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Independence of Chinese Banking Regulator: A Legal Perspective

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I. A Conceptual Framework for Banking Regulatory Agency Independence

- Regulatory independence
Independence from political and industry interference from the government and interest groups.
- Legal framework for assessing independence
 - Performance independence
 - Personnel independence
 - Financial independence
 - Legal immunity of supervisory liability



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II. Performance Independence

- Performance independence refers to the autonomy of a banking regulatory agency to perform its statutory functions
- Elements for assessing performance independence
 - Regulatory objectives
 - Legal status
 - Regulatory powers



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A. Regulatory Objectives

- Role of regulatory objectives in regulatory independence
- Banking Supervision Law of China, art. 3
 - Promoting the stability of the banking industry
 - Maintaining the public's confidence in the banking industry
- Regulatory objectives are too general



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B. Legal Status

- Precondition for ensuring regulatory independence
- CBRC was set up by NPC's decision in April 2003
- Banking Supervision Law was adopted by NPC in December 2003



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C. Regulatory Powers

- Powers to enact, implement and enforce regulatory rules independently.
- Banking Supervision Law, arts. 15 & 21.
- The division of rule-making responsibilities between the NPC, State Council and CBRC is not clear cut.
 - Art. 21, Banking Supervision Law: prudential rules can be stipulated in the form of law and regulations, or enacted by the CBRC.
- Banking Supervision Law of China, art. 5
- Regulatory process is invisible so that the agency is vulnerable to interference.



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III. Personnel Independence

Personnel independence can be assessed from the legal arrangements for appointment and dismissal of senior officials, and conflict of interest of a banking regulatory agency.



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A. Appointment and Dismissal

- Statutory qualifications
- Banking Supervision Law of China, art. 9 on statutory qualification: expertise and experience.
- Legal grounds for dismissal
- Banking Supervision Law of China is silent on dismissal.
- But, Regulations on Promotion and Appointment of Communist Party and Government Cadres spell out the grounds for dismissing a cadre, including unsatisfactory performance assessment, incapacity, gross misconduct and negligence.



B. Conflict of Interest

- Fully devoted to responsibilities
- Art. 10, Banking Supervision Law: the CBRC officials are prohibited from obtaining undue benefits by taking advantage of their position and from doing part time job in banks and other enterprises.
- Conflict of interest restriction is extended to activities after leaving office.
- Art. 102, the Law on Civil Servants of China



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IV. Financial Independence

- No financial autonomy, no regulatory independence
- Funded through appropriations from the government budget and/or levies on regulated banks
- The Budget Law of China and its Implementation Regulations:
 - The CBRC proposes its budget for the review of the Ministry of Finance.
 - The budget proposal is approved by the NPC or its Standing Committee
- Levies on regulated banks are directly handed over to the central treasury and the Ministry of Finance appropriates the levies to the CBRC according to the approved budget of the CBRC.

V. Legal Immunity of Supervisory Liability



- Core principles for effective banking supervision: protect the agency and its staff against lawsuits for actions and/or omissions while discharging their duties in good faith
- Chinese banking laws and regulations do not provide for any specific statutory immunity for the CBRC and its staff.
- According to China's legal practices, the CBRC and its staff may exempt from tort liability if the following criteria are met:
 - Perform legally defined functions
 - Perform functions in good faith
 - Owe a duty of care to depositors
 - Causal relation between the alleged breach of its duty of care and the loss incurred by the claimant

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This presentation just provides a general picture about the legal framework for the CBRC's independence rather than assess the degree of the CBRC's independence. The independence is achieved not only by the legal arrangements but also the implementation of these arrangements.