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"Quack Corporate Governance" As Traditional Chinese Medicine—The Securities Regulation Cannibalization of China's Corporate Law and a State Regulator's Battle Against Party State Political Economic Power

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ABSTRACT

From the start of the People's Republic of China's (PRC) "corporatization" project in the late 1980s, a Chinese corporate governance regime subject to increasingly enabling legal norms has been determined by mandatory regulations imposed by the PRC securities regulator, the China Securities Regulatory Commission (CSRC). Indeed, the Chinese corporate law system has been cannibalized by all-encompassing securities regulation directed at corporate governance, at least for companies with listed stock. This Article traces the path of that sustained intervention and makes a case—wholly contrary to the "quack corporate governance" critique much aired in the United States—that for the PRC this phenomenon is necessary, appropriate, and benign. That analysis, in turn, reveals a great deal about the following: the development of Chi-

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nese law and legal institutions after 1979; China's contemporary political economy; the true identity of the firm under the PRC "corporatization without privatization" program; the normative character and function of corporate law across increasingly globalized capital markets; and the ways in which state intervention may protect against state abuse of power and enable greater private autonomy. For analysts of China's contemporary political system, this Article uncovers a new identity of the Chinese party state's horizontally oriented "fragmented authoritarianism," where a central government agency has instituted pre-enforcement designs that systemically constrain the economic and directorial power of the PRC's most powerful, formally non-governmental, political economic actors.

> After a decade of experimentation and experience, effectively-implemented supervision systems and methods [for Chinese listed companies] are in place. However, these supervisory systems and methods stop in large part at the level of administrative regulation and policy, resulting in too large a gap for effective enforcement [between such administrative regulation and] national laws like the Company Law, the Securities Law, etc., and a lack of required coherence [in the legal-regulatory system].
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> – State Council of the PRC, Legal Affairs Office, September 7, 2007[1]

I. INTRODUCTION

From the start of its "corporatization" project in the late 1980s and early 1990s, corporate law and corporate governance in the People's Republic of China (PRC or China) have been determined by China's securities regulator acting far beyond the bounds of parallel structures with which the terms "corporate" and "law" are associated. Indeed, the broad extent of China's securities regulation incursion into the notionally separate domain of PRC corporate law should cause purveyors of a "quack corporate governance" complaint in the United States the deepest alarm.

The received "quack corporate governance" wisdom directed at recent U.S. legal and regulatory reforms has been well publicized. In this Article, after briefly taking note of that critique, I analyze the trajectory witnessed in China over the last two decades: the veritable cannibalization of corporate law norms by securities agency regulation which solely determines the governance of China-domiciled companies with listed stock. This analysis serves several functions: First, it allows for a better understanding, generally, regarding the development of Chinese law and legal institutions in the post-1979 reform era and, specifically, key legal institutions operating at the heart of China's corporate system during the establishment and rapid expansion of domestic capital markets. Second, this study helps elaborate the true identity of the modern Chinese firm under the PRC's "corporatization" program and in that nation's special political economy, and how it differs from business organizations in oth-

1. "Shanghshi Gongsi Jiandu Guanli Tiaoli (Zhengqiu Yijian Gao)" Qicao Shuoming [Explanation of the Drafting of "Articles for the Administration and Supervision of Listed Companies (Comment Draft)"] attached to Guowuyuan Fazhi Bangongshi Guanyu Gongbu "Shanghshi Gongsi Jiandu Guanli Tiaoli (Zhengqiu Yijian Gao)" Ji Qi Shuoming Gongkai Zhengqiu Yijian De Tongzhi [Notice of the State Council Legal Affairs Office Regarding Promulgation of "Articles of the Administration and Supervision of Listed Companies (Comment Draft)." It's Explanation and Seeking Public Comments], at one time *available at* http://www.chinalaw.gov.cn (last visited Sept. 9, 2007) (on file with the author).

er developed and developing world jurisdictions. Third, this Article aids us in pondering the very nature of corporate law itself and how its norms function on firms and shareholders situated in vastly different political economic circumstances and even across globalized capital markets. Fourth, I hope that the analysis here will prod serious thinking about how private autonomy can be protected in the corporate commercial spheres of different political economies and the perhaps counterintuitive role state-enforced mandatory provisions can play in remedying structurally determined exploitation of minority shareholders in what is presented as a neutral and autonomy-conferring legal architecture. Fifth and finally, I believe that this Article reveals a highly complex, and horizontally oriented, identity of what political scientists have called the PRC party state's "fragmented authoritarianism"—or how vertically arranged silo-systems of power in what is understood as a unitary party state are permitted to compete and constrain horizontally situated, short-term focused, political economic power in the service of long-term economic system and development policy goals.

II. THE "QUACK CORPORATE GOVERNANCE" CRITIQUE

The last ten years in the United States have seen a volley of critiques directed at high profile corporate law and governance reforms implemented through federal securities law and agency regulatory action. This criticism originated with U.S. law academics,[2] who were profoundly offended by the incursion of U.S. *federal* regulation into the domain of U.S. *state* regulation principally through the July 2002 and July 2010 legislative enactments known as the Sarbanes–Oxley Act of 2002 (SOX)[3] and the Dodd–Frank Wall Street Reform and Consumer Protection Act

2. *See, e.g.*, Stephen M. Bainbridge, *Dodd–Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1781 (2011); Robert Charles Clark, *Corporate Governance Changes in the Wake of the Sarbanes–Oxley Act: A Morality Tale for Policymakers Too*, 22 GA. ST. U. L. REV. 251 (2005); Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes–Oxley Act of 2002*, 28 J. CORP. L. 1 (2002); Larry E. Ribstein, *Sarbanes–Oxley After Three Years*, 3 N.Z. L. REV. 365 (2005); Roberta Romano, *The Sarbanes–Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005). However, the critique is not unanimous or entirely despairing. *See, e.g.*, Robert A. Prentice & David B. Spence, *Sarbanes–Oxley As Quack Corporate Governance: How Wise Is the Received Wisdom?*, 95 GEO. L.J. 1845 (2007) (contesting the Romano critique of SOX point by point); John C. Coffee, Jr., *The Political Economy of Dodd–Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1022–26 (2012) (dubbing the "quack corporate governance" complainants a "'Tea Party Caucus' of corporate and securities law professors . . . ."); Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 601–07 (2003); Clark, *supra*, at 290 (asserting that Delaware is quite up to the challenge presented by encroaching federal securities regulation).

3. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (hereinafter SOX).

(Dodd–Frank)[4] respectively, but also other Securities and Exchange Commission (SEC) regulatory initiatives pre-dating SOX.[5] Indeed, the push back is not simply academic, as even sitting state-level judges openly lament these developments,[6] and U.S. federal courts almost casually invalidate regulatory action perfectly consistent with the spirit of the SEC's mission or explicitly sourced in such statutory enactments, and pursuant to an incorrect standard of review for rule-makings by independent agencies.[7]

A good number of the substantive provisions of SOX and Dodd–Frank—many resulting in amendments to the 1934 Securities and Exchange Act (1934 Act)—have attracted academic and judicial fire.[8] The

4. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 11-203, 124 Stat. 1376 (hereinafter Dodd–Frank).

5. For example, the SEC's attempt to require one share, one vote (i.e., forbid dual-class common) for publicly listed companies was invalidated by the U.S. federal courts in 1990. *See infra* note 7.

6. *See, e.g.*, Leo E. Strine, Jr. & William B. Chandler III, *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. PA. L. REV. 953 (2003) (describing federal SOX-origin prescriptive rules as "shadow corporation law"); Leo E. Strine, Jr., *Breaking the Corporate Governance Logjam in Washington: Some Constructive Thoughts on a Responsible Path Forward*, 63 BUS. LAW. 1079 (2008) (attacking SOX and its enactment of federal laws affecting corporate governance).

7. *See, e.g.*, Bus. Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990) (invalidating the SEC's attempt to forbid dual-class common); Bus. Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011) (invalidating the SEC's proxy access Rule 14a-11). The role of the U.S. D.C. Circuit Court of Appeals in this regard has increasingly attracted press attention. *See, e.g.*, Floyd Norris, *Circuit Court Needs to Let the SEC Do Its Job*, N.Y. TIMES, Sept. 21, 2012, at B1; Ben Protess, *As Wall Street Fights Regulation It Has Back Up on the Bench*, N.Y. TIMES, Sept. 25, 2012, at B2. For elegant academic laments, see James Cox & Benjamin Baucom, *The Emperor Has No Clothes: Confronting the DC Circuit Usurpation of SEC Rule-Making Authority*, 90 TEX. L. REV. 1811 (2012) (on the invalidation of 1934 Act Rule 14a-11 by the D.C. Circuit, "Our conclusion is that the D.C. Circuit has assumed for itself a role opposed to the one Congress prescribed for courts reviewing SEC rules.").

8. Including a collection of what Dean Clark calls "conflict-reducing" and "action-inducing" rules: the entirely independent director requirement for audit committees (SOX, § 301); the prohibition on accounting firms' provision of non-audit services (including financial information system design and implementation; appraisal or valuation services; internal auditing services; investment banking services; legal and expert services unrelated to audit brokerage services; and actuarial services) to audit clients (SOX, § 201); the prohibition of corporate loans to officers or directors (SOX, § 402(a)); executive certification of periodic reports and financial statements (SOX, § 302); entirely independent director requirement for compensation committees (Dodd–Frank, § 952; 1934 Act § 10C; and Rule 10C-1 (June 2012)); direct regulation of the use of compensation consultants (Dodd–Frank; 1934 Act, § 10C; and Rule 10C-1 (June 2012)); "claw back" of incentive-based compensation received by executive officers at public companies where there has been an accounting restatement (Dodd–Frank, § 954; 1934 Act, § 10D); mandated (advisory) shareholder vote on executive compensation at least once every three years; the grant of power to company shareholders to determine how often review of executive compensation should occur during that three year period (Dodd–Frank, § 951; 1934 Act, § 14A); "comply or explain" requirement regarding whether chairperson of the board and CEO posts are split (Dodd–Frank, section 972; 1934 Act, § 14B); and a

rationales supporting sharp criticism of these law-making efforts and associated regulatory actions are equally numerous, with what I believe to be the primary ones summarized as follows:

- In the U.S. federal system, the individual states have exclusive jurisdiction over corporate law mandates, and thus, the national legislature (the U.S. Congress) has no authority to pass legislation in the same area, much less pass legislative directives mandating federal agency regulation in the same areas; any attempt to change this allocation represents a usurping transfer of power from the states to the federal government (the "state jurisdiction" critique).
- In the words of Roberta Romano, "[T]he more efficacious corporate and securities law regimes are the product of competitive legal systems, which permit legal innovations to percolate from the bottom up by trial and error, rather than being imposed from the top down by regulators or corporate governance entrepreneurs, who are far removed from the day-to-day operations of firms"[9] (the "legal systems market/laboratories of federalism" critique).
- The reform mandates operate so as to eat away at the allegedly beneficial norms (for organizational decision making) of director primacy/board centrism and thus frustrate the governance efficiencies promised by thoroughgoing separation of ownership and management (the "director primacy" critique).
- The packaging of what could have been conventional securities regulatory disclosure mandates as substantive corporate governance mandates is more costly (the "choice of regulatory approach cost" critique).
- Compliance with reform mandates is a new cost incurred by regulated firms, and is in absolute terms pretty expensive, with no or little benefit (the "costs of new compliance/cost-benefit" critique).

statutory requirement that public companies include shareholder nominees on proxies (Dodd–Frank, § 971; 1934 Act, § 14 (amended); and judicially invalidated Rule 14a-11).

9. Romano, *supra* note 2, at 1529; *see also id.* at 1598–99 (echoing ROBERTA ROMANO, THE ADVANTAGE OF COMPETITIVE FEDERALISM FOR SECURITIES REGULATION (2002)); Bainbridge, *supra* note 2, at 1795 ("[T]he uniformity imposed by [U.S.] federal law precludes experimentation with differing modes of regulation. Accordingly, as the sphere of federal domination grows, the room for new and better regulatory ideas to be developed shrinks. Instead of the laboratories of federalism, we risk being stuck with rules that may well be wrong from the outset and, because Washington moves only in response to crises, may quickly become obsolete.")

- The prospect of burdensome compliance with reform mandates applied through national securities law and regulation causes externally domiciled issuers to avoid the reform-regulated capital markets or flee from the reform-regulated market to less burdensome capital markets (the "unattractive to securities issuers" critique).
- Many of the federal corporate governance legislative initiatives carried by the likes of SOX and Dodd-Frank are long-standing ideas advocated unsuccessfully by "corporate governance entrepreneurs" acting for allegedly undeserving constituencies and thus are not appropriate responses to, or remedies for, the alleged triggering events (Enron, WorldCom, the Global Financial Crisis, etc.) (the "opportunistic packaging of spurious preventatives" critique).
- Empirical studies demonstrate that the proposed substantive reforms do not "work" (e.g., reduce wrongdoing, make fiduciaries more independent, improve fiduciaries' or firm performance, increase firm value, benefit investors generally, allow investors to distinguish between good and bad firms, etc.—there being some real variance on precisely what desired effect is not brought about, often in the same paper) (the "empirical studies demonstrate ineffectiveness" critique).
- The subject federal laws are classic "bubble laws,"[10] enacted in a hurry, on an accelerating "bandwagon" (in Dean Clark's phrase), and determined by legislators' reelection concerns in the context of "media frenzy" and heightened public attention to (or "populist" backlash regarding) corporate malfeasance and scandals rather than sober give-and-take over policy by experts and "legitimate" constituencies; legislators did not notice, or ignored, prior academic work proving that proposed corporate governance mandates would be ineffective after enactment (the "bad, panicked, uninformed, badly informed, and inexpert legislative process" critique).
- The incursions of federal securities regulation into the domain of state corporate law operate in only one direction, or with a "ratchet"—there is no going back once the poison has been introduced (the "ratchet" critique).

10. *See* Bainbridge, *supra* note 2, at 1784–86.

Of interest in this list of complaints is the lack of attention to two other critiques which might be appropriately leveled against this development—a disregard that may arise from the relative U.S.-centrism of the major academics carrying the attack.

First, there is very little invocation or exploration of the fact that corporate law and securities regulation are different areas of law—they are sourced in different traditions, with different aims and design, mostly different subjects, and entirely different modes of operation. Perhaps U.S. academics do not allude to this problem very often because it is subsumed in the U.S. federalism-specific "state jurisdiction" critique précised above. I will refer to this below as the "distinct legal systems" critique. Embedded in this critique is a more philosophical and essentially libertarian concern, or a worry about "state" incursion into the realm of "free" and "private" ordering—a sub-strand which takes on extra weight when the jurisdiction at issue is not a liberal democracy but an avowedly authoritarian state such as China.

