中国公司治理报告(2004):

董事会独立性与有效性

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序

在西方国家，特别是英美法系国家，公司治理经历了一个从管理层中心主义到股东会中心主义再到董事会中心主义的曲折变化历程。在早期，股东的权利是得不到保障的，被称为第一个股份有限公司的1551年成立的莫斯科夫公司和17世纪初成立的荷兰东印度公司等甚至没有设立股东大会这样的机构。十八九世纪以来，受民主思潮的影响，各国公司立法逐渐强调股东的权利，并规定股东大会是股份有限公司的最高权力机构。进入20世纪以来，随着经济发展和市场竞争的加剧，股份有限公司规模逐渐扩大，公司股份也迅速分散，股东大会中心主义事实上已变得名不副实。股东大会形式化的结果导致支配公司的权限日益集中于公司董事会手中。相应地，董事会治理开始成为公司治理的关键环节。事实上，近十多年来，董事会改革已成为全球化浪潮，成为全球公司治理改革运动的核心内容。

在中国现行法律框架下，董事会受股东所托，负责公司的经营决策和业务领导，是公司的最高行政机构。因此，董事会运作的独立性和有效性将直接影响到公司的经营和股东的利益。在这一背景下，上海证券交易所研究中心在2003年完成《中国公司治理报告(2003)》这一全面的研究报告的基础上，把董事会的独立性和有效性作为《中国公司治理报告(2004)》的主题，无疑具有重要的理论和实践意义。

《中国公司治理报告(2004)：董事会独立性与有效性》记录了中国过去几年来董事会制度的发展与变革。它口子不大，但挖掘很深；它以全球化的视角深入分析了中国上市公司董事会制度的渊源、现状和问题，以充分的调查深刻总结了中国公司董事会运作的经验和教训，并在此基础上提出了完善中国董事会运作机制的针对性和可操作性很强的改革建议。我们相信，本报告的出版，将对中国公司董事会运作机制的完善、公司治理总体水平的提高和中国资本市场的长期健康发展，产生积极的影响。

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摘　要

中国企业向现代企业制度的迈进是从中共十一届三中全会召开后起步的。1979年颁布的《中外合资经营企业法》规定合营公司应设董事会，这一与公司制接轨的安排为在中国建立以董事会运作为核心的企业制度起到了示范和带动作用。1993年颁布的《公司法》对公司制企业的治理结构作出了不同于以往的规定，要求一般有限责任公司应设立股东会、董事会和监事会；国有独资公司不设立股东会，但应设立董事会；股份有限公司应设立股东大会、董事会和监事会。该法还对股东会、董事会和监事会的权限作了划分。

之后，特别是近几年来，中国上市公司在董事会制度建设方面取得了较大进展。首先，上市公司独立董事制度和董事会专门委员会制度基本建立，绝大多数上市公司董事会成员中有三分之一（约3至4人）是独立董事，近半数上市公司设立了董事会专门委员会，这为保障董事会的独立性和有效运作提供了基础。第二，股东（特别是中小股东）选举董事的权利得到加强，半数以上的上市公司在其章程中规定了以累积投票方式选举董事，董事会成员的代表性普遍提高。第三，董事会议事机制逐步完善，90％以上的上市公司制定了较详细的董事会议事规则，初步建立了一个符合中国公司法和公司治理规范的董事会议事制度框架。第四，初步确立了追究公司董事责任（包括民事责任）的制度，如2003年1月最高人民法院颁布《关于审理证券市场因虚假陈述引发的民事赔偿案件的若干规定》，使《证券法》、《公司法》中的有关规定更具可操作性。

随着中国经济体制改革的深化，中国上市公司治理和董事会运作也开始逐步规范。然而，由于长期计划经济体制的影响，上市公司董事会运作仍存在许多深层次的矛盾和问题，这些问题严重制约了公司董事会运作的独立性和有效性。

第一，董事会制度形式化与内部人控制问题十分突出。中国多数上市公司是由原国有企业进行股份制改造而来的，这一特殊背景使上市公司存在大量不流通的国有股和法人股，并最终导致中国现行公司治理主要表现为关键人控制模式。在这种情况下，大股东和国有股东的代表基本上控制了公司董事会，流通股股东在董事会的代表性不足，使得公司的经营决策权集中于少数

