

光华法学文丛

高晋康 主编



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# 银行监管权 边界问题研究

熊伟  
著



法律出版社  
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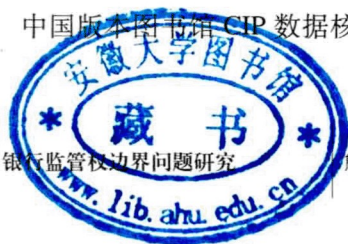
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## 序 言

由美国次贷危机引发并演变为全球性的金融危机,对世界实体经济造成前所未有的重创,而金融危机也成为全球金融监管改革最重要的推动力。随着金融市场的稳定和经济形势的向好,在后危机时代下国际社会已从采取短期政策措施以遏制危机蔓延转向对金融监管体系进行全面改革重塑,金融监管的边界问题受到广泛重视。虽然对金融监管特别是银行监管问题经济学界研究成果颇丰,但从法学界来看,目前鲜有从银行监管权边界角度系统性分析银行监管实践问题的研究著作。熊伟博士《银行监管权边界问题研究》一书以银行监管权边界为切入点,对国际社会银行监管权边界调适进行了全面梳理和比较研究,并以此次金融危机为例,分析了银行监管权边界的结构性缺陷,着重对中国银监会监管权纵横向边界存在的问题进行

了较为深入、系统和全面的研究,提出了改进措施。这是关于我国银行监管问题研究的新成果,对完善我国银行监管制度有着重要的学术价值和应用价值。

本著作是在作者的同名博士学位论文的基础上修改而成。在我看来,主要有以下几个创新之处:

第一,通过历史的实证考察,洞悉了银行监管权边界变动趋势和规律,为我国银行监管实践提供指导。本书对世界主要经济体美英、欧盟以及新兴市场国家俄罗斯、韩国的银行监管权边界进行了全面的立法考察和历史回顾,并且在每个重要阶段对边界变动情况进行了分析。本书还对美国银行监管权边界结构性缺陷进行了详尽分析,考察了世界主要经济体后危机时代银行监管权边界调适的新动向,得出了银行监管权边界变动的共性特点。这些共性的特点具有普适性,对我国银行监管权边界的制度设计具有重要的启示作用。

第二,本书对银行监管权纵向边界的讨论和研究,是立足于解决目前我国银行监管实践中存在的问题展开的,主要是讨论中国银监会监管权与商业银行经营自主权、与银行业协会自治权之间的边界问题。本书分析了银行监管权与商业银行经营自主权的冲突,并且对纵向边界的合理度进行了考量。本书从监管目标选择、金融安全考量和消费者权益保护三方面提出了银行监管权与商业银行经营自主权边界的确定标准。基于对“政府—市场”原有双路径到“政府—行业协会—市场”三路径的理性认识,本书将银行监管权与银行业协会自治权的边界纳入纵向边界研究范畴,分析了两者边界存在的问题,提出了边界完善的原则。这一研究视角的尝试,应当说具有一定的创意。

第三,在银行监管权横向边界方面,作者紧扣监管实践的热

点、难点问题,对目前我国银行监管实践中最具争议的热点问题:银监会与人民银行监管权、与证监会监管权、与金融国有资本出资人相关权力以及与地方金融办监管权力边界进行了分析和讨论。对这些热点、难点问题的研究,可以说反映出作者具有较为丰富的监管实践经验和较强的学术敏感性。

本书作者熊伟博士是我的博士生,他在西南财经大学攻读法学博士期间,勤于学习、善于思考、敢于创新,能够紧密结合自身从事的银行监管实践工作,完成具有系统化的学术型著作。这充分说明,实践工作者通过自身努力,同样可以在学术研究领域做出自己的贡献。当然,本著作也存在一些值得需要进一步研究的问题,如银监会与证监会对上市银行监管权的边界研究还需深入、在边界标准系统化方面还需加强等。我真诚希望熊伟博士在以后的银行监管工作中,继续加强理论学习,不断提高学术水平,提出对银行监管实践更具针对性、实用性和创新性的政策建议。

是为序!

