

光华法学文丛

高晋康 主编



光华文丛

# 金融控股公司 内部治理机制研究

梁远航  
著



法律出版社  
LAW PRESS·CHINA

# 金融控股公司 内部治理机制研究

梁远航  
著

本书得到四川省哲学社会科学重点研究基地中国金融法研究中心资助  
本书为西南财经大学2014年度『中央高校基本科研业务费专项资金』项目



法律出版社  
LAW PRESS·CHINA

## 图书在版编目(CIP)数据

金融控股公司内部治理机制研究 / 梁远航著. —北京: 法律出版社, 2014. 10  
ISBN 978 - 7 - 5118 - 6724 - 7

I. ①金… II. ①梁… III. ①金融公司—控股公司—企业内部管理—研究 IV. ①F831.2



金融控股公司内部治理机制研究

梁远航 著

责任编辑 郑 导  
装帧设计 汪奇峰

© 法律出版社·中国

开本 A5  
版本 2014 年 9 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 廊坊市精彩印刷有限公司

印张 9.875 字数 215 千  
印次 2014 年 9 月第 1 次印刷  
编辑统筹 独立项目策划部  
经销 新华书店  
责任印制 张建伟

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

西安分公司/029-85388843

重庆公司/023-65382816/2908

上海公司/021-62071010/1636

北京分公司/010-62534456

深圳公司/0755-83072995

书号:ISBN 978 - 7 - 5118 - 6724 - 7

定价:35.00 元

(如有缺页或倒装,中国法律图书有限公司负责退换)

## 序

金融控股公司作为金融经营综合化的制度创新,虽然已有几十年的历史,但对于金融现代化才刚刚起步的我国,金融控股公司的大量引进和创设仅仅十年有余,因此,如何在充分发挥金融控股公司制度优势的同时,又能有效控制其经营风险,对于我国而言,仍是一个制度规定尚付阙如,理论研究深入不足,实践运行艰难摸索的难题。因此,有关金融控股公司的研究也成为我国近几年理论研究的热点问题,但是现有的研究更多地着眼于金融控股公司的效率优势和监管制度,但对于如何从内部治理的角度来探讨金融控股公司内部的权力配置和科学治理却被多数的研究所遮蔽,从这个意义上讲,梁远航同学从金融控股公司内部治理视角出发,以法学的规范分析为基础,对我国金融控股公

公司内部权力的合理安排和科学架构给予了较为全面和深入的探讨,应当说,其既是对我国现有金融控股公司理论研究一定程度的查漏补缺,同时也将对我国金融控股公司的现实运行优化起到一定的理论指导作用。

《金融控股公司内部治理机制研究》是在梁远航的博士论文的基础上而成。该书揭示出金融控股公司内部治理上不同于一般控股公司和单一企业的特性,并立足于我国实际,总结出我国金融控股公司内部治理机制失当后导致的特殊风险,以这些特性为“靶心”,勾勒出我国金融控股公司内部治理机制优化的特殊举措和路径。作为梁远航同学的博士指导教师,我认为这本书除视角的新颖性外,还具有如下优点值得肯定:一是对我国金融控股公司进行的类型化分析具有较好的理论归纳力和综合力,对于我国更好地把握和分析金融控股公司的内部治理特点和相应的差异化监管政策是具有相当的借鉴作用和功效;二是作者在书中大量援引我国现有金融控股公司的章程,案例以及自身工作经历进行实证研究,这种实证研究的思路和做法也是当前我国博士论文研究方法中值得大量推广和运用的;三是本书从法学视角,着眼于金融控股公司内部治理机制的微观解构,阐释金融控股公司内部组织与组织间治理的联接性和依存性,从而导出我国金融控股公司内部治理机制优化建构努力的方向和措施建议,其对策建议在我看来是具有一定的现实针对性和可行性的。

虽然在我看来本书具有上述优点,但仍存在一些不足,譬如对于金融控股公司在我国生存发展特殊语境的分析尚有所不足,对于公司内部治理机制的理论分析深度仍有相当的提升空间,这些都有待于梁远航同学通过进一步的理论学习和实践来提高。

梁远航同学为西南财经大学法学院的全程学生、本科、硕士

和博士均在法学院学习,我在他本科期间即与其结识,深知其人,为人正直,天资聪颖,勤奋努力,踏实肯干,敢于担当。我骄傲于有这样的学生,更愿在此祝福他毕业以后人生更加美好和幸福!

