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The Reflection on China's Financial Regulators' Supervising Legal System

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Abstract

China has not established a sound financial accounting system for regulators for years. The reasons for this problem could be listed in the following: the deficient accountability concept, unscientific financial supervision mechanism and the lack of public participation in the legal mechanism selection. Therefore, re-examining the concept of accountability of financial regulators, improving the main the main system of accountability based on perfecting the legislature, the ruling party, the executive, the judiciary, other stakeholders and international financial organizations and behavior have been become inevitable.

Keywords: financial regulatory, accountability subjects, accountability mechanism

1. An Overview of Banking Supervision

Banking supervision refers to the supervision and regulation over the banks by the authorized banking supervision authorities of a country or a certain region. In China, banking supervision system consists of the People's Bank of China and the China Banking Regulatory Commission (CBRC). When banking supervisory authorizations and their staffs violate their duties and obligations prescribed by law, they should take the legal liabilities for damages, which may include administrative, civil, and criminal liabilities. When we talk about the liability of a banking supervisor, there are always some controversies around it.

2. The Legal Deficiencies of the Compensation Liability of China's Banking Supervisor

In China, there are no clear stipulations or regulations on the civil liability of banking supervisors. In practice, the banking supervisor shall be prosecuted for their supervisory responsibilities by the manners of administrative compensation. However, some regulations need to be improved:

Firstly, the existing laws on the responsibility of bank supervisors need to be improved. Although the financial laws and regulations of China, such as “Commercial Bank Law of the People's Republic of China”, “Law of the PRC on Supervision over the Banking Industry” and “Law of the PRC on the People’s Bank of China”, contain lots of provisions on the legal liability of financial subjects, there are few provisions on the legal liability of banking supervisor. At present, merely some provisions contained in “the Law of the People's Republic of China on State Compensation” can be applied to address these issues, while these provisions are not specific but vague and general.

Secondly, the scope of administrative compensation shall be broadened. In terms of the standard of compensation for property damage, the State only compensates for direct loss, and the indirect loss is not included. As a result, the victim in financial activities cannot get as much compensation as their loss. “Law of the People's Republic of China on State Compensation” has increased the amount of compensation for property damage, and some indirect loss such as the return of the execution of fines or fines, recovered or confiscated money, the release of frozen deposits is included, compared to the compensation of breaching civil liability, but it is far from enough.

Thirdly, there are no provisions provided on the compensation responsibility while the banking supervisor fails to fulfill its duties and causes damage to a third party. In many countries, a third party can require compensation from the banking supervisor if the supervisor violates the duty and obligation leads to damage. For example, if the supervisor fails to fulfill the duty of care so that the illegal acts performed by the banks cannot be detected, which leads to damage to depositors, the depositor is permitted to file a lawsuit against the supervisor to require compensation. However, in China, due to the lack of legal support, it is difficult for such victims to get compensation. Additionally, the laws in China fail to specify the scope of supervision, and regulators are not clear about the scope of their rights. Furthermore, there are not enough provisions on the legal responsibility that can restrict the power of supervisors. Because the power of supervisors cannot be effectively restricted by corresponding legal responsibility, it often leads to the abuse of power or the negative abandonment of power.

3. Suggestions on the Construction of the Compensation Liability System of China's Banking Supervisor

For China, it should improve the responsibility system of banking supervision institutions in the light of domestic circumstances.

Firstly, the exemption of the civil compensation liability of the supervisor and the exception of such exemption should be clearly stipulated in the legislation of banking supervision. For example, supplement the provisions concerning the responsibility of a supervisor in “Commercial Bank Law of the People's Republic of China”, “Law of the PRC on Supervision over the Banking Industry”, or “Law of the PRC on the People’s Bank of China”. The supplemented provisions shall: (1) Clarify the responsibilities of banking regulators to financial participants; (2) Refine and increase the types of illegal exercise of banking supervisors; (3) Clarify and appropriately expand the scope of compensation.

Secondly, we should formulate the legal provisions of compensation for the third party's loss caused by the failure of the banking supervision to perform its duties. In China, when a third party suffers damage due to the negligence of the supervisor in performing its duties, the administration compensation is the only resolution for him/her to get a remedy. However, under article 4 of “Law of the People's Republic of China on State Compensation”, the elements of compensation are not clearly defined, so it is difficult for the victim to get compensation under article 4. Meanwhile, it is also difficult for victims to prove a direct causality between his damage and the failure of the supervisor. Therefore, it should stipulate the constituent elements of the liability of compensation for the loss of the third party caused by the failure of the banking supervisor to perform its duties, the constituent elements shall contain:

(1) Obligations of banking supervisors. A supervisor is obligated to fulfill their supervised duties and to ensure that financial institutions act in accordance with the law.

(2) *Mens Rea* shall be gross negligence or intentional. In reality, the cases of bank supervisors and their staff violating their statutory duties and obligations are mainly as follows: first, the supervisors fail to perform their duties or fail to timely reflect and report the problems existing in the regulated institutions, resulting in heavy losses; Second, in the process of dealing with the risks faced by financial institutions, regulators did not timely perform their regulatory duties and dealt with them according to their authority, resulting in greater losses. Third, supervisor and financial activities participants who violate laws and regulations collude with each other to intentionally conceal the facts of violations, resulting in heavy losses.

(3) A heavy loss. The act of a supervisor should result in heavy losses.

(4) A causal link between the loss and the supervisor’s failure to exercise due diligence. Considering the difficulty and complexity of exercising banking supervision, the supervisor may be exempted from liability for general negligence even though he has fulfilled his duty of due diligence.

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