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Recommended Citation

Howson, Nicholas C. "Regulation of Companies with Publicly Listed Share Capital in the People's Republic of China." *Cornell International Law Journal* 38, no. 1 (2005): 237-249.

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Regulation of Companies with Publicly Listed Share Capital in the People's Republic of China

Nicholas C. Howson†

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Introduction

Mr. Chairman, colleagues, and friends: It is a great honor for me to be able to address this group of experts and legislators, and many colleagues and friends, on a topic I care deeply about—the regulation of so-called public companies,¹ both outside of China and, since the early 1990s, inside of China.

First, and with many of the others invited to participate in this conference today and tomorrow, I thank the Office of Legislative Affairs (“OLA”) of the State Council of the People’s Republic of China (“PRC”) as well as the China Securities Regulatory Commission (“CSRC”) for convening this very important conference, and express my appreciation for the expert work and arrangements provided by our friends at the Shanghai Stock

† Professor, Cornell Law School; Of Counsel, Paul, Weiss, Rifkind, Wharton & Garrison LLP. This piece is adapted from a speech given at the International Seminar on Amendment of the PRC Company Law which took place in Shanghai, People’s Republic of China, on October 10 to 12, 2004. Passages in italics were not delivered in the speech at the Conference, but were included in the written materials submitted to the participants.

1. I say “so-called public companies,” because, in the Chinese context at least, companies do not themselves go wholly “public.” Instead, a certain portion of their share capital is listed and made available for relatively free public trading. Thus, it may be better to say that I am concerned about the regulation of “companies which have a portion of their share capital listed on, and freely tradable through, domestic or foreign exchanges.”

Exchange ("SSE"). I also salute The China Law Center, Yale Law School for its critical role in procuring U.S. perspectives for the conference, its long-standing interest in the issues involved with amending the PRC Company Law specifically, as well as its overall program of cooperating with Chinese legal experts on legal reform issues. Finally, I thank the Cornell Law School, where I am currently a Visiting Professor, for allowing me to travel to Shanghai for this meeting and offer these remarks.

A prior leadership group in China counseled that we "seize the moment" in certain important tasks. This is indeed the time to seize the moment with respect to reform of China's company and securities laws. Thus, the State Council OLA and the CSRC—with the critical help of the SSE—have done very well to convene a conference at this time with Chinese and international experts on amendment of the Company Law.

I. China's Company Law, Corporatization, and Capital Markets

I say above that I "care deeply about" China's public companies. This is because I have had a very significant interest as well as practice experience in the development of China's corporate and securities laws from the late 1980s and early 1990s, which saw the issuance of the Opinion on Standards for Companies Limited by Shares (the "Standard Opinion") to the Company Law, the establishment of the CSRC in 1992, the adoption of the Issuance and Trading Regulations in 1993, and finally, the promulgation of the Securities Law in 1998, through China's initial domestic capital raisings and its first listing of stock on overseas markets—including the first direct listing of shares by a Chinese issuer on the New York Stock Exchange in August of 1994. I have had the good fortune to couple that with significant experience in other financial centers, including New York and London, and thus have been able to see and live the way in which such jurisdictions regulate public companies, and manage issues concerning public shareholders.

I must also disclose that I am an admirer of all that China has wrought in the past fifteen years in developing capital markets and corporate establishments. I respect the rich discourse, debate, and ambition of our Chinese legislative and academic colleagues—many of them are here today or will speak at this meeting—who continue to ponder how to improve China's systems and, of course, China's interactions with outside economies and investors, always in a way appropriate to China's specific circumstances. Thus, I am gratified that various responsible departments have recognized that the 1994 Company Law of the PRC should and will be subject to significant amendment.² For as the socialist market economy and related institutions have grown and changed in China, law and regulation must adapt and grow to suit that pronounced market and institutional change.

2. We recognize that the Company Law has been amended in very minor, technical, ways over the past decade.

II. U.S. Regulation of Public Companies Through Company Law

I have been asked to share some thoughts on the U.S. regulation of public companies, especially on those aspects which have particular relevance to company law generally (as opposed to securities regulation), and to China's Company Law specifically. Accordingly, I have offered the conference a fairly extensive outline of some of the many things I would have *wanted* to discuss and contrast—if I had been permitted to speak for several days. Sadly for me—and happily for you—I have been allotted a slightly shorter time.