Second, no U.S. academic I know of points to the strong likelihood of a *transnational* cannibalization of corporate law arising from the subject phenomenon[11]—where an issuer domiciled in Country *A* becomes subject to the corporate governance-related norms imposed by Country *B*'s securities regulation, and the national corporate law of country *A* is overridden, denied, or substantially altered. This is a violation of what the United States calls in its domestic federal context the "internal affairs doctrine" (judicial institutions look to the laws of the state of incorporation to determine the rights and duties of firm participants), only now working across international, not U.S. state, borders. Again, this is rarely addressed because U.S. corporate law and even securities law academics do not spend enough time worrying about the extraterritorial reach and effect of U.S. law and regulation on governance at foreign-domiciled firms (as opposed to securities issuance and disclosure by such firms). But they should, as the effect in our increasingly globalized capital markets can be significant. One only needs to consider, for example, the effect on the corporate law and governance applicable to a major Delaware-incorporated U.S. multinational firm. If that firm were to list shares on the Shanghai Stock Exchange or commence a China Depositary Receipts (CDRs) program directed at a Chinese stock exchange—initiatives

11. Larry Ribstein alluded to the issue very briefly in his many writings on the subject but in the context of increased costs for foreign private issuers accessing the U.S. capital markets or simple "lack of fit," not the effect of U.S. securities regulation corporate governance-related mandates on the corporate law and corporate governance regime applicable to the foreign issuer under its national law. *See, e.g.*, Ribstein, *Sarbanes–Oxley After Three Years*, *supra* note 2, at 377, 382.

sure to be implemented in the next couple of years (and already seen in the sub-continent with the listing of Standard Chartered Bank's shares on an Indian exchange)[12]—whereby the mandates of Delaware corporate law, U.S. securities law, and U.S. exchange regulation will be substantially overridden, that Delaware-incorporated firm will immediately become subject to the PRC securities agency-imposed corporate governance norms described here. I refer to this as the "transnational effect" critique below.

III. "QUACK CORPORATE GOVERNANCE" AS TRADITIONAL CHINESE MEDICINE

By comparison, the thirty-year development of a legal corporate governance regime in the PRC makes the U.S.-origin "quack corporate governance" concern seem decidedly quaint. In China, the exact opposite of the U.S. development path deemed in need of protection has unfolded. Rather than zealously patrolling the fragile border between corporate governance norms and securities regulation, the PRC's public company regulators (strongly supported by some Chinese legislators, other executive departments, and academics) boldly and consistently acted to create, re-craft, or anticipate the most fundamental aspects of the nation's formal legal corporate governance system, in both design and application, and institute extremely robust board-related norms, shareholder-empowering norms, or both.[13] Indeed, the PRC securities regulator's implemented

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12. For Shanghai listings by foreign-domiciled issuers, see Enoch Yiu, *Shanghai Bourse Studies Listing of Multinationals*, S. CHINA MORNING POST (Aug. 13, 2012, 11:26 AM), http://www.scmp.com/article/616267/shanghai-bourse-studies-listing-multinationals; *Whole Bank, Not Just HSBC China, for Shanghai Listing*, STANDARD, Dec. 12, 2007; Sundeep Tucker & Justine Lau, *Beijing Set to Encourage Foreign Listings*, FIN. TIMES (Jan. 17, 2008, 1:21 AM), http://www.ft.com/intl/cms/s/0/7954771a-c51b-11dc-811a-0000779fd2ac.html#axzz2gszeYiYM; *NYSE Set to List on Shanghai Exchange*, S. CHINA MORNING POST (Apr. 14, 2012, 1:22 AM), http://www.scmp.com/article/633770/nyse-set-list-shanghai-exchange; David Barboza, *Shanghai Exchange Finalizing Plans for Foreign Listings*, N.Y. TIMES (Apr. 15, 2010), http://www.nytimes.com/2010/04/16/business/global/16exchange.html?_r=0; and *Shanghai Mayor Says Time Not Right for Exchange's International Board*, BLOOMBERG (Jan. 16, 2012, 6:26 PM), http://www.bloomberg.com/news/2012-01-16/shanghai-mayor-says-timing-not-right-for-international-board.html. For CDRs, see Zhang Jiwei, *CDR Zoufeng* [*CDR Whirlwind*], 39 CAIJING MAG., June 2001, at 58–60 (China); and Michael Wei & Jason Subler, *Reuters Summit—BNY Mellon Sees First China Depositary Receipt Listings Next Year*, REUTERS (Sept. 2, 2009), http://blogs.reuters.com/financial-regulatory-forum/2009/09/02/reuters-summit-bny-mellon-sees-first-china-depository-receipt-listings-next-year/.

13. It is only fair to note that the problem is apparent in the other direction too, whereby the company law statute has a good number of provisions that might normally be considered the province of a securities law and regulatory regime. *See, e.g.*, Zhonghua Renmin Gongheguo Gongsifa [The Company Law of the PRC] (promulgated by the Standing Comm. Nat'l. People's Cong. Oct. 27, 2005, effective Jan. 1, 2006) [hereinafter 2006 PRC Company Law], *in* XIANXING ZHENGQUAN QIHUO FAGUI HUIBIAN (XIUDINGBEN) [SECURITIES AND FUTURES LAW AND REGULATION

policies, rule-makings, and enforcement practices—at times exceeding or breaching the constraints of formal legislation—embody very well the extraordinary power many of China's agencies have in the PRC's specific institutional context. This process has advanced so far in China that the consumer side of the legal regime—defendant fiduciaries (and their counsel) and even Chinese courts—continue to argue that claims for breach of legal duties at listed companies should not be heard in the People's *Courts* applying *corporate* law, but instead before the PRC securities *regulator* applying only *securities* law and regulation.[14]

While there are simply too many expressions of this phenomenon to completely catalogue here,[15] a number of the most interesting examples are described below to demonstrate how profound the contrary orientation in the PRC is.

Reviewing these examples, corporate law specialists will note immediately that the PRC securities regulator—the CSRC—made these bold incursions into the corporate law domain via two distinct methods with immediately discernible, and different, prospects of effectiveness: (i) the filling-in of substantive corporate law doctrines, which still have to be enforced by a state actor, whether the judiciary or a regulator (e.g., corporate fiduciary duties); and (ii) the establishment of "self-enforcing" mechanisms, which are meant to be effective as between the parties to a firm long before the state needs to be involved in enforcement, if at all (e.g., minority shareholder "class" negative veto rights). As discussed in more detail below, one of the many ironies of this development path in the PRC is that the CSRC and other Chinese bureaucracies have em-

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CURRENTLY IN EFFECT (REVISED EXITION)] (China Securities Regulatory Commission ed., 2011) [hereinafter CSRC Laws and Regulations], at 72–84, chapt. V, §§ 1 (issuance of shares), 2 (transfer of shares) & chapt. VII (company bonds).

14. *See* Wang Dianxue, *Shanghai Gongsi Dongshi Beifa Zhuanggao Zhengjianhui* [*Penalized Director of a Listed Company Sues CSRC*], XINJINGBAO [NEW CAPITAL NEWS], June 4, 2008 (China) (plaintiff suing the China Securities Regulatory Commission (CSRC) to overturn a fine asserts that although he is a corporate director, he has not breached the legal duties of directors set forth in the 2006 PRC Securities Law, in his view the exclusive source of such duties for directors of listed companies, preempting entirely the 2006 PRC Company Law and its legal duties for directors). Much earlier, in March 1999, and before the coming into effect of China's first Securities Law, the Pudong New District People's Court (not a defendant fiduciary or its counsel) took a similar view when it refused to hear China's first public shareholder's lawsuit—explicitly grounded in the 1994 PRC Company Law—on the basis that "[t]he plaintiff's case regarding behavior in violation of securities laws and regulations in the stock market should be handled by the CSRC. The plaintiff's suit regarding a securities dispute does not come within the jurisdiction of the People's Courts." *See* Jiang Shuzhen v. Hongguang Industry Co. Directors, *in* XU ZHAOHONG & ZHENG HUI, ZHENGQUANFA ANLI JINGJIE [SELECTED SECURITIES LAW CASES] 58–64 (2001) (China).

15. The Appendix lists some of the most important PRC regulatory enactments directly impacting corporate law and governance.

ployed mandatory rules to make the nation's company law more "self-enforcing," even as the PRC Company Law from 1994 to 2006 and beyond has explicitly moved in the opposite direction: towards greater use of enabling default rules and ever-broader invitations to the Chinese judiciary to enforce standards ex post.[16]

A. Corporate Fiduciary Duties

It is not an exaggeration to say that corporate fiduciary duties for orthodox corporate fiduciaries and even controlling shareholders initially came into Chinese corporate law from outside of the corporate law and largely at the hands of the PRC's early securities regulatory bureaucracy and then the CSRC. As I have detailed elsewhere, in June 1993 and before the PRC had an effective company law statute, the PRC Commission on Restructuring of the Economic System (CRES), by a letter to the Hong Kong Securities and Futures Commission glossing language contained in a sub-statutory regulation, absorbed all then-current Hong Kong (and thus English) fiduciary duties jurisprudence into Chinese law, at least for PRC-domiciled firms issuing stock and listing in pre-Handover Hong Kong.[17] When the language glossed in the 1993 CRES letter was subsequently dropped from the PRC's first Company Law, effective in mid-1994,[18] the CSRC reinstated the all-important language in a regulatory "addendum" applicable to Chinese firms suddenly subject to the fiduciary duties-deficient 1994 Company Law but issuing stock into Hong Kong. This language reinstatement through an agency rule-making was effected explicitly to recover and maintain the wholesale importation of corporate fiduciary duties into the law applicable to PRC-domiciled firms listing "overseas" (Hong Kong and beyond), which was previously

16. *See* Nicholas C. Howson, *Corporate Law in the Shanghai People's Courts, 1992–2008: Judicial Autonomy in a Contemporary Authoritarian State*, 5 E. ASIA L. REV. 303, 316–27 (2010) [hereinafter *Corporate Law in the Shanghai Courts*].

17. *See* Nicholas C. Howson, *The Doctrine That Dared Not Speak Its Name—Anglo-American Fiduciary Duties in China's 2005 Company Law and Case Law Intimations of Prior Convergence*, *in* TRANSFORMING CORPORATE GOVERNANCE IN EAST ASIA 193, 210–11 (Hideki Kanda, Kon-sik Kim & Curtis Milhaupt eds., 2008) [hereinafter *Doctrine That Dared Not*]. The CRES letter stated that four Chinese characters (*chengxin zeren*) in the then-governing legal basis for joint stock company establishment (the CRES "Opinions on Standards for Companies Limited by Shares") "[h]as the same type of meaning (*jüyou leiside hanyi*) as fiduciary duty under Hong Kong law" with the words rendered here as "fiduciary duty" in English in the otherwise Chinese language letter. *Id.*

18. *See* Zhonghua Renmin Gongheguo Gongsifa [Company Law of the PRC] (promulgated by the Standing Comm. Nat'l. People's Cong. Dec. 27, 1993, effective July 1, 1994, and as amended Dec. 25, 1999 and Aug. 28, 2004), *available at* http://www.lawinfochina.com/Display.aspx?lib=law&ID=641 [hereinafter 1994 PRC Company Law].

accomplished in the 1993 CRES letter.[19] Realists will understand this incorporation and then reinstatement as largely symbolic and directed at foreign perceptions, and very easy for both the CRES and the Hong Kong Securities and Futures Commission to effect with little cost or immediate consequence. While that view has merit with respect to the events of 1993–1994 and the effort to complete the PRC's first "overseas" initial public offerings, this rhetorical absorption of a developed body of common law corporate fiduciary duties almost two decades ago was only the start of a sustained campaign by the Chinese bureaucracy to introduce and make fast the very notion of corporate fiduciary duties in Chinese law, culminating in formal adoption and articulation of these duties in article 148 of the 2006 PRC Company Law.

After July 1994, faced with an inadequate 1994 PRC Company Law lacking any explicit statement of corporate fiduciary duties (and only a vague loyalty provision and a scattering of duty of loyalty-related prohibitions),[20] various state bureaucracies, but primarily the CSRC, continued to push corporate fiduciary duties into corporate law via Chinese regulations and administrative enactments binding on listed firms.[21] For instance, the State Council Securities Commission (SCSC)[22] and CRES accomplished this—with some real teeth—for PRC-domiciled firms listing both overseas and domestically with the issuance of "mandatory" (for foreign listing firms) and "guidance" (for domestically listing firms) articles of association, which model firm constitutions are replete with declarations of the duties of care and loyalty owed by fiduciaries to the firm and its shareholders, *which did not then exist in Chinese corporate law*.[23]

19. *See Doctrine That Dared Not*, *supra* note 17, at 211.

20. *See* 1994 PRC Company Law, *supra* note 18, at arts. 59 (instructing "loyal" performance, protection of the interests of the company, and prohibiting acting for personal gain), 60 (prohibition against misappropriation of firm assets), 61 (prohibition against direct competition and unapproved related party transactions), 62 (confidentiality), 123 (applying the foregoing to companies limited by shares).

21. *See, e.g.*, Shangshi Gongsi Zhili Zhunze [Principles for Listed Company Corporate Governance] (promulgated by CSRC and State Econ. Trade Comm'n, Jan. 7, 2002), zhengjianfa [2002] 1, CSRC Laws and Regulations, at 925–29 [hereinafter Listed Company Governance Provisions], art. 33 ("Directors should undertake their responsibilities loyally (*zhongshi*), in good faith (*chengxin*) and diligently (*qinmian*) in accordance with the best interests of the company and the entire body of shareholders.").

22. The SCSC was a ministry-level body directly under the PRC State Council and originally superior to the CSRC. The SCSC was subsequently disbanded with the elevation of the CSRC to a ministry-level commission under the State Council.

23. *See* Guanyu Zhixing "Dao Jingwai Shangshi Gongsi Zhangcheng Bibei Tiaokuan" de Tongzhi [Notice Regarding Implementation of the "Mandatory Articles of Association for Overseas Listing Companies"] (promulgated by State Council Sec's Comm'n & CRES, Aug. 27, 1994) zhengweifa [1994] 21, and the attached form of articles of association, CSRC Laws and Regulations, at 997–1008 [hereinafter Mandatory Articles of Association for Overseas Listing Companies]; and

The acceptance of these corporate constitutions by Chinese firms and their shareholders was (and is) made mandatory by the CSRC's notified practice of withholding any initial listing approval, or de-listing going forward, unless the issuer's articles of association conform to the promulgated forms. Moreover, aside from the ability of shareholders to sue in something like contract for the breach of these governance provisions, there is evidence that the Chinese People's Courts have enforced the terms of these "guiding" or "mandatory" articles of association as a kind of stand-alone legal-regulatory norm even in the rare case where a listed firm has not put in place conforming articles of association.[24]

The same legal-regulatory alchemy was performed outside of the firm operations and management context via 2001 measures issued by the CSRC governing the acquisition of listed companies, which declared—again *without any basis in Chinese corporate law* at the time—that the target board of directors, supervisory board, and high-level management had what amounted to fiduciary duties to target stockholders and the target firm in approving or recommending an external offer and pre-decision process requirements that look suspiciously like those normally divined from the Delaware Supreme Court's 1985 *Van Gorkom*[25] decision.[26]

Guanyu Fabu "Shangshi Gongsi Zhangcheng Zhiyin" De Tongzhi [Notice Regarding the Issuance and Promulgation of the "Guidance Articles of Association for Listed Companies"] (promulgated by CSRC, Dec. 16, 1997) zhengjian [1997] 16, and the attached form of articles of association, *available at* http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=19599 [hereinafter Original Guidance Articles of Association for Domestically Listing Companies] (amended after passage of the 2006 Company Law by Shangshi Gongsi Zhangcheng Zhiyin [Guidance Articles of Association for Listed Companies] (promulgated by CSRC, Mar. 16, 2006) zhengjiangongsizi [2006] 38, CSRC Laws and Regulations, at 938–948). *See, e.g.*, Mandatory Articles of Association for Overseas Listing Companies, *supra*, chapt. XIV, and art. 116 (with the pre-2006 proxy for fiduciary duties *chengxin* ("good faith")), and in the Original Guidance Articles of Association for Domestically Listing Companies, chapt. V, and arts. 80 (mandating "loyalty" (*zhongshi*)) and 81 (mandating "prudent" (*jinshen*), conscientious (*renzhen*), and diligent (*qinmian*) behavior by directors).