关键人手中,董事会运作流于形式。企业法定代表人制度赋予了作为法定代表人的董事长与其他董事不同的法律地位,无疑也助长了这一趋势。

2004 年 3 月至 5 月,上海证券交易所研究中心以问卷调研结合实地走访的形式,对沪市 208 家上市公司进行了抽样调查。结果显示,经第一大股东提名并当选的董事人数平均在董事会成员总数一半以上,经国有股股东提名并当选的董事人数平均超过 45%。不考虑独立董事,来自国有股东的董事平均占公司董事会成员的 60%以上。而且,大约有 40%的被调查公司没有制定较详细的董事选举程序和投票规则,选举过程由董事会(特别是董事长)和大股东操控。另外,尽管多数被调查公司规定了股东的累积投票权,但不少公司在实际投票时仍然采取简单多数表决制度。而且,无论是否采取了累积投票制度,流通股股东在董事会中的代表性依然普遍不足。

第二,董事会决策议事机制的独立性有待提高。一方面,议事过程缺乏民主,董事长往往享有过大的权力,事实上,几乎所有的议事程序均由董事长或大股东代表决定;另一方面,董事会会议的出席率偏低、独立董事参与不足和大股东直接干预董事会会议等现象也大量存在。

第三,独立董事缺乏独立性,制度建设还存在许多问题和障碍。首先,独立董事聘任程序不够规范,总体上难以保证其独立性要求,事实上,90%的独立董事是由第一大股东提名的;其次,独立董事多为社会名流,近一半的独立董事来自高等院校和科研单位,很难保证其有足够的时间、精力和实践经验履行职责;最后,激励机制比较单一,缺乏动态化的、长期的针对独立董事的激励与约束机制。

第四,董事会专门委员会基本上未能发挥作用。首先,专门委员会的独立性依赖于独立董事的独立性,在目前独立董事独立性受到普遍质疑的情况下,专门委员会的独立性无法得到保障;其次,由于独立董事人数不足,通常一个独立董事需要在多个专门委员会任职,从而使得专门委员会难以有效展开工作;再次,专门委员会运作缺乏足够的信息知情权和调查权;最后,专门委员会同其他机构(如监事会)在职能设置上存在冲突。

第五,董事会考核与薪酬体系很不合理,缺乏有效的董事考核机制和长期激励机制。抽样调查显示,执行董事平均年收入为 15 万元,中值为 11.5 万元,普遍缺乏长期化的激励机制。此外,外部非独立董事一般在股东单位担任有关职务,普遍不在上市公司领取薪酬,形成所谓的"零薪酬董事",事实上,208 家样本公司中只有 7 家向外部非独立董事支付薪酬。

第六,法律体系不完善,董事的民事权利与民事责任欠明确且不对等。中国现行财产责任机制还很不完善,往往存在重刑事处罚和行政处罚、轻民事责

任的情况，甚至以前者抵消后者的情况也屡有发生。我国法律对有关责任人民事责任的规定语焉不详，而且，对于虚假陈述以外的案件目前尚缺乏立案依据。因此，立法上和实践中，对董事侵害股东和其他利益相关者利益的行为未能予以有效的制裁，投资者的司法救济手段十分有限。

目前，中国公司治理改革正在进行之中，基本目标模式的确立和实现还有待较长时间的艰辛努力，以上董事会运作林林总总的问题，只能在中国整体公司治理机制不断完善的前提下才可能得到有效解决。可以说，董事会运作的有效性和独立性与中国整体公司治理机制的完善这两个进程是交织在一起的，任一进程的进展都将为另一进程开辟新的机会。鉴于此，本报告提出如下改革建议——这些建议多为问题导向的改革举措，但亦为完善中国整体公司治理机制所必需。

第一，完善股东选举董事制度，防止大股东或关键人控制董事会，使董事会具有更广泛的代表性。(1) 引入并完善强制性累积投票制度，并采取积极措施防止大股东通过减少董事席位数、交错选举等措施对累积投票进行事实上的限制；(2) 董事会中必须有经流通股股东提名的代表；(3) 降低少数股东的行权条件，规定持有公司普通股份 1%的股东有董事提名和董事解任请求权；(4) 引入远程投票制度，特别是网上投票制度；(5) 完善投票权代理制度，引入投票权信托和投票权拘束契约制度。

