loyalty of trustee was created to prevent the trustee from exploiting or encroaching on the trust assets for personal gain. The scope of fiduciary conduct is determined by the *conflict* and *profit* rules, which cannot be contained by each other.[8, p.155] The duty of loyalty is a fiduciary duty, derived from the basic moral requirements, focusing on avoiding conflicts of interests; and the duty of prudent investment, is the duty of directors or trustees to use their talents, knowledge, skills, and experience and to meet certain standards.[12, p.529]

(II) The Contents are Different

The contents of trustee's prudent investment duty includes the attention, experience, skills and modern financial theory, which reflects the positive and prudent obligation that the trustee should perform in managing the trust assets and handling the trust affairs. The contents of trustee's prudent investment duty develops continuously with the development of the trust practice. The modern paradigm of prudent investment obligations of trustee is reflected by measuring the prudence in the process of developing investment strategies and managing trust assets. Prudence should be measured mainly by the process of developing, implementing, and monitoring investment strategies. Prudence is represented by the process of managing risk, not by labeling a particular investment risk as prudent or rash [13, p. 111]. The measure standard or content of trustee's prudent investment obligation has been changed and developed by *legal list rule*, *prudent person rule* and *prudent investor rule*. The *legal list rule* specifies the possible items and scope of the investment. The *prudent person rule* focus on *handling trust affairs as your own business*, which seems flexible but empty and produces many problems in practice. The *prudent investor rule* introduces modern portfolio theory as the standard of prudence, including various modern financial theories such as risk-return measures and diversified investment concepts.

The duty of loyalty of trustee focus on the idea as *not using the trust assets*, mainly for the negative code of conduct. The contents of the duty of loyalty include: first, trustee shall not use the trust property for self-transactions; second, trustee shall not mix its own property with the trust property, or the different trust property; third, trustee shall not conduct a conflict with the interests of the beneficiaries, such as the transactions of the trust property for the interests of the trustee rather than the interests of the beneficiary. The Restatement of the Trust Law (Second Edition) in America states the duty of loyalty of trustee as this, *a trustee has a duty not to profit at the expense of the beneficiary and shall not conduct non-competition without authorization or consent*.

(III) The Expansions are Different

The expansion of trustee's duty of prudent investment is stronger than trustee's duty of loyalty. Trustee's prudent investment obligations have more detailed and flexible specific connotations or specific rules in various industries of trust. On the one hand, as what was mentioned before, trustee's prudent investment obligation has different expressions such as *cautious investor obligation* and *kind management obligation* and so on. On the other hand, trustee's prudent investment obligation in the pension fund trust, family trust, real estate investment trust, rural land trust and other specific trust industries have different specific rules.

For example, in the pension fund trust, the State is the trustor, trustees include the National Social Security Fund Council are the direct trustees, commercial banks are the custodian, and specialized investment management companies are the investment managers. All these three different trustees should fulfill their prudent investment obligations, and the specific connotation and specific rules of the prudent investment obligation of each party are not exactly the same. That is the expansion of trustee in the pension fund trust. Similarly, trustee's prudent investment obligations show a strong expansion in the specific trust industries such as family trust, real estate investment trust and rural land trust. In contrast, the duty of loyalty of trustee has relatively unified specific connotations and specific rules no matter which industry and field of the trust. That is, self-dealing, mixing trust assets with self-owned assets or different trust assets are prohibited, and any act that conflicts with the interests of the beneficiaries is prohibited.

IV. The Difference between Trustee's Prudent Investment Duty and the Prudent Duty in the Company Law

The specific application of fiduciary obligations in the field of Company Law includes the duty of loyalty and prudence. The duty of prudence is not only to the company, but also to the shareholders and creditors of the company. This paper focuses on the comparison of trustee's prudent investment duty and the prudent duty in the Company Law, so the duty of loyalty in the Company Law is not discussed too much, but only the duty of prudence in the Company Law is analyzed. The paragraph 1 of article 147 of China's Company Law stipulates the prudent obligation of the directors, supervisors and senior executives. The article 98 of the *Guidelines on the Articles of Association of Listed Companies* stipulates the obligation of *cautious*, *serious* and *diligent* of the directors of listed companies. Although the duty of prudence of the controlling shareholder is not clearly stipulated in China's Company Law, it is a hot issue widely discussed by business law scholars.