24. See, for example, the 2006 Lu Jianming v. Shanghai Light Industry Machinery Co. case opinions (Jingan District People's Court, reversed on appeal by the Shanghai No. 2 Intermediate People's Court) summarized in *Corporate Law in the Shanghai Courts*, *supra* note 16, at 433–36.

25. *See* Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

26. *See* Shangshi Gongsi Shougou Guanli Banfa [Measures for the Administration of Acquisitions of Listed Companies] (promulgated by CSRC, Dec. 1, 2002) zhengjianhuiling [2002] 10, *available at* http://vip.chinalawinfo.com/newlaw2002/SLC/SLC.asp?Db=chl&Gid=42687, art. 33 (holding that the duty of target board, supervisory board members, and high-level management is to not harm the lawful rights and interests of the shareholders or the company), chapt. III (laying out the *Van Gorkom* type requirements describing the requisite duty of care applicable to the target board). After the effectiveness of China's 2006 Company Law, these Measures were amended to track the explicit language for both duty of loyalty (*zhongshi yiwu*) and duty of care (*qinmian yiwu*). *See* Shangshi Gongsi Shougou Guanli Banfa [Measures for the Administration of Acquisitions of

Finally, the CSRC injected corporate fiduciary duties into Chinese law not only for orthodox fiduciaries (directors, supervisory board members, and management), but also for the most provocative actor in the PRC political economy: controlling *shareholders* (most often a corporate identity of the state or party).[27] For instance, the 2004 CSRC regulation described immediately below, which created negative veto rights for public shareholders as a body, holds explicitly that the controlling shareholders and actual control parties of listed companies have fiduciary duties to the listed company and the other shareholders of the listed company. [28]

B. Protections for "Public Shareholders" and Quasi-Class Negative Vetoes

A strong example that embodies the incursion of securities regulation directly into the heart of China's corporate governance regime is the issuance in December 2004 of "Regulations Regarding Strengthening Protection of the Rights and Interests of Public Shareholders,"[29] which effectively re-defined public shareholders other than controlling shareholders (whether holding listed or unlisted shares) as a kind of class and conferred upon that new quasi-class negative veto rights regarding certain decisions.[30] This constitutes a regulatory initiative far beyond mere exhortations to good and better governance at listed companies generally and directly determines shareholder constituencies and approval thresholds designed to frustrate or check oppressive or conflicted majority ac-

Listed Companies] (promulgated by CSRC, July 31, 2006) zhengjianhuiling [2006] 35, CSRC Laws and Regulations, at 845–853, art. 8 [hereinafter Listed Company Acquisition Rules].

27. The not obvious doctrinal fact of controlling shareholders' fiduciary duties was declared in the CSRC's and State Economic Trade Commission's 2002 Listed Company Governance Provisions ("Controlling shareholders have a fiduciary duty (*chengxin yiwu*) to the listed company and the other shareholders"). *See* Listed Company Governance Provisions, *supra* note 21, art. 19.

28. Guanyu Jiaqiang Shehuigongzheng Gudong Quanyi Baohu De Ruogan Guiding [Several Regulations Regarding Strengthening Protection for the Rights and Interests of Public Shareholders] (promulgated by CSRC, Dec. 7, 2004) zhengjianfa [2004] 118, CSRC Laws and Regulations, at 929–30, art. 5(1) [hereinafter Public Shareholder Protection Regulations] (declaring that control shareholders/parties have a *chengxin zeren*, the then-employed term of art expressing corporate fiduciary duties).

29. *Id.*

30. This negative veto is accomplished specifically by requiring that certain corporate actions be approved by both a majority of the general shareholders meeting and, in addition, a majority of the so-called "public shareholders" (*shehui gongzhong gudong*). The actions implicated include any new issuance of stock to the public or convertible debt, or any rights offering (other than where the control party promises to take up the entire offering in cash); major reorganization of the assets of the listed company; repayment of any debt to the company by a shareholder with company stock; any overseas listing by a significant subsidiary of the listed company; and "any matter that has a major effect on the rights and interests of the public shareholders." *See id.* at art. 1(1)(i)–(v).

tion. For those familiar with U.S. corporate law and jurisprudence, these PRC *securities regulatory agency* norms require for Chinese listed companies what is (i) commanded by state-level corporate *statute* or (ii) arrived at via private ordering and only evaluated ex post by a state law *court* (e.g., Signal's supermajority and majority of the minority offered in the roll-up merger of UOP evaluated by the Delaware Supreme Court in *Weinberger*).[31]

C. Related Party Transactions and Self-Dealing; Controlling Shareholders' Duties

When faced with a deficient 1994 company law statute weak on regulation of related party transactions and the abuse of listed subsidiaries by controlling shareholders, the CSRC acted in 2003 and again in late 2005 to institute corporate governance changes explicitly designed to address these problems. In 2003, the CSRC with the State-owned Assets Supervision and Administration Commission (SASAC) (the latter a government department with very tenuous control over state-affiliated controlling shareholders) issued a notice that addressed funds transfers by listed companies to their controlling shareholders and those shareholders' affiliates, and listed company guarantees of the financial obligations of such controlling shareholders or those shareholders' affiliates.[32] The notice prohibited certain funds transfers from the listed company to the controlling shareholders or their affiliates, and the provision of external guarantees by the listed company for the benefit of its controlling shareholder or any 50% or more-owned subsidiaries of the latter.[33] The 2003 notice limits the aggregate amount of external guarantees by a listed company to less than 50% of net assets (in the most recent fiscal year)[34] and forbids guarantees for any debtor carrying excess leverage.[35] What is most evocative in the present context is that the notice institutes (admittedly weak) supermajority/direct shareholder approval requirements for all external guarantees—two-thirds of the board *or* mandatory general shareholders' meeting approval.[36] These are weak because the controlling shareholder in a PRC listed firm will control all or most of the direc-

31. *See* Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983).

32. Guanyu Guifan Shangshi Gongsi Yü Guanlianfang Zijin Wanglai Ji Shangshi Gongsi Duiwai Danbao Ruogan Wenti De Tongzhi [Notice Regarding Several Issues Relating to the Regulation of Listed Company-Related Party Funds Flows and Listed Company External Guarantees], Aug. 28, 2003, zhengjianhui [2003] 56, CSRC Laws and Regulations, at 981–83.

33. *Id.* at arts. 1(2)(i)–(vi), 2(1).

34. *Id.* at art. 2(2).

35. *Id.* at art. 2(3).

36. *Id*.

tors and thus a required supermajority at the board level is no significant block—just as the controlling shareholder will use its majority voting power in the general shareholders' meeting to assure the required shareholders' approval. These frailties were addressed, in part, with another CSRC notice issued only two years later, this time in tandem with the newly established China Banking Regulatory Commission.[37] That jointly issued notice reasserts value limits on any guarantees but most critically mandates that company articles of association set forth explicitly the approval authority of the board with respect to external guarantees. The notice further requires supermajority (two-thirds) approval by the board of directors for guarantees within that approval authority or for external guarantees that must be submitted to the shareholders' meeting, approval by the board (presumably a majority) and then majority approval by the shareholders *but with the controlling shareholder and its affiliates not permitted to vote*.[38] Moreover, both the 2003 and 2005 notices create a kind of ad hoc veil-piercing mechanism (only recognized in PRC corporate law after January 1, 2006), providing for controlling shareholder joint and several liability on non-conforming external guarantees forced out of listed subsidiaries.[39] Implicit in each of these CSRC notices is the idea that controlling shareholders have some kind of fiduciary duty to their dominated (listed) firms, in particular the (minority) holders of the public float. This implication is consistent with the CSRC's long campaign to articulate fiduciary duties for controlling shareholders alluded to above.[40]

D. Independent Directors

In 2001, even after the PRC's company law drafters embarked on a muddled experiment—really no more than a declaration of affiliation—with German style "codetermination" and the establishment of a "supervisory board" in addition to a U.S.-style board of directors at all Chinese companies, the CSRC instituted a conflicting system which mandated that after July 1, 2003 one-third of any listed company's board must be composed of "independent directors."[41] While many analysts and market

37. Guanyu Guifan Shangshi Gongsi Duiwai Danbao Xingwei De Tongzhi [Notice Regarding Regulation of the Provision of External Guarantees by Listed Companies], Nov. 14, 2005, zhengjianfa [2005] 120, CSRC Laws and Regulations, at 983–84.

38. *Id.* at art. 1(3)–(4).

39. *Id.* at art. 3l; Notice Regarding Several Issues Relating to the Regulation of Listed Company-Related Party Funds Flows and Listed Company External Guarantees, *supra* note 32, at art. 4.

40. *See supra* notes 27–28 and accompanying text.

41. *See* Guanyu Zai Shangshi Gongsi Jianli Dulidongshi Zhidu De Zhidao Yijian [Guiding Opinion on the Establishment of an Independent Director System], Aug. 16, 2001, zhengjianfa

participants see the PRC's independent director system as flawed as the two-tiered boards that now dot the Chinese corporate landscape, with the supervisory board either supine or serving as the convenient home for members of the firm's (Communist) party committee,[42] the fact remains that the independent directors override of Chinese-style codetermination came through a CSRC "guiding opinion" and formally non-binding CSRC corporate governance "principles," yet absolutely enforced by the CSRC's withholding of initial public offering or listing approvals for China-domiciled firms that did not conform. This is another example of the CSRC remaking basic corporate governance structures applicable to boards of directors entirely outside of the corporate law, or indeed "law" of any kind.

E. Class Negative Veto Rights—Where Share "Classes" Are Prohibited

In one of the most inventive expressions of the phenomenon asserted here, the SCSC and CRES 1994 Mandatory Articles of Association for Overseas Listing Companies for PRC-domiciled firms issuing stock in Hong Kong or foreign markets were drafted to provide negative veto rights for certain class shareholders under a national corporate law that explicitly *prohibited different classes of stock* (and even preferred stock). This was effected by chapter IX of the Mandatory Articles of Association, which declared shares held by foreign public buyers to be a share "type" (*leibie*)—not the legally prohibited term "class"—and required a two-thirds supermajority approval of the share "type" holders convened in a separate meeting for any resolution seeking to "change or eliminate type shareholders rights and interests" (a class/minority protection taken from the United Kingdom's Companies Act-tradition affected class su-

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[2001] 102, CSRC Laws and Regulations, at 924 –925. Independent directors were separately mandated in the CSRC's later 2002 Listed Company Governance Provisions, *supra* note 21, chapt. III, § 5, arts. 49–51.

42. *See* Donald C. Clarke, *The Independent Director in Chinese Corporate Governance*, 31 DEL. J. CORP. L. 125 (2006) (a structural and theoretical critique); Nancy Huyghebaert & Lihong Wang, *Expropriation of Minority Investors in Chinese Listed Firms: The Role of Internal and External Corporate Governance Mechanisms*, 20 CORP.GOVERNANCE: INT'L REV. 308 (2012) [hereinafter *Expropriation of Minority Investors*]; Y. Cheung, L. Jing, T. Lu, R. Rau & A. Stouraitis, *Tunneling and Propping Up: An Analysis of Related Party Transactions by Chinese Listed Companies*, 17 PAC.-BASIN FIN. J. 372 (2009) [hereinafter *Analysis of Related Party Transactions*] (both showing empirically the ineffectiveness of independent directors in protecting minority shareholders in listed PRC firms). The independent director system has given rise to a raft of extremely difficult, and very basic, problems for everyone involved, e.g., who or what precisely do independent directors owe a fiduciary duty to—the listed firm, the general shareholders meeting, the general shareholders meeting exclusive of the deemed controlling shareholders, or abstract notions of fairness and transparency, protection against minority shareholder oppression, or both?

permajority vote on "variation of class rights").[43] This mechanism has consistently empowered minority, foreign markets-purchasing, shareholders in PRC-domiciled firms with Hong Kong or overseas listings, and in one case, ironically benefited the Chinese state-controlling shareholder seeking to implement the forced consolidation of one of the PRC's regional airlines and see off a competing (and target-preferred) bid by Singapore Airlines.[44]

F. The 2007 "Articles for the Administration and Supervision of Listed Companies"

The CSRC—and the corporate law academics aiding it in the initiatives revealed here—have not had complete success in re-making China's corporate law and corporate governance regime. We know, for instance, that the CSRC failed in its behind-the-scenes attempt to change the company law directly, and have the 2006 PRC Company Law's new veil-piercing provision set forth a lower standard for controlling shareholder liability (focusing on controlling shareholder/controlled subsidiary separateness and comingling).[45]

A second example shows much greater ambition on the part of the CSRC and its reform allies, which made the resulting failure (at least to the time of this writing) greater too. In late 2007, after the effectiveness of the 2006 PRC Company Law, the CSRC (with very significant input by China's activist corporate governance academics)—acting through the PRC State Council's Legislative Affairs Office—submitted to the PRC State Council for review, and released for public comment, a draft omnibus regulation (or *tiaoli*) titled, "Articles for the Administration and Su-

43. *See* Mandatory Articles of Association for Overseas Listing Companies, *supra* note 23, chapt. IX, at CSRC Laws and Regulations, at 1002–03; Companies Act, 2006, c. 46, part. 17, chapt. 9 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2006/46/part/17/chapter/9/crossheading/variation-of-class-rights.

44. *See* Barry Naughton, *SASAC and Rising Corporate Power in China*, 24 CHINA LEADERSHIP MONITOR 1 (2007). The author, when a practicing lawyer, used the same mechanism to create substantial negative veto rights for the foreign private equity investor in its 25% private investment in Hainan Airlines Co., Ltd. which never had an overseas listing and thus was not required to have in place the Mandatory Articles of Association for Overseas Listings Companies. As a self-enforcing check on the oppressive actions of the controlling shareholders and their insiders, the mechanism proved near foolproof.

45. *See* Chao Xi, *Piercing the Corporate Veil in China—How Did We Get There?*, 5 J. BUS. L. 413, 423–27 (2011) (describing how the CSRC's proposed statutory language would have allowed for piercing to controlling shareholders on a showing of non-separation between shareholder and subsidiary and/or co-mingling of assets, not just the higher—and more difficult to apply—standard of "abuse").

pervision of Listed Companies," which comprised 106 articles.[46] Explained as an effort to rationalize all of the individual CSRC pronouncements that had an impact on listed company corporate governance noted here into a single administrative regulation (and, explicitly, to conform Chinese listed company governance mandates with post-Enron SOX innovations in the United States), the draft regulation (i) asserts CSRC jurisdiction over all corporate governance matters at companies with shares listed on the Shanghai or Shenzhen exchanges (in addition to securities issuance and trading matters, the traditional domain of a securities regulator); and (ii) covers seemingly every base imaginable, including:

- strict separation (financial, assets, personnel, management, business, etc.) between controlling shareholders and listed subsidiaries
- orthodox fiduciary duties;
- board responsibility for monitoring officers and management (*Caremark*[47] oversight duties);
- SOX-style certification of periodic reports (and financial statements therein) for directors, supervisory board members, and senior management;
- the corporate fiduciary duties of controlling shareholders;
- related party transactions (including a requirement that more than half of the independent directors approve major related party transactions);
- external guarantees forced from listed subsidiaries and firm approval of the same;

46. These draft regulations were released as the Shangshi Gongsi Jiandu Guanli Tiaoli (Zhengqiu Yijian Gao) [Articles for the Administration and Supervision of Listed Companies (Comment Draft)]; *see supra* note 1, and LIU JUNHAI, ZHONGGUO ZIBEN SHICHANG FAZHI QIANYAN [RULE OF LAW FRONTIER FOR CHINA'S CAPITAL MARKETS] 164 (2012). The author has on file a copy of these draft Articles and the State Council Legislative Affairs Office's accompanying explanation (likely drafted by the CSRC and its academic advisors), and transcripts from the various hearings convened for comments. In 2003, a very similar effort was pushed by many of the same Chinese academics, but through the medium of an expert-drafted Supreme People's Court "regulation" (*guiding*), which would have substantially re-written the 1994 PRC Company Law to include many of the innovations seen in the 2006 PRC Company Law. *See* Guanyu Shenli Gongsi Jiufen Anjian Rugan Wenti De Guiding (Yi) (Zhengqiu Yijian Gao) [Regulation Regarding Several Problems on Hearing Company Dispute Cases (One) (Comment Draft)] (promulgated by Supreme People's Court, Nov. 4, 2003) [hereinafter Omnibus Company Law Regulation], *available at* http://www.chinacourt.org/public/detail/php?id=88551. The passage and promulgation of the 2006 PRC Company Law in late 2005 effectively pre-empted the 2003 Omnibus Company Law Regulation, carrying a great many of its innovations into law.

