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# 网上银行业务安全的法律保障机制研究

## Research on the Legal Safeguard Mechanisms for the Safety of Internet Banking

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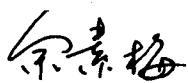
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## 摘 要

伴随着网上银行业务的兴起与迅猛发展,日益暴露和凸显出来的各种安全问题俨然成为当前制约网上银行业务进一步推进的重大瓶颈。对于这些现实中存在的网上银行业务安全隐患,国际社会传统的法律规范体系显然已经无法有效应对和处理。因而,分析网上银行业务安全问题的深层内涵与实质,研究其特殊表现与不同诱因,探讨如何针对其特殊性构建和完善更为有力的网上银行业务安全法律保障机制极具现实意义。鉴于此,本书在金融法学与国际金融法学理论的基础上,综合运用规范分析、实证分析、比较分析等研究方法,对网上银行业务安全及其法律保障问题展开了系统研究。

全书除引言部分外,共分五章。

第一章为网上银行业务及其安全问题概说。该章首先对网上银行业务的基本概念与主要特点予以界定和归纳,而后以网上银行业务活动中实际存在的安全问题为根据,从理论上概括网上银行业务安全应有的三层含义,即计算机系统与信息安全、交易安全以及网上银行机构及整个行业体系安全,并对网上银行业务安全问题的根源、实质及解决途径进行初步探讨;在此基础上,再对当前国际社会关于网上银行业务安全保障的立法实践加以概括介绍,提出了关于构建网上银行业务安全法律保障机制的总体设想,指出该机制应由系统与信息安全保障机制,网上银行交易安全保障机制,以及网上银行机构及其行业安全保障机制等三大部分构成。本章在提出问题的同时,还初步提出了解决问题的总体方案,旨在为后文的深入分析确定总纲和奠定基础。

第二章至第四章以第一章的初步分析为依据,分别从系统与信息安全保障、交易安全保障和银行机构及行业安全保障等三方面对国际社会网上银行业务安全法律保障机制展开了深入的实证研究和考察。这三章着重分析和论证的问题,构成全文之主体部分。

其中,第二章为网上银行业务系统与信息安全法律保障机制研究。该章从网上银行业务安全的第一层含义出发,分析了威胁网上银行业务系统与信息安全的主要风险因素,论证了实施法律介入的必要性,进而较为详尽地考察和探讨了目前国际社会业已确立的关于网上银行业务系统与信息安全保障的主要政策与法律机制。这些机制主要涉及如下四个方面:一是确保计算机信息系统与网络整体安全的国际与国内政策法律保障机制;二是保证诸如加密、电子签名等重要安全技术手段充分发挥其保安功能的国际与国内法律规范;三是促使网上银行业务系统与信息安全达到其行业所要求的特定安全水平的行业自律机制;四是要求网上银行业务的特殊系统与信息安全风险得到有效防范与控制的具体银行业监管制度。

第三章为网上银行交易安全法律保障机制研究。该章先行剖析了网上银行业务的主要参与人及其相互关系,说明了网上银行交易活动的特殊性 with 复杂性;继而围绕网上银行业务安全的第二层含义,就危及网上银行交易安全的主要因素以及革新传统交易法律制度的必要性展开了具体分析;在此基础上,又针对国际社会网上银行交易安全法律保障机制的各项主要制度进行了较为细致的探讨和研究。首先,由于这些法律制度大多着眼于解决当前网上银行交易活动中因交易形式与过程电子化、虚拟化而产生的安全问题,因而该章对与此相关的一些重要法律规范进行了详细阐述和分析,既涉及对包括网上银行业务活动在内的所有电子商务活动均可一般适用的基础性法律制度,如有关数据电文的法律制度、有关网络空间电子合同的法律制度以及有关电子签名与认证的法律制度等,又涉及专门适用于调整和规范电子资金划拨等网上银行特定交易活动的特殊交易法律制度。其次,考虑到还有一些重要法律制度的创设或改进是特别为处理网上银行交易中日渐严重的客户权益安全保障问题



而进行的,因而该章随后又围绕客户权益的特别法律保障机制展开论述。最后,该章还就充分反映当事人意思自治与灵活性的合同机制与行业自律机制在保障网上银行交易安全方面的基础与补充作用加以阐释和讨论。

第四章为网上银行机构及其行业安全法律保障机制研究。鉴于银行业监管法律制度在这一层次保障机制中处于核心地位,该章实际上集中探讨和研究了网上银行业务监管法律机制。该章首先从深刻剖析网上银行的各种风险及其特点入手,阐述了这些风险因素对于传统银行业监管法律制度的冲击与挑战,进而提出了改革传统银行监管法制的必要性和紧迫性;接着,该章分别从市场准入监管制度、持续性审慎监管制度及市场退出制度等三大方面深入阐明了国际社会关于改革与完善网上银行业务监管法制的基本立场与实际做法,其中又特别以市场准入监管制度和持续性审慎监管制度这两部分内容为重点而详加论述。