Thus, you will find in the outline headings for many of the topics concerning U.S. regulation of public companies that I feel certain many of you know very well already. These include the following:

- The state (as opposed to federal) role of U.S. corporate law, even for companies that issue stock primarily under federal securities law and regulation;
- The locus of public company regulation—whether in company law or securities regulation, or both (and in the latter case, how to allocate between the two);
- The U.S. federal securities laws and regulations, starting with the Securities Act of 1933 and the Securities Exchange Act of 1934 and their many rules, regulations, and forms; takeover and tender offer laws; proxy and disclosure regulation; and, of course, the Sarbanes-Oxley (“SOX”) initiatives of recent years;
- The U.S. institutional structure which supports regulation of public companies, including the Securities and Exchange Commission, (“SEC”), a special and expert administrative agency, the U.S. Department of Justice, which plays an important role in criminal prosecutions, and the very well-developed and in some ways equally expert court system; and
- Sophisticated, but ultimately permissive, media supervision, which strives to encourage fact-based reporting and to protect media outlets against exposure to legal actions for slander, libel, or defamation, or to other harmful or overly inhibiting constraints.

III. Why Do We Regulate Public Companies?

I do not have time today to describe these facets of the U.S. regulatory scheme as it has come into being over seventy years. Instead, I want to focus on the goals that animate the regulation of public, as opposed to private, corporate entities specifically. This should highlight why nations such as the United States, China, Australia, France, or India might have different objectives and methods for regulating public companies than for regulating private companies. This, in turn, will tell us what aspects are relevant to company law specifically, and how they might inform change and amendment of China's Company Law currently in force.

What then are some of the goals of the regulation of public companies and public trading in the United States (and by implication in China)? Textbooks may suggest:

- To protect investors, especially against fraudulent or manipulative behavior by other market participants;
- To serve the informational needs of investors, on initial purchase, in secondary trading, and during the life of the issuer, thus creating a more transparent market and better allocation of capital;
- To ensure better corporate governance by empowering minority or public shareholders, and to reduce the agency costs arising from shareholders' cost of monitoring agents such as directors, management, and controlling shareholders; and
- To create a trusted, transparent, and active capital market that is perceived as fair, as a sustainable mechanism for the raising of capital through the sale of securities.

In the United States, much, if not all, of these aims can be served by what we call securities regulation. There is little doubt that the same is true in China, as exemplified by the extraordinary contributions of the National People's Congress, the State Council, and the CSRC over the past decade.

Securities regulations comprises a body of laws and regulations directed and tailored specifically to the public markets and their participants— issuers, underwriters, broker-dealers, institutional investors, and the public which purchases and trades easily transferable share capital on public exchanges. Specifically, this body of law addresses in detail initial issuance of stock on the public markets, secondary market trading, mandated disclosure during such initial offerings, ongoing disclosure in the secondary market, and transactions involving listed companies or publicly traded share capital. The touchstone of U.S. securities regulation is disclosure—the theory being that insofar as participants have adequate knowledge about the value or potential value represented by the abstract instrument that is a share of stock, they should be permitted to make their own purchase or sale transaction decision.

Others of the above-listed goals might be addressed in other bodies of law or regulation, such as criminal statutes, accounting principles, or even regulations and standards governing professionals like accountants, lawyers, or financial advisors. Still other aspects—such as litigation methods or possibilities—might be set forth in codes of civil procedure, court rules, or administrative agency statutes or practices.

IV. Governance: How Does Company Law Regulate Public Companies?

My task today is to discuss how a nation's company law, in interaction with an increasingly sophisticated body of securities regulation and a strong and expert administrative agency like the SEC in America or the C.S.R.C. in China, might be arranged to serve some of the above-listed goals.