47. *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).

- maximum ratios of inside directors;
- the independent directors system;
- minimum ratios of independent directors on audit, compensation, and controls board committees;
- a prohibition on directors delegating their vote to the chairman of the board;
- limitations on directors' consent in lieu of meeting;
- the design and enforcement of mandatory articles of association;
- the general shareholders' meeting and shareholder voting (including proxy voting);
- mandatory cumulative voting;
- internal controls (and accountant certification of such controls);
- limits on stock compensation;
- the mandatory retention of outside corporate counsel;
- investor relations;
- post-issuance use of proceeds;
- asset reorganizations;
- prohibition on "financial assistance" in takeovers (taken from the U.K. Companies Act, which ironically largely abolished the prohibition after October 1, 2008);
- procurement of a fairness opinion in any acquisition;
- procedural remedies—such as a quasi-derivative action to allow shareholders to sue for rescission of illegal stock grants to directors and officers (which already exists for shareholders seeking disgorgement of directors, supervisory board members, or senior management short swing trading profits under article 47 of the 2006 PRC Securities Law);[48] and
- more robust private rights of action (seeking explicitly authorized civil damages).

If issued as a departmental regulation by the CSRC or an administrative regulation by the State Council, these Articles for the Administration and Supervision of Listed Companies would have completely and

48. *See* Nicholas C. Howson, *Punishing Possession—China's All-Embracing Insider Trading Enforcement Regime*, *in* INSIDER TRADING HANDBOOK 327, 330 (Stephen P. Bainbridge ed., 2013) (allowing shareholders to sue for disgorgement "acting in the company's interest").

fundamentally re-made the corporate and securities law applicable to companies with a public float on either of the Chinese exchanges, and every aspect of the corporate governance system binding on them. Indeed, the CSRC-drafted Articles, if finally issued as a State Council regulation, would have created a second or addendum PRC Company Law by administrative regulation, not legislative act of the Chinese national legislature. As of this writing, this effort by the CSRC and its academic allies to do an end-around "law," and re-craft corporate law via securities regulation, has failed. Nonetheless, it stands as a monument to the continuing ambition of China's securities regulator (and those academics leading the effort) to use securities regulation to re-make every aspect of the corporate law in a more perfect image, and perhaps serves as a marker for future efforts (or indeed explicitly "legal" amendments) under a future PRC government administration.[49] And, of course, much of the substantive law and regulation contained in the never-promulgated CSRC Articles is already applied and enforced via the diverse enactments noted here.

G. The Fate of CSRC Securities Regulation-Based Reforms in PRC Corporate Law

The fate of the many corporate governance-related mandates actually instituted by the CSRC in the development of China's corporate governance model has been very good and includes (i) post facto absorption into corporate statute in whole or in part ("legalization"); and (ii) non-absorption into Chinese corporate law but continuing effectiveness via the application and enforcement of PRC securities law and regulation ("continuing effectiveness but not legalization"). It might also include, theoretically at least, reversal or elimination by subsequent company law enactment ("elimination"). Examples of the legalization result abound, such as the provisions in the 2006 PRC Company Law which articulate the fiduciary duties of care and loyalty for orthodox corporate fiduciaries;[50] require recusal from board votes of conflicted directors;[51] state in

49. The author is aware that some of the key academics working on the Articles for the Administration and Supervision of Listed Companies (Comment Draft) had been invited in 2012 to leave their academic posts and work full time at the CSRC to push through such changes, deemed a necessary step if the current merit review of issuances is to be ended. However, with the removal of the powerful reformer Guo Shuqing as chairman of the CSRC, and the transfer of Xiao Gang from the Bank of China to the CSRC chairmanship, this initiative may be terminated. *See* Chitra Somayaji, *Xiao Quits Bank of China to Take Helm at Securities Watchdog*, BLOOMBERG (Mar. 18, 2013, 1:27 AM), http://www.bloomberg.com/news/2013-03-17/xiao-quits-bank-of-china-to-succeed-guo-at-securities-regulator.html.

50. 2006 PRC Company Law, *supra* note 13, at art. 148.

law the fiduciary duties of controlling shareholders (and thus provide a legal remedy for minority shareholder "oppression" or controlling shareholder self-dealing);[52] require a cap on so-called external guarantees, recusal of controlling shareholders on shareholder votes for external guarantees, and a supermajority (2/3) vote for any external guarantee greater in value than 30% of corporate assets, or a majority of non-controlling shareholders for any external guarantee;[53] mandate a supermajority shareholder vote (2/3) on the disposition of significant assets;[54] and allow for different "classes" of shares.[55] In some situations, the corporate law is crafted so as to absorb preexisting CSRC-origin norms by simple backwards-looking statutory cross-reference. This is how, for example, the mandatory independent directors system of 2001 is absorbed into Chinese *corporate* law post-2006—by a statutory mandate[56] that there must be independent directors, in accordance with "State Council" (read "State Council commission") issued norms, which in fact were already issued five years prior. The same is true for those corporate governance norms that see continuing effectiveness but not legalization. One example in this realm is the entire machinery, rights (including benefit of a mandatory offer for target shareholders) and obligations (including target board fiduciary duties) brought into Chinese law with the introduction of the CSRC's Listed Company Acquisition Rules—the 2006 PRC Company Law merely provides a legal basis for such transactions (especially a corporate merger) with nothing else.[57] Another example is the continuing effectiveness of the "type" (class) shareholders' negative veto right on any corporate action, which affects the rights and interests of such "type" shareholders in PRC-domiciled firms listing on the Hong Kong or overseas markets.[58] On the theoretical "elimination" side, it is impossible for this observer to find even one example of a CSRC securities law-imposed corporate governance norm that has been eliminated or significantly carved back by a subsequent corporate law enactment. Indeed, and now returning to the worried rhetoric of U.S. "quack corporate governance" theorists, the CSRC-led securities regulation reconstruction of China's corporate law embodies the strongest form of "ratchet" imag-

51. *Id*. at art. 125.
52. *Id*. at art. 20.
53. *Id*. at arts. 122, 16.
54. *Id*. at art. 122.
55. *Id*. at art. 127.
56. *Id*. at art. 123.
57. *Id*. at arts. 173–80.
58. *See supra* notes 43–44 and accompanying text.

inable—it is wholly unidirectional and always results in permanent change in the parallel (and receiving) corporate legal system.

IV. WHY CHINA AND THE CSRC HAVE TAKEN THIS APPROACH

A. Administrative Law Competence

Under the principles governing the contemporary Chinese legal system, there is no question as to the legal authority of the CSRC to issue administrative regulations which impinge so directly upon what we may understand as corporate legal norms. The CSRC—as a "commission" directly under the PRC State Council—has the authority to issue "departmental regulations" ("*bumen guizhang*" or just "*guizhang*" in the PRC legislative idiom). These regulations are a well recognized species of administrative rule-making for ministries and commissions like the CSRC under the PRC State Council and have a very solid legal basis in the 2000 PRC Law on Legislation[59] insofar as they are issued publicly.[60] Moreover, the CSRC has specifically delegated legal authority to make such departmental regulations regarding "the activities of securities issuers and listed companies,"[61] and there is nothing in the 2006 PRC Company Law or any other statute that forbids such regulation in the corporate governance sphere or appoints any other Chinese governmental institution as the primary or exclusive norm provider with respect to corporate law and governance. The only thing the CSRC cannot do, and here regardless of the subject of the regulation, is regulate or undertake enforcement outside of the bounds authorized for it in law.[62]

B. "Corporatization Without Privatization" and Its Effects

The far more revealing question is "why?" Why has the CSRC, alone and with other agencies, acted via administrative securities regula-

59. *See* Zhonghua Renmin Gongheguo Lifa Fa [PRC Law on Legislation] (promulgated by the Standing Comm. Nat'l. People's Cong., Mar. 15, 2000, effective July 1, 2000), *available at* http://lawinfochina.com/Display.aspx?lib=law&ID=386, arts. 71–77. I thus reject the (mostly academic) attacks against the CSRC's authority to regulate on corporate governance matters (for listed companies) reported by Professor Clarke in 2003, *infra* note 96 and accompanying text.

60. *See* PRC Law on Legislation, *supra* note 59, at arts. 61–62; Zhonghua Renmin Gongheguo Zhengquan Fa [PRC Securities Law] (promulgated by the Nat'l. People's Cong., Oct. 27, 2005, effective Jan. 1, 2006), CSRC Laws and Regulations, at 3–16 [hereinafter 2006 PRC Securities Law], art. 184.

61. *Id.* at arts. 179(1), (3).

62. I have addressed this problem, specifically with respect to the enforcement of China's narrowly crafted statutory insider trading prohibition by the CSRC and likely the People's Procuratorate, in Nicholas C. Howson, *Enforcement Without Foundation?—Insider Trading and China's Administrative Law Crisis*, 60 AM. J. COMP. L. 955 (2012).

tion to alter so significantly China's corporate law and corporate governance regime, at least with respect to listed firms? The layered answer to that question promises important insights about the real political economy of modern China, the nature of the firm post-"corporatization," the most significant abuses visited on Chinese investors, the character of "law" in the PRC, and the relative competence, autonomy, and political independence of key political–legal institutions like the courts.

Donald Clarke and I have tried to explain the "corporatization" program in the PRC and its consequences for both the nature of Chinese firms and the nature of corporate law in contemporary China.[63] The traditional PRC state-owned enterprise—or literally "enterprise owned by all the people" (*quanminsuoyouzhi qiye*) (SOE)—was not what many inside and outside of China mistook it for: a legal corporation simply owned by a single shareholder, the state (on behalf of "all the people"). Instead, it was a division or ring-fencing of productive assets by a state administration, without granting separate legal personality or competence to that accumulation of assets, or any financial separateness (and thus accountability for profits, losses, or taxable gains) for it. It had party state-appointed managers who moved through a bureaucratic hierarchy into progressively more powerful *political* positions. It did not issue ownership interests in itself, like stock or equity. The "control" interest in such SOEs (the right to appoint management and appropriate gross revenues, and once a tax system came into being, net revenues or profits) was vested in some identity of the state—often central line ministries, but also subordinate units of the government such as local bureau of the same line ministries (e.g., the Hebei Provincial Bureau of Heavy Machinery) or local-level People's governments (e.g., the Chongqing Municipal People's Government). "Corporatization," as commenced in the 1980s, confirmed along with the "modern enterprise system" in law with the 1994 Company Law, and most recently expressed in the 2006 PRC Company Law, sought to implement a "modern enterprise system" and abolish the SOE as an *organizational* form[64] by converting SOEs into a *legal* form

63. *See, e.g.*, Donald C. Clarke & Nicholas C. Howson, *Pathway to Minority Shareholder Protection—Derivative Actions in the People's Republic of China*, *in* THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH 243, 245–49 (Daniel Puchniak, Harald Baum & Michael Ewing-Chow eds., 2012) [hereinafter *Derivative Actions in the PRC*] (which the following paragraphs draw upon).

64. The SOE was not given a *legal* form until 1988 and the promulgation of a "law" governing SOEs, concurrent, ironically, with elimination of the SOE organizational form. *See* Zhonghua Renmin Gongheguo Quanmin Suoyouzhi Qiye Fa [Law of the PRC on Industrial Enterprises Owned by All of the People] (promulgated by the Nat'l. People's Cong., effective Apr. 13, 1988), *available at* http://www.lawinfochina.com/Display.aspx?lib=law&ID=1188.

of "company" authorized and apparently governed by PRC company law: (i) a company limited by shares (CLS), a joint stock company form for widely held firms; (ii) a limited liability company (LLC), for a smaller and closely knit group of investors; or (iii) a wholly state-owned subform of the LLC (WSOC), a company owned by a state agency with no shareholders' meeting and an optional board of directors.

It is critical to understand that this process did not implicate "privatization" of the economy or SOEs, or any real withdrawal of the state (or the Communist Party behind the state) from the same, because a controlling equity interest in the converted SOE went to or was maintained by state entities. To the present day, the party state remains absolutely committed to retaining control over converted enterprises in a very broad range of sectors—not just the usual suspects for state control (e.g., defense, natural resources, infrastructure, etc.) but also non-national security and non-key infrastructure sectors that are simply profitable to central or local state or party insiders when financed with the aid of (relatively) passive public investors. Moreover, while former administrative channels of control at SOEs may seem to have disappeared along with abolition of the SOE form, they in fact often continue to be effective just behind the scenes, completely subverting formal legal norms described in company law.[65]

While this design for "corporatization without privatization" coupled with maintenance of central or local state (and behind them, Communist Party) control has impacted both closely held LLC firm establishments and widely held CLSs, it has had a very pronounced effect on the ownership, control, legal, and governance structures applicable to the PRC's listed CLS issuers (whether listing inside China, in the Hong Kong Special Administrative Region, or abroad) and the disempowerment of those companies' minority (public) widely dispersed shareholders. These patterns of control and equity ownership have very important implications for China's corporate law and the corporate governance regime as applied.

First, the strong prevalence of concentrated ownership in Chinese companies (especially listed firms) means that the key agency problem for PRC corporate governance is not *vertical* (between management in-

65. *See* Nicholas C. Howson, *China's Restructured Commercial Banks: Nomenklatura Accountability Serving Corporate Governance Reform?*, *in* CHINA'S EMERGING FINANCIAL MARKETS: CHALLENGES AND GLOBAL IMPACT 123 (Martha Avery, Cai Jinqing & Zhu Min eds., 2009) (detailing how party committees operated behind, and over, boards of directors at the PRC's largest international issuers).

siders and a large body of disaggregated shareholders) but *horizontal* (between controlling shareholders and minority shareholders).[66]

Second, the controlling shareholder and its insider appointees are not run-of-the-mill control parties/insiders, but most often are an identity of state or party organizations, representatives of central or local government institutions, or party *nomenklatura* appointments, giving them a heady mix of *political* and economic power, especially against disaggregated, non-politically privileged, minority shareholders. This means that any attack against alleged misfeasance by such control parties—however carried, and employing whatever institution—will be difficult or at the very least politically sensitive.

