

REGULATION OF SECURITIES TRADING AND MARKETS
CASES and Materials for Study in US Securities Exchange Act of 1934

美国证券交易 经典案例教程

姚承曦 David A. Sirignano 著



中国金融出版社

Regulation of Securities Trading and Markets
Cases and Materials for Study in US Securities Exchange Act of 1934

美国证券交易 经典案例教程

by
Chengxi Yao/姚承曦 and David A. Sirignano

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Tripartite Mission of The U.S. Securities and Exchange Commission

- Protect Investors
- Maintain Fair, Orderly, and Efficient Markets
- Facilitate Capital Formation

——About the SEC: What We Do, www.sec.gov

In Perspective:
Securities and Financial Regulation

PowerPoint:

- Overview: U.S. Financial Regulatory Structure
- Overview: Securities Regulation

Overview: US Financial Regulatory Structure

Financial Stability Oversight Council: Chaired by Secretary of the Department of the Treasury
(Financial Stability Act of 2010)

Securities Regulation

Fifty State Securities Regulators

North American Securities Administrators Association Inc. (NASAA)

State Blue Sky Laws

- Registration of securities
- Registration of securities professionals
- Enforcement

Securities and Exchange Commission (SEC)

Tripartite Mission:

- Protect investors
- Maintain fair, orderly, and efficient Markets
- Facilitate capital formation

Futures Regulation

Commodity Futures Trading Commission (CFTC)

Commodity Exchange Act (CEA)

Exclusive Jurisdiction over Futures Market

- To help protect market users and the public from fraud and manipulation
- To ensure commodity derivatives market integrity

Depository Institution Regulation

1. Office of the Comptroller of the Currency (OCC)
 2. Board of Governors of the Federal Reserve System (Federal Reserve)
 3. Federal Deposit Insurance Corporation (FDIC)
 4. Office of Thrift Supervision (OTS)
 5. National Credit Union Administration (NCUA)
- To ensure financial soundness and safety of regulated institutions and the banking system as a whole
 - To afford protections to depositors and to the public

State Insurance Regulation

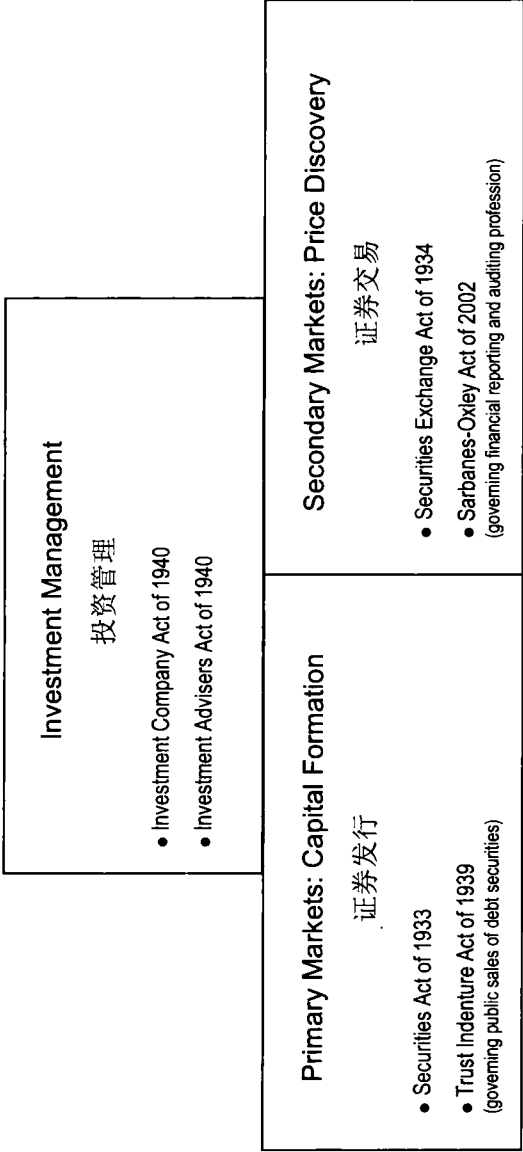
National Association of Insurance Commissioners (NAIC)