Among the goals listed above, the item that immediately lends itself to resolution through company law is that of improving corporate governance. For publicly listed companies, good corporate governance is not necessarily an end in itself. Transparency and the protection against oppression, manipulation, or fraud on minority or noncontrolling shareholders created by enforceable legal mechanisms and conventions that allow shareholders to monitor issuers, directors, managers, and controlling shareholders, leads to more attractive issuers, a deeper, more active, and more trusted market, and, many economists say, faster economic growth.

Standards of good governance must be different for a large public company with a diffuse shareholder population than for a closely held corporation or partnership. In the private company context, shareholders and owners can actually negotiate governance of the firm, or at least fully understand how the firm is to be governed as they make their investment or purchase their interest. During the life of their involvement, such investors in smaller, more closely held firms, may have very low or nonexistent agency costs to overcome in trying to monitor or participate in the governance of the firm. Often they will quite literally have a seat at the table, whether as owner-managers, or part of a small group of coinvestors.

Public shareholders are in a very different situation as compared to investors in closely held firms. Public shareholders participate as one of often thousands of passive actors in a diffuse body and may have no real expectation that their ownership interest will be coupled with a control right. In short, their interest may be limited by the circumstances to a purely economic interest to receive dividends or to be able to transfer the stock to capture accumulated value. If such public shareholders seek to participate in governance of the issuer, they face countless obstacles in affirmatively exercising any power or resisting oppressive behavior by real control parties. Law, legal mechanisms, and institutions can redress that imbalance for public shareholders.

In the United States and the UK, there are a number of concepts and institutions which encourage good governance:

- Fiduciary duties of directors and officers;
- Fiduciary duties of controlling shareholders;
- Self-enforcing transactional or procedural rules, such as class-based supermajority or veto rights (especially in the UK);
- Courts;
- Private rights of action for breaches of law and legal duties; and
- Liability for civil damages, in addition to criminal liability and administrative liability for fines and penalties

V. Certain Chinese Characteristics: Controlling Shareholders, Civil Law Traditions, and the Courts

We must admit that a wholesale importation of concepts from outside of China would be inappropriate because of the many unique aspects of its capital markets, its listed companies, its economy and society, and its legal

institutions. Some of the many things we might point to as distinct include the dominance of state-tied controlling shareholders, the civil law tradition that many Chinese scholars and lawyers feel defines the Chinese legislative and judicial system, and the still-developing court system.

First, we must note the power of so-called controlling shareholders and their agents either on the board of directors or in the management corps of the company. In China, this is oftentimes coyly attributed to "historical reasons" (*lishi de yuanyin*). Most everyone understands what these historical conditions are: many if not almost all listed companies in China are in fact transformed state-owned enterprises, now recast as companies limited by shares, which seek to finance themselves through the capital markets without really disturbing control by the original owners-operators. In June 2004, CSRC statistics revealed that China presently has 1324 listed companies. Of those, one shareholder has more than 50% of the issued shares of 486 companies, and one shareholder has between 20 and 50% of 724 companies (thus for 91.4% of China's listed firms, one shareholder owns between 20% and approximately 70%³ of the equity). The single largest state-shareholder of state-owned shares (*guoyougu*) controls more than 50% of the shares at 419 companies, and the single largest state-shareholder controls between 20 and 50% of the shares at 450 companies (thus for 65.6% of China's listed firms, the single largest state shareholder controls between 20% and approximately 70% of the equity).⁴

Recently, there has been much talk in China about protecting minority shareholders in general, and public shareholders specifically, against "controlling shareholders" (*konggu gudong*) or "de facto control persons" (*shiji kongzhi ren*). The very recent CSRC opinion solicitation draft "Several Provisions on Strengthening the Protection of Rights and Interests of Societal Public Shareholders" (issued September 26, 2004) does a good job of focusing on—and proudly naming—exactly which "minority" or "medium-sized and minority" shareholders the concern is about: the widely diffuse body of public shareholders (*shehui gongzhonggu gudong*), those who have purchased on the public markets and who have literally no inherent power or rights against the majority owner and operator of the firm.⁵

Second, China has another unique feature which is relevant for this discussion—China's system is one that our Chinese colleagues tell us is part of the civil law system (*dalufa xi*). Without debating the merits of that characterization here, or examining strong German, Japanese, and Soviet influences,⁶

3. This assumes that listed companies will list about 30% of their capital.

4. See Zhu Yun, *Ziben Duoshujue Yuanze yu Kongzhi Gudong de Chengxin Yiwu* [The Principle of Majority Equity Decisionmaking and A Duty of Good Faith for Controlling Shareholders], 2004 FAXUE YANJU [LEGAL STUDIES] 104, 105, statistics also available at www.csrc.gov.cn.