(I) The Duty of Prudence of the Controlling Shareholders

Due to the influence of the strong clan culture tradition, family consciousness, wealth inheritance concept and other factors, as well as the objective situation of economic development, the trend of the *single-large shareholder* in Chinese companies is obvious, which means it is relatively common for the controlling shareholders to control the company. The functions and powers of the board of directors is over absorbed by the board of shareholders. Such as the legal capital system, capital adjustment, stock and bond issuance, most of the important powers that involves management and design company strategic, have been allocated to the board of shareholders. This kind of power allocation leads to the result that shareholders fight for the control of the company, especially the result of erosion of power by major shareholders over other shareholders [14, p. 105]. The controlling shareholder controls the operation and management of the company, inevitably leading to it difficult for the company to achieve independent governance. In countries and regions with highly centralized ownership structure and prominent corporate holdings, it is extremely difficult for corporate institutions to govern independently from the control of major shareholders [15, p. 93]. However, the control of corporate governance by controlling shareholders is not necessarily not conducive to the development of the company. As a business entity, there is a need for leading forces and controllers in

the operation of the company. A large number of outstanding listed companies in China are concentrated under the corporate governance model of *single-large shareholder* [15, p. 100].

The controlling shareholder controlling corporate governance is an objective fact in China, which has its rationality and legitimacy. However, it is important that the power of the controlling shareholder should have corresponding obligations to curb the abuse of the power of the controlling shareholder. The duty of prudence of the controlling shareholder is to regulate the obligation to carefully exercise the power of controlling. The object of the controlling shareholder's prudent obligation is mainly the minority shareholders. The assumption of the controlling shareholder's duty of prudence is also the result of absorbing the powers of the board of directors, so that the content of the controlling shareholder's duty of prudence is the same as the directors' prudent duty. When a controlling shareholder damages the interests of the company using the way of controlling, the controlling shareholder assumes the role of de facto director, and the non-controlling shareholder can hold the controlling shareholder responsible for the breach of the fiduciary duty of director through a shareholder-derived action [16, p. 95]. The controlling shareholder undertakes the fiduciary duty on behalf of the directors, and thus undertakes directors' fiduciary duty in the violation of the fiduciary duty.

(II) The Duty of Prudence of the Directors

There are different expressions as to the duties of the directors. The obligation rules of directors in American law contain many important concepts such as the duty of loyalty, diligence, compliance and integrity [17, p. 200]. American case law determines that directors have fiduciary obligations to the company and shareholders [18, p. 148]. The obligation rules of directors—imposes a duty of loyalty and prudence on directors, a system designed to reduce agency costs [19, p. 139]. The fiduciary duty was born from the correction of the incompleteness of the contract intended to retain and give directors full autonomy to bridge the gaps created by the contract under different circumstances [20, p. 88]. Although there are different expressions about the content of directors' duties, the duty of prudence is the basic duty of directors.

The specific content of the director's prudent obligation is determined by the role of the director. From the perspective of the horizontal comparative method, board roles are present in different types. The first role is the British model as a strategic manager, directors are regarded as top policy makers, managers, and consultants; The second role is the joint decision-making mechanism model represented by Germany, as the *strategic management and relationship investor power alliance*, the board is divided into supervisory committees and management committees, the supervisory committee is responsible for the formulation and implementation of the overall policies of the Company, as well as to elect and supervise the directors of the regulatory committee, and the management committee is responsible for the day-to-day management; The third role is the American modern model as a *supervisor and system defender*, the board is responsible for the supervision, design, and system maintenance, as the director's duty of care becomes prominent and the role of independent directors is prominent, the downward mandate of directors and the formation of special committees became routine and the primary means of resolving internal control, along with the way of conduct is further programmed [14, p. 100-101]. From a longitudinal perspective of historical development, the roles, functions and responsibilities of directors are constantly changing: from trustees to representatives, then to limited agents and monitors [14, p. 100]. When a director assumes the role of trustee, the duty of prudence of the director is to exercise the rights and obligations of trustee carefully. When the director assumes the role of representative, the duty of prudence of the director is to exercise the rights and obligations of representative prudently. When a director assumes the role of limited agent, the board of directors is responsible for the daily operation and management of the company, and the board of directors