鲁篱

2013年9月

## 内容摘要

银行监管是门艺术。艺术之道在于平衡,而平衡之关键则在于确定银行监管权边界问题。一方面,在商业银行的发展过程中,如何解决银行监管权对商业银行的限制与商业银行本身发展创新的矛盾,既能保持银行主体的创新发展活力,又能防范银行自身特殊性所可能产生的风险,在监管与发展之间寻求一个合理的度,一直以来是银行监管中的两难选择。解决问题的关键在于合理界定银行监管权与银行市场主体权利的边界,这也是增进银行监管权理性化程度和有效性的前提。另一方面,伴随着商业银行经营综合化的发展,各国对商业银行的监管又不仅限于一个监管部门。由此,在不同监管部门的监管权力之间划分出各自权力的界域,无疑是防止重复监管和空白监管最有效的制度安排。这不仅直接决定了权力主体在监

管体系中所扮演的角色,更标示着监管的科学性和法治化水平。本书试图分析和回答这些问题,全文分为五章,具体包含以下内容:

第一章分析银行监管权边界的基本理论问题。市场失灵是政府干预的前提,银行作为重要的要素市场,同样存在市场失灵问题,这是银行监管权存在的前提条件。本书采用具有逻辑上内在联系的公共利益理论、公共强制理论和法律不完备性理论论证银行监管权存在的正当性。进一步,利用监管俘虏理论、公共选择理论和监管辩证理论论证银行监管权边界的应然性。

第二章展开银行监管权比较考察。选取了美国、英国、欧盟以及俄罗斯和韩国的银行监管实践进行历史考察,从中探求银行监管权边界的松紧变化。美英两国代表了不同的监管体系。美英和欧盟是目前国际金融业最为成熟的地区。2007年金融危机以来,其银行监管的立法改革最为充分,出台的监管政策最具代表性,改革步伐迈得最大,充分反映了后危机时代下国际社会银行监管改革的最新趋势。而俄罗斯和韩国作为新兴市场国家的代表,其银行业面临的机遇和挑战与我国有很多相似之处。

第三章研究银行监管权的纵向边界问题。主要以中国银行业监督管理委员会(以下简称银监会)作为考察对象。分为两节,第一节重点分析银行监管权与商业银行经营自主权的边界。银行的趋风险性使得自身市场业务极易影响其他市场主体权益甚至公共利益的情况,因此,有银行必然有银行监管权的约束。结合《公司法》和《商业银行法》相关规定对商业银行经营自主权进行分析。在常态下,银行监管权对商业银行经营自主权的限制主要表现在对其市场准入、重大经营决策、高级管理人员选择、经营范围以及资产收益自由处分限制等方面。而在非常态下,银行监

管权主要涉及对商业银行违反审慎规则要求下的限制和对已不再具备继续生存能力的商业银行进行市场退出处理的限制两个方面。由于监管成本的存在,银行监管权对商业银行经营自主权的限制直接或间接地受到制约。监管过度、监管不足与边界的合理度没有必然关系。本书认为,银行监管权的合理边界应该是在确保追求相对静态的监管目标时不损害商业银行经营自主权的动态效率的区间波动。从监管目标选择、金融安全考量以及消费者权益保护等三方面提出了确定边界合理度的标准。第二节重点分析银行监管权与银行业协会自治权的边界问题。银行业协会自治的合理性在于利益之维护、中介作用之发挥、资源约束与成本节约之需要。本书认为,自治权具有“公私混合”的特征,更适合界定为一种私权力。契约让权、法律授权以及委托授权是自治权的三大来源。本书提出了自治权失灵理论,论证银行监管权干预银行业协会自治权的正当性,并对银行监管权与自治权相遇后的状态进行分析。结合我国银行业协会现状分析认为,“先天不足”是银行监管权与银行业协会自治权边界模糊的主要原因,并提出了边界完善的四个原则:充分尊重和保障自治权的行使是维护银行业自治权边界的前提;银行监管权介入银行业协会自治权边界的触发机制应以穷尽内部救济原则为判断标准;银行监管权介入自治权边界的广度应受有限监督原则的制约;银行监管权在具体干涉自治权时必须将比例原则作为重要考量因素。

第四章主要研究银行监管权的横向边界问题。银行监管权横向边界的设计没有统一的标准,本书选取银监会监管权与人民银行、证监会、国有金融资本出资人以及地方金融办相关权力的边界作为研究对象。本书认为,在银监会与人民银行监管权边界问题上各种银行监管权的配置模式孰优孰劣仍有争论,人民银行