第二，进一步完善董事会议事机制，包括：(1) 监管机构应对上市公司董事会议事规则的制定及遵守提出更高的要求，确保上市公司制定切实可行、内容合理的董事会议事规则，并且严格遵守；(2) 应在董事会的组织、议题选择、决议表决、董事会休会期间董事长权力等环节，适当地限制董事长的决策权，保证董事会集体决策机制的有效发挥；(3) 交易所和证券监管部门对上市公司董事会会议的董事出席率等指标进行考核；(4) 为了提高董事会决议表决的严肃性，董事会表决应更多地采用记名投票制度；(5) 切实执行关联董事回避关联交易表决制度，保证董事会议事机制的独立性；(6) 加强董事会秘书制度建设，增加对董事会秘书工作的重视，保证董事会秘书有足够的资源完成自己的工作。

第三，强化独立董事职责，建立有效的独立董事激励约束机制。(1) 进一步明确规定独立董事的任职条件，独立董事除需具备独立性和专业能力外，还必须有足够的时间和精力投入公司董事会运作，因此，独立董事应最多只可在两家上市公司兼任独立董事；(2) 完善独立董事的选聘机制，防止控股股东通过被其控制的董事会操纵独立董事的任免；(3) 增加独立董事在公司董事会中的比重，最终使独立董事占到公司董事会成员的多数；(4) 加强独立董

事与高层管理人员的沟通,加大独立董事对公司活动的参与度,建立保证独立董事行使职权的专项制度等;(5)建立固定收入和股权收入相结合的报酬激励机制;(6)建立有效的独立董事约束机制,使其责权利相对称;(7)正确协调好独立董事与监事及监事会的关系,独立董事的监督作用主要体现在董事会职责范围内,即在聘任、报酬、审计、重大经营决策等问题上对管理者形成约束和监督,而监事会则侧重于对公司内部财务和董事及经理的行为进行监督。

第四,逐步完善董事会专门委员会制度。近期应以确保专门委员会的信息知情权和调查权为重点,突出和强化审计委员会的作用,同时积极为薪酬委员会和提名委员会的有效运作创造良好外部制度环境和配套措施。在中长期,伴随着独立董事制度的日趋成熟和相关配套机制的建立,上市公司应逐步增加独立董事的数量和所占比重,为专门委员会制度的进一步深化和完善创造条件。

第五,正确处理董事会和高管关系。对于董事长和总经理两职是否分离问题,应以分离为好,以保障董事会实质上的独立性。一方面,董事会要有针对高层管理人员的合理的考核与监督机制,确保董事会对公司的战略性指导和对管理人员的有效监督;另一方面,董事会要支持管理层在日常业务上的决策自由。

第六,完善外部董事薪酬制度,建立健全董事的持股制度,缩小奖金、年度报酬、津贴等固定报酬所占比重,强化董事会下属薪酬与考核委员会的建设。

第七,强化董事义务与责任制度。(1)将董事注意义务法定化、明确化,同时增加董事对第三人民事责任的规定,要求在滥用职权或有违义务时,董事对第三人产生的损害与公司一同承担赔偿责任;(2)强化董事所承担的民事责任,规定更为科学、合理的董事责任追究的民事实体要件和程序保障;(3)加大对董事的刑事处罚力度,严格处罚董事和高层管理人员滥用公司财产、转移股东财富等行为。

Summary

The progress toward a market-based modern corporate China started after the Third Plenary Session of the Eleventh Central Committee of the Communist Party of China. The Corporate Law for Joint Ventures enacted in 1979 requires joint-ventures to set up the board, setting a leading example for board based operations of the modern Chinese corporate system. The 1993 Company Law made pathbreaking requirements that limited liability companies should set up the board of shareholders, the board of directors, and the board of supervisors; that wholly state-owned enterprises should set up the board of directors instead of the board of shareholders; that limited shareholding companies should set up general shareholder's meeting, board of directors and the board of supervisors. The law has also delineated specific descriptions as to the power of each of these boards.