may select a manager, who specifically carries out the daily operation and management of the company. Therefore, when the directors act as the limited agent to manage the day-to-day operation and management of the company, the duty of prudence of the directors specifically includes carefully selecting and managing managers, and making careful decisions and execution of the day-to-day operation and management of the company.

(III) The Difference between the Trustee's Prudent Investment Duty and the Prudent Duty of the Controlling Shareholders and Directors

Fiduciary obligations have different logical starting points in the field of Trust Law and the Company Law. Trustee's duty of prudent investment is different from the prudent duty of the controlling shareholders and the directors in terms of the basis, content and object. First, the basis of the duty are different. The foundation of prudent investment obligation of trustee lies in the establishment of trust contract and the ideological foundation lies in the prevention of imprudence of trustee. The purpose of the duty of prudence in the field of the Company Law is first to safeguard the overall interests of the company. The existence of the company is the prerequisite for the subjects in the Company Law to assume and fulfill the obligation of prudence. Therefore, the shareholders, directors and managers of the company do not enjoy the ownership of the company property, because the company property is held in the name of the company, so the primary basis for the prudent obligation of all subjects in the field of Company Law lies in the establishment of the company. On the basis of the establishment of the company, the general meeting of shareholders or shareholders elect or appoint the board of directors or directors, senior executives and supervisors. Therefore, the other basis for the generation of the duty of prudence of directors is the appointment of the general meeting of shareholders or shareholders and the prevention of the abuse of such appointment. Another basis arising from the prudence obligation of the company's controlling shareholder is the reliance and trust of the non-controlling shareholder and the prevention of the abuse of this trust.

Second, the contents of the duty are different. The content of trustee's prudent investment obligation is the attention, experience, skills and obligations of trustee who should apply the modern financial theory when managing the trust assets. In the field of Company Law, the duty of prudence of the controlling shareholder is on behalf of the directors. The content of the duty of prudence of the directors to the company and shareholders is to manage the company affairs prudently and responsibly and safeguard the interests of the company. For example, the article 98 of the *Guidelines on the Articles of Association of Listed Companies* specifies the prudent obligations of the company, including: *prudently, carefully and diligently exercise the rights of the company to comply with the business scope and laws and regulations; treat all shareholders fairly; timely understand the business management status; sign written confirmation on the periodic report; and truthfully provide relevant information to the board of supervisors*. The directors' duty of prudence to the creditors is mainly in the factual bankruptcy of the company, the object of the fiduciary obligation of the directors turns from the company or the shareholders to the creditors. The directors' duty of prudence to the creditors is to carefully handle the company's bankruptcy affairs of the company, reasonably handle the company's property and claims and debts, and protect the rights and interests of the creditors.

Third, the obligation objects are different. The objects of trustee's duty of prudence are the trustors and the beneficiaries. The objects of the prudent obligation of the controlling shareholders in the field of Company Law are mainly the company and the non-controlling shareholders, and the objects of the prudent obligation of the directors are the company, the shareholders and the creditors. The objects of the obligation of prudence of the directors shall be extended by the company and the shareholders to the creditors and other directors of the company. The traditional view is that directors are entrusted by the company to serve