McCarran-Ferguson Act: State Regulatory Jurisdiction over "the Business of Insurance"

- Solvency or financial regulation
- Consumer protection or market regulation

References: About the SEC: What We Do, www.sec.gov; The US Department of the Treasury: Blueprint for a Modernized Financial Regulatory Structure (Mar 2008); Dodd-Frank Wall Street Reform and Consumer Protection Act, Title I: Financial Stability, PL 111-203, 124 Stat 1391 (Jul 21, 2010)

Overview: Securities Regulation



Reference: About the SEC: The Laws That Govern the Securities Industry, www.sec.gov

Foreword—序言

公正、公平、有序和高效的竞争性证券交易市场对充满活力的经济必不可少。交易市场高度的流通性和高质量、实时信息公开有益于交易价格充分反映上市公司内在价值和供求关系，为投资管理提供基础，给投资者带来机会，建立他们的未来。企业通过证券市场融资扩大生产，不管是IPO还是后续发行，依赖于公平和竞争性的交易市场给其证券进行合理准确定价。公平和竞争性的市场有助于投资者建立对该市场的信心。

这样的交易市场的标志是什么？证券交易市场监管的作用又是什么？概而言之——透明。投资者决定买卖股票，需要瞬时报价信息。证券商履行其法律义务，为证券客户指令提供最佳执行，市场就必须瞬时向所有公众同时发布成交价格、成交量、交易场所和其他交易信息。这有利于各交易市场间的竞争，也有益于投资者监督券商的服务水平。再者，必须有公司业绩、前景等方面信息的真实性和透明度。不然，即使有效资本市场论成立，股票价格也只能反映错误信息而不能反映企业的真实内在价值。此外，监管必须要透明。比如，在卖空、金融衍生品和市场博弈等易受操纵的方面，应采取预防性措施加以管理。对内幕交易和其他证券欺诈行径必须全面禁止，建立强有力的政府强行遏制机制，并为投资者获得经济损失补偿提供法律途径。还应加强对各种新金融产品的研究和监管，以防范风险，保护投资者、交易对方和其他市场参与者，维护整个金融体系的稳定。

一个管理良好的证券市场有助于国家经济繁荣富强。一个管理过度的市场将使竞争窒息，经济增长停顿。一个管理不善的市场则将摧毁财富。美国证券市场在近十几年内所历尽的沧桑风雨一一喻示了这些真理。研究美国证券交易市场的监管有助于我们防止类似市场创伤事件的再度发生。

由中国汕头大学商学院金融与证券监管学教授姚承曦和前美国联邦证券委员会官员David A. Sirignano合著的《Regulation of Securities Trading and Markets——美国证券交易经典案例教程》对庞大而又复杂的美国证券交易市场的监管作了系统和清楚明了的介绍。该书通过对经典案例的重点讨论，从证券市场的监管结构、交易模式、上市公司透明机制、预防性反操纵政策和杜绝内幕交易五个方面，使我们将证券交易和证券市场监管方面的重要理论和主要问题尽收眼底。

马庆泉

2012年2月26日

SUMMARY OF CONTENTS

Basic Goals of the Securities Exchange Act of 1934:

1. To provide fair and honest mechanisms for the pricing of securities;
2. To assure that dealing in securities is fair and without undue preferences or advantages among investors;
3. To ensure that securities can be purchased and sold at economically efficient transaction costs; and
4. To provide, to the maximum degree practicable, markets that are open and orderly.