Since then and more so recently, the board system of listed companies has made substantial progresses. Firstly, the systems of independent directors and the board's sub-committees have basically been established. Nearly half the listed companies have set up sub-committees, which provide a foundation for the independent and effective board operation. Secondly, the rights of shareholders, especially those of small investors, have been strengthened. More than half of the listed companies have adopted cumulative voting in electing board members and therefore have broadened the representation from the shareholders. Thirdly, decision-making rules and procedures of the board are also improving gradually. Above 90% of the listed companies formulated detailed rules on how to decide on company issues. Corporate China has gradually formed some generally accepted outlines on rules of the board in deciding company issues according to the Corporate Law and the practice of good corporate governance. Fourthly, board member liabilities including civil liabilities have been basically defined, for example, in January 2003, the Supreme People's Court enacted "Several

Provisions on the Trial of Civil Damages Cases Arising from Misrepresentation in the Securities Market", under which both the Securities Law and the Company Law become more implementable.

With the deepening of China's economic reform, corporate governance including the running of board is becoming more up to the standard. However, because of the long term impact of the traditional planned economy, problems at a deeper level still remains. This in turn has severely limited the independence and effectiveness of the board operations.

Firstly, there is a serious problem of insider control and formalism in board operations. As most listed companies are transformed from state-owned enterprises through the corporatization reform, they have a large percentage of non-tradable state-owned shares and legal-person-owned shares, the largest shareholder and state shareholder basically controls the board, and the representation of tradable share shareholders are very limited. The operation of such a company is therefore controlled by a few keymen and the operation of the board is more of a formalism.

From March to May 2004, the research center at Shanghai Stock Exchange surveyed 208 Shanghai listed companies and paid visit to some of these companies. The survey shows that more than half the board directors are nominated by the largest shareholder, and more than 45% of the board members are nominated by state shareholder. Excluding independent directors, the number of directors from state shareholder constitutes more than 60% of the board members. About 40% of the surveyed companies have yet to establish more detailed voting procedures and rules, and the processes are currently controlled by chairman of board and the largest shareholder. In addition, although most surveyed companies have set up cumulative voting rules, a substantial number of them still use simple majority voting rules in practice. Perhaps more importantly, whether the cumulative voting system is set up or not, the representation of tradable shares is still very limited.

Secondly, the independence of the decision-making of the board should be strengthened. On one hand, the chairman usually holds excessive power, and almost all decision-making rules and procedures are determined by representatives from the board and the large shareholders. On the other hand, attendance on board meeting is low, the participation of independent

directors is limited and direct intervention by large shareholders on board meeting is quite frequent.

Thirdly, the lack of independence of independent directors reflects that the system has still many problems and obstacles to be overcome. Firstly, the election process of independent director is not up to the standard, and generally cannot ensure independence of the selected directors. In fact, 90% of the independent directors are nominated by the largest shareholder. Secondly, independent directors are mostly reputable individuals of whom nearly half come from universities and research institutes. They usually are lack of the time, energy and practical experience to perform their duties. Lastly, the incentive mechanism for independent directors is quite uniform and there is a lack of dynamic and long term performance based compensation scheme.

Fourthly, the sub-committees of the board have yet to play an important role. The independence of sub-committees depends on the independence of independent directors. The committee's independence cannot be ensured without the directors being independent. At present, an independent director can hold different positions in more than several sub-committees, making such committees less effective in their operations. In addition, the operation of the sub-committee depends on the right to find out the company issues and the right to investigate, but currently such rights are quite limited. Lastly, the sub-committees have overlapping functions relative to other organizations such as the board of supervisors.

Fifthly, there is a lack of sound evaluation and compensation system of the board, especially the mechanism to motivate board members in the longer term. Our survey shows that on average an executive director owns about RMB150000 each year, with a mean-value of RMB115000, but generally there is no long term incentive based compensations. In addition, the outside non-independent directors usually hold relevant positions at the parent company and are not paid by the listed company. This is what we call "zero salary directors". In fact among the 208 listed company surveyed, only 7 of them are paying the outside non-independent directors.

Sixthly, the legal system is yet to be improved. The civil rights and obligations of directors are not clearly defined and are not comparable to each

other. The lack of a sound financial responsibility system in China often leads to the over-reliance on criminal and administrative punishment and the neglect of (in some cases forgo of) civil compensations. The provision of the current Chinese law on civil liabilities is not detailed enough for any effective implementation and therefore there is a lack of legal basis on putting a case on file except for those cases involving misrepresentation. In both legislation and practice, director's violation of the rights of shareholders and other related parties can't be effectively punished and investor's means for seeking judicial remedy is very limited.