保留部分监管权有其合理性。银监会与人民银行在行使监管权时存在监管权错位、监管权重叠和监管权协调不足等问题。从宏观审慎监管框架的角度对后危机时代银监会与人民银行监管权边界进行了设计。在银监会与证监会对上市银行监管权边界问题上,银监会与证监会监管权存在监管标准不一、监管措施不当以及监管效率低下的问题。基于上市银行新的风险特点及组合、业务发展方向,在边界的完善上从并表监管的视角入手展开。本书认为,银行监管权与国有金融资本出资人相关权力存在边界冲突的原因在于我国出资人的特殊身份而扮演“出资人与监管者”的双重角色。财政部直接作为国有金融资本出资人与银监会作为行业监管者之间存在角色错位的问题,在出资人选择方面给予排除,汇金模式是目前较为现实的选择。在与地方金融办监管权的边界问题上,分析了目前银监会派出机构与地方金融办存在职责不明的情况,从理顺分工和合作关系以及建立“大统一、小分权”的分层管理体制两方面构建两者权力边界。

第五章分析优化银行监管权边界的监管治理问题。不管是纵向边界还是横向边界,都是银监会在行使监管权过程中与外部市场主体或权力部门所发生的关系,而监管主体的监管治理对银行监管权的纵横向边界的完善至关重要。对监管治理的三个主要要素——独立性、透明度、问责性进行分析,并结合巴塞尔银行监管委员会发布的《有效银行监管核心原则》相关规定,对银监会的独立性、透明度、问责性进行评估,提出改进措施。

**关键词:** 银行监管 银行监管权 边界

## **Abstract**

Banking regulation is an art. The key point lies in the balance, and the key of the balance is to determine the boundary issues between banking regulatory power, banks and other regulatory authorities. On one hand, in the development of commercial banks, how to solve the conflict between the banking regulatory restrictions and banking innovation, to maintain the innovation and vitality of the banking institutions, meanwhile to guard against the risk that may arise in the banking sector particularity, to find a reasonable balance between regulation and development, has been a long-time dilemma. The key to solve the problem is to reasonably define the boundary of the banking regulation power and banking institution power, which is to promote

the rationalization of the power to govern and is the premise of effective regulation. On the other hand, along with the comprehensive development of commercial banks' operation, the national regulation of commercial banks is not limited to a regulatory authority. Thus, how to divide regulation power between different regulatory authorities is key to effective arrangement to overcome regulatory overlap and blank regulation, not only directly determine the role of the power to the main body in the regulatory system, but also mark the level of supervision of the regulatory science and the rule of law. This paper attempts to analyze and answer these questions. The text is divided into five chapters, and specifically includes the following:

The first chapter analyzes the basic theoretical issues of boundary of banking regulation power. Market failure is the premise of the government intervention. Banks, as an important element of the market, also face the problems of market failure, which is a prerequisite of banking regulation power. Apply the inherent public interest theory, the legitimacy of the incompleteness of public compulsory theory and legal theory to illustrate the necessity of banking regulatory power. Further, the use of regulatory capture theory, public choice theory and the theory of dialectical argument to prove banking regulation right boundary should be contingent.

The second chapter compares regulation power in different countries. Selecting the bank regulatory practice in the United States, the United Kingdom, the European Union as well as Russia and South Korea for historical research, and from which to explore

the bank custody of elastic change. United States and Britain are on behalf of different regulatory system. The United States and Britain and the European Union is the most mature areas of the international financial industry. After the financial crisis, they execute most fully legislative reform of banking regulation, the most representative of the introduction of regulatory policy, fully reflects the latest trends of the banking regulatory reform of the international community in the post-crisis era. Russia and South Korea as a representative of the emerging market countries, the opportunities and challenges faced by their banking sector have a lot of similarities with that of China.

Chapter III studies on longitudinal boundary issues of Banking Regulation power. China Banking Regulatory Commission is the object of observation. This chapter is divided into two sections. The first section focuses on analysis of boundary of banking regulation power and commercial banks operating autonomy. Banks' risky business affect other market players interests or public interests, so there must be regulatory power constraints. Combine the relevant provisions of the Companies Act with the Law on Commercial Banks to analyze the operational autonomy of the commercial banks. Under normal conditions, the banking regulation power restrictions on commercial bank operational autonomy mainly in the market entrance, major business decisions, the choice of senior management, business scope and restrictions on assets free disposition. And in the very state banking regulation power involve restrictions caused by violation of the requirements of prudential rules for commercial banks and to conduct market exit processing

