



CORPORATE GOVERNANCE OF COMMERCIAL BANKS  
AND BANKING SUPERVISION

# 商业银行 公司治理与银行监管

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史生丽 著



法律出版社  
LAW PRESS · CHINA



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[www.lawpress.com.cn](http://www.lawpress.com.cn)



[www.falvm.com.cn](http://www.falvm.com.cn)

## 图书在版编目(CIP)数据

商业银行公司治理与银行监管 / 史生丽著. —北京:  
法律出版社, 2010. 6

ISBN 978 - 7 - 5118 - 0854 - 7

I. ①商… II. ①史… III. ①商业银行法—研究—中国  
②银行监督—银行法—研究—中国 IV.  
①D922. 281. 4

中国版本图书馆 CIP 数据核字(2010)第 104906 号

商业银行公司治理与银行监管  
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编辑统筹 法律应用出版分社  
责任编辑 何海刚  
装帧设计 贾丹丹

© 法律出版社·中国

出版 法律出版社

开本 A5

总发行 中国法律图书有限公司

印张 9. 625

经销 新华书店

字数 243 千

印刷 北京北苑印刷有限责任公司

版本 2010 年 10 月第 1 版

责任印制 陶松

印次 2010 年 10 月第 1 次印刷

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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

销售热线/010 - 63939792/9779

网址/www. lawpress. com. cn

咨询电话/010 - 63939796

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

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上海公司/021 - 62071010/1636

北京分公司/010 - 62534456

深圳公司/0755 - 83072995

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书号: ISBN 978 - 7 - 5118 - 0854 - 7

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)

## 序

由当代大型公司的问题所引发的公司治理运动,在 20 世纪八九十年代因商业银行的问题被扩展至金融业。1997 年的东南亚金融危机使学界开始意识到,大量金融创新所蕴含的新的风险可能导致对银行公司治理重要性的重新评估。2008 年的全球性金融危机将学界研究推向了新的阶段:2009 年诺贝尔经济学奖得主奥利弗·威廉姆森认为,危机发生的主要原因是监管不力而不是市场失灵;全球最具规模的国际专业会计师组织 ACCA 在其题为“走出信贷危机”的报告中指出,信贷危机的根源是银行公司治理方面的失败。

近年来,随着我国国有商业银行改革的逐步推进,完善银行公司治理和银行监管作为改革的两个关键问题受到国内学界和业界的关注,研究也取得了令人瞩目的成果。但对更深层次的问题——商业银行公司治理和银行监管之间的相互关系,现有研究还不够系统、深入。史生丽博士的著作《商业银行公司治理与银行监管》恰好选择了这一新视角,从商业银行公司治理特殊性产生的制度需求出发,较系统地深入研究了银行监管对商业银行公司治理的影响和作用。作者借鉴和运用相关理论,论证了“在我国经济转型时期,完善银行监管相关法律制度是改善商业银行公司治理的重要制度安排”这一主题,对提高商业银行公司治理的有效性、完善我国银行监管有较重要的理论价值和实践意义。具体而言,本书的新意和特点主要表现在以下方面:

首先,研究视角比较新颖。本书从银行监管对商业银行公司治理影响的新角度展开研究,拓宽了学界对商业银行公司治理研究的视角。

其次,观点创新。通过对商业银行公司治理的特殊性和制度需求、监管对商业银行公司治理的影响和作用等问题进行系统的提炼和研究,作者提出了“监管能在一定程度上满足商业银行公司治理的制度需求”的观点,论证充分,逻辑严谨,资料丰富翔实。

最后,理论联系实际。本书在理论分析的基础上,联系我国实际提出了修改《商业银行法》和《银行业监督管理法》、制定《金融监管合作分工条例》和《商业银行公司治理指引》等立法建议,对我国相关法律制度的完善具有重要的参考价值。

史生丽博士有多年银行法律工作的实践经验,博士就学期间对商业银行公司治理和银行监管问题进行了持续关注和重点研究,曾发表《商业银行公司治理结构的国际比较及对我国的启示》、《对商业银行公司治理特殊性的分析》、《借鉴与启示:我国商业银行董事会制度的完善》等论文,并在此基础上完成了博士论文。本书就是她在博士论文的基础上修改而成的。作为史生丽攻读博士学位期间的指导教师,我深知她在商业银行公司治理问题上所倾注的心血和付出的努力,认为《商业银行公司治理与银行监管》一书从新的研究视角将商业银行公司治理问题的研究提高到一个新的水准。