The reform of China's corporate governance is an ongoing process. From the set up of the basic objectives to their realization, it will require long time efforts. All the problems mentioned above can only be solved with the development of corporate governance. The effectiveness and independence of the board are interweaved with the improvement of overall corporate governance in China. The improvement on one can provide opportunities for the improvement on the other. Therefore, the following reform measures we propose are not only ways to improve the board operations but also necessary for the improvement of overall corporate governance in China.

Firstly, the system for electing directors should be improved. Large shareholders and keymen's control of board should be prevented to promote boarder representation of all shareholders. We should (1) introduce and enforce cumulative voting, and take active measures to prevent large shareholders from interfering with cumulative voting through such methods as reducing the number of directors on the board; (2) require that there be representatives of tradable share shareholders on the board; (3) lower the barriers on minority shareholders to exercise their rights, for example we could stipulate that shareholders with more than 1% of the shares should have the right to nominate the directors and the right to propose the discharge of a director; (4) introduce remote voting system such as online voting system, and (5) improve relevant mechanisms for the proxy voting rights.

Secondly, decision-making procedures on company issues need to be improved. (1) The regulations should provide higher standard on such procedures and ensure the establishment and implementation of feasible and reasonable board decision-making rules and processes. (2) The rights of the

board chairman should be restricted in areas of the composition of board members, the selection of topics of discussion, the voting on proposals, etc. (3) The stock exchanges and the regulators could set up mechanisms to examine the directors' attendance rate of board meetings. (4) The board should abolish anonymous voting. (5) The board should ensure the independence of the decision-making process and effectively prevent related parties in board meetings concerning their transactions. (6) Secretary of the board should play more important roles, and have enough resources to carry out their work.

Thirdly, listed companies need to strengthen the role of independent directors, and establish the incentive based compensation scheme for them. (1) They need to clearly define the qualification of independent directors. In addition to being independent and having relevant expertise, the independent directors should have enough time and energy to put into the operation of the board. The independent directors should perform duties in no more than two listed companies. (2) The listed companies should improve the process of selecting independent directors, and prevent the control of controlling shareholders on such a process. (3) The listed companies should increase the percentage of independent directors and so that eventually the number of independent directors should exceed 50% of the number of board members. (4) The listed companies should strengthen the communication between the independent directors and the senior management, improve the participation of independent directors in the company's activity and establish special rules to ensure that independent directors can implement their plans. (5) The listed companies should establish a combination of fixed and equity based compensation scheme. (6) The listed companies should establish effective controlling mechanisms for independent directors and make their rights comparable to their responsibilities. (7) The listed companies should coordinate the relationship between independent directors, supervisors and the supervisory board. The independent directors should be more involved in recruiting, remunerations, auditing, and other important business decisions, while the supervisors should be more involved in the monitoring of internal financial affairs and the activities of the directors and managers.

Fourthly, efforts are needed to gradually improve the role of sub-

committees under the board. At present, the right to be informed and the right to investigate should be our focus. The role of the auditing committee and remuneration committee should also be strengthened and they should be provided with good external environment and supplementary measures. In the medium to long term, with the establishment of relevant measures, listed companies should increase the percentage of independent directors, and provide foundations for furthering the role of sub-committees.

Fifthly, efforts are also needed to soundly manage the relationship between the board and the senior management. The chairman's role should be separated from that of the chief executive to ensure the independence of the board. On one hand, the board should provide sound evaluating and monitoring mechanism to ensure that the board should provide strategic guidance and provide effective monitoring of the management. On the other hand, the board should give the management full authorization on daily business decisions.

Sixthly, the listed companies should improve the compensation system for external directors and establish proper shareholding plans for directors. Fixed compensation such as bonus, annual payment and fringe benefits should decrease in percentage and efforts should be focused on strengthening the role of remuneration committee under the board.

Seventhly, the listed companies should strengthen both the responsibility and the rights of directors. (1) The responsibility of the directors should be legally defined, and the provision on their civil liability to the third party should be included. The directors should be responsible together with the company for damages done to the third party when there is a violation of civil rights. (2) The civil responsibility of the director should be strengthened. A more scientific and proper provision should be established to provide the legal basis and procedural support for ascertaining director's civil liabilities. (3) more severe criminal punishment should also be enforced on cases such as abuse of company assets and tunneling.