——Senate Report 94-75, 94th Cong., 1st Sess., 3 (1975)

Chapter 1. Regulatory Structure

Chapter 2. Market Structure

Chapter 3. Public Company Transparency

Chapter 4. Prophylactic Regulation of Manipulation

Chapter 5. Fraud in connection with the Purchase or Sale of a Security

TABLE OF CONTENTS

<i>In Perspective: Securities and Financial Regulation</i>	ii
<i>Foreword—序言</i>	v
SUMMARY OF CONTENTS	vii
TABLE OF CONTENTS	ix
CHAPTER 1 REGULATORY STRUCTURE	1
<i>Section 1.1 Competition and Regulation: The SEC and the CFTC</i>	1
1.1.1 Futures and Options on “Government Securities” : Securities or Commodity?	1
1.1.2 Index Participations: Securities or Futures?	4
1.1.3 Futures and Options on Single Stock and on Stock Indexes: Securities, Futures, Security Futures	21
<i>Section 1.2 Regulation of Financial Gatekeepers</i>	24
1.2.1 Auditor Independence and Oversight by PCAOB Board	24
1.2.2 Credit Rating Agency NRSRO Designation	42
<i>Section 1.3 Securities Industry Self-Regulation</i>	54
1.3.1 Concept of “Statutory Supervisor”	54
1.3.2 The Shingle Theory	76
1.3.3 Suitability Doctrine: Application to Online Brokerage	82
CHAPTER 2 MARKET STRUCTURE	83
<i>Section 2.1 Exchange Markets, OTC Markets, and Customer DMA</i>	84
2.1.1 NASDAQ Competing Dealers Model; NYSE Hybrid Auction Model; HFT Liquidity Model	84
2.1.2 ATSS and Concept of “Exchange”	99
2.1.3 OTC Markets for Non-Listed Equities: OTCBB and Pink Sheets ..	119
2.1.4 Customer Direct Market Access to Exchanges and ATSS	120
2.1.5 Multiple Trading of Standardized Options in Listed Stocks	121

Section 2.2	<i>National Market System: Market Competition and Order Competition</i>	125
2.2.1	Concept of “Best Execution”	125
2.2.2	Concept of “Customer Order Protection”	137
2.2.3	The NMS System: Transparency, Competition, Fairness, Efficiency	138
2.2.4	Inter-Market Surveillance for Cross-Market Trading Activities	154
CHAPTER 3	PUBLIC COMPANY TRANSPARENCY	159
Section 3.1	<i>Periodic Reporting and Other Disclosure by Public Company</i>	159
3.1.1	Periodic Reports by China-Based US Public Company & IFRS as Global Accounting Standards	159
3.1.2	US Public Company Doing Business in China & Foreign Corrupt Practices Act	166
3.1.3	Issuer Selective Disclosure & Regulation FD (Fair Disclosure)	177
Section 3.2	<i>Mandatory Disclosure by Certain Shareholders</i>	193
3.2.1	Potential for Corporate Control: Disclosure by 5% Threshold Beneficial Owner	193
3.2.2	Decoupling by Derivatives: Who Is “Beneficial Owner”?	195
CHAPTER 4	PROPHYLACTIC REGULATION OF MANIPULATION	221
Section 4.1	<i>Manipulation in Financial Markets</i>	221
4.1.1	Concept of Manipulation	221
4.1.2	Market Gaming by NBBO Manipulation	222
Section 4.2	<i>Transactions for Corporate Control</i>	222
4.2.1	Tender Offer: All-Holders and Best-Price Requirements	222
4.2.2	Takeover Battle: What Is Tender Offer?	240
Section 4.3	<i>Trading during Securities Distribution</i>	253
4.3.1	Short Sale Restriction in Advance of Follow-on/Secondary Offering	253
4.3.2	Market Making Restriction	259
Section 4.4	<i>Short Selling</i>	259
4.4.1	Prohibition of Manipulative Naked Short Selling	259
4.4.2	Regulation of Short Sale: Order Marking; Locate; Circuit Breaker; Close-Out	268

CHAPTER 5 FRAUD IN CONNECTION WITH THE PURCHASE OR SALE OF A SECURITY	281
<i>Section 5.1 Insider Trading Liability Theories</i>	281
5.1.1 Classical Theory of Insider Trading Liability	281
5.1.2 Tipper-Tippee Liability Theory; Temporary Insider Concept	302
5.1.3 Misappropriation Theory; Prophylactic Prohibition Theory	328
<i>Section 5.2 Private Damages Action for Fraud</i>	351
5.2.1 Elements of Private Securities Fraud Action; Theory of Economic Loss	351
5.2.2 In Pari Delicto Doctrine (Equal Fault Concept)	359
<i>Section 5.3 Transnational Securities Fraud in Globalized Securities Market</i>	373
5.3.1 Reach of US Insider Trading Law Enforcement	373
5.3.2 Limit on Extraterritorial Application of US Securities Laws to Foreign-Cubed Private Action	384