5. See CSRC, *Guanyu Jiaqiang Shehui Gongzhonggu Gudong Quanyi Baohu de Ruogan Yijian*, September 26, 2004.

6. This completely ignores the critical influence of U.S. securities law and practices on China's securities regulatory system, or the U.K. influence on both China's corporate and securities law (often mediated through Hong Kong).

there is a pronounced bias in Chinese lawmaking and the Chinese legal system towards positive, statutory law—rather than judicially articulated case law and jurisprudence. Whereas in the United States or England, for example, one might expect to see a key concept like fiduciary duty elaborated in a fact-specific case opinion, in the Chinese context we would expect to see the same concept described in a formal statute or regulation, and then invoked by a public legal authority (like a court) in arriving at a decision or implementing an enforcement action. (It is worth noting in this context that many scholars, in fact, believe that the specific concept of fiduciary duty is best developed, and may only be available, in common law systems.)

Third, it must be acknowledged that China is still in the throes of its unprecedented program of “legal construction” (fazhi jianshe). This means that while a huge amount of law and regulation may have been promulgated since the end of the Cultural Revolution, while there is an ever-growing and increasingly expert private bar, and while many of the formal institutions of the rule of law have been established, there is no assurance that judicial institutions like courts have the independence, the technical expertise, or the political power to pronounce on difficult concepts, much less enforce their decisions against other actors. (This is particularly important in the Chinese corporate and securities law context, where the forces being monitored and sought to be constrained are often intimately tied to state or party actors.)

These three aspects, and many others, should inform the precise bounds of any prescription offered by any person for China's Company Law reform for public companies. For instance, we may think that in China there should be a greater emphasis on mechanisms which monitor or constrain controlling shareholders at Chinese listed companies than there is in the United States, even beyond the directors and management they so readily appoint. (In the United States, such large shareholders, in most cases so-called institutional shareholders, are often looked to in just the opposite way—as the vehicle for strong monitoring and control of a separate body of directors and management.) We would also expect to see concepts like duty of care and duty of loyalty set forth in affirmative statutes or special rulemakings, rather than being articulated in a line of cases pronounced from China's courts or even administrative bodies (like the CSRC). And finally, we may be hesitant about looking to China's newly established courts to articulate legal principles on their own, ruling based on consistent and widely applicable principles, or actually being able to enforce their decisions.

VI. China's Company Law and Governance Rules for Public Companies

With those cautionary notes, we can then examine how the Company Law might be amended to help improve governance, real or perceived, at and inside China's listed companies to protect the rights and interests of public shareholders.

Some of these recommendations can be noted quite succinctly. They include stronger articulation, in China's civil law system way, of the fiduci-

ary duties (duty of care, and duty of loyalty) for directors, officers, supervisory board members, and—importantly in the Chinese context—controlling shareholders, all in the basic Company Law of China. The current articulation of these concepts in the Company Law is weak and fragmentary.⁷ Moreover, it does not use the specific characters in the May 1992 Standard Opinion (*chengxin* and *qinmian*)⁸ that were glossed by the Committee on the Restructuring of the Economic System (“CRES”) in its June 1993 letter delivered to the Hong Kong authorities in connection with the first listings of Chinese issuers on the Hong Kong Stock Exchange as being the same as “fiduciary duty” (English in the original) under Hong Kong law.⁹ This was apparently remedied—but only for overseas listing companies—with the promulgation of special rules¹⁰ for overseas listing companies which among other things reinstated the Standard Opinion’s use of *chengxin* and *qinmian*.¹¹ While the CSRC has in recent years consistently sought to introduce these duties—in elaborate form, or by using the shorthand characters *chengxin yiwu* or *chengxin zeren*—in countless pronouncements (rules, opinions, mandatory or mandatory articles of association), it is time that these duties firmly find their source and legal basis in the Company Law—for all kinds of companies, listed or not. In addition, these principles, especially the duty of loyalty, must be extended to the actions and behavior of controlling shareholders of listed companies. (The CSRC, in its rules mandated articles of association and pronouncements has also started to focus on this aspect.) Admittedly, these important duties are difficult to elaborate in a single statute, or at least in a way that can provide guidance for decisionmakers. Equally problematic is the notion that they are to be enforced *ex post* by the potentially unreliable judicial actors described above. However, the fact remains that they are a critical component of ensuring good corporate governance at listed companies, and protecting minority and passive, widely diffuse, public shareholders. While the U.S. system has the advantage (or burden) of a well-developed common law system and institutions that support the creation, delineation, and enforcement of fiduciary duties, there is no reason why China’s own institutions cannot start to create something analogous.