第 1 章　董事会制度：形成、演变与完善

§1.1　董事会制度的国际比较

§1.1.1　董事会制度的产生

在现代公司制企业的组织结构中，董事会是一项十分重要的制度安排。对于董事会的产生，存在规制说和内生说的争论。规制说认为，董事会是规制的产物，是在一国《公司法》的强制要求下设置的。在法律规定下，董事会的法律责任主要分为两类：一是代表公司执行权力而具有的法律地位；二是具体的执行功能。内生说则认为，董事会是公司制企业的内生产物，因为拥有实质控制权的董事会是先于规制出现的，规制只是对制度创新的事后认可与规范。事实上，这两种学说在不同国家的董事会制度形成中都是适用的。在市场经济自由发展的国家，董事会是企业制度发展的内生产物；而在转轨经济国家中，董事会的建立更多源自规制的要求。

应该说，在市场经济的自然发展状态下，董事会制度是随着现代企业制度的发展而内生的。企业制度的发展经历了业主制主导、合伙制主导和公司制主导三个阶段。业主制是最早发展起来的一种企业形态，其特点是业主对企业拥有完全的控制权和剩余索取权，同时对企业承担无限责任，适合企业规模较小的情况。随着经济发展和企业规模扩大，业主制的主导地位逐步让位于合伙制。所谓合伙制，就是由几个合伙人按照协议，各自提供资金、实物和技术，共同经营，分享剩余，并对企业债务承担完全责任。在合伙制企业中，合伙人可以不担任企业的实际管理者，而聘请他人，企业的所有权与经营控制权开始分离。由于合伙制下的合伙人数目有限，所以经理和合伙人之间的沟通比较容易，“委托—代理”问题尚不突出，他们之间的关系由合同确定，受《合同法》规范。

19 世纪初期开始，科学技术的发展导致经济规模迅速膨胀，小规模经济条件下产生的合伙制企业形态不再适应经济发展的需要，于是，能够将众多的劳动力和大量的资本联合起来，集中在一个单一的经济实体中有效加以运用的股份有限公司在英美等国家应运而生，并逐渐占据了主流企业形态的地位。公司制形成后，企业经营不再是一个人或一小部分人的事情，而涉及更大范围

利益相关者的权益。与业主制和合伙制不同,公司是一个独立于出资人的法律实体,其存续不受出资人生命周期的影响,股份可以自由转让,出资人承担有限责任,公司的运作受《公司法》[①]的规范。

20世纪初,在英美等国家,由于公司股权日趋高度分散,公司的所有权与控制权分离,公司实际运作逐步控制在经理层手中,"委托—代理"关系达到极端状态,公司治理问题备受关注。一方面,公司所有者(股东)要求经营者(经理层)追求股东利益最大化;另一方面,公司的经营者作为经济人,也在追求自身利益最大化。这样,当公司的整体利益和经营者的个人利益发生冲突时,就存在经营者滥用控制权来满足自身利益而损害公司利益,并进而损害公司所有者利益的道德风险。

因此,为了有效地防范公司经理层的不当行为,保障自身合法权益,股东有必要采取各种方式来行使对经理层的监督权,解决"委托—代理"关系中存在的问题,这也是董事会制度得以产生的现实基础。股东的监督权,主要通过内部监督和外部监督两类方式来实现。

外部监督是指股东从公司外部通过有效的市场机制来监督公司的经营。具体来说,主要是通过以下四条途径迫使经营者与股东利益目标保持一致,努力创造出更好的经营业绩。

(1) 竞争性的股票市场及其优胜劣汰机制;

(2) 竞争性的经理市场及其优胜劣汰机制;

(3) 股东根据市场对经营者的评价确定经营者的报酬;

(4) 公司收购(Take—over)通过公司控制权市场对公司经营者形成外部压力。

内部监督是指股东从公司内部通过建立有效的公司治理机制来监督公司的经营状况。具体来说,就是通过股东大会选举董事会或监事会,再由董事会或监事会对管理层进行监督。

上述两种监督制度是相互支持、相互补充的,其作用的充分发挥是有条件的。

§1.1.2 董事会的基本类型及职责

从各国《公司法》的规范内容和公司治理的客观要求来衡量,董事会是代表公司行使其法人财产权的必要合议体机关,由股东大会选举产生,由不少于

① 美国于19世纪初最先制定了关于股份有限公司设立的法规,英国则在1844年出现了针对股份合作公司注册和监管的立法,并于1862年颁布了《公司法》。

法定人数的董事组成。董事会是公司制企业内负责战略决策和对公司经理层实施监督的常设机构。

在具体实践中，由于社会条件、公司规模以及经营复杂程度的差异，董事会制度在不同国家、不同时期和不同公司中所呈现的表现形式和采取的组织形式也是有差异的（参见专栏 1.1）。