Chapter 1 Regulatory Structure

The SEC wanted to protect its turf—and by “its” turf I mean not only that of the bureaucrats but also, more importantly, of the agency’s principal clients, the stock exchanges. But the CFTC and its clients preferred to fight rather than switch, because they knew that a regulatory cartel (or a business cartel supported by regulation) would drive business abroad rather than divert it to the stock exchange in New York. . . . there is a (political) market in regulation as there is a market in other things, . . . Left to its own devices, competition is a wonderful balm.

——Honorable Frank H. Easterbrook, Judge, United States Court of Appeals for the Seventh Circuit, *When Does Competition Improve Regulation?* 52 Emory L.J. 1297, 1303 (2003)

Many securities industry participants believe that regulation lends credibility not otherwise available. . . . The futures industry would rather have . . . a freely competitive environment that would economically punish wrongdoers more efficiently than government regulators. The Chicago Mercantile Exchange even portrayed itself as a bastion against communism. . . .

——J. Markham, *Merging the SEC and the CFTC—A Clash of Cultures*, 78 U Cin L Rev 571 (2009-2010)

Section 1.1 Competition and Regulation: The SEC and the CFTC

1.1.1 Futures and Options on “Government Securities”: Securities or Commodity?

评论：“政府债券期货”——证券或期货？证券委、期货委、财政部各抒己见

Note: GNMA Futures Dispute: Futures on Government Securities—Securities or Futures

SEC-CFTC Jurisdictional Correspondence of 1975

In September 1975, the CFTC approved the application of the Chicago Board of Trade (“CBOT”), a futures exchange, to trade *futures on GNMA’s* (Government National Mortgage Association pass-through mortgage-backed certificates, which were securities backed by the full faith and credit of the United States as to both interest and principal payment, i.e. “government securities” and, as such, “exempt securities” under Section 3(a)(2) of the Securities Act of 1933). Chairman of the Securities and Exchange Commission (“SEC”) Roderick M. Hills wrote a letter (Nov 13, 1975) to the CFTC asserting SEC’s jurisdiction over the GNMA futures, on the ground that since GNMA’s were securities, *futures on securities* were also securities. Responding that the issue “touches a most sensitive nerve,” and that “the CFTC views its responsibilities under the Commodity Exchange Act most seriously, and it is unwilling to concede the right to do the job that Congress has expressly entrusted to the CFTC alone,” the Commodity Futures Trading Commission (“CFTC”) issued a memorandum prepared by its Office of the General Counsel (Dec 3, 1975), asserting its exclusive jurisdiction over *all futures* contracts—both *futures on traditional commodities* such as pork bellies and wheat and *futures on financial instruments* such as GNMA and other government securities.

Congress took sides with the CFTC. Voting in 1978 to maintain the CFTC’s exclusive jurisdiction over futures trading, Congress stated: when creating the CFTC in 1974, it was aware that futures trading in financial instruments and Government securities were being developed by the futures industry; and it decided to vest the regulation over futures trading in a single expert agency created to administer the CEA—the CFTC. When enacting the *Commodity Futures Trading Commission Act of 1974* (“CFTC Act”) which extensively amended the *Commodity Exchange Act* (“CEA”), Congress (i) created the CFTC as the exclusive regulator of the futures markets; and (ii) substantially expanded the coverage of the CEA by broadening the definition of “*commodity*” to include not only agricultural commodities but also “all other goods and articles, and all services, rights, and interests in which contracts for future delivery are dealt in.”