7. See PRC Company Law, arts. 57-63, 123.

8. See Commission on the Restructuring of the Economic System (“CRES”), *Gufenyouxiangongsi Guifan Yijian* [Opinion on Standards for Companies Limited by Shares], May 15, 1992, art. 62.

9. See CRES, *Guanyu “Gufenyouxiangongsi Guifan Yijian” he “Guanyu dao Xianggang Shangshi de Gongsi Zhixing ‘Gufenyouxiangongsi Guifanyan’ de Bucong Guiding” zhi Xianggang Lianjiaosuo de Han* [Letter to the Hong Kong Exchange Regarding the “Opinion on Standards for Companies Limited by Shares” and the “Implementation by Hong Kong Listing Companies of the ‘Supplementary Rules for the Opinion on Standards for Companies Limited by Shares’”], June 10, 1993, item 6.

10. Special Regulations of the State Council on Foreign Offerings and Listings of Companies Limited by Shares, promulgated on August 4, 1994 by the State Council of the PRC, but published only on August 19, 1994 in the *Renmin Ribao* (People’s Daily), *Guoneiban* (Domestic Edition). (“Overseas Listing Regulations”).

11. See Article 23(1) of the Overseas Listing Regulations.

A. Private right of action; Private right of action for civil damages (i.e. not just injunction); Private right of action for civil damages for breaches of law and other duties (i.e. not just formal resolutions that breach law or the articles of association, etc.); Class (not "Group") Actions; Derivative Actions

It seems unnecessary to summarize the many aspects of this particular recommendation, how it works in the United States, or why it would be useful in China (outside of the now limited context of fraudulent or misleading disclosure per the Supreme Peoples Court's December 26, 2002 rules). Suffice to say that the combination of a private right of action for shareholders to sue corporate managers and insiders for civil damages on a broad range of breaches or defaults has proven most effective in the United States, both as a credible threat which has served to constrain the actions of certain corporate actors, but also as a mechanism which complements enforcement by a resource-constrained administrative actor (like the SEC in the United States or the C.S.R.C. in China).

In the United States, there is much talk of a seemingly contradictory status—"private attorneys general." Some of our Chinese colleagues may wonder how the word "private" can be coupled with the term we use for a "public" (government) prosecutor (or attorney general). That is precisely why the term is so illustrative, as it really addresses the way in which "private" shareholders have the power in many cases to enforce corporate and securities laws and regulations, without ever having to bother the "public" authorities (the government, administrative bodies, or prosecutors).

Admittedly, in the Chinese context, key complimentary mechanisms like real class action suits¹² and derivative actions may also be addressed outside of the Company Law, and more rationally positioned in the PRC Law on Civil Procedure. (Our Chinese colleagues will know that many U.S. state corporate laws for instance provide the legal basis for derivative actions in their company law statutes. It is worth noting that in the United States the creation of a strong legal basis for such essentially procedural innovations in company law has proven very important, even as procedures for specific implementation can be fleshed out in other laws, regulations, and practices. For instance, with respect to derivative actions, it is crucial that the right of certain shareholders to actually cause the corporate entity to sue directors and officers (who otherwise can control every action of the corporate entity) is embedded in the company statute.)