是为序。

鲁 篱

2014 年 6 月 18 日

## 内容摘要

虽然我国确立了“分业经营、分业监管”的金融体制,但受制于全球金融竞争和自身发展需要,金融混业经营的步伐从未停止过。自2001年10月,国务院批准中信集团整体改制方案后,金融控股公司的形态更获得了官方的认可和确认,金融控股公司在我国金融版图上大量涌现,并且展现出了较强的经济控制力和影响力。然立法和监管改革的滞后,使得我国金融控股公司缺乏必要的立法管制及存在严重的监管套利和监管空白,同时其在内部治理机制上要么照搬单一公司的治理模式,要么将子公司直接当成分支机构进行管理,严重侵害子公司的独立法人格,并侵害少数股东及利益相关者的合法利益,此状况如长期持续,产生的破坏力将远远大于金融控股公司所带来的经济效

益。2007 年由于金融危机导致的全球经济危机至今还未完结,金融控股公司在这场危机中所表现出的巨大破坏力仍让我们记忆犹新,作为 2007 年危机源头的美国虽号称具有完美的公司治理法律和外部约束市场,但大量金融控股公司的倒下证明了金融控股公司内部治理机制的特殊性和良好内部治理机制的重要性。

书稿立足金融控股公司内部治理机制这一主线,聚焦于金融控股公司区别于一般控股公司、单一公司的特殊性,由此引发金融控股公司内部治理的特殊性以及我国金融控股公司内部治理机制失当所导致的特殊风险,并针对我国金融控股公司内部治理机制中的特殊问题,力图构建出良好且系统的内部治理制度予以回应,同时借助外部规制强化内部治理机制的运行和实施,将纸面的需要转化为现实。研究路径为:金融控股公司内部治理机制的特殊性→我国金融控股公司内部治理机制存在的问题及失当后的特殊风险→国际有关治理指引、发达国家及我国台湾地区金融控股公司内部治理机制的比较分析→支持金融控股公司内部治理优化的理论基础→优化金融控股公司内部治理机制的特殊举措及必要的外部规制分析。研究结论主要是针对金融控股公司内部治理机制具有的特殊性,由此产生了特殊风险并提出了特殊的治理需求,在金融控股公司内部治理机制优化中必须对此予以回应,以充分发挥金融控股公司的经济功能,降低金融控股公司的风险,防范生成系统风险。全文除引言部分外,共有六章,具体包括以下内容:

第一章分析了金融控股公司内部治理机制的特性问题。金融控股公司兼具金融业和控股公司的双重特性,因此,呈现出行业特殊性、风险传导特性和监管特性,并且金融控股公司复杂的资本结构、公司结构、组织结构、经营结构及财务结构的运行特征



使得金融控股公司内部治理机制上具有公司治理目标多元性、多任务、多层次委托—代理模式、多样的利益冲突及利益相关者的特殊保护地位等特性,凸显出金融控股公司在内部治理机制上与单一公司及一般控股公司的差异,并产生出特殊的法律问题,如关联交易、监管套利、信息不当利用、资本虚增及不正当竞争。针对上述特性,进一步勾画出金融控股公司内部治理机制的一般框架,并深入分析了内部治理机制中不同层面对风险管理的影响程度及内部治理机制失当后的特殊风险,再次论证了金融控股公司内部治理机制的特殊性和特殊价值。

第二章对我国金融控股公司内部治理机制进行了实证研究。对我国金融控股公司内部治理机制的实际情况按照金融控股公司母公司的不同进行类型化分析,梳理了中信集团、四大国有银行、平安、广发证券、华融资产管理公司及东方集团的内部治理情况。我国金融控股公司的经营模式缺乏统一的标准,既有纯粹型金融控股公司又有事业型金融控股公司,经营范围也十分广泛,即可拥有金融子公司又可控股实业等,但在内部治理机制建设上没有体现出金融控股公司的特性,由此归纳出我国金融控股公司在内部治理机制上的特殊问题,揭示了我国金融控股公司由于内部治理机制失当后将产生的特殊风险,并通过中信泰富和德隆的案例分析再次证明了我国金融控股公司内部治理机制失败后导致的严重风险。

第三章展开了金融控股公司内部治理机制的比较分析。通过对国际上较优的公司治理指引的介绍,选取美国、英国、德国、日本及我国台湾地区在金融控股公司内部治理机制上的立法实践进行分析,并对花旗集团、德意志银行及国泰金控的内部治理机制微观设计进行考察,从宏观微观两个层面探寻金融控股公司内部治理机制完善的主要方向和思路。