在这本专著问世之际,我很高兴为之作序,将它推荐给各位读者,希望它能够在相关领域引发更广泛的思考和更深入的研究,以有助于我国国有商业银行改革的实践,并促进我国银行公司治理法律制度的进一步完善。

徐晓松

2010年8月15日

## 摘 要

本书主题是:在我国经济转型时期,完善银行业监管相关法律制度是改善商业银行公司治理的重要制度安排。

对于主题的论证,从三个层次展开:第一,在普遍意义上,由于商业银行的特殊性致使商业银行公司治理除了要解决一般公司治理存在的问题之外,还需解决因风险主要承担者(存款人)在公司治理中缺位、控股股东和管理者道德风险加剧、治理目标需要保护存款人利益和兼顾社会公众利益而导致的如何对控股股东和管理者进行有效监督和制约问题。银行监管机构以存款人利益代表和社会公众利益代表身份介入商业银行公司治理,通过依法行使监管权对商业银行股东、董事和高级管理人员权利、义务和责任的配置和权利行使产生影响,实现对控股股东和管理者的监督和制约,弥补一般公司治理手段不足,从而使银行监管在一定程度上满足基于商业银行公司治理特殊性产生的制度需求。第二,具体到我国,由于政府主导下的商业银行公司治理变迁、特殊的内部人控制、特殊的内部组织机构及有限的外部治理环境,使我国商业银行公司治理对银行监管的制度需求更为强烈。通过分析,发现银行监管机构是我国商业银行公司治理的重要力量,银行监管对商业银行公司治理有促进作用,完善银行监管制度是改善我国商业银行公司治理的重要途径。第三,银行监管对商业银行公司治理的影响是通过银行监管机构依法行使监管权实现的,法律赋予银行监管机构的监管权利边界和手段决定银行监管

对商业银行公司治理产生影响的范围和深度。因此,银行业监管法律制度是银行监管对商业银行公司治理产生影响的重要基础,完善我国银行业监管相关法律制度是通过改进银行监管促进商业银行公司治理的重要制度安排。

本书主要采用理论联系实际、比较分析、历史分析的方法进行论述,分为前言、正文和结论三部分。其中正文部分分为五章,第一章和第二章论述了第一个层次涉及的问题,第三章和第四章论述了第二个层次涉及的问题,第五章论述了第三个层次涉及的问题。这五章的具体内容如下:

第一章对商业银行公司治理的特殊性及其制度需求进行了论述。首先,分析了一般公司治理的基本问题。从公司治理含义、治理目标和法律视野中的公司治理手段三个方面构建了基本分析框架。其次,分析了商业银行公司治理的特殊性。从分析商业银行特殊性(主要是资金结构特殊、信息高度不对称、强大的外部性、金融安全网的存在)入手,研究了商业银行公司治理的特殊性。笔者认为,商业银行公司治理除了要解决一般公司治理面临的问题之外,还需解决因风险主要承担者(存款人)在公司治理中缺位、控股股东和管理者道德风险加剧、治理目标需要保护存款人利益和兼顾社会公众利益而导致的如何对控股股东和管理者进行有效监督和制约问题。最后,分析了商业银行公司治理的制度需求。对于商业银行公司治理面临的新问题,一般公司治理手段作用有限,需要寻找新的治理途径。商业银行公司治理由此而产生的制度需求表现为需要外部主体介入商业银行公司治理,保护存款人和社会公众利益,对控股股东和管理者进行有效监督和制约。

第二章从银行监管制度适应商业银行公司治理制度需求的角度进行了论述。主要分析了商业银行监管及其制度体系、银行监管在商业银行公司治理中的作用。对于前一问题,对银行监管的理论与实践进行了分析,从监管权和监管类型两个方面对商业银行监管制

度体系作了介绍。对于后一问题,首先,分析了国际组织对银行监管在商业银行公司治理中作用的规定。其次,依据有关法律规定和监管规则分析了银行监管对股东、董事和高级管理人员的权利、义务及责任的影响。这种影响主要体现在:对商业银行股东行使权利的限制、对商业银行董事资格、注意义务标准和承担责任对象的影响、对董事会独立性和责任内容的要求、对高级管理人员资格及经营管理权的影响。再次,对银行监管机构在商业银行公司治理中作为存款人利益代表和社会公众利益代表的特殊地位进行了分析。最后,对银行监管机构介入商业银行公司治理实现的公平和安全法律价值进行了分析。在此基础上得出结论:银行监管机构以存款人利益代表和社会公众利益代表身份介入商业银行公司治理,通过依法行使监管权对商业银行股东、董事和高级管理人员权利、义务和责任的配置和权利行使产生影响,从而实现对商业银行控股股东和管理者的监督和制约,弥补一般公司治理手段的不足。

