Preliminary Study on the prohibition system of Securities fraud

胡晓珂 ◆ 著

证券欺诈禁止制度初论

——以反欺诈条款为中心的研究

经济科学出版社

中央财经大学法律系“十五”规划重点项目

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序

《证券欺诈禁止制度初论》一书是在我的博士论文基础上修改完稿的。两年前，选择证券“反欺诈”作为答辩论文的主题，既与自己的学习兴趣和法律实践有关，更重要的原由在于：在中国证券市场令人炫目的发展历程中有着太多的困惑，而这些困惑与证券欺诈有着或多或少的关联。我确信，对于证券市场这样一个跨学科、有着强烈包容性的领域，以“社会为本位”的法学理念有着广阔的研究空间。

本书在体系和结构上基本上保留了博士论文的原貌，但需要提请读者注意以下三点：一是在我的论文答辩之前和答辩之时各位评阅教授和答辩委员所提出的意见使得我有机会针对论文所存在问题进行深入思考并修正其中不足；二是论文答辩之日距今已有两年时间，这期间也是中国证券市场发生了巨大变化的两年，当年有关证券市场发展方向的争论问题随着国务院《关于发展资本市场的九条意见》的颁发，在今天看来似乎有了答案；三是2002年12月最高人民法院审判委员会对因虚假陈述引发的民事赔偿案件进行了较为详尽的规定，

“中科创业”、“大庆联谊”等证券欺诈案的审判工作也为中国证券市场寥寥可数的反欺诈司法实践提供了宝贵的经验，这些内容限于条件的局限性，并未反映在最初的博士论文中，不把这些新的内容展示给读者，恐怕是我的过失。

正如北京大学吴志攀教授所言：“经济学家敏感，法学家稳重。”法律中的许多变化都是缓慢而渐进发生的，在一定程度上，法律的这种稳定性和确定性并不足以为我们提供一个行之有效、富有生命力的法律制度，任何有关证券法律制度的研究恐怕都难以及时适应经济发展的瞬息变化。但笔者以为，法学研究的可贵之处在于：它提供了一种理想的法律制度模式，使法律的必要修正按照有序的程序进行，并最大程度地降低由此而带来的社会成本。从这一角度出发，对于证券欺诈禁止制度这样一个内容丰富、争议颇多、且新问题不断出现的研究课题，本书进行了一些积极和有益的尝试。

理论与现实之间总是存在差距的，要在理论上揭示“证券欺诈”这一复杂的社会现象并提出有价值的建议，是一项极为困难的工作。将本书最后的题目冠以“初论”二字，也表明作者在此所进行的研究仅仅是粗浅的，它绝非是对证券“反欺诈”课题研究的一个终了，书中的不当之处，恳请读者予以赐教。

胡晓珂

2004年2月29日

Abstract

Securities fraud is the same old as securities market, and the establishment and implement of antifraud provisions is also an important part of Chinese Securities Regulation as it is in other countries with mature capital market. So far, Chinese Securities market has gone through a brash period for ten years that are like a raging fire. This is a time of its coming into being to its maturity. Furthermore, a series of phenomena which happened in the securities market, dazzled all participants, and these lead to some intentional or unconscious consideration, discussion and argument on these problems that more or less had some relations with fraudulent actions. Accordingly, regulation or development has always puzzled the new securities market in China.

It is the most direct cause that arouses the study on the system of securities antifraud provisions in this thesis that argument pressed so close to the fact and opinions at loose ends are brought forward by the specialists and scholars. In the author ' s view, the idea of openness directly leads to the es-

tablishment of disclosure philosophy in securities market, and the idea of justice is the essential request for the builder of securities regulation. Thereby, the idea of fairness is the inherent demand of securities market. With the guidance of fairness, the masterstroke under the antifraud provision always leads all kinds of actions to material justice, order and effectiveness during the establishment of securities regulation. In fact, the pubic confidence is base on a system where three ideas live in perfect harmony, whereas it is unilateral that only emphasizes the fact that build up disclosure system. In some degree, the establishment of securities regulation has been exceeded the scope which protect the traditional individual rights, and the subject which emphasize the material justice and the idea based on the social interest may be a common subject for all securities markets.

However, from the study on securities frauds forbidden system, we can know that there still lacks systemic studies. Many researches prefer separately the study on the insider trading, misleading statements or manipulation etc. The key reason of such conditions is that there is periodical different understanding for securities frauds in different countries and under vary ground of law culture and in the development of securities market. Moreover, there are some arguments on whether a behavior belongs to fraud. And there are much illegible difference among securities fraud, securities crimes

and securities misfeasance in many researches. Yet securities fraud that could impede market mechanism running is a synthesis-taking place in a special field, and it may be provided with a common logic relation that can be discussed. The study lacking systematism would not only go against understanding the characteristic and rule of securities fraud in the whole, but also make against providing with the most material valuable guidance for the regulation activities. In conclusion, it is important and impending for securities antifraud provision though systemic studies.

