

银行公司治理研究

中国国有银行改革的法律路径

王红一
著



**Banking Corporate
Governance:**

the Legal Approach of
China's Reform for
the State-Owned
Commercial Banks

BY WANG HONG YI

法律出版社
LAW PRESS · CHINA

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图书在版编目(CIP)数据

银行公司治理研究:中国国有银行改革的法律路径 /

王红一著. —北京:法律出版社,2008.10

ISBN 978-7-5036-8861-4

I. 银… II. 王… III. 银行法—研究—中国 IV.
D922.281.4

中国版本图书馆 CIP 数据核字(2008)第 153357 号

© 法律出版社·中国

银行公司治理研究

——中国国有银行改革的法律路径

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责任编辑 孙东育

装帧设计 乔智炜

开本 A5

版本 2008 年 10 月第 1 版

出版 法律出版社

总发行 中国法律图书有限公司

印刷 北京北苑印刷有限责任公司

印张 9.125 字数 221 千

印次 2008 年 10 月第 1 次印刷

编辑统筹 法学学术出版分社

经销 新华书店

责任印制 陶松

法律出版社/北京市丰台区莲花池西里 7 号(100073)

电子邮件/info@lawpress.com.cn

网址/www.lawpress.com.cn

销售热线/010-63939792/9779

咨询电话/010-63939686

中国法律图书有限公司/北京市丰台区莲花池西里 7 号(100073)

全国各地中法图分、子公司电话:

第一法律书店/010-63939781/9782

重庆公司/023-65382816/2908

北京分公司/010-62534456

西安分公司/029-85388843

上海公司/021-62071010/1636

深圳公司/0755-83072995

书号:ISBN 978-7-5036-8861-4

定价:25.00 元

(如有缺页或倒装,中国法律图书有限公司负责退换)

内 容 提 要

在现代契约理论的视野下,企业是股东、公司管理层、债权人和其他利益相关者等一系列契约的组合。公司治理针对公司契约中的控制权、代理成本和不完全合同等问题之解决提供制度安排,其中,法律是公司治理制度的重要组成部分,并对其他要素产生影响。银行是企业的一种,但银行与一般公司契约具有不同的特点,产生了银行公司治理的特殊问题,因此强化银行公司治理及进行相关立法非常必要。相比之下,中国国有银行公司治理又具有自身的特殊性,更为复杂,中国的银行公司治理改革和相关法律变革应具有针对性。

基于银行公司治理的特殊性,本书分别对银行治理中的股东、经营者(董事)、存款人和其他利害关系人契约的特殊性及法律应对问题展开具体分析,进而对中国银行公司治理的特殊问题进行探讨并提出法律建议。

公司治理中,股东控制具有积极作用但也存在

问题,需要对股东控制加以约束。银行中股东控制问题更加严重,因而银行公司治理强化对银行控制股东的约束及加重控制股东的责任具有合理性。中国国有商业银行存在“国有金融资产出资人缺位”问题,相关法律的变革既要明确出资人代表及其法律地位,发挥国有股东的真正作用,保护国有股权益,避免国有金融资产流失,同时又要加大对国有金融资产出资人代表的约束力度,避免他们对银行进行不适当干预。

董事等公司管理层是公司的核心领导者,公司治理以控制管理层为核心,对其加以约束和激励。一般公司治理中对董事等管理层的约束和激励机制在银行中效果有限,加强银行公司治理,需要强化银行董事责任,控制经营风险和保障相关利益。与一般公司相比,银行董事责任的对象和内容应更为广泛,标准更为严格。我国国有银行董事具有与政府关系密切等特点,现行立法要解决责任规定不完善、不相衔接,以及轻信义责任和重管制的问题。

债权人参与公司治理有一定的障碍并处于不利地位,保护债权人的法律措施在一定程度上可以看做对公司治理的矫正途径。由于银行存款人的债权风险更高,与银行股东和董事等经营者的利益冲突更为激烈,为保障银行业平稳运行,确立存款人在银行公司治理中的法律地位并对存款人提供充分保护十分重要。其中,存款保险制度既对保护存款人发挥积极的作用,又可能对银行公司治理产生一定的负面影响,立法者应寻求二者的平衡。在中国存款保险从隐性向显性转型的改革中,存款保险法律制度设计应与其他保障存款人利益和稳定金融体系的立法协调统一。