Third, the combination of a strong horizontal agency problem, and the nature of who and what the control parties are, means that China's public companies have been run as vehicles to attract passive investment capital from information-deprived public investors entirely in the interest of those largely unaccountable controlling shareholders. The same firms have therefore represented a ready invitation to opportunism, "tunneling," minority shareholder abuse and oppression, and outright fraud by the controlling shareholders and their appointed insiders—an invitation taken up with particular gusto at CLSs with a public float, subject to little monitoring by or accountability to a passive, politically disempowered and disaggregated shareholder interest and thoroughly compromised judicial enforcement institutions.[67] A ready example of the problem, which does not rise to fraud or criminality, much addressed in the CSRC overlay of corporate governance regulation addressed herein, is the virtual habit of state-owned controlling shareholders of PRC listed companies directing those listed companies to give financial guarantees for the obligations of other controlled subsidiaries of the controlling shareholder.[68] For the minority shareholders of the listed firm, this amounts to the coercive imposition of unrelated risk on the shoulders of the listed firm for

66. The same problem operates across the Taiwan Straits, in the Republic of China/Taiwan, and continues to elicit similar substantive law and institutional changes. *See* Christopher J. Guinello, *The Revision of Taiwan's Company Law: The Struggle Toward a Shareholder-Oriented Model in One Corner of East Asia*, 28 DEL. J. CORP. L. 92 (2003).

67. *See Analysis of Related Party Transactions*, *supra* note 42; *Expropriation of Minority Investors*, *supra* note 42 (fraction of state ownership is positively associated with value-destroying related party transactions); H. Berkman, R. Cole & L. Fu, *Expropriation Through Loan Guarantees to Related Parties*, 33 J. BANKING & FIN. 141 (2009) [hereinafter *Expropriation Through Loan Guarantees*] (loan guarantees issued by controlled listed firms to their controlling shareholders); G. Jiang, C. Lee & H. Yue, *Tunneling Through Intercorporate Loans: The China Experience*, 98 J. FIN. ECON. 1 (2010) (widespread use of inter-corporate loans by controlling shareholders to extract funds from listed PRC firms).

68. *See Expropriation of Minority Investors*, *supra* note 42.

the benefit of the controlling shareholder (and usually a redirection of value away from the listed firm when the guaranty is called upon default of the affiliate debtor), and exclusive of any benefit to the listed firm or its public shareholders. In Anglo-American corporate law jurisprudential terms, this is classic "self-dealing" by the controlling shareholder, "oppression" of the non-controlling shareholder investors, or both. As can be readily understood, the controlling shareholders have the opportunity to implement these schemes both via opportunistic use of the corporate form twisted by the lopsided capital structure common under "corporatization" and because of their rather significant political and economic power in the PRC context.

Fourth and finally, this process of "corporatization without privatization" has led to a very fundamental dilemma in the design and implementation (or not) of Chinese corporate governance and the legal structure supporting it.[69] The state continues to operate enterprises in China and exercise control in furtherance of its goals, which—good or bad[70]—must be understood as distinct from the narrower shareholder wealth maximization goal of all other shareholders, i.e., the minority shareholders. (Admittedly, the goals of the state control party and the minority shareholders may converge from time to time, in particular with respect to short-term shareholder gains; however, there is nothing in the corporatization program, or law formal and applied, which requires that the state control party exercise its control in the service of wealth maximization for *all* shareholders.) Thus the state, through its controlling shareholders in corporatized entities, very openly exploits the minority shareholders who have no other way to benefit from their investment in the corporatized firm. As long as Chinese ideology and national industrial policy continue to have state shareholders controlling corporate entities where there are any other shareholders, real protections for such minority shareholders present either (i) a constraint on the state's ability to operate in a way that is the very reason the state has maintained control or (ii) if those constraints are not to operate on state-controlled firms, then the necessity for separate corporate law regimes applicable to state-controlled corporatized firms, on one hand, and all other firms, on the

69. *See* Donald C. Clarke, *Corporate Governance in China: An Overview*, 14 CHINA ECON. REV. 494, 494–95 (2003) [hereinafter *Corporate Governance in China*]; *Derivative Actions in the PRC*, *supra* note 63, at 246–47.

70. The "goals" for which the state exercises its control rights can range from the assumed private interests of officials and cadres asked to represent "all of the people" of the state (much discussed in public governance literature) to various wider political or social imperatives (cross-subsidization of failing firms, full employment, etc.), which seem more benign, but still operate to the detriment of external minority investors.

other hand. There is no immediate prospect of a formal, separate legal regime for state-controlled firms. Indeed, the 1994 PRC Company Law, the 2006 PRC Company Law, and the "modern enterprise system" and "corporatization" policies were all proclaimed as major steps in the opposite direction, eliminating any distinction between state firms and non-state controlled companies. Instead, the history of *non*-implementation of China's company law, especially to protect minority shareholders in public capital markets financed and corporatized issuers, indicates recognition of—and push back against—the idea of any constraint on the state's ability to operate investee firms in the way in which it desires; again, the reason for which it maintained control in the first place.[71]

C. Legislative and Judicial Competence and Autonomy

The concerns sketched out in the preceding paragraphs animated the wholesale reformation of the defective 1994 PRC Company Law into the form now effective as the 2006 PRC Company Law, which added substantive claims (e.g., duty of care, controlling shareholders' fiduciary duties, piercing of the corporate veil, etc.) and procedural innovations (e.g., a derivative action, the ability of shareholders to call special shareholders' meetings, etc.), all designed to create or make more effective legal remedies for minority shareholders against politically powerful firm insiders and controlling shareholders. However, notwithstanding this constructive legislative policy and the real achievement that is the 2006 PRC Company Law, at least three other factors were at work that required—and continue to require—sustained securities administrative agency involvement in corporate governance law/rule-making.

First, there have been and remain serious issues pertaining to the technical competence of PRC legislators at the National People's Congress, especially with respect to more complex areas like corporate law. The 1994 Company Law, while rightfully hailed as China's first post-Communist Revolution company law, is a monument to bad, confused, and plainly incomprehensible drafting, especially when compared to the specialist agency-drafted CRES "opinions on standards" on CLSs and LLCs, which served as China's corporate organizing statutes immediate-

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71. *See, e.g.*, *Corporate Law in the Shanghai Courts*, *supra* note 16, at 400–16; *Derivative Actions in the PRC*, *supra* note 63, at 254–56, 267–69, 275–78 (both noting the complete absence of widely-held or listed company governance-related shareholder company law-related suits—other than securities law claims alleging fraudulent or misleading disclosure pursuant to a very limited allowance made under pressure by the PRC Supreme People's Court—in the Chinese courts, and the partially related hostility of the People's Courts to any cases involving a large number of parties, resulting in large parts of the PRC Company Law remaining unimplemented).

ly prior to the promulgation and effectiveness of the 1994 law.[72] Moreover, it is apparent that the same powerful forces indicated here in the term "controlling shareholders" have worked vigorously to protect themselves or make the company "law" of China less protective of minority rights. Professor Xi Chao of the Chinese University of Hong Kong Law School has shown how during the drafting of the 2006 PRC Company Law, pressure was brought to bear (successfully) by SOEs and the state body responsible for state ownership positions in corporatized SOEs to substantially weaken the statutory basis for veil-piercing.[73]

Second, while the situation is better than some observers surmise, there must be continuing doubts about the competence, autonomy, and political independence of PRC judicial institutions called upon to implement ex post corporate law standards or remedies.[74] In other words, even if state-of-the-art substantive provisions and procedural mechanisms are introduced into PRC company law—as they assuredly were in November 2005 with the promulgation of the final 2006 PRC Company Law—there is a continuing concern as to whether the PRC People's Courts will be competent and powerful enough to adjudicate, implement, and enforce such law with respect to any kind of PRC corporation, LLC, CLS, or WSOC, much less accept or be permitted to accept disputes concerning the same. This is a long-standing concern for transitional jurisdictions like the PRC, and an aspect that has justified advocacy by developed world corporate law theorists in favor of the design and implementation of "self-enforcing" company law,[75] and the search for other non-legal institutions in China specifically that might support the heavy burden of

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72. *See* Nicholas C. Howson, *China's Company Law: One Step Forward, Two Steps Back—A Modest Complaint*, 11 COLUM. J. ASIAN L. 127 (1997).

73. *See* Xi, *supra* note 45, at 423–27 (describing the role of SASAC in sabotaging the CSRC's more aggressive statutory veil-piercing proposal originally set forth in the Company Law Amendment's Consultation Draft, due to SASAC concern that the expanded doctrine would be applied to unlisted corporatized SOEs as well).

74. There is a voluminous and growing literature recounting corporate law adjudication in the Chinese People's Courts. *See, e.g.*, *Corporate Law in the Shanghai Courts*, *supra* note 16 (corporate law adjudication in the Shanghai Higher People's Court system between 1992 and 2008); Wang Jun, *Gongsi Jingyingzhe Zhongshi He Qinmian Yiwu Susong Yanjiu—Yi 14 Sheng, Zhixiashi De 137 Jian Panjueshu Wei Yangben* [Analysis of Litigation Regarding Company Management's Duties of Loyalty and Care—Using 137 Judgment Opinions from 14 Provinces and Directly Administered Municipalities], 5 BEIFANG FAXUE [NORTHERN JURISPRUDENCE] 24 (2011) (China) (corporate fiduciary litigation nationwide); *Derivative Actions in the PRC*, *supra* note 63 (the corporate derivative action); Hui Huang, *Piercing the Corporate Veil in China: Where Is It Now and Where Is It Headed?*, 60 AM. J. COMP. L. 743 (2012) (corporate veil piercing).

75. *See* Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1914 (1996) (noting that in these types of jurisdictions, "company law that depends on fast and reliable judicial decisions is simply out of the question . . . .").

enforcement of corporate governance norms by the judiciary and the CSRC.[76]

I should note in passing that the PRC judicial *bureaucracy* (i.e., not courts issuing opinions on adjudicated cases) has played some role in implanting substantive corporate law doctrine and procedural innovations into China's corporate law and governance system. Before 2005, this was done via the creation by individual (Provincial/Directly Administered Municipality) Higher Level People's Court systems of "opinions" on issues presented in litigation concerning the woefully deficient 1994 PRC Company Law.[77] In many cases, these "opinions" (some entirely internal and non-public) read like detailed, revised company law statutes and are the primary source of critical corporate law claims and procedural architectures such as the derivative action, a shareholder oppression claim, piercing of the corporate veil, invalidation of directors' or shareholders' resolutions, settlement restrictions, etc. (none of which had a legal basis in the then-effective 1994 PRC Company Law).[78] Importantly, none of these local court system opinions attempted to institute self-enforcing governance mechanisms like supermajority negative veto rights, as one example, in the style the CSRC has for public companies. After the effectiveness of the 2006 PRC Company Law, the Supreme People's Court has released three judicial "regulations" concerning the company statute and has embarked on a "guiding cases" project, none of

76. *See* Donald C. Clarke, *The Role of Non-Legal Institutions in Chinese Corporate Governance*, *in* TRANSFORMING CORPORATE GOVERNANCE IN EAST ASIA 168 (Hideki Kanda, Kon-sik Kim & Curtis Milhaupt eds., 2008) (analyzing the role played by markets, including the stock markets; commercial banks; asset management companies, that purchased bad debt from China's commercial banks; independent directors; the supervisory board; controlling (state) shareholders; compensation; gatekeepers for the public markets, principally lawyers and accountants; and the financial press).

77. See, for example, such detailed opinions issued by the Jiangsu Province Higher People's Court, Guanyu Shenli Shiyong Gongsifa Anjian Ruogan Wenti De Yijian (Shixing) [Opinions on Several Issues on Adjudicating Cases Applying Company Law (Trial Implementation)] (June 2003), *in* GONGSIFA YINAN WENTI JIEXI (DI SAN BAN) [COMPANY LAW ISSUES: PROBLEMS AND ANALYSIS (3RD EDITION)] 240–48 (Shanghai Higher People's Court ed., 2006) (China); the Shanghai Higher People's Court (No. 2 Civil Division), Guanyu Shenli Sheji Gongsi Susong Anjian Ruogan Wenti De Chuli Yijian (Yi) [Opinions on Adjudicating Cases Regarding Corporate Litigation (One)], *id.* at 231–36 (2003) (China); and the Beijing Higher People's Court, Guanyu Shenli Gongsi Jiufen Anjian Ruogan Wenti De Zhidao Yijian (Shixing) [Guiding Opinion on Several Issues on Adjudicating Corporate Dispute Cases (Trial Implementation)], *id.* at 236–40 (Feb. 2004) (China).

78. A group of PRC legal academics tried to hijack this process, but from the apex of the national judicial bureaucracy or the Supreme People's Court, with the drafting and submission for approval of the 2003 Omnibus Company Law Regulation, *supra* note 46, which attempted to rewrite the 1994 Company Law in its entirety. That effort was preempted by the passage of the 2006 PRC Company Law, which tracked many of the wholesale changes attempted through the Omnibus Company Law Regulation (e.g., derivative actions, corporate fiduciary duties, and specifically a duty of care, etc.).

which, however, remake corporate governance norms in the same fashion as the CSRC regulation described here.[79]

Third, is one result of the basic dilemma in China's corporate governance project described above, the almost complete *non*-implementation of China's company law for minority shareholders in public capital markets-financed corporatized issuers, arising from the system's denial of any constraint on the state's ability to operate public-invested investee firms in the way in which it desires, the reason for which it maintained control in the first place.[80]

D. The CSRC and the Continuing Utility of Self-Enforcing Governance Norms

Each of the above-described factors have worked together to leave the CSRC as one of the only state institutions in China capable of the following: (i) expert drafting of substantive provisions, in particular of the self-enforcing type; (ii) technical resistance against controlling state shareholders (and the political–economic systems backing them); (iii) substituting for an inexpert, overly bureaucratic, or politically cowed judiciary; and (iv) seeing to the institution of corporate governance norms to protect minority shareholders against exploitation by state controlling shareholders (in a context where there is empirical support for the idea that traditional internal and external corporate governance constraints are not effective),[81] at least with respect to PRC companies explicitly under the CSRC's jurisdiction—firms issuing publicly traded securities. Using

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79. See ZUIGAO RENMIN FAYUAN GUANYÜ GONGSIFA SIFAJIESHI (YI), (ER) LIJEI YÜ SHIYONG [SUPREME PEOPLE'S COURT ON USE AND UNDERSTANDING OF COMPANY LAW JUDICIAL INTERPRETATIONS ONE AND TWO] 3, 7–11 (Xi Xiaoming ed., 2006) (China) for the first and second Judicial Regulations on the Company Law (concerning how the People's Courts should handle actions that straddle January 1, 2006, and on shareholder petitions for judicial dissolution, respectively). The third Judicial Regulation, issued and effective February 16, 2011, and concerning various issues including promoters' pre-incorporation liability, defective capital contributions, the rights of shareholders who have not completed or who have made defective capital contributions, and "trust" arrangements between record shareholders and beneficial interest shareholders, is available at http://www.court.gov.cn/qwfb/sfjs/201102/t20110216_13851.htm. The "Guiding Cases" initiative was commenced in November 2010 by the Supreme People's Court, and a group at the Stanford Law School Library is working to translate such cases as they are issued, which can be accessed at http://cgc.law.stanford.edu/guiding-cases/. To date, only one of such Guiding Cases has involved corporate governance matters. "Guiding Case No. 10" (Li Jianjun v. Shanghai Jiapower Environmental Protection Science & Technology Co., Ltd. (Final Version, Nov. 9, 2012)) *available at* http://cgc.law.stanford.edu/wp-content/uploads/2013/04/CGCP-Chinese-Guiding-Case-10.pdf (shareholder challenge to a board resolution).