The fact remains however that the Company Law is a perfect place to situate an affirmative private right of action for all shareholders, for civil damages in addition to equitable remedies like injunctions (damages payable to the injured shareholders, not digested as fines, or recouped, by the administrative actor), and for a wide scope of misbehavior (for instance,

12. Not "collective" actions (*gongtong susong*) as are now permitted in China – the difference being that a decision in a real class action may benefit a person or interest who is deemed to be in the class of affected persons, even if such person or interest has not actually participated in the suit.

breach of a fully articulated fiduciary duty as suggested above).¹³ Many of our Chinese colleagues will want to tread very carefully here, worried about throwing Chinese courts open (and exposing inexperienced judges) to irate and unpredictable shareholders bringing troublesome lawsuits before unprepared courts, and risking chaos and social instability. I agree with Professor Wang Liming's wonderful rejoinder to that concern. He suggested that under the new circumstances of China's economy and capital markets development, social peace and harmony may only be assured by the offer of a realistic remedy for aggrieved property rights holders (especially public shareholders) before a legal institutional decisionmaker, while the absence or lack of availability of the same may now contribute to a lack of stability.¹⁴ This is a very profound insight about the development of property rights, law, legal institutions, and remedies generally in China.¹⁵

B. Self-enforcing transactional or procedural rules, such as class- or type-oriented supermajority voting rights requirements

Many people understand that, given the stage of development of China's legal system, mechanisms like fiduciary duties and a private right of action for civil damages, etc. may not really be useful in the PRC context, given the ongoing development of China's judicial institutions (and the finite resources available to an administrative actor like the CSRC). Accordingly, many will place their hopes in a style of company law regulation which U.S. academics have called "self-enforcing"—where the company statute will create certain transactional or procedural rules which can empower minority and public shareholders, or simply protect them against oppressive behavior by controlling parties or their agents. The current Chinese Company Law has a thin notion of this, for instance in the articles that require two-thirds shareholder approval for certain key decisions by the general shareholders' meeting.¹⁶ The 1994 Mandatory Articles of Association for Overseas Listing Companies have a much stronger feature—which unfortunately only protects *foreign* public shareholders (holders of H or N shares)—at Chapter 9, granting holders of a certain "type" (*leibie*) of shares supermajority approval rights for corporate actions which will affect

13. As many know, the combination of the PRC Company Law and the PRC Securities Law "unpacks" the most desirable program, for instance providing a private right of action, but only to sue for an injunction, PRC Company Law, art. 111; or making certain actors liable for "damages", but not making clear that the injured shareholders are due compensation for the same, PRC Securities Law, arts. 63, 202; or providing for a right of action only on formal resolutions that contravene law, regulation or the articles of association, or which otherwise harm the shareholders' interests, but not other breaches of law or legal duties, PRC Company Law, art. 111.

14. See Wang Liming, Zhengzhan Falu Pinglun, 1 Lun Zhengzhanfahong Minshi Zeren Zhidu de Wanshan [Securities Law Review, Improving the Civil Liability Regime in Securities Law] 110 (2001).

15. Each of the first two recommendations—strengthening fiduciary duties and broadening the private right of action for shareholders—imply support for an idea that has circulated for some time in China: the establishment of special company or securities law courts, with the expertise to hear and decide upon shareholders' and company disputes (modeled after the special division of the People's Intermediate Courts which are empowered to hear intellectual property rights-related cases).

16. See PRC Company Law, arts. 104, 107.

them.¹⁷

In recent years, the CSRC in its many rulemakings has tried to impose some of the same kinds of constraints, for instance requiring prior disclosure and high shareholder approval thresholds for certain related party transactions, independent director approval, or withdrawal from deliberations of interested directors. In the acquisition context, the CSRC has borrowed from the UK system, to require distribution of a “control premium” to minority shareholders upon a change of control of a listed company, and a “mandatory offer” at a floor price even to shareholders who cannot offer change of control to the acquirer.¹⁸ In late September of this year, the CSRC released for comment a draft set of rules which would mandate that “public shareholders” of listed companies provide majority approval of certain significant actions, voting as a specific group.¹⁹ It is well understood that China does not want to contemplate different “classes” of shares, or share capital that has different rights and powers (economic or control-related). However, the Chinese system has already shown—as in the above examples—how the corporate law can be structured so as to empower certain “types” of shareholders, based upon their status or citizenship, or how they have purchased their stock interests (whether privately or publicly through an exchange). The Company Law of the PRC is a suitable place to anchor at least some of these concepts, even if specific implementation is located in the Securities Law, stock exchange regulations, or mandatory corporate constitutions.