专栏 1.1
董事会的基本类型

全美董事联合会咨询委员会（简称 NACD）根据功能将董事会分成四种类型：

（1）底限董事会：仅仅为了满足法律上的程序要求而存在。

（2）形式董事会：仅具有象征性或名义上的作用，是比较典型的橡皮图章机构。

（3）监督董事会：检查计划、政策、战略的制定、执行情况，评价经理人员的业绩。

（4）决策董事会：参与公司战略目标、计划的制定，并在授权经理人员实施公司战略的时候按照自身的偏好进行干预。

还可从公司演化的角度将董事会分为另外四种类型：

（1）立宪董事会：强调董事会是依照一定的法律程序，在某个权力主体的批准下成立的。董事会遵照《公司法》的规定成立，仅具有形式上的意义。公司或由创始人控制，或由 CEO 控制。多出现在规模小、技术水平低的私营公司中。

（2）咨询董事会：随着公司规模的扩大和经营复杂程度的提高，各类专业人员被招募进入董事会，从而使董事素质得到提高，能够在独立行权的条件下尽职尽责。根据专家来源的不同，可以将其分为“外部人控制型”和“内部人控制型”两个类别。当前，绝大部分美国公司的董事会属于这一类型。

（3）社团董事会：由于股权分散化、公众化程度的提高，董事会内部形成了不同的利益集团，意见差别通过少数服从多数的投票机制解决。在运作中，此类董事会往往因利益集团的矛盾、冲突而造成决策效率低下。

（4）公共董事会：此类董事会的突出特点是政治利益集团代表进入董事会，它仅在公有制或混合所有制的公司中存在。

资料来源：作者根据相关资料整理。

尽管董事会制度具有形式上的差异性,但在董事会应具备的职责方面,人们的认识却基本一致,即董事会应具有战略决策和监督管理的双重职责,而不具体掌控公司的日常经营。经济合作与发展组织(OECD)在其制定的《公司治理原则》中也强调,公司治理机制应确保董事会对公司的战略性指导和对管理人员的有效监督,并确保董事会对公司和股东负责。OECD 将董事会的职责(功能)主要归纳为七个方面(参见专栏 1.2),并认为要确保这些主要职责得到认真履行,董事会成员应在全面了解情况的基础上,诚实、勤恳、细致地进行工作,最大限度地维护公司和股东的利益;董事会的决议对不同股东团体可能会有不同的影响,董事会应公平对待所有股东;董事会应保证与适用法律一致,并考虑利益相关者的权益;董事会应能够对公司事务进行独立的客观判断,特别是要独立于经理层;为完成应尽的责任,董事会成员应当能够及时、准确地获取相关信息。

专栏 1.2
董事会的职责

OECD 对董事会职责的界定:

(1) 对公司战略、主要行动计划、回避风险的策略、年度预算和经营计划进行审计和指导,设定经营目标,监督目标的实施和公司经营,监管主要资本支出、收购和财产获得。

(2) 挑选、替补、监督并在必要时替换主要执行官员,以及监督职位继任计划的执行。

(3) 审计主要执行官员和董事会的报酬,保证董事会提名程序的正规性和透明度。

(4) 对经理层、董事会成员和股东利益之间的潜在冲突,包括公司资产的不正当使用和有关的不正当交易进行监督和管理。

(5) 保证公司会计制度、财务报告制度、包括独立审计采用适当的控制体系,特别是风险监控、财务控制和对公司活动的合法性进行监督的体系。

(6) 对治理措施的有效性进行监督,必要时进行更改。

(7) 对信息披露和信息交流过程进行监督。

NACD 对董事会职责的定义:

(1) 行使监督职能。具体包括:提名 CEO,批准 CEO 提名的其他经理人员人选,为 CEO 提供必要的工作条件,评价管理人员的业绩,确