第三章论述了中国商业银行公司治理中的问题。首先,通过回顾我国商业银行公司治理变迁过程,笔者发现政府主导对商业银行公司治理产生重要影响。其次,对特殊内部人控制问题进行了分析。我国商业银行中,在存在国有股情况下,控股股东一般为国有股股东,这涉及国有股权行使问题。另外,与国有股行使相联系的是行政化选任董事、监事和高级管理人员。这使得我国商业银行内部人控制有特殊性并有经济转型时期的特征。尚未建立健全金融企业国有资产出资人制度是产生上述问题的主要原因。最后,对特殊的内部组织机构和有限的外部治理环境进行了分析。在我国,党委会与董事会、监事会及行长办公会之间关系还需理顺,因产品市场竞争尚待时日、并购市场不活跃、银行家市场还未建立使得外部市场制约力量有限。在此基础上推导出:与发达国家相比,我国商业银行公司治理对银行监管的制度需求更为强烈。

第四章论述了完善银行监管制度是改善中国商业银行公司治理



的重要途径。从银行监管机构是中国商业银行公司治理重要力量和中国银行业监管对商业银行公司治理具有促进作用两个方面进行了分析。对于前一个问题,从三个方面进行了分析。第一,分析了当前中国商业银行公司治理存在的缺陷,主要体现为董事会建设还需进一步加强、监事会功能没有充分发挥、信息披露还需加强。第二,分析了改善中国商业银行公司治理面临的体制困难,主要体现为建立健全金融企业国有资产出资人制度尚待时日、经济转型时期董事会及监事会受体制因素制约未能充分发挥作用。第三,对中国商业银行公司治理主体状况进行了分析,对股东、债权人(含存款人)、经营者、职工和银行监管机构在公司治理中发挥的作用进行了比较。通过上述三个方面的分析,得出中国银行业监管机构是商业银行公司治理重要力量的结论。对于后一个问题,从总体评价和实例分析两个角度切入。总体上看,我国银行业监管机构通过制定规则,引导、督促商业银行建立良好公司治理;通过实施监管增强公司治理的“执行力”;对公司治理进行评价。在这部分,笔者梳理了我国法律、法规及银行业监管机构颁布的部门规章和规范性文件,对涉及商业银行公司治理的有关内容进行了系统化分析和评述。通过对选取的三个实例进行分析,发现银行业监管机构在市场准入阶段严格把关,避免带有公司治理先天缺陷的商业银行设立;通过对章程的审查,改变商业银行内部组织机构权利、义务和责任的配置;通过对商业银行公司治理的检查,帮助商业银行完善公司治理。在此基础上得出结论:我国银行监管对商业银行公司治理产生了重要的影响,具有积极的作用。完善银行监管制度是改善中国商业银行公司治理的重要途径。

第五章对以增进商业银行公司治理为目标的银行业监管相关法律制度完善进行了论述。首先,分析了与商业银行公司治理相关的银行业监管法律制度存在的问题。主要体现在:对控股股东的规制需要进一步加强、监督董事会履行职责的具体方式不够明确、董事及高级管理人员问责制度操作性不强、相关主体向银行监管机构报告

义务不明确、监管措施的实施条件不够明确和具体、以会谈备忘录确定的监管协调机制约束力不强。其次,针对存在的问题提出了完善银行业监管相关法律制度的立法建议。主要涉及完善《商业银行法》和《银行业监督管理法》相关规定、制定《金融监管分工合作条例》和《商业银行公司治理指引》。最后,对配套改革涉及的中国银行业监管机构自身治理问题进行了研究,提出中国银行业监管机构自身治理需要优化,监管权行使需要改进。在此基础上得出结论:银行业监管法律制度是银行监管对商业银行公司治理产生影响的重要基础,完善我国银行业监管相关法律制度,是我国通过改进银行监管促进商业银行公司治理的重要制度安排。

最后,得出本书结论:在我国经济转型时期,可以通过改进银行监管促进商业银行公司治理的完善,而银行监管相关法律制度完善是实现这一目标的重要制度安排。

正文部分五章的内在联系是:遵循了用普遍意义的结论分析我国特殊问题的思路。在第一章和第二章的分析基础上,第三章和第四章联系中国实际进行了分析。在前四章内容基础上,针对我国商业银行公司治理需要完善的现实,从银行业监管相关法律制度完善层面提出立法建议。其中,第二章回应了第一章提出的问题,第三章与第一章相呼应,第四章与第二章相呼应。

关键词:商业银行 银行监管 商业银行公司治理 监管法律制度

## ABSTRACT

The subject of this book is: in China's economic transition, an important systematic design to improve the corporate governance of commercial banks is to perfect the related legal systems of banking supervision.