第四章对优化金融控股公司内部治理机制的理论基础进行了梳理和分析。金融控股公司的特殊性使得其在内部治理机制优化中的理论基础也具有特殊性。委托—代理理论是公司治理的基础理论,在金融控股公司的模式下,委托—代理理论的进一步发展为金融控股公司内部治理机制优化的进路提供了理论依据和指引,金融控股公司作为金融机构的聚集平台,其展现的金融脆弱性和金融联系传染机制将更加直接和深入,因此,金融脆弱性理论和金融联系传染机制理论为金融控股公司在内部治理机制的风险控制机制上提供了理论指导,此外信息不对称现象在金融控股公司运行中层出不穷,运用信息不对称理论,建立信息披露的激励和约束机制是解决信息不对称的关键举措,同时借助利益相关者理论研究成果,通过维护利益相关者在金融控股公司的重要地位,进一步优化内部治理机制。

第五章对金融控股公司内部治理机制的重构路径进行了研判。在前面研究的基础上,本章分为两节对金融控股公司内部治理机制的重构进行了阐述,第一节基于金融控股公司属于控股公司的一种,对其具有控股公司的一面在内部治理机制优化中的一般路径进行了分析。本书认为:一是在我国应将金融控股公司的经营模式限定为纯粹型金融控股公司,并且经营范围上应与实业严格隔离;二是在股权结构及交叉持股规制上应尽量减少恶意行使控制权的机会;三是应在治理结构上实现母子公司的衔接,并通过机制改善促进独立董事发挥作用;四是要规范控制权行使,建立控制权行使的激励约束机制,同时应建立控制权行使后的利益补偿机制。第二节对优化金融控股公司内部治理机制的特殊举措进行了分析。首先归纳了章程治理在金融控股公司的特殊价值,并针对我国金融控股公司章程的实际状况提出通过章程治

理促进内部治理机制优化的具体措施。其次建立风险隔离机制,丰富和完善“防火墙”,通过内部治理机制防止风险蔓延和传递。再次,促进信息披露,增强透明度。书稿从内部治理机制如何促进信息披露,及信息披露如何反作用于内部治理机制的优化进行了论述。最后构建利益相关者的参与及保护机制,增进利益相关者在金融控股公司治理中的参与度,并构建对利益相关者的保护措施,以维护金融控股公司的社会公信力。

第六章探讨了金融控股公司内部治理机制的外部规制措施。市场不是万能的,如果单纯依赖金融控股公司内部治理机制的自我规范无异于与虎谋皮,因此,基于大众利益之考量,在金融控股公司内部治理机制建设中必须引入外部规制,一方面解决公共产品提供问题,另一方面解决金融控股公司的外部性问题,并通过外部规制强化内部治理机制的实施。本章主要从行政监管、立法规制、行业自律及市场激励四个方面对外部规制措施进行了论述,并在论述中对外部规制的主要边界、主要途径及责任追究等进行了阐述。在行政监管方面提出为缓解金融控股公司监管套利和监管空白,在目前存在制度依赖的情况下,有必要分三步走实现监管体制的改革,以提高对金融控股公司的监管效能。在行业自律方面,提出需要完善行业协会的作用,一方面由于行业协会的权力来源于成员企业的授权,因此,像监管一样通过召开联席会议的方式解决金融控股公司的行业自律缺少合法性基础,需要建立单独的金融控股公司行业协会,另一方面自愿入会是行业协会的题中之义,但可通过在评级制度中将其作为扣分项促使金融控股公司要么入会,要么通过提高其他项目得分来维持评级。

**关键词:**金融控股公司 内部治理机制 特性 优化

## **Abstract**

Although China established the “separate management, separate supervision” of the financial system, but be restricted by the global financial competition and their own development needs, the pace of financial mixed never stopped. Since October 2001, the State Council approved the CITIC Group’s overall restructuring plan, the financial holding company also received the official form of recognition and confirmation, financial holding companies in China’s financial territory have emerged in large numbers, and show a strong economic control and influence. But legislative and regulatory reforms lag, make China’s financial holding company lack the necessary legislative control and exist a serious

regulatory arbitrage and regulatory gaps, while its internal governance mechanisms are either copy a single company's governance model, or manage as a branch directly, this way seriously violates the legal personality independent of subsidiary and infracts minority shareholders and stakeholders's legitimate interests. This situation such as long-term sustainability, the destructive power will be far greater than financial holding company brought economic benefits. As the source of the crisis in the United States in 2007, although the company claims to have a perfect market governance laws and external constraints, but a large number of financial holding companies fell demonstrates financial holding company's internal governance mechanisms particularity and importance of good internal governance mechanisms.