the interests of the company and are bound by fiduciary obligations. The traditional Company Law theory holds that the shareholders are the sole owner of the company, so the beneficiary of the fiduciary obligation points directly to the shareholders [20, p. 87]. However, with the continuous development of company practice and relevant legal norms, opinions suggest that directors' obligations include vertical obligations and horizontal obligations. Vertical obligations refer to the directors' obligations to the company, while horizontal obligations refer to the directors' obligations to the relevant subjects of the company, including the shareholders, creditors or other directors of the company. The horizontal obligations of directors are proposed for the purpose of protecting innocent directors and to distinguish them from malicious directors or wrongful directors [19, p. 142]. As directors' duty of prudence to the creditors, the present theory tends to hold that when the corporation is actually bankrupt, the object of the fiduciary duty of directors turns from the corporation or stockholders to the creditors. Since the 1990s, a series of precedents in America shows that the deterioration of corporate finance will lead to the transformation of directors' fiduciary duty from shareholders to creditors, and such situation is considered as a new philosophical changes in America's Corporate Law [21, p. 59]. When the company is in a healthy operation, directors do not have to assume fiduciary obligations to creditors, because the company and creditors are two parties as rational economic people in the market economy, and directors must give priority to their respective interests, so it is impossible to require directors to give priority to the interests of creditors. However, when the company is in bankruptcy, the directors, as the spokesperson of the company, transform their internal functions into external functions, and the directors' fiduciary duty to the shareholders turns into a fiduciary duty to the creditors. When the enterprise goes bankrupt or is in bankruptcy, the property of the company is in trust state, and the property of the company is converted into trust fund, or in fact into creditor's property, and the fiduciary obligations of directors and senior executives are also converted into fiduciary obligations to creditors [22, p. 73].

V. The Difference between Trustee's Prudent Investment Duty and the Prudent Duty in the Securities Law

(I) The Content and Nature of the Duty of Prudence in the Securities Law

The application of fiduciary duty in the field of China's Securities Law is mainly reflected in the prudent obligation. The article 10 and article 130 of the Securities Law stipulate the prudent duty of securities companies, the article 142 stipulates the legal consequences of directors, supervisors and senior managers failing to fulfill the prudent obligation, the article 92 stipulates the prudent obligation, the article 160, the paragraph 2 of article 160, and the article 163 respectively stipulate the prudent duty, and the administrative responsibility and civil liability for failing to fulfill the prudent obligation of the securities service institutions.

The subjects of prudent duty clearly stipulated in the Securities Law in China are securities companies and securities service institutions. The article 10 of China's Securities Law stipulates that the securities company should be *honest, diligent and responsible* as the sponsor of the listed company. The sponsor shall *carefully check the application documents and information disclosure materials of the issuer and supervise the standardized operation of the issuer*. The article 130 of China's Securities Law stipulates on the whole that securities companies should fulfill the obligation of prudent, diligent and responsible, honest and trustworthy. The business scope of a securities company includes: *securities brokerage, securities investment consulting, financial consulting related to securities trading, securities investment activities, securities underwriting and sponsor, securities margin financing and short selling, securities market-making trading, securities self-management and other securities businesses*. The prudent duty of a securities company is within its business scope, which is the requirement for the compliance management and risk

control of the securities companies when carrying out the securities business to protect the rights and interests of investors. Securities service institutions refers to accounting firms, law firms and securities services engaged in securities consulting, asset evaluation services. The content of prudent obligation of securities service institutions is mainly for *securities issuance, listing, trading and other securities business activities, issue audit report and other verification report, asset evaluation report, financial adviser report, credit rating report or legal opinion documents and etc.*

How to determine the nature of the prudent obligations of securities companies and securities service institutions stipulated in China's Securities Law? Is it the specific application of fiduciary duty in the field of Securities Law or the duty of care in the Tort Law? Some scholars have proposed that the duty of prudence in the field of Securities Law in China should be the duty of care in Tort Law. The so-called prudent duty in China's Securities Law is not a fiduciary duty, but merely a tort duty of care imposed by law [23, p. 69-71]. However, the fiduciary obligation is a very broad concept, whose characteristics are flexible and elusive, and the theme of good faith, credit as the cornerstone of traditional moral concept. The prudent duty of securities companies and securities service institutions stipulated in the Securities Law in China should belong to the specific application of fiduciary duty. In China's Securities Law, the subject of the securities contract may stipulate the specific content or specific performance mode of the prudent obligation, which conforms to the characteristics of contractual and flexible fiduciary duty.