80. *See supra* notes 69–71 and acommpanying text.

81. *See Expropriation of Minority Investors*, *supra* note 42 (analyzing ownership structure, board of directors, external legal environment, and stock markets, including public information flow).

its jurisdiction over the operation and governance of securities issuers with listed stock, and faithful to its mission to protect at least the appearance of a level-*ish* playing field for China's capital markets (to continue to attract the participation of private capital), the CSRC has been the primary, and best, workshop for expert substantive corporate governance provisions designed to resist incumbent state control parties, and in ways that avoid the risks of non-enforcement by an overmatched judiciary.[82]

As I have noted above, however, the CSRC and other bureaucracies have instituted corporate governance norms along two distinct pathways: (i) the filling-in of substantive corporate law doctrines, which must still be enforced by a state actor (e.g., the judiciary or a regulator); and (ii) the establishment of "self-enforcing" mechanisms, which can be effective (e.g., at the general shareholders' meeting) without immediate recourse to enforcement by any external institution. I should emphasize, then, that the sub-strain of CSRC action described herein which pertains to the filling-in of major doctrinal aspects of China's substantive corporate law is not responsive to the major justifications for CSRC involvement listed above. For example, if a public authority like the CSRC is concerned about the political and economic power of controlling shareholders or has doubts about the competence, autonomy, and independence of the Chinese judiciary, the implantation of substantive corporate fiduciary duties (or controlling shareholders' fiduciary duties) into China's company law alone is not responsive to the problem (as effective articulation and enforcement of these norms will be deferred or frustrated by the resisting forces apparently animating the reform in the first place). Clearly, the CSRC, as an expert agency, has pursued these doctrinal initiatives to fill unconscionable voids in China's developing corporate law and communicate something about the governance, and monitoring, of PRC-domiciled firms issuing stock both domestically and internationally (e.g., the absorption of the entire body of Hong Kong, and English, fiduciary duties law in 1993 in conjunction with China's first listings "overseas" in pre-Handover Hong Kong).[83]

Conversely, those CSRC initiatives which are "self-enforcing" are directly responsive to the full menu of issues/forces listed above, with much greater promise of effectiveness. For instance, the negative veto

82. For more than a decade, domestic and foreign analysts have discussed the potential positive corporate governance effects of increased investment in Chinese listed companies by (controlling shareholder) unaffiliated institutional investors. It is still too early to understand the corporate governance effect, positive or negative, of such investors' participation should it become more prevalent, yet we can say with certainty that at present, the role of such investors pales in comparison to what the CSRC can do via the regulation described here.

83. *See supra* note 17–19 and accompanying text.

rights created for approval of related party "external" guarantees constitute a very effective response to the identified abuse, especially when compared to reliance on the doctrinal fill-in, a vague and unevenly applied duty of loyalty standard applied ex post. Of course, academic analysts will question the viability of a self-enforcing design for China's corporate law, given the spectacular demise of a highly touted and U.S. legal academic-directed Russian experiment and the broad recognition that even (initially) self-enforcing norms may have to be enforced (subsequently) by the state when firm participants do not comply with the allegedly self-enforcing rules.[84] In response, I can only invoke my decades-long experience as a corporate law practitioner in the PRC to assert that self-enforcing mechanisms—like negative vetoes or super-majority approval rights—do work in China presently and are extremely effective at constraining autocratic and politically endowed controlling shareholders regardless of how they seek to implement that control through the board of directors or the general shareholders' meeting. Moreover, to the extent such mechanisms do function, that compliance is not reported and thus cannot be observed or quantified; only brazen non-compliance by firm participants will become apparent (via litigation or the financial press), and there is very little evidence of that—all of which tends to confirm my personal observations of how well self-enforcing norms function in China.

V. ENABLING TO MANDATORY—THE STATE *QUA* REGULATOR BATTLES THE STATE *QUA* SHAREHOLDER

A. The U.S.-Origin Quack Corporate Governance Critiques and the PRC

This Article begins with a précis listing of the several critiques launched against SOX and Dodd–Frank-imposed "quack corporate governance." Many of those attacks do not apply directly to the equivalent regulatory phenomenon seen in the PRC and detailed here given China's unitary national government and national corporate law (e.g., the U.S.-specific "state jurisdiction" and "legal systems market/laboratories of federalism" critiques—there is in fact no market for corporate law in the PRC).[85] Others of the attacks do not track well onto the PRC's still de-

84. *See* Bernard Black, Reinier H. Kraakman & Anna Tarassova, *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 STAN. L. REV. 1731 (2000).

85. As Jennifer Hill sensibly points out, the Romano/Bainbridge "legal systems market/laboratories of federalism" critique may not apply even in avowedly federal nations with state-level corporate law. *See* Jennifer Hill, *Regulatory Show and Tell: Lessons from International Statutory Regimes*, 33 DEL. J. CORP. L. 819, 820 n.9 (2008) ("Although Australia technically has a state-based system of corporate law, the Corporations Act 2001 effectively operates as a 'federal' rule as a

veloping institutional structures (e.g., the "bad, panicked, uninformed, badly-informed and inexpert legislative process" or "opportunistic packaging of spurious preventatives" critiques—CSRC reforms are a remedy to a dysfunctional, inexpert, and often manipulated legislative process, and there is no harm in an institution like the expert CSRC acting strategically to implement critically needed corporate governance protections when the national legislature cannot, will not, or does not have the required technical competence).

There are, however, other aspects of the U.S.-origin complaint against a securities regulation incursion into the corporate law domain that do sound in the PRC circumstance. Certain of these PRC-relevant U.S.-style critiques can be answered by pointing to the Chinese political economy in which PRC firms operate. For instance, unfettered "director primacy" in China may not be a "good," but instead an evil that must be restrained at corporatized SOEs majority owned by state-owned controlling shareholders, which elect most of the directors on a given board, and the judicially applied fiduciary duty constraint is weak. The same might be said for the "choice of regulatory approach cost" and "empirical studies demonstrates ineffectiveness" critiques, as there may be reason to think that a public-spirited regulator like the CSRC *should* be in the business of erecting additional costs in the face of overly powerful state-tied controlling shareholders and their insiders. (There is a longer rebuttal to the latter of these critiques, which goes to how one measures "effectiveness" in analyzing corporate governance reforms—said another way, whether such effectiveness should be entirely based on measured firm value or market cap, profitability, or decision-making efficiency, as contrasted with enhanced protection of, and accountability to, minority owners by the erection of obstacles like super-majority voting rights, negative vetoes, etc.) Similarly, the "cost of new compliance/cost compliance," "unattractive to (domestic and foreign) securities issuers," and "transnational effect" critiques may all be inappropriate for the PRC circumstance, as the corporate governance provisions analyzed in this Article may serve to increase investor confidence (PRC and foreign) regarding China and make PRC issuers only more attractive to the providers of investment through the capital markets.

result of reference by each state of its powers relating to corporations to the federal government. This broad referral of powers by the states to the federal government constituted an attempt to unify and harmonize corporate law rules in Australia. . . . Thus, whereas state competition has been viewed as an essential contributor to efficiency in the U.S. corporate law, in the Australian context, it was considered an obstacle to efficiency.").

B. "Distinct Legal Systems" and Corporate Law with Chinese Characteristics

Perhaps most interesting and revealing of the nature of both corporate law and governed firms in contemporary China is the critique I assert above that U.S. law academics pay too little attention to[86]—what I call the "distinct legal systems" critique (coupled with the expressed fear of a unidirectional "ratchet" effect).

In the Anglo-American legal system, corporate law has changed significantly over more than 150 years. Corporate law commenced with special legislative chartering of state-promoted, partially or wholly privately financed, firms engaging in quasi-public activities under mandatory and often immutable rules (e.g., regional monopoly trading companies, railway and canal-building firms, etc.). Today, we observe general corporation codes which are enabling in orientation, providing something like a standard form contract structured around default provisions with very few mandatory or immutable rules working on firm participants' internal rights and obligations or the firm's external activities. Indeed, corporate law is now determined by a mixed application of some default provisions left unchanged by the participants, specific arrangements crafted by ex ante contracting-out of other default rules, and extremely broad common law doctrines interpreted and enforced ex post by a usually circumspect (and business judgment rule-constrained) judiciary as prodded by private shareholder plaintiffs (and in the United States, their attorneys working with the benefit of contingency fee arrangements and liberal cost-sharing/class action rules). Basic theories of the corporation have developed in parallel from the eighteenth and nineteenth century idea that firms were a creation of the state, to the twentieth century "contractarian" conception of the company as a creation of private contract.

Securities law and regulation can be seen as substantially different from modern corporate law. Securities law is almost wholly built on immutable and mandatory rules (e.g., disclosure) or prohibitions (e.g., against insider trading or securities trading manipulation), with an expert administering agency and the courts left to interpret and enforce the

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86. Roberta Romano implies the distinction I draw here—but goes no further—when offering a way to rescind the mandates she calls "quack corporate governance," by suggesting (in her more moderate remedy) that what is mandatory be transformed into the default:

> The easiest mechanism for operationalizing such a policy change [rescinding the offending SOX mandates] would be to make the SOX mandates optional, i.e., statutory default rules that firms could choose whether to adopt. . . . Were the SOX corporate governance mandates to be treated as defaults, corporations would be able to opt out by shareholder vote.

Romano, *supra* note 2, at 1594–95.

meaning or reach of those rules/prohibitions alongside private shareholder plaintiffs. Indeed, securities law rarely functions to "enable" and defers very little to private arrangements or any notion of ex ante contracting out of its strong norms, precisely because to be effective it must be mandatory and immutable.

For many analysts, it is the enabling standard form contract and default rule-providing—and *non*-mandatory—character of corporate law that both defines and recommends it. Indeed, I believe that one thing animating the "quack corporate governance" critique in the United States (and aside from the ideological "legal systems market/laboratories of federalism" critique) is related to the notion that a corporate establishment and governance system predicated on private contracting in the embrace of well understood and mostly majoritarian default rules must be protected at all costs and against the imposition of mandatory rules that constrain the space for private agreement or alter the mutability of state-offered default prods. Why this keen concern about mandatory provisions? In my view, it arises from a bedrock confidence in developed economies that capital accumulates (i.e., it is invested by private parties) and will be efficiently allocated to useful projects, through an infinite variety of complex and often shifting arrangements regarding entity governance and investor rights (with respect to both firm governance and value recognition), which arrangements are in turn determined by different levels of information availability, the value (both cash and know-how) brought to the table by specific investors, and innumerable other factors. Said another way, there is a strong belief that any attempt to significantly pattern or constrain those arrangements (and beyond what the public interest or basic accountability absolutely requires) will impede realization of the best, privately negotiated, arrangements and thus fatally dampen capital formation.[87] (Whether or not this is true as a general matter for all investors, which I doubt, it has to be true for the most powerful and sophisticated venture investors, who have the knowledge and bargaining leverage to ask for and achieve specific, self-interested investment and governance terms.) An offshoot of this line of thinking, and especially strong in the United States with its resurgent libertarian tradition, is the concern that recoils at the thought of too much intervention by the state or any other external player into the "self-ordered" or "private" realm, or "free" action.

87. *See* Frank H. Easterbrook, *The Race for the Bottom in Corporate Governance*, 95 VA. L. REV. 685, 688 (2009) ("Corporate law came to be enabling rather than directory in the United States because that serves investors' interest, not because it serves managers' interest. States that adopt inefficient regulation propel capital out of their jurisdictions.").

None of the above is meant to deny that, even in developed world economies, there are areas where these two distinct legal systems must converge on the same object of affection: the large widely held corporation with listed shares.[88] This limited convergence occurs because shareholders (and potential shareholders) of large public firms experience the most extreme kind of information asymmetry, and thus mandatory disclosure (and some mandatory process) is imposed via securities regulation to redress a pernicious imbalance, force standardized information disclosure that might not occur if disclosure was voluntary,[89] and not incidentally maintain the attractiveness of public capital markets, which are in turn critical to capital formation. Examples of this quite appropriate incursion of securities regulation-origin mandatory rules into the normally more contractually determined corporate law realm can be seen with respect to the shareholder voting process (proxy solicitations and the real shareholders' meeting), existential decision making by shareholders (tender offers), and breach of fiduciary duties by public securities trading where a deep market and anonymous trading in that market give rise to an information asymmetry that is complete and otherwise without remedy (insider trading).

So, how does the contemporary Chinese accommodation highlighted in this Article fit into this discourse about two legal systems: contractarian-friendly/enabling corporate law versus mandatory securities law

88. Indeed, there are major Anglo-American tradition jurisdictions that have abandoned any real distinction between corporate law and securities law norm vehicles, such as Australia, where both corporate law and securities law are embodied in the same piece of legislation, some items of corporate law are mandatory and some items of securities law are at least permissive (but not enabling), such as the Australian Securities Exchange (ASX) corporate governance-related "comply or explain" rules, which also feature in the Dodd–Frank statute, *supra* note 5. Professor Hill explores some of this, and in particular how much more protection institutional shareholders in News Corp. enjoyed under mandatory Australian corporate/securities law in the Australian Corporations Act and the ASX Listing Rules (regarding norms delivered by the Listing Rules, and relating to super-voting shares, shareholders' meetings and voting, takeovers, and best practices principles) than under enabling Delaware corporate law, U.S. securities law, and New York Stock Exchange (NYSE) regulation before News Corp.'s shift of domicile to Delaware and its primary listing to the NYSE in her contra-convergence study. Jennifer G. Hill, *Subverting Shareholders Rights: Lessons from News Corp.'s Migration to Delaware*, 63 VAND. L. REV. 1 (2010).

89. There is, of course, a very rich and long-standing debate about whether mandatory standardized disclosure is desirable or necessary given the incentives, which might support purely voluntary disclosure by issuers. *See, e.g.*, Frank Easterbrook & Daniel Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669 (1984); Meritt B. Fox, *Retaining Mandatory Securities Disclosure: Why Issuer Choice Is Not Investor Empowerment*, 85 VA. L. REV. 1335 (1999). I do not engage with that interesting debate here, other than to note that the normative cases with respect to mandatory or voluntary disclosure in the PRC capital markets have to take account of China's specific institutional context and political economy, which are radically different from the landscape over which these interesting battles have been fought for so many years.

(which I emphasize is distinct from the overarching U.S.-specific preoccupation with *state* corporate law and *federal* securities law)? For many of the reasons highlighted here, in 1993–1994 the Chinese Communist Party-led government began its experiment with company law making decidedly in the "mandatory" and not the "enabling" mode.[90] Indeed, that orientation was but a continuation of China's earliest, from the late Qing to 1949, identities of corporate law specifically,[91] and law generally.[92] All of that in turn is consistent with the Chinese state's (and before that, the imperial Chinese court's) desire to control or monitor very closely potentially independent capital accumulation and business activity, and benefit from it.[93] Only with the passage of the 2006 PRC Company Law did China move—formally at least—away from a business regulation philosophy and in a new direction: towards an enabling statute that allows for increasing private contracting-out of default rules ex ante alongside continuing self-enforcing mechanisms, and which creates very significant work for the judiciary applying standards (like fiduciary duties) ex post. In fact, this development in the direction of a formally "enabling" corporate law system and away from a directive, business regulation and orientation has been celebrated widely in the PRC among academics and People's Court officials alike. For example, a 2007 commentary on a 2003 case (where the Shanghai No. 1 Intermediate People's Court had to choose between *statutory* rights of first refusal due to existing shareholders and the rights of a good faith purchaser under a fraudulently approved securities purchase *contract*) by the Shanghai Higher People's Court channels Frank Easterbrook directly:

90. *See Corporate Governance in China*, *supra* note 69, at 496, 500 ("And the [1994] Company Law is thus clearly more concerned with regulating and suppressing than with fostering and nurturing. . . . The policy choice in the current [1994] Company Law is clear: the rules are almost uniformly mandatory.").