This article is based the main line of financial holding company's internal governance mechanism, focuses on the financial holding company from the general holding company, the particularity of a single company, which triggered a financial holding company's internal governance particularities and internal governance mechanisms of China's financial holding company misconducts cause special risks and for the internal governance mechanisms of the financial holding company in a special issue, try to build a good system of internal governance systems respond, meanwhile the help of external regulation to strengthen the operation and implementation of internal governance mechanisms, lead the paper needs into reality. Research path: Financial holding company's internal governance mechanisms particularity; internal governance mechanism of the

financial holding company exists problems and misconduct lead to the special risks; internal governance mechanisms of international guidelines on governance ,financial holding companies in developed countries and China's Taiwan are comparative analysis; the theoretical basis of internal governance of financial holding company; special measures to optimize the financial holding company's internal governance mechanisms and the necessary external regulatory analysis. Conclusion of the study is mainly directed against the financial holding company's internal governance mechanism is unique, the resulting special risks has made a special governance requirements the financial holding company's internal governance mechanism must be optimized to respond to this, in order to give full play to the financial holding company economic function and reduce the risk of a financial holding company, to prevent systemic risks generated. Addition to the introduction section, six chapters of, the total specifically including the following:

The first chapter analyzes the financial holding company's internal governance mechanisms characteristic problem. Financial holding companies have both the dual characteristics of financial and holding company, thus showing a special industry, risk transfer characteristics and regulatory characteristics, as the complexity of the financial holding company's capital structure, corporate structure, organizational structure, management structure and financial structure operational characteristics that make internal governance mechanisms of financial holding company have corporate governance objectives pluralism, multi-tasking multi-level commission-agent model, a

variety of stakeholders conflict of interest and special protection status and other characteristics, highlighting the internal governance mechanisms differences between financial holding company with a single company and holding company, and produce a special legal issues, such as related party transactions, regulatory arbitrage, improper use of information, capital inflated and improper competition. In response to these features, further lays out a financial holding company within the general framework of governance mechanisms and in-depth analysis of the different aspects of internal governance mechanisms impact on risk management and internal governance mechanisms misconduct leads the special risks, once again demonstrated the financial holding company's internal governance mechanisms particularity and exceptional value.

The second chapter is about the empirical research of our financial holding company's internal governance mechanism. According to our Financial Holding Company's internal governance mechanism the actual situation, based on the financial holding company parent of different types of analysis performed, combed the CITIC Group, the four state-owned banks, Ping an, GF Securities, China Huarong Asset Management Corporation and the Eastern bloc's internal governance. Our financial holding company's business model lack of uniform standards, both purely financial holding companies and operately financial holding companies, financial holding company operating in a very wide range, it can have but also controlling industrial and other financial subsidiaries, but in the internal governance mechanisms construction does not reflect the

characteristics of the financial holding company, which summed up China's financial holding companies in the internal governance mechanisms on specific issues, and reveals our financial holding company misconduct due to internal governance mechanism will produce the special risks, further to CITIC Pacific and Deron case study confirms our financial holding company after the failure of internal governance mechanisms lead to serious risks.

Chapter three launched financial holding company's internal governance mechanisms comparative analyzed. Through the international guidelines on corporate governance optimum presentation and select the United States, Britain, Germany, Japan and Taiwan region of China in the financial holding company's internal governance mechanisms legislative practice and Citigroup, Deutsche Bank and Cathay Financial Holding's internal governance microscopic mechanisms study design, which from both macro and micro levels to explore the main directions and ideas of sound internal governance mechanisms of financial holding company .

Chapter IV has combed and analyzed the theoretical basis of optimizing the financial holding company's internal governance mechanism. The particularity of the financial holding company makes its internal governance mechanisms optimization theory also has a particularity. Commission-agent theory is the basic theory of corporate governance, under the financial holding company mode, the commission-agent theory further development will provides a theoretical basis and guidelines for the financial holding company's internal governance mechanism optimization approach, financial holding companies as a



financial institution aggregation platform to show their financial vulnerability and financial linkages infection mechanism would be more direct and in-depth, so the theory of financial fragility and financial linkages Contagion theory provides a theoretical guidance for financial holding company in the internal governance mechanisms of risk control mechanism. Further information asymmetry in the financial holding company run after another, the use of asymmetric information theory to establish the information disclosure incentive and restraint mechanisms to solve information asymmetry is key initiatives, and with stakeholder theory research, through safeguard stakeholders in the financial holding company's important position further the internal governance mechanisms optimization.

Chapter V judged the financial holding company's internal governance mechanisms path reconstruction. Based on the previous study, the chapter described the financial holding company's internal governance mechanisms reconstruction dividing into two pairs, first based financial holding company as a holding company to analyze the general path of the internal governance optimization mechanisms. This paper argues that first our country should limit the financial holding company's business model to purely financial holding company, and industrial operating range shall be kept in strict isolation from industry; second, in the ownership structure and regulation on cross-ownership should minimize malicious exercise control opportunities; three, parent company should achieve convergence in the governance structure, and to promote the role of independent directors through the mechanism of improvement;