But the problem must have to face is that in the Securities Law practice, what is the standard of prudence. There is no specific evaluation methods of prudence. In judicial practice, prudence has become the bottom clause of the outcome evaluation, that is, the securities manager is presumed to violate the obligation of prudence when false information disclosure, internal trading and other events occur.

(II) The Difference between Trustee's Prudent Investment Duty and the Prudent Duty in the Securities Law

First, the basis of the obligations are different. The basis of the prudent obligations of securities companies and securities service institutions in the field of Securities Law depends on the investors' trust in the professional securities institutions and the prevention of the abuse of such trust. Investors do not directly investigate the basic situation of the listed company, but rely on the securities company as the sponsor of the listed company to check the authenticity and integrity of the documents and information disclosure of the listed company. Investors do not directly supervise the operation, financial situation, changes of senior management personnel, but rely on the supervision and regular information disclosure of the listed company, and the temporary information disclosure of major emergencies of the listed company. At the same time, investors also rely on securities service institutions to produce, issue audit reports and other verification reports, asset appraisal reports, financial advisory reports, financial advisory reports, credit rating reports or legal opinions for securities business activities such as issuance, listing and trading of securities. As professional securities institutions, securities companies and securities service agencies are more similar to the role of *guarantor*, who should be prudently provide investors with investment channels and information, so the choice and trust of investors are the foundation of the prudent duty of the professional securities institutions. The foundation of prudent investment obligation of trustee lies in the establishment of trust contract and the prevention of imprudent management and investment of trust property.

Second, the contents of the obligations are different. The obligation of prudence in the field of Securities Law focuses on the due diligence and information disclosure of professional securities institutions, and focuses on standardizing the authenticity, integrity and timeliness of the due diligence and information disclosure. The problem of false information disclosure by responsible subjects such as securities companies and securities service agencies is the key content to be prevented in the Securities Law. The main difference

of prudence between Trust Law and Securities Law lies in the content. The prudence in the Securities Law does not involve active and careful management and investment, but focus on procedural prudent obligation, which means focus on the investment object's financial situation, operation, management structure, risk, timely production and disclosure of corresponding audit report, appraisal report, evaluation report, investigation report, legal opinion, etc. While the prudent investment duty in the Trust Law requires the trustee actively manage trust property, using commercial judgment rules to the trust property investment, actively manage investment risk, spread investment risk, due diligence and information disclosure in the trust investment process.

Third, the objects of the obligations are different. The purpose of the prudent obligations of professional securities institutions such as securities companies and securities service institutions in the field of Securities Law is to protect the legitimate rights and interests of investors, so the primary obligation object is investors. At the same time, the professional securities institutions have a legal relationship with listed companies in terms of service contracts, so they have obligations of prudence and diligence to listed companies based on the service contracts. What is most important is that professional securities institutions in the field of Securities Law need to be objective, fair and prudent to listed companies, and should not harm the interests of investors. The object of prudent duty of the directors, supervisors and senior managers of a securities company is the securities company. The objects of trustee's prudent investment duty are the trustors and beneficiaries.

VI. Conclusion

Trustee's duty of prudent investment holds its distinguishing characteristics, which includes the difference from its loyalty duty, and from the prudent obligations of other subjects with the operation and management responsibilities of assets in the market economic activities. The difference between trustee's prudent investment duty and its loyalty duty is mainly reflected in the different ideological basis, content and extensibility of them. The prudent investment obligation of trustee is heterogeneous with the prudent obligations of the controlling shareholders, directors, senior executives and supervisors in the Company Law, and the prudent obligations of the relevant subjects in the field of Securities Law. This heterogeneity is mainly reflected in the heterogeneity of the subject, content and object of the prudent obligations.

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