The arguments to support the subject of this book are developed from three levels: First, generally speaking, due to the special features of commercial banks, corporate governance of commercial banks should not only solve the agency problems of general corporate governance, but also the problem of how to carry out effective supervision and restriction on controlling shareholders and the management, which is caused by such factors as the missing lever of the main risk bearers (depositors) in corporate governance, the intensification of moral risk of controlling shareholders and the management, the need to protect depositors' interests and to consider public interests in the objective of governance. Banking supervision organization, as the beneficial representatives of both depositors and the public, intervenes in the corporate governance of commercial banks, and through its supervision power, influences the allocation and implementation of the rights, liabilities and responsibilities of the shareholders, directors and senior officers of commercial banks. This will realize its supervision and check

on the controlling shareholders and the management of commercial banks and fill the gaps of the general mechanics of corporate governance. Thus, banking supervision can, to a certain degree, meet the systematic requirement caused by the special features in the corporate governance of commercial banks. Second, as far as China's specific situation is concerned, because of the government-oriented evolution, special insider control, special internal organization structure and limited outside governance environment, the systematic demand of corporate governance of commercial banks for banking supervision in China is much stronger. Detailed analysis shows that banking supervision organization is a major force in the corporate governance of commercial banks in China, banking supervision can promote the corporate governance of commercial banks and to perfect the banking supervision system, which is an important path to the improvement of the corporate governance of commercial banks in China. Third, the influence of banking supervision on the corporate governance of commercial banks is realized through the implementation of the supervision power of banking supervision organizations. The boundaries and means of the supervision power endowed by law determine the scope and depth of such influence. Therefore, the legal system of banking supervision is the basis on which banking supervision influences the corporate governance of commercial banks. To perfect the related legal system of banking supervision is an important systematic design to enhance the corporate governance of commercial banks through improving banking supervision.

This book mainly uses the methods of combining theory with practice, comparative analysis and historical analysis in developing its arguments. It is composed of three parts: preface, text and conclusion.

The text is composed of five chapters. The first two chapters discuss the problems of the first level. Chapter three and four discuss the problems of the second level. Chapter five discusses the problems of the third level. The specific contents of the five chapters are as follows:

Chapter one discusses the special features of the corporate governance of commercial banks and its systematic demands. Firstly I discuss the fundamental problems in general corporate governance and establish the basic framework of analysis from three aspects: the meaning of corporate governance, the objective of governance, and the mechanics of corporate governance from the perspective of law. Then I analyze the special features of the corporate governance of commercial banks. Starting from analyzing the special features of commercial banks, that is, the special capital structure, high asymmetry of information, strong externality and the existence of financial security network, I explore the uniqueness of the corporate governance of commercial banks. I suggest that the corporate governance of commercial banks should not only solve the agency problems of general corporate governance, but also the problem of how to carry out effective supervision and check on controlling shareholders and the management, which is caused by such factors as the missing lever of the main risk bearers ( depositors ) in corporate governance, the intensification of moral risk of controlling shareholders and the management, the need to protect depositors' interests and to consider public interests in the objective of governance. And lastly I analyze the systematic demand of the corporate governance of commercial banks. The general mechanics power of corporate governance is not enough to solve the new problems raised by the corporate governance of commercial banks and we need to find a new path of governance.

Therefore, the systematic demands of the corporate governance of commercial banks are (1) to allow outsiders to take part in the corporate governance of commercial banks; (2) to protect depositors and public interests; (3) to carry on effective supervision and check to controlling shareholders and the management.