limitations if viability of commercial banks no exists. Due to the existence of regulatory costs, banking regulation power restrictions on commercial bank operational autonomy, directly or indirectly, will be restricted. Over-regulation, under-supervision and the boundary do not exist a positive correlation. The book argues that the right boundary of the banking regulation in without harm to dynamic effectiveness of banking autonomy while pursue the relatively static regulatory objectives. From the regulatory target selection, financial security considerations, as well as the interests of consumers protection, this paper states reasonable degree standard of the boundary. Section II focuses on analysis of the Banking Regulation power boundary issues with the autonomy of Banking Association. The reasonableness of autonomy of the Banking Association is that the need for the safeguarding of the interests, playing intermediary role, resource constraints and cost savings. This book argues that autonomy has the characteristics of the public-private mix, more suitably it should be defined as a private power. Contract so that the power to legal authority, as well as an authorized agent are the three sources of autonomy. This book states autonomy failure theory argues that the correctness of Banking Regulation right to interfere with the autonomy of the legitimacy of the Banking Association, and the situations when regulation power and autonomy encounter. Combined with the status quo of China's Banking Association that "deficiencies" is the main reason of the Bank custody of the Banking Association of autonomy fuzzy boundaries and the boundary sound principles: full respect and protect the autonomy of the exercise is to safeguard the banking sector

autonomy premise of the boundary; banking regulation power intervention the autonomy boundary of the Banking Association trigger mechanism should be based on the principle of exhaustion of internal remedies criteria; bank regulators the right to intervene in the autonomy of the breadth of the boundary shall be governed by the principle of the constraints of limited regulation; banking regulation power in specific interference autonomy must be the principle of proportionality as important considerations.

Chapter IV researches lateral boundary issues of banking regulation power. The lateral interface design on Banking Regulation power has no uniform standard, the book select the power to Banking Regulatory Commission and the People's Bank, the Securities and Futures Commission, the state-owned financial capital investor and local financial powers as the object of study. On the boundary issue between China Banking Regulatory Commission and the People's Bank, the book argues that the various bank regulatory right configuration mode is better still argue, PBO retain partial custody of their reasonableness. Power dislocation between CBRC and the PBO exists in the exercise of regulatory right, overlapping regulatory power and custody of the lack of coordination and other issues. Design from a point of macro-prudential Hgulation framework of the post-crisis era have custody of the CBRC and the PBO boundary. On the boundary issue between CBRC and CSRC, the CBRC and the CSRC have custody of different regulatory standards, inappropriate regulatory measures and regulatory inefficiencies. Based on new risk characteristics and composition,

business development direction of listed banks, from the perspective of consolidated regulation perspective to make improvement of boundary. This book argues that, the conflict between Banking Regulation right and the powers of the state-owned financial capital investor lies in that the state-owned financial capital investor plays dual role of investors and regulators. The role of Ministry of Finance as a state-owned financial capital investor and CBRC as the role of industry regulators has a problem of dislocation, in the choice of the investor, Huijin mode is a more realistic option. Analysis on unknown duties between local financial custody and CBRC, from hierarchical management structure to rationalize the division of cooperation relations and the establishment of a grand unified decentralization to build the boundary of the two powers.

Chapter V researches regulation governance of banking regulation power boundary. Both vertical boundary and lateral boundaries are existing relationship between CBRC and external market players or powers, and regulatory governance is crucial to the perfection of the boundary, both vertically and laterally. This paper conducts factor analysis on three main aspects of regulatory governance—independence, transparency and accountability. Combined with the relevant provisions of the Basel core principles of effective banking regulation. This paper provides assessment of the CBRC independence, transparency, accountability and suggests improvements.

**Key words:** Banking Regulation; Banking Regulation Power; Boundary

# 目 录

0. 导论	1
0.1 研究背景	1
0.2 文献回顾	5
0.3 基本研究范畴界定	16
0.4 研究目的与方法	19
0.4.1 研究目的	19
0.4.2 研究方法	20
0.5 本书论证结构	22
1. 银行监管权边界的基本问题	31
1.1 概念厘定的逻辑起点: 银行监管权	31
1.1.1 银行监管权的本源追溯	31
1.1.2 银行监管权的性质	37
1.2 银行监管权存在的前提: 市场失灵	41
1.2.1 市场失灵	42
1.2.2 银行市场的失灵问题	43