91. *See* William C. Kirby, *China Unincorporated: Company law and Business Enterprise in Twentieth-Century China*, 54 J. ASIAN STUD. 43 (1995).

92. *See* Liang Zhiping, *Explicating "Law": A Comparative Perspective of Chinese and Western legal Culture*, 3 J. CHINESE L. 55, 61, 89 (1989) ("Prohibitions and commands emphasize the function of law; punishment, however, is primarily the means by which realization of this function is guaranteed. . . . Law was never perceived as a means of preserving rights, freedom, justice, since these were completely alien concepts in ancient China. Law was punishment . . . [a]ccording to traditional ideas, law was above all a tool of suppression. It was also one of countless methods of governing, which could be used and constituted at will by the ruler.").

93. *See* Kirby, *supra* note 91, at 44 ("The history of this first modern Chinese [company law] is to some degree a barometer of the state's assumptions towards the economy over the course of the twentieth century. . . . [T]he Chinese state would be the prime beneficiary of the adoption of the corporate form of business activity. But the first assumption of the [early twentieth century] Qing reformers, that the modern corporation on a Western model would be the essential vehicle for *private* Chinese economic development, would prove quite mistaken."); Madeleine Zelin, *The Firm in Early Modern China*, 71 J. ECON. BEHAVIOR & ORG. 623 (2009).

> First and foremost, the thing we must clarify is this: the jurisprudential logic underlying the giving of priority to the [right of first refusal] over the purchase rights of the transferee is absolutely not because the former right is in statute and the latter is merely a contractual right. This is because statutory rights are not always superior to contractual rights—in fact, it is just the opposite. Approaching it systematically and *adhering to the orientation which protects private ordering, regulation of the market requires that application of the law fully respect the freedom to contract to encourage successful transactions*. . . . There is significant meaning in this.[94]

(At the same time, the close proximity in time of China's corporate governance system to a strong business-regulation orientation makes the distance between the CSRC mandatory norms described here and increasingly enabling corporate law much less, certainly as compared with the same leap that the SEC or U.S. Exchanges attempt to perform—not just across the borders of law, but also federal and state jurisdictional lines.)

But herein lies the rub: as China's corporate law has moved in one direction, the mandatory norms imposed by the CSRC and other agencies described in this Article have pushed the applied law of corporate governance in precisely the opposite direction.[95] The reasons for this administrative agency counter-strike (and incursion into a notionally separate domain of law and regulation) are clear and once again reveal in stark terms the very real political economy of China and its corporatized SOEs. Describing modern PRC company law as "enabling" appropriately conjures another use of that term, something like the "enabling" of a drug addict or mafia chief acting in furtherance of a recognized public or social evil. Given lopsided capital structures and the dominant horizontal agency concern (and horizontal oppression) described above, the unconstrained power of state controlling shareholders (and their appointed insiders), and a radical information asymmetry between such controlling shareholders and public (both retail and even institutional) capital providers, an enabling company law design in China is in fact a wide invitation for dominant shareholders to oppress and disadvantage far weaker

94. Commentary regarding the case reported as "A Investment Company v. Wang and Other Shareholders,"(Shanghai No. 1 Intermediate People's Court, on appeal 2003), in 2005 NIAN SHANGHAI ANLI JINGXUAN [2005 SELECTION OF SHANGHAI COURT CASES] 106–109 (Shanghai Higher People's Court, ed. 2007) (with the quoted portion of the commentary *id.* at 111 (emphasis added)).

95. Interestingly, my own research has shown how the Chinese People's Courts—contrary to some expectations and certainly the doctrinal rhetoric quoted from the *Investment Company v. Wang* case commentary above—have mimicked this trajectory, adjudicating some enabling provisions of the 1994 and 2006 PRC Company Laws as mandatory. *See Corporate Law in the Shanghai Courts*, *supra* note 16, at 382–83 ("'Conservative' Adjudication – iii. Enabling to Mandatory").

actors in the firm, especially where minority shareholders have very little power to bargain for effective protections or obtain any price discount to reflect their disadvantageous position. Therefore, mandatory provisions designed to protect, even minimally, the basic rights of minority capital providers against such control parties are mandatory.

A decade ago one of the best observers of corporate governance developments in China, Don Clarke, was not sanguine about the role the CSRC might play in supporting better and more effective corporate governance in China. His concerns properly focused on resource constraints at the CSRC (already fully occupied with market regulatory tasks, merit regulation for issuers, and patrolling disclosure into the capital markets) and its basic legal authority to intervene in the corporate law sphere:

> The prime candidate here [as an institution able to play a role in corporate governance reform] would seem to be the . . . CSRC; however, it is hampered by significant disabilities. First, its staff is small relative to the scale of its tasks. . . . The CSRC . . . must enforce merit requirements that attempt to ensure the investment quality of the business as well as disclosure requirements. Moreover, its very authority to make and enforce rules regarding corporate governance has been challenged as insufficiently grounded in legislation. So far the challenge has been only academic, but at some point a suitably motivated court might agree.[96]

Professor Clarke then went on to question the viability of the CSRC advocating for substantive corporate law doctrine like fiduciary duties, or participating in a meaningful way in their enforcement:

> It is very unlikely that the CSRC, which does not even have the status of a regular government administrative agency, can by itself create a private right of action for shareholders against directors. It has engaged in a limited number of disciplinary actions against directors, but any norm that relies solely on administrative enforcement is going to be of limited value, given the CSRC's resource constraints.[97]

The answer to those concerns lie in what Professor Clarke uncharacteristically failed to imagine a decade ago: (i) for the CSRC, virtually costless (or non-resource depleting) corporate governance reform mechanisms, i.e., self-enforcing norms (e.g., class supermajority voting rights and supermajority of the non-controlling shareholder group votes, etc.) and structural reforms that enhance firm monitoring but implicate only firm-

96. *Corporate Governance in China*, *supra* note 69, at 504 (citation omitted).
97. *Id.*

level costs (e.g., independent directors); (ii) a revised 2006 Company Law that now fully incorporates a good number of the substantive legal doctrines and procedural mechanisms/private rights of action the CSRC and its academic allies have long tried to sell into the body of China's corporate law (e.g., fiduciary duties for orthodox corporate fiduciaries and even controlling shareholders, the derivative action, etc.); and (iii) a constantly developing judiciary that is increasingly effective in enforcing these key legal doctrines, exclusively CSRC-origin corporate governance norms, or both.

C. Regulatory Expansion of Private Autonomy in the Statist Political Economy

Outside of Professor Clarke's well informed but ultimately unrealized worries about the effectiveness of CSRC-led and instituted regulatory reform of Chinese corporate governance, other observers—especially those in the West—may have a separate, more philosophical, concern with the practices revealed here, that being alarm at profound "state" incursion into a realm of "private freedom." As noted above, I believe this largely philosophical concern fans some of the more strident "quack corporate governance" attacks in the United States. Surely that concern, directed at governance structures in a liberal democracy like the United States, only has greater purchase when focused on a largely authoritarian political system like the PRC.

For China, however, as we fill in the specific PRC context, we are called upon to reappraise what may be called the "spheres of freedom" concern and understand that our worries may be completely backwards. Indeed, an understanding of the CSRC's impact on China's corporate governance regime since the 1990s should cause those most exercised about state incursion on spheres of autonomy to celebrate the injection of mandatory norms into China's increasingly contractarian company law regime. Writing more than a decade ago, Professors Bill Alford and Shen Yuanyuan described a still common vision about "law" and its power in the PRC's reform era:

> Law . . . [is] increasingly seen in both academic and policy circles as critical to the attainment for Chinese of fuller economic, political[,] and social freedoms. In part, the prominence accorded to law is attributable to its perceived potential, however imperfectly realized to date in the PRC, to facilitate the above described transfer of power from state to society by limiting the spheres of life over which the former has authority and providing constraints as to the manner in which such authority is to be exercised. No less importantly, law is extolled for the vital role it has to play, once the

> state has receded, in establishing the proverbial 'level playing field' on which a new society is to be grounded. In contrast to the avowedly political and highly particularistic manner in which the Chinese state historically reached into citizens' lives, law is commended for being facilitative, rather than determinative, providing a neutral framework through which citizens, each endowed with the same rights and each entitled to invoke the uniform procedural protection that formal adjudication is intended to provide, may work things out for themselves . . . .[98]

But Alford and Shen then very wisely cautioned against an automatic or total embrace of "law" as an instrument for the protection of private freedoms:

> Compelling though the rationales for a drastically circumscribed role for the Chinese state may be, they do not provide us with a sufficiently nuanced metric for thinking about freedom in the PRC. Without slighting the values to which this vision speaks, we need soberly to confront difficult questions regarding . . . the ways in which even the most seemingly neutral rules intended to do no more than structure autonomous decision-making, may shape outcomes and have an impact on freedom.[99]

Professors Alford and Shen were writing about the PRC Marriage Law and the incursion of protective and empowering state regulation into the domestic marriage sphere, but we may apply their nuanced and skeptical view to the development of corporate law in China. If we recognize a distinction between the state as an overbearing economic actor spawning a parade of controlling shareholders, on one hand, and the state as a (potentially) publicly interested regulator, on the other, we may perceive a new vision of the CSRC's serial mandatory-type regulatory incursions into the province of mostly enabling legal corporate governance. For in the PRC's "corporatization" program, we are confronted with a notional and mostly rhetorical retreat "under law" (the enabling Company Law specifically) of the state, a "retreat," which in fact cloaks the reassertion or maintenance of concentrated power (the state metamorphosed into a politically privileged controlling shareholder), in a situation where the controlling parties make sure formally conferred "legal" protections for

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98. William P. Alford & Shen Yuanyuan, *Have You Eaten? Have You Divorced? Debating the Meaning of Freedom in Marriage in China*, *in* REALMS OF FREEDOM IN MODERN CHINA 234, 235–36 (William C. Kirby ed., 2004) ("We would do well . . . to be mindful of the perhaps singular capacity of the state to curb private abuses of power and structure an environment in which freedom might be widely enjoyed.").

99. *Id.*

the exploited minority are not utilized (e.g., the absence of listed company corporate governance cases in the Chinese courts and blocks against multi-party actions of any kind). The only effective remedy for this deprivation of even limited autonomy and basic fairness embodied in the structurally determined exploitation of minority shareholders, and the inability of the system to apply and enforce whatever "legal" protections are on offer, is state intervention of another sort: the injection by a state institution into enabling corporate law of immutable substantive doctrines and mandatory corporate governance mechanisms designed to protect those who will suffer such deprivations and constrain the awesome powers vested in the continuing control parties. That is precisely the path pursued by the CSRC (and certain other bureaucratic actors) over the last several decades, while at the same time effecting a thoroughgoing and perhaps aesthetically displeasing cannibalization of China's corporate law—a kind of legal systems "hostile takeover," which I argue here is both absolutely necessary and almost completely benign.

D. "How" Has the CSRC Pushed Back?—Vertical Systems and Horizontal Resistance

Observers familiar with the contemporary Chinese party state, political scientists in particular, may have a final provocative question when alerted to the way in which the CSRC has created effective constraints on the power of China's state-tied controlling shareholders. That "how" question—how is the CSRC inspired to do this and, moreover, how does the CSRC get away with it?—is based in a vision of the PRC as a unitary, and largely authoritarian, party state where agents of the party state penetrate into every aspect of society, from enterprises and their controlling shareholders, to government departments, to a judiciary wholly lacking in autonomy or independence. Analysts will point to the rotation of personnel from top executive positions at China's corporatized SOEs into top regulatory jobs or senior central or local government postings as proof of this reality.[100] If that vision is even partially correct, then there should be no allowance for an expert agency like the CSRC (with no economic and little independent political power) to conceive

100. The career of Shang Fulin, head of the CSRC until October 2011, is a case in point. Before he was appointed head of the CSRC in December 2002, he was President of the Agricultural Bank of China. Since October 2011, he has served as head of the CSRC's sister commission with jurisdiction over the financial institutions, the China Banking Regulatory Commission. His predecessor at the CSRC, Zhou Xiaochuan, now the head of China's central bank, was formerly the president of the China Construction Bank. In March 2013, Shang Fulin's successor at the CSRC, Guo Shuqing, moved from the CSRC to a post as Deputy Party Secretary and Governor of Shandong Province. These rotations are duplicated at all levels of the party state.

and implement mechanisms that limit the power of, or seek to hold accountable, far better-endowed actors—SOEs and their controlling shareholders and the sprawling systems of political economic power they spring from.

It turns out that there is very little contemporary writing about the PRC that explores what might be at work in this specific situation,[101] and thus, I am led to speculate on answers to the "how" questions. (This is not the place to address the possible sources of the CSRC's concrete power, as opposed to the agency's normative power, and answer the specific questions political scientists are usually concerned with—e.g., what rank does the CSRC and its party organ have in the state bureaucracy and the party system, respectively? What, or whose, patronage network does the CSRC lie in? What individual or groups of leaders have empowered the CSRC at different times in its development? What resources are the CSRC able to attract, and conversely, what resources does it control? Is the CSRC able to resist agency capture, and how?) Instead, my speculations on the "how" questions focus on the CSRC's normative power against SOEs and the systems that support them, and three ideas that reveal a new identity of the horizontal aspect of what has been called the PRC's "fragmented authoritarianism": (i) the CSRC's perception of its role as the "ministry" of capital markets development, empowered to act against other, more sector-specific, concentrations of political and economic power like SOE systems; (ii) the relatively "central" (versus "local") basis and "all sectors" (versus specific sector) orientation of its

101. There is an abundant political science literature on China's "fragmented authoritarianism," which focuses on how vertical (from center to locality) *governmental and bureaucratic* systems work in conjunction, or not, across horizontal lines (within a given geographic area). This literature is strongly associated with the work of University of Michigan political scientist Ken Lieberthal. *See* KENNETH LIEBERTHAL & MICHEL OKSENBERG, POLICY MAKING IN CHINA: LEADERS, STRUCTURES AND PROCESSES 3–34 (1988); Kenneth Lieberthal, *Introduction: The "Fragmented Authoritarianism" Model and Its Limitations*, *in* BUREAUCRACY, POLITICS AND DECISION MAKING IN POST-MAO CHINA 1, 1–32 (Kenneth Lieberthal & David M. Lampton eds., 1992); KENNETH LIEBERTHAL, GOVERNING CHINA—FROM REVOLUTION THROUGH REFORM 186–88 (2004). Political scientist Andrew C. Mertha has also written more recently on this aspect of PRC governance. *See* Andrew C. Mertha, *"Fragmented Authoritarianism 2.0": Political Pluralization of the Chinese Policy Process*, 200 CHINA Q. 1 (2009); Andrew C. Mertha, *Policy Enforcement Markets—How Bureaucratic Redundancy Contributes to Effective Intellectual Property Implementation in China*, 38 COMP. POL. 295 (2006). All of these studies, however, focus on horizontal competition (or, in Professor Mertha's case, redundancy in enforcement) between vertically arranged *governmental and bureaucratic* actors, and usually with respect to specific policy decisions or approvals. This Article reveals a new and different identity of the horizontal contest where there is ever-increasing enmeshment of political and economic power, the spectacle of a central government agency creating *preenforcement* designs that *systemically* constrain the economic and directorial power of a supremely powerful, *non-governmental*, *non-regulatory* constituency, SOEs, and their controlling shareholders.

power and the use of it; and (iii) the possibility that those SOEs and controlling shareholders that are seeing their power challenged may accept such constraints so as to preserve viable capital markets that they can access going forward for much-needed finance capital.