社会责任是公司治理的目标之一,也是保护公司利益相关者的重要途径。公司治理通过矫正传统的公司结构并调整公司行为以实现公司的社会责任。与一般公司相比,银行具有特殊社会责任,需要将银行公司治理、金融监管和社会责任高度统一,并通过金融立法予以规范。中国商业银行社会责任的实施效果部分受到缺乏约束机制的影响。为使

银行切实履行社会责任,需要解决的法律问题包括:建立适宜银行公司治理特殊性的法律架构,将社会责任的目标、要求和标准纳入银行公司治理的各个环节;对国有商业银行重新定位;重塑国有银行与国有企业的关系;规制国有银行的金融垄断;强化银行实施“绿色信贷”等社会责任的法律约束等。

ABSTRACT

Banking Corporate Governance: the Legal Approach of China's Reform for the State-Owned Commercial Banks

From the perspective of modern contract theory, firm is the nexus of incomplete contracts of shareholders, company administrators, creditors, and other stakeholders. In the firm contracts, the problems, such as control, agency costs, incompleteness, etc. , gives rise to the need of corporate governance to provide institutional arrangement. Legal institution is a very important and influence factor of corporate governance.

Banks are firms, but special attributes of banks make corporate governance problems different in practice, and it is necessary to enhance banking corporate governance and relative legislation. By comparison with banks in market economy, the corporate governance of China's state-owned commercial

banks is more particular and has more complex problems, which implicates to the need of pertinence for the reform and law-making of China's state-owned commercial banks.

The book expands from the analysis of the particularity of banking contract for shareholders, directors, depositors and other stakeholders in banking corporate governance, then investigates the attributes of the corporate governance of China's state-owned commercial banks, and propose suggestions to improve relative laws and regulations.

In corporate governance, concentrated shareholders exert positive effects, but also raise new corporate governance problem, therefore, the legal system to constraint the control from dominant shareholders has important implications. In banking industry, it is necessary to strengthen the liabilities of dominant shareholder when enhancing banking corporate governance, for the controlling shareholders problem becoming more serious in banks. As to the corporate governance for China's state-owned commercial banks, the prominent problem is the vacancy of the state financial assets owner, so the relative legal system is expected to have two functions: one is to define the legal status of the investor representative of state-owned financial assets and make it to play as a real shareholder and protect state-owned financial assets, the other is to prevent state shareholders from inappropriate intervention in banking management by strengthening their liabilities.

Directors and other administrators are leaders in companies, and thus the core objectives for corporate governance to control by constraints and incentive mechanism. However, such mechanisms are weak in banking corporate governance, which raises the need to enhance obligations of directors by expanding to control the risk of management, and protect the right of stakeholders. Thus, the contents of the obligations of directors are broader,

and standards higher than that of directors in non-financial companies. Directors in China's state-owned commercial banks are characterized as having close relationship with government agencies and rare undertaking fiduciary duties and responsibilities. To achieve the aim of reforming the state-owned commercial banks, it is important to perfect the legislations on the liabilities of directors.

Creditors of companies face obstacles in corporate governance, and in disadvantage situation. Legal system for protecting creditors can balance the role of creditors and others in corporate governance. In banks, the credit of depositors is far more risk than that of creditors in companies, and depositors are in far more inferior position. To safeguard the stable operation of banks, legal system to establish the role of depositors in banking corporate governance and provide sufficient protection is very important. Within the legal system for protecting depositor, the system of deposit insurance would exert negative influence on corporate governance, which should be handled in legislations. In the reform for transforming implicit deposit insurance to explicit deposit insurance in China, deposit insurance legal system should be coordinated and united with other legal system for protecting depositors and stabilizing financial system.

Company social responsibility is one of the objectives of corporate governance, and the important way to protect company stakeholders. Corporate governance is the effective way to realize company social responsibility. Compared with non-financial companies, banks undertake special social responsibility, and the approaches to realize it are banking corporate governance, governmental regulation and legal system. In China, the situation of commercial banks performing social responsibility is far from expectation, which partly resulted from unitary and weak constraint system. To ensure the

effects of fulfilling banking social responsibility, the legal problems need to be handled include: putting the aims, requirements and standards into each step of the legal framework for banking corporate governance; redefining the nature of state-owned Commercial Banks; rebuilding the relationship between the state-owned commercial banks and enterprises; regulating the financial monopoly from state-owned commercial banks, and; enhancing legal system for performing “Green-Credit Policy” in China, etc.

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