Chapter two discusses from the point of the view, which is the adapting of banking supervision system to the systematic demand of the corporate governance of commercial banks. I focus on two aspects: one is the supervision of commercial banks and its system, the other is the function of banking supervision in the corporate governance of commercial banks. As for the former, I analyze the theory and practice of banking supervision and introduce the commercial bank supervision system from the aspects of supervision power and supervision category. As for the latter, I first discuss the provisions of international organizations on the role of banking supervision in the corporate governance of commercial banks. Then I discuss the influences of banking supervision on the rights, liabilities and responsibilities of shareholders, directors and senior officers based on related legal provisions and supervision rules. The major influences are: the restriction on the implementation of power by the shareholders of commercial banks, the influence on the directors in their qualifications, criterion of duty of care, and the object of their liability, the requirements on the independence of board of directors and the contents of its responsibility, and the influence on the senior officers in their qualifications and management power. Then I discuss the special position of banking supervision organization in its role as beneficial representative of both depositors and the public in the corporate governance of commercial banks. Finally, I discuss how the banking

supervision organization's intervention to the corporate governance of commercial banks helps realizing the legal value of equity and safety. Based on the above discussion, I conclude that banking supervision organization takes part in the corporate governance of commercial banks as the beneficial representatives of both depositors and the public and, through its supervision power, influences the allocation and implementation of the rights, liabilities and responsibilities of the shareholders, directors and senior officers of commercial banks. This may realize its supervision and check on the controlling shareholders and the management of commercial banks and fill the gaps of the general mechanics of corporate governance.

Chapter three discusses the problems in the corporate governance of the commercial banks in China. First, by reviewing the evolution of the corporate governance of the commercial banks in China I find out that government orientation significantly influences the corporate governance of commercial banks. Then I discuss the problem of special insider control. In the commercial banks of China, in case there are state-owned shares, the controlling shareholders are generally state-owned shareholders, which arise the problem of how to exercise the rights of state-owned shares. This problem becomes more serious by the fact that the directors, supervisors and senior officers are designated by government. This makes the insider control in the commercial banks of China unique and with characteristics of economic transition. The major cause of the above problems is that we have not yet established a sound state-owned assets contributor system in financial enterprises. In the end, I discuss the special internal organization structure and limited outside governance environment. In China, the relation between P. C committee and the board of directors, board of supervisors as well as

the working meeting of bank president needs to be straighten out. Since the product market competition is still not enough, the merger and acquisition market is not brisk, and the market of bankers is not set up yet, the discipline of outside market is rather limited. Based on the above analysis, I conclude that the systematic demand of the corporate governance of commercial banks for banking supervision in China is much stronger than the systematic demand of the corporate governance of commercial banks for banking supervision in developed countries.

Chapter four argues that perfecting banking supervision system is an important way to improve the corporate governance of commercial banks in China. I carry on the analysis from two aspects: one is that banking supervision organization is a major force in the corporate governance of commercial banks in China; the other is that banking supervision may promote the corporate governance of commercial banks in China. The first problem is explored from three aspects: first, the drawback of corporate governance of commercial banks in China at present are mainly reflected by the facts that the board of directors needs further strengthened, the function of board of supervisors is not fully played, and information disclosure needs to be further improved; second, the systematic difficulty in the improvement of the corporate governance of commercial banks in China mainly lies in the fact that the establishment of state-owned assets contributor system in financial enterprises is still far away and during China's economic transition, the board of directors and board of supervisors are yet to play their due roles due to systematic restrictions; third, an analysis is conducted on the subjects involved in the corporate governance of commercial banks in China and the comparison is made among the shareholders, creditors (including depositors), manager, employees, and banking supervision



organization regarding the roles they play in the corporate governance of commercial banks in China. The analysis from the above three aspects leads to the conclusion that banking supervision organization is an important corporate governance lever in commercial banks of China. I examine the latter problem from the perspective of both general review and empirical analysis. Generally, banking supervision organization in China directs and urges the commercial banks to set up sound corporate governance by making regulations and strengthen the “enforcement” of corporate governance by exercising supervision and assessing corporate governance. In this part, I comb the laws, rules and regulations and exercisable files issued by banking supervision organization and make systematic analysis and comment on those contents related to the corporate governance of commercial banks. Based on the analysis of three selected cases I find that banking supervision organization supervise strictly at the threshold of market and avoid the set up of commercial banks with inherited corporate governance defect. It changes the allocation of the rights, liabilities and responsibilities of commercial banks’ internal organization structure by examining article of association. It helps the commercial banks to improve their corporate governance by exercising examination. I draw a conclusion on this basis that banking supervision in China greatly influences the corporate governance of commercial banks and has positive effects. Perfecting banking supervision system is an important way to improve the corporate governance of commercial banks in China.

Chapter five discusses the perfection of related legal rules of banking supervision in order to promote the corporate governance of commercial banks. I first discuss the problems in the legal rules of banking supervision related with the corporate governance of