在对国际组织有关网上银行业务监管的研究成果进行考察和分析时,考虑到巴塞尔委员会在该领域的权威性和影响力,笔者在兼顾其他一些国际组织的同时,特别针对巴塞尔委员会所发布的有关监管原则进行了重点探讨;而在对网上银行业务监管法制进行国别研究时,一方面,鉴于美国网上银行业务监管法律体系所具有的复杂性、特殊性与先进性,笔者将美国的有关监管法制作考察之重心进行了较为详细的研究;而另一方面,为了反映处于不同经济状态的国家均重视发展网上银行业务战略、实施有效监管与安全保障措施的这一现实,笔者在考察部分发达国家和新兴市场经济国家和地区网上银行业务监管法律实践的同时,也选取了如印度等部分发展中国家的相关实践予以分析和研究。

在有关网上银行业务安全法律保障机制的全面探讨和论述中,考虑到系统与信息安全保障以及网上交易安全保障同一般电子商务的安全保障存在较多共通性和相似性,为避免本书沦为一般电子商务安全的法律保障问题的研究,笔者又围绕其中最能反映金融行业特色、最具网上银行业务鲜明个性特征的银行业监管法律机制部分

展开了更为细致深入的研究与探讨。

第五章则集中论述了我国网上银行业务安全法律保障机制的构建与完善问题。在这一部分，笔者的逻辑是，建设网上银行业务安全法律保障机制作为解决我国网上银行业务安全问题的基本法律途径，将前述分析所得的国际社会有关网上银行业务安全保障的有益经验应用于该机制的具体构建与完善过程。本章是全文的最后结论部分，它落脚于我国的具体实际，在阐明我国网上银行业务发展的特殊战略意义与必要性，分析我国网上银行业务及其安全保障法制建设的现状基础上，将国际经验与我国具体实践相结合，提出了完善我国网上银行业务安全法律保障机制的构想和建议，特别是完善我国网上银行业务监管法制的具体构想和建议。

**关键词：**网上银行业务安全 网上银行业务 法律保障机制  
法律监管

## ABSTRACT

Accompanied by the springing up and rapid development of internet banking, various security problems are increasingly emerging and distinctive, just having become the major bottlenecks which are restricting internet banking from further developing. Obviously, the traditional legal systems in the international society are incapable to effectively respond against or to solve these hidden but real troubles existing in the internet banking activities. Thus, it is of great practical significance to analyze the deep connotations and essences of the security problems of internet banking, to examine their peculiar manifestations and different causes, and to explore how to build up and improve the stronger legal safeguard mechanisms in accordance with the particularity of internet banking. In view of that, on the basis of theories of financial jurisprudence and international financial jurisprudence, the author comprehensively applies the analytical methods of positivism, normativism and comparison to make systematic research on the issues of the legal safeguards for the safety of internet banking.

The dissertation consists of five chapters besides the introduction part.

Chapter one is the summary for the safety problems of internet banking. In that chapter, the author first defines and concludes the basic concepts of internet banking and the main

characteristics thereof, then she summarizes the three-layer implications for "the safety of internet banking" in theory according to the various security problems existing in the internet banking practice, that is, the security of computer systems and information, the security of transaction, and the safety and soundness of internet banking institutions and the whole banking systems as well, and thereafter she makes an initial analysis on the sources, essences, and resolutions about the safety problems of internet banking. On that basis, the author also briefly introduces the international legislative practices with regard to the assurance of safety of internet banking, and puts forwards the general conception about constituting the legal safeguard mechanisms, and points out that the mechanisms should be composed by three parts, namely the safeguard mechanisms for system and information security, for transaction security, and for the safety and soundness of internet banking institutions and the industry, etc. In Chapter one, the author not only raises problems, but also indicates the general resolutions for the problems, thus the chapter in fact establishes the general principles and lays the foundation for the deeper analysis in the later chapters.

It is based on the initial analysis made in Chapter one that the following three chapters ranging from Chapter two to Chapter four make the deeper exploration and positivist research on the legal safeguard mechanisms for the safety of internet banking in the international society, respectively from the angles of the safeguards for system and information security, the safeguards for transaction security, and the safeguards for the safety and soundness of internet banking institutions and the whole banking industry as well. The three chapters constitute the main parts of

the whole dissertation, by way of analyzing and demonstrating the problems.