C. Unified regulation and mandatory forms for all capital markets issuers

A final suggestion for the Chinese corporate law regime, which is not specifically tied to the assurance of better corporate governance, but is related to the connection between company law and listed issuers: As many of you know, China has implemented a bifurcated corporate law for listed companies—one kind of law for companies that list on domestic exchanges (A and B share issuers) and one kind of law for companies that list on overseas (including the Hong Kong SAR) exchanges. For domestically listed companies, the Company Law and the CSRC’s 1997 Guidance Articles of Association govern. For overseas listed companies, the Company Law, the Overseas Listing Rules and the 1994 Mandatory Articles of Association for Overseas Listing Companies govern.

In contrast to other Chinese corporate and securities regulatory systems necessitated by the lack of full convertibility of the Renminbi yuan (i.e., the basic lack of foreign capital participation in the A share markets), this bifurcation is not necessary or advisable. It leads to confusion in China, amongst issuers, their directors, officers, and shareholders, and

17. See Mandatory Articles of Association for Overseas Listing Companies, arts. 78–85.

18. See PRC Securities Law, Chapter 4, and the subsequent CSRC Rules on the Acquisition of Listed Companies.

19. See *supra* text regarding the draft Several Provisions on Strengthening the Protection of Rights and Interests of Societal Public Shareholders.

confusion in the legal system as to which set of norms govern. (An example is the confused status, described above, of basic fiduciary duties for directors and corporate actors after the promulgation of the string of enactments including the Standard Opinion, the June 1993 CRES Letter, the Company Law and finally the Overseas Listing Rules.) Many persons understand why there is a bifurcated system—China has consistently made a good faith effort to create the very best law and governance systems for issuers seeking capital from sophisticated foreign investors on overseas markets. However, those initial efforts occurred more than a decade ago, and there is no reason why the system of regulation cannot be unified, and a Company Law produced or mandatory articles of association formulated that will apply to *all* Chinese issuers—regardless of where they list their stock.

Accordingly, we would recommend not only thoroughgoing amendment of the Company Law and the Securities Law, but the elimination of the Overseas Listing Rules (provided positive aspects of those Rules are imported into the Company and Securities Law), and—if still deemed necessary—a mandatory form of articles of association (policed by the CSRC) to be used by *all* listed companies in China, regardless of where they list.

Conclusion

My remarks have focused on ways in which U.S. or foreign methods of regulating public companies might inform China's current effort to amend its own statutes, most specifically the PRC Company Law. I must, however, conclude with one thought:

Almost every one of the above ideas, some taken from the United States or UK systems, and in all cases already sprouting in Chinese corporate or securities law, implicate other kinds of serious reform—legislative or institutional. (That can be seen most clearly in suggesting a new, fuller, articulation of fiduciary duty, or assuming that Chinese judicial institutions would be competent or powerful enough to apply or enforce the same concepts.) No one would think that these related reforms are easy, mechanical, or assured. However, one thing seems certain in China today, and it is directly relevant to the world of public companies and the rights of public shareholders. By virtue of their investment and stake in listed companies, public shareholders will continue to call for changes that protect them (or provide a remedy for them), and China's other institutions—the government, state shareholders (or state-owned legal person shareholders), regulators, enforcement institutions—will be forced to heed those calls and implement change and reform. Thus, the mere existence of publicly listed companies and interested market participants will demand amendment of China's corporate law system, and in ways that may seem to challenge the interests or powers of large state shareholders or certain government departments which control industrial assets. While this may initially seem objectionable to certain constituencies in China, in time they too will see such reforms as necessary for the creation of more efficient and competi-

tive companies and the building of a more vibrant capital market in China, which in turn will redound to their benefit as they seek continuing financing and existence in the Chinese or global economies.