In 1978, the SEC and the Department of the Treasury urged a form of *vertical integration* of federal regulation over the futures markets (such that the SEC would have jurisdiction over the futures contracts where the underlying “commodity” was a security; and the Treasury would have jurisdiction over the futures contracts where the underlying “commodity” was a government security). Congress decided to maintain the traditional *horizontal regulatory approach* to commodity futures trading established under the CFTC Act of 1974, while requiring the CFTC to “maintain communication with” the Department of the Treasury, the Federal Reserve Board, and the SEC “with respect to matters that relate to the responsibilities of those agencies” (such as the requirement for the CFTC to solicit the views of the Treasury and the Federal Reserve Board when approving futures on Government securities, in order to consider impact on the debt financing requirements of the US

Government and efficiency and integrity of the underlying market for Government securities).

[References: *SEC-CFTC Jurisdictional Correspondence*, Comm. Fut. L. Rep. (CCH) ¶20117 (1975-1977); *Commodity Exchange Act Extension and Amendments*, HR Rep. No. 95-1181, 95th Cong. 2d Sess., pp.12-5: Purpose and Need for the Legislation: 2. Jurisdictional Issues (May 15, 1978)]

评论：政府债券“期权”——股权或商品权？证券委、期货委再次交锋；两委主席互约停战三章

Note: GNMA Options Dispute: Stock Options or Commodity Options?

Shad-Johnson Jurisdictional Accord of 1981; Enactment into Law 1983

Suffering the defeat on the GNMA futures in 1975, the SEC in 1981 approved the application of the Chicago Board Options Exchange (“CBOE”), a stock exchange, to trade GNMA options. CBOT, the futures exchange, petitioned the Court to set aside the SEC’s approval order, on the ground that GNMA options were commodity options, and that commodity options were subject to the CFTC’s exclusive jurisdiction under the Commodity Exchange Act. The Court found that the SEC lacked authority to approve CBOE to trade the GNMA options, noting that the 1974 CEA Amendment broadened the term “commodity” to encompass non-equity “securities,” and that commodity options (and thus the GNMA options) fell within CFTC’s exclusive jurisdiction under the CEA.

While the GNMA options dispute was pending in court, **Chairman John Shad** of the SEC and **Chairman Philip McBride Johnson** of the CFTC reached a jurisdictional agreement: the Shad-Johnson Jurisdictional Accord of 1981, purporting to divide up regulatory authority between the two agencies. As codified into law in 1983, the Accord amended the Commodity Exchange Act and the Securities Act and Securities Exchange Act to, among others:

1. give the SEC authority over options on securities including exempt securities (such as GNMA options), and options on groups or indices of securities;
2. give the CFTC authority over futures and options on futures, on exempt securities (such as GNMA futures) and on broad-based groups or indices of securities—with veto power by the SEC over stock index futures approved by the CFTC;
3. explicitly prohibit single-stock futures and futures on narrow-based indices, and options on such futures—reflecting a political compromise due to the disagreement of the two agencies on who and how to regulate such futures and options, rather than a decision based on any economic rationale.

[References: *Chicago Board of Trade v. SEC*, 677 F.2d 1137 (7 Cir Mar 24, 1982) (“*GNMA Options Dispute*”); *SEC-CFTC Joint Explanatory Statement*, 1982 Fed Sec L Rep ¶83096 (Feb 2, 1982); codified by Congress through amendments to securities laws, in PL 97-303, 96 Stat 1409, as “*An Act to clarify the jurisdiction of the Securities and Exchange Commission and the definition of security*” (Oct 13, 1982), and amendments to the Commodity Exchange Act, in PL 97-444, 96 Stat 2294, as “*An Act to extend the Commodity Exchange Act ...*” (Jan 11, 1983)]

评论：“政府债券期货之期权”与“政府债券期权”——期货市场、证券市场继续龙争虎斗

Note: Options on GNMA Futures: Competition with GNMA Options

In competition with the SEC-regulated Chicago Board Options Exchange which traded *GNMA options*, the CFTC announced that the CFTC-regulated Chicago Board of Trade had proposed to trade *options on GNMA futures*.