Among them, Chapter two is mainly about the research on the legal safeguard mechanisms for the security of internet banking system and information. In the perspective of the first layer implications of the safety of internet banking, the author in this chapter analyzes the major factors threatening the system and information security, demonstrates the necessity of legal interference, and then in great detail examines and discusses the main policies and legal mechanisms for safeguarding the security of system and information established in the international society at present. The aforementioned mechanisms mainly involve the following four respects: the first one is the international and national policies and legal safeguard mechanisms, which aim at ensuring the entire security of the computer systems and networks; the second one is the international and national laws which try to enable some important security technologies, such as cryptography and electronic signatures, to fully perform their functions; the third one is the industry self-regulating mechanisms which attempt to urge the internet banking systems and the related information to come up to the specific security level required by the industry; and the fourth one is the concrete banking supervision laws and systems which require the special security risks of internet banking systems and information to be prevented and controlled effectively.

Chapter three specifically addresses the legal safeguard mechanisms for transaction security of internet banking. In this chapter, the author first analyzes the main parties of internet banking and the relationships between them, reflecting the particularity and complexity of the internet banking transaction.

After that, surrounding the second layer implication of the safety of internet banking, the author concretely discusses the major risky factors which perhaps affect the security of transaction and explains the necessity of transforming the traditional transactional legal systems. On that basis, the author further makes a more detailed examination on the legal mechanisms for transaction security. At first, by virtue that most of these legal systems focus on solving the main security problems resulted from electronization and fictionization of the transaction forms and procedures in the current transactional internet banking activities, the author in this part makes the detailed elaboration and analysis of some relevant important legal rules, which not only involve those basic laws generally applicable to all the electronic commercial activities including internet banking, for instance, the legal systems of the data message, of electronic contracts entered into in the internet space, and of electronic signatures and certification as well, but also cover those special legal systems for transaction specifically applicable to certain particular internet banking transactions such as electronic funds transfer. Secondly, considering that some other important legal systems are created or corrected for the purpose of addressing the increasingly serious security problems which have been threatening the rights and benefits of customers, the author therefore expounds the special legal safeguard mechanisms for the customers' rights and benefits. Finally, the author also explains the fundamental and supplementary roles played by the contractual mechanisms and the self-regulating mechanisms in safeguarding the transaction security of internet banking.

Chapter four concerns the study on the legal safeguard mechanisms for the safety and soundness of internet banking

institutions and the whole industry. Considering that the legal systems on banking supervision lie at the core of the entire mechanisms, the author in fact makes the concentrated exploration on the legal mechanisms for the supervision of internet banking in that chapter. First of all, the author profoundly analyzes various risks related to internet banking, and sets forth the challenges brought by them to the traditional banking supervision laws, and further points out that it is necessary and imminent to transform the traditional laws. Thereafter, the author carefully explores the basic standpoints and actual practices of the international society in the respect of transforming and improving the internet banking supervision legal systems, including the three major parts such as the market access supervision, the ongoing prudential supervision and the termination supervision, and the first two parts are considered as the focal points of the exploration.

While examining the research products obtained by the international organizations in the field of internet banking supervision, the author treats the relevant supervisory principles issued by the Basle Committee as the most important objects of study although she examines at the meantime some documents made by other international organizations, for the Basle Committee is so authoritative in the international banking supervision field. When discussing the internet banking supervision laws in different legal jurisdictions, on one hand, the author considers the legal practices in the United States as the focal points for they are so special, complicated and advanced, on the other hand, the author also chooses some other countries including the developed countries, emerging market economic countries and developing countries as the objects of study so as to

show such an important fact that almost all the countries of different economic conditions emphasize the strategies of developing internet banking and the implementation of the effective supervision and safeguard measures.

During the exploration of the legal safeguard mechanisms for the safety of internet banking, the author examines more about the internet banking supervision legal systems for the reasons that they are more capable of reflecting the characteristics of banking. In comparison, the legal safeguard mechanisms for the security of system and information as well as those for the security of transaction are considered less important, and the reason is that these two parts have many common and similar places with the legal safeguard mechanisms for the security of general electronic commerce.

In Chapter five, the author collectively discusses the problems of constructing and improving the Chinese legal safeguard mechanisms for safety of internet banking. The logic implied by the author here is to consider building the legal safeguard mechanisms as the basic legal approaches to resolving the safety issues of internet banking in China, and then to apply those helpful experiences obtained from the international society to the specific progress of constitution and improvement of the Chinese legal safeguard mechanisms. As the last and concluding part of the dissertation, this chapter finally focuses on Chinese concrete practices. On the basis of explaining the special strategic meanings of developing internet banking in China and the necessity of developing internet banking, as well as analyzing the current conditions about development of Chinese internet banking and about Chinese relevant legislation, the author combines the international experiences with our concrete situations, then puts



forward some detailed reflections and suggestions on improving current legal safeguard mechanisms for the safety of internet banking, especially on improving current supervision laws of internet banking.

**Key words:** safety of internet banking      internet banking  
                 legal safeguard mechanisms      legal supervision