The CSRC was indeed the first independent agency, and subsequently ministry-level body, in the PRC's history with jurisdiction over an area that is not a specific industrial *sector*, but a *market activity* in an increasingly market economy. Thus, just as, for example, the Ministry of Textile Industry governed the PRC's entire textile industry and its productive SOEs, the CSRC can be seen as the Ministry of Capital Markets—a regulator certainly, but also a government department charged with maintaining both the integrity and attractiveness of China's domestic capital markets. This sense of ownership of the capital markets, and investment in the success of the same, may contribute to the CSRC's concrete moves to resist the power of even politically well endowed SOEs and their supporting systems (coupled with affirmative regulation of the issuers, funds, brokers, underwriters, and accountants it is charged with oversight of). Second, the CSRC is very much an organ of the central government, which is not tied to or reliant upon any given industrial or manufacturing sector. Most large SOE systems are also anchored in some kind of central authority (usually a former ministry metamorphosed into a group holding company), but their political and economic interest quickly stretches into lower level, and thus localized, operations, and usually limited to a specific sector (e.g., telecoms, power generation, etc.). Thus, while we may think of such SOE systems as all-powerful and rooted in the "center," they can in fact be challenged by a purely central sectorally non-affiliated organ like the CSRC. Third, there may be SOE systems and the controlling shareholders they have spawned who are supportive (or at least tolerant) of the appearance and the reality of formal constraints on their governance power within a specific listed firm as the price of functioning, apparently level-playing field, and investment-attracting capital markets, something they desperately need to continue serving their corporate finance needs.[102] This idea is different from a

102. While this idea may be surprising, and even unlikely, in the Chinese or any context, it is precisely the dynamic at work in India, where in 2001 the securities regulator implemented the SOX-like (but pre-SOX) "Clause 49" reforms (added to stock exchange listing requirements) based upon the recommendations of the 1999 Kumarmangalam Birla Committee, which recommendations in turn were based upon a voluntary 1998 Corporate Governance Code devised by none other than the Confederation of Indian Industry (CII). The CII is an organization made up of, and representing the interests of, India's largest public firms. *See* Bernard S. Black & Vikramaditya Khanna, *Can Corporate Governance Reforms Increase Firm Value? Event Study Evidence from India*, 4 J. EMPIRICAL LEGAL STUD. 749, 759 (2007) ("Corporate governance reform efforts in India were largely triggered

common trope about corporate governance reform in the PRC that every reform step is merely signaling to foreign capital investment, whether via private investment or the public capital markets. Here, the focus is on what these SOE systems and the controlling shareholders understand they need to do (or at least can stomach) to gain *Chinese* capital investment through the public capital markets.

V. CONCLUSION

While at first blush the CSRC program described in this Article seemingly offends against bedrock principles of the highly articulate anti-“quack corporate governance” constituency, settled ideas of what enabling corporate law should be in modern capitalist economies, and equally strong concerns for always-endangered realms of private “freedom” or autonomy, on reflection it accomplishes something far more positive. The program provides effective mechanisms for the protection against exploitation of minority shareholders (which exploitation, as demonstrated above, is the necessary consequence of China’s “corporatization without privatization” program), and thereby makes financing easier for those seeking to raise capital (whether repackaged SOE or truly “private” entrepreneurial firm), investment more attractive for those interested in contributing capital, and the allocation of capital more efficient overall—precisely the policy goals invoked when advocating the merits of enabling corporate law and autonomous private action under the program.

Certainly, the applied remedy described herein—mandatory provisions injected via administrative agency *fiat* into an enabling corporate law regime to confer greater power on minority investors and thus spur investor participation in the capital markets—seems freighted with irony or contradiction. Yet, as I hope to have demonstrated here, it is a very good response to the circumstances presented by China’s unique political economy, and the particular evils arising from the “corporatization without privatization” of Chinese SOEs, with retention of absolute power by party state forces metamorphosed—by operation of “law” no less—into controlling shareholders of new, dominated, corporations.

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by CII’s promulgation of its Corporate Governance Code in 1998. CII then followed up by lobbying SEBI to implement mandatory reforms – presumably consistent with the CII Code. . . . Much like the Business Roundtable in the United States, major Indian firms were the interest group most likely to oppose governance reform. Instead, however, CII *initiated* the reform effort.” (emphasis in original)); Nicholas C. Howson & Vikramaditya Khanna, *The Development of Modern Corporate Governance in China and India*, *in* CHINA, INDIA AND THE ECONOMIC ORDER 513, 527–31 (Muthucumaraswamy Sornarajah & Wang Jiangyu eds., 2010).

Some will complain that the CSRC-designed and implemented remedy applies to a very small subset of all firm establishments in the PRC—approximately 2,500 listed companies and 100 securities firms in a country with more than 550,000 LLCs and 100,000 CLSs.[103] This concern is well founded in 2013, but it fails to take account of two ongoing developments. First is the CSRC's initial move, effective January 1, 2013, asserting regulatory jurisdiction over *unlisted* but deemed "public companies"—CLSs with more than 200 shareholders, or which have issued shares "to the general public" (*shehui gongzhong*) and "in a public manner" (*yi gongkai fangshi*).[104] If successful, this extension of CSRC regulatory authority will result in a large portion of the approximately 100,000 CLSs in China being subject to the corporate governance norms described here. Second is the process revealed in this writing: the way in which CSRC *regulation* applicable in the first instance to only listed companies and securities firms eventually finds its way into China's basic corporate *law* applicable to all business enterprises domiciled in China (other than WSOCs). While the latter process provides no immediate or irrevocable assurances to the most impatient reformers, it does augur well for a better and more effective legal corporate governance system in the not too distant future.

Appendix: Selected PRC Regulatory Enactments Affecting Corporate Governance

103. These approximate numbers were provided to the author by corporate and securities law specialist Professor Tang Xin of the Tsinghua University Law School in April 2013.

104. *See* CSRC, Feishangshi Gongzhong Gongsi Jiandu Guanli Banfa [Supervisory and Administration Measures for Non-Listed Public Companies] zhongguo zhengquan jiandu guanli weiyuanhui ling [2012] 85 (promulgated by CSRC, Sept. 28, 2012, effective Jan. 1, 2013), arts. 2(1), 2(2), *available at* http://www.csrc.gov.cn/pub/zjhpublic/G00306201/201210/t20121011_2156 89.htm. These Measures certainly foresee substantial intrusion into the corporate governance system applicable to such unlisted "public companies," for instance with respect to mandatory articles of association for such firms, chapt. II, "Corporate Governance," art. 6: "The CSRC shall, in accordance with law, make specific stipulations regarding the mandatory provisions ["*bibei tiaokuan*"] of the articles of association for public companies and regulate the development and amendment of the articles of association of public companies." *Bibei tiaokuan* is the same linguistic formulation used for the Mandatory Articles of Association for Overseas Listing Companies, *supra* note 23, and stronger than the term used for the Guidance Articles of Association for Listed Companies, *supra* note 23 (*zhiyin* or "guidance"). Of course, a question remains as to how the CSRC will enforce the adoption of these mandatory corporate constitutions, or indeed any provision of the Measures for Non-Listed Public Companies or subsequent regulation based in the Measures, without the threat of a withheld listing or de-listing available to it with respect to listed CLSs.

SCSC & CRES, *Notice Regarding Implementation of the "Mandatory Articles of Association for Overseas Listing Companies"* [Guanyu Zhixing "Dao Jingwai Shangshi Gongsi Zhangcheng Bibei Tiaokuan" de Tongzhi], Aug. 27, 1994, zhengweifa [1994] 21

CSRC, *Notice Regarding the Issuance and Promulgation of the "Guidance Articles of Association for Listed Companies"* [Guanyu Fabu "Shangshi Gongsi Zhangcheng Zhiyin" De Tongzhi], Dec. 16, 1997, zhengjian [1997] 16

State Economic and Trade Commission & CSRC, *Opinion Regarding Further Promotion of Standardized Operation and Deepened Reform of Companies Listing Overseas* [Guanyu Jinyibu Cujin Jingwai Shangshi Gongsi Guifan Yunzuo He Shenhua Gaige De Yijian], Mar. 29, 1999, guojingmaoqigai [1999] 230

CSRC, *Guidance for Board Secretary Work at Companies Listing Overseas* [Jingwai Shangshi Gongsi Dongshihui Mishu Gongzuo Zhiyin], Apr. 8, 1999, zhengjianfaxingzi [1999] 39

CSRC, *Notice Regarding Prohibiting Listed Company Chief Executives and High Level Management From Also Holding Positions at Controlling Shareholder Units* [Guanyu Shangshi Gongsi Zongjingli Ji Gaoceng Guanlirenyuan Bude Zai Konggu Gudong Danwei Jianzhi De Tongzhi], May 5, 1999, zhengjiangongzi [1999] 22

CSRC, *Guiding Opinion on the Establishment of an Independent Director System* [Guanyu Zai Shangshi Gongsi Jianli Dulidongshi Zhidu De Zhidao Yijian], Aug. 16, 2001, zhengjianfa [2001] 102

CSRC, *Principles for Listed Company Corporate Governance* [Shangshi Gongsi Zhili Zhunze], Jan. 7, 2002, zhengjianfa [2002] 1

CSRC, *Measures for the Administration of Acquisitions of Listed Companies* [Shangshi Gongsi Shougou Guanli Banfa], Dec. 1, 2002, zhengjianhuiling [2002] 10

CSRC & SASAC, *Notice Regarding Several Issues Relating to the Regulation of Listed Company-Related Party Funds Flows and Listed Company External Guarantees* [Guanyu Guifan Shangshi Gongsi Yü Guanlianfang Zijin Wanglai Ji Shangshi Gongsi Duiwai Danbao Ruogan Wenti De Tongzhi], Aug. 28, 2003, zhengjianhui [2003] 56

CSRC, *Several Regulations Regarding Strengthening Protection for the Rights and Interests of Public Shareholders* [Guanyu Jiaqiang Shehuigongzheng Gudong Quanyi Baohu De Ruogan Guiding], Dec. 7, 2004, zhengjianfa [2004] 118

CSRC, *(Provisional) Measures for the Administration of Repurchase of Publicly-held Stock by Listed Companies* [Shangshi Gongsi

Huigou Shehui Gongzheng Gufen Guanli Banfa (Shixing)], June 16, 2005, zhengjianfa [2005] 51

CSRC & China Banking Regulatory Commission, *Notice Regarding Regulation of the Provision of External Guarantees by Listed Companies* [Guanyu Guifan Shangshi Gongsi Duiwai Danbao Xingwei De Tongzhi], Nov. 14, 2005, zhengjianfa [2005] 120

CSRC, (*Provisional) Measures for the Administration of Stock Compensation at Listed Companies* [Shangshi Gongsi Guquan Jili Guanli Banfa (Shixing)], Dec. 31, 2005, zhengjiangongsizi [2005] 151

Ministry of Commerce, CSRC, State Administration of Taxation, State Administration of Industry and Commerce & State Administration of Foreign Exchange, *Measures for the Administration of Strategic Investment by Foreign Investors in Listed Companies* [Waiguo Touzizhe Dui Shangshi Gongsi Zhanlüe Touzi Guanli Banfa], Dec. 31, 2005, waiguanju ling [2005] 28

CSRC, *Rules for Listed Company General Shareholders Meetings* [Shangshi Gongsi Gudongdahui Guize], Mar. 16, 2006, zhengjianfa [2006] 21

CSRC, *Guidance Articles of Association for Listed Companies* [Shangshi Gongsi Zhangcheng Zhiyin], Mar. 16, 2006, zhengjiangongsizi [2006] 38

SASAC & CSRC, *Provisional Measures for the Transfer of Stock in Listed Companies by State Shareholders* [Guoyou Gudong Zhuanrang Suochi Shangshi Gongsi Gufen Guanli Zanxing Banfa], June 30, 2007, guoziweiling [2007] 19

Ministry of Commerce, SASAC, State Administration of Taxation, State Administration of Industry and Commerce, CSRC & State Administration of Foreign Exchange, *Regulations Regarding Foreign Investors Merger and Acquisitions with Mainland Enterprises* [Guanyu Waiguo Touzizhe Binggou Jingnei Qiye De Guiding], Aug. 8, 2006, shangwubuling [2006] 10, amended June 22, 2009, shangwubuling [2009] 6

CSRC, *Measures for the Administration of Listed Company Major Assets Reorganization* [Shangshi Gongsi Zhongda Zichan Chongzu Guanli Banfa], Apr. 16, 2008, zhengjianhuiling [2008] 53

CSRC, *Measures for the Administration of Acquisitions of Listed Companies* [Shangshi Gongsi Shougou Guanli Banfa], July 31, 2006, zhengjianhuiling [2006] 35 (amended by the *Decision Regarding Amendment of Article 63 of the "Measures for the Administration of Acquisitions of Listed Companies"* [Guanyu Xiugai "Shangshi Gongsi Shougou Guanli Banfa" Di Liushisan Tiao De Jueding], Aug. 27, 2008, zhengjianhuiling [2008] 56

CSRC, Public Security Bureau, People's Bank of China, SASAC, General Customs Administration, State Administration of Taxation, State Administration of Industry and Commerce & China Banking Regulatory Commission, *Notice Regarding Further Improving Work on Cleaning Up Large Shareholder Misappropriation of Listed Company Funds* [Guanyu Jinyibu Zuohao Qingli Dagudong Zhanyong Shangshi Gongsi Zijin Gongzuo De Tongzhi], Nov. 7, 2006, zhengjianhui [2006] 128

CSRC, *Administrative Rules for Same Company Stock Holdings and Changes by Listed Company Directors, Supervisory Board Members and High-level Management Personnel* [Shanghshi Gongsi Dongshi, Jianshi Ji Gaoji Guanlirenyuan Suo Chi Bengongsi Gufen Ji Qi Biandong Guanli Guize], Apr. 5, 2007, zhengjiangongsizi [2007] 56

Ministry of Finance, CSRC, State Audit Bureau, China Banking Regulatory Commission & China Insurance Regulatory Commission, *Notice Regarding the Printing and Distribution of "Basic Regulation of Enterprise Internal Controls"* [Guanyu Yinfa "Qiye Neibu Kongzhi Jiben Guifan" De Tongzhi], May 22, 2008, caihui [2008] 7

Ministry of Finance, CSRC, State Audit Bureau, China Banking Regulatory Commission & China Insurance Regulatory Commission, *Notice Regarding the Printing and Distribution of Complimentary Guidance for Enterprise Internal Controls* [Guanyu Yinfa Qiye Neibu Kongzhi Peitao Zhiyin De Tongzhi], Apr. 15, 2010, caihui [2010] 11

CSRC, *Decision Regarding Amendment of Several Regulations on Listed Company Cash Dividends* [Guanyu Xiugai Shangshi Gongsi Xianjin Fenhong Ruogan Guiding De Jueding], Oct. 9, 2008, zhengjianhuiling [2008] 57