[Reference: CFTC, Chicago Board of Trade Proposed Option Contract, 52 FR 48861 (Dec 28, 1987)]

1.1.2 Index Participations: Securities or Futures?

研究课题：“指数参与”：“证券”乎？“期货”乎？

案例提要：Case Study: Chicago Mercantile Exchange v. SEC, 883 F.2d 537 (7 Cir Oct 23, 1989)

Index Participations (“IPs”) Dispute

The SEC approval orders allowed *stock exchanges* to trade index participations, concluding IPs were “stock” or “security” within the meaning of Sec. 3(a)(10) of the Securities Exchange Act; the *futures exchanges* filed petitions in court seeking review of the SEC orders, claiming IPs were futures. From the perspective of the *long—which was the SEC’s perspective*, IPs looked like an interest in a portfolio of stocks; hence there was a basis for drawing IPs within the definition of “security” in Sec. 3(a)(10) of the Securities Exchange Act, which includes “stock” and “certificates of interest or participation in” stock. From the perspective of the *short—which was the CFTC’s perspective* and where such perspective was implied by the Commodity Exchange Act’s reference to “contracts ... for future delivery,” shorts on IPs were similar to shorts on stock-index futures. Fact was, IP was designed to be a novel instrument: it was no less a future than it was a security, and no more; and it is both a security and a future.

Congress conceived the role of the SEC as regulating capital formation, and that of the CFTC as regulating price revelation without transfer of capital. Under the Commodity Exchange Act:

- (1) The *CFTC* has authority to regulate trading of futures and options on futures; the *SEC* has authority to regulate trading of securities and options on securities;
- (2) If an instrument is *both* a security and a futures contract, the *CFTC* is the sole regulator; if the instrument is *both* a futures contract and an option on a security, the *SEC* is the sole regulator.

In the case that follows, the court was asked to decide *whether tetrahedrons belong in square or round holes*.

**Chicago Mercantile Exchange, Board of Trade of the City of Chicago, and
Investment Company Institute, Petitioners**
v.
**Securities and Exchange Commission, Respondent and
Philadelphia Stock Exchange, Inc., Options Clearing Corporation, American
Stock Exchange, Inc., and Chicago Board Options Exchange, Inc., Intervening
Respondents**

United States Court of Appeals, Seventh Circuit
883 F.2d 537 (7 Cir. Oct 23, 1989)

Before BAUER, Chief Judge, EASTERBROOK, Circuit Judge, and FAIRCHILD, Senior Circuit Judge.

EASTERBROOK, Circuit Judge.

The Commodity Futures Trading Commission has authority to regulate trading of futures contracts (including futures on securities) and options on futures contracts. The Securities and Exchange Commission has authority to regulate trading of securities and options on securities. If an instrument is both a security and a futures contract, the CFTC is the sole regulator because “the Commission shall have exclusive jurisdiction with respect to ... transactions involving ... contracts of sale (and options on such contracts) for future delivery of a group or index of securities (or any interest therein or based upon the value thereof)”, 7 U.S.C. § 2a(ii). See also 7 U.S.C. § 2 (“the Commission shall have exclusive jurisdiction, except to the extent otherwise provided in section 2a of this title”); *Chicago Board of Trade v. SEC*, 677 F.2d 1137 (7 Cir. 1982), vacated as moot, 459 U.S. 1026 (1982) (*GNMA Options*). If, however, the instrument is both a futures contract and an option on a security, then the SEC is the sole regulator because “the [CFTC] shall have no jurisdiction to designate a board of trade as a contract market for any transaction whereby any party to such transaction acquires any put, call, or other option on one or more securities ... including any group or index of such securities, or any interest therein or based on the value thereof.” 7 U.S.C. § 2a(i).

The CFTC regulates futures and options on futures; the SEC regulates securities and options on securities; jurisdiction never overlaps. Problem: The statute does not define either “contracts ... for future delivery” or “option”—although it says that “ ‘future delivery’ ... shall not include any sale of any cash commodity for deferred shipment or delivery”. See Lester G. Telser, *Futures and Actual Markets: How They Are Related*, 59 J. Business S5 (1986). Each of these terms has a paradigm, but newfangled instruments may have aspects of each of the prototypes. Our case is about such an instrument, the index participation (IP). We must decide whether tetrahedrons belong in square or round holes.

I.

Index participations are contracts of indefinite duration based on the value of a