Therefore, fixing on the research object which is the securities by the rule of Chinese Securities Law, this dissertation tries to build a specific regulatory field for securities market by systemic study and discusses all kinds of deceive action in broad eye. The purpose is that provide antifraud provision and regulatory practice with theoretic use for reference under the guidance of the equitableness.

This dissertation is divided into four Parts. Part I, "The analysis on Securities antifraud provision", introduces the concept of securities fraud. Although the author has been aware that the definition of securities fraud may be in the chips a disputed problem, the concept which is clear or not would be a key in connection with a frame of the following content. Therefore, the thesis concludes that the concept of securities fraud is any deceive action resulting in

someone else damage in the securities market for the own purpose of getting benefits or avoiding losses, directly or indirectly, by the use of any artifice to defraud or infringe on own obligation, including misleading statement, insider trading, manipulation, defrauding client and so on relating with issuance and listing. Underlying the concept, this dissertation briefly reviews the historical development of antifraud provisions linking to American and British securities markets.

Part II, including Chapter Two, mainly discusses the reasons that establish the antifraud provisions. This dissertation analyzes the theoretic base where antifraud provisions live in by surveying Regulatory Failure and Securities Regulatory Failure, whereas not employing the common way which draws a conclusion following discussing the securities fraud harm. It is noted that the market itself can' t automatically solve inherent problems, and the key which overcomes Securities Regulatory Failure is reasonable Government regulation. In fact, the objective of securities antifraud provision provides a expansive activity space with securities regulation, as government should actively protect securities market from any fraud. Then, the regulatory principles are honest, balance and harmony, fare and maintenance compete so as to establish an order, material justice and efficient market. In some sense, the running foundation of antifraud

provision is base on the idea of society. It is noted that the three main objectives of securities antifraud provisions are the demand of order, material justice and efficiency, and the final establishment of an open, just, fair market with public confidence is based on the harmony of three objectives.

Part III, as the main of this dissertation, answers how to forbid securities fraud. On the basis of the concept of securities fraud having been discussed, the content divide into two parts, as the part of behavior and the part of liability and remedy for securities fraud. In part of behavior, this dissertation emphasizes on demonstration research and analyzes the representation and the characteristic of securities fraud, such as misleading statement, insider trading, manipulation and defrauding client. Due to the same fraudulent characteristic, this dissertation holds that different sorts of fraud show relatively independence and open in the their shapes. Moreover, the system characteristic which is open and relatively independent provides a explicit thinking way close to regulatory actuality with securities legislation and executing. In part of the second dimension, this dissertation aims at the liability and remedy for securities fraud. From the point of view of the author, starting from the systemic study on securities fraud, though every fraud representation isn' t absolutely same on liability and remedy, it is unilateral that only uses a kind of liability to study on securities fraud,

and it doesn' t accord with the tendency of modern legislation. In fact, the study on securities liability and remedy hasn' t been limited on the separate area of civil, administrative or criminal liability, as regulation securities fraud exceed the traditional scope. Therefore, this dissertation tries to reveal the whole figure of the principal on liability and remedy for securities fraud by a synthesis analyzing on civil, administrative or criminal liability. The core of this dissertation is that reveal the antifraud provision goal which establish a pubic, justice, fare market with public confidence for speeding up National economy by the reasonable and necessary governmental regulation.

After discussing the concept of securities fraud, the forbidden necessity and regulatory measure, Part Four, as the end of this dissertation, reviews the actuality and problems in Chinese securities market and brings forward the author' s recommendation from exterior and interior institutional building. Lastly, it is noted that the dispute between Chinese characteristic and International rule is actually a copy of an argument between regulation and development. In conclusion, the core of Chinese securities antifraud provision is that provides law sustaining capable with a more emulative securities market.

It is an attempt that this dissertation analyzes systematically and fully the securities antifraud provision. For explai-

ning these problems, this dissertation regards all sorts of fraudulent behaviors in the securities market as a whole, whereas not making use of a traditional dissection way. Through the demonstration research, this dissertation focuses on the basic fuzzy concept. On study method, this dissertation make use of a combination of demonstration research and criterion research and is apt to the former. Underlying acquiring information, this dissertation tries to get a whole and general know about the research by the comparative and analytical method, as inducement from individual to general and deduct from general to individual.

The whole study of antifraud provision is a real challenge. As markets change and new financial breed would be introduced, the corresponding counter-measures from such perspectives must be innovated. Although the view of this dissertation could be superficial, it is affirmed that more and more securities regulating and legislation focus on the problem, as protecting an innocent person from defrauding. In conclusion, the study on antifraud provision is a long-term necessary part of securities legal system building.

导 论

反欺诈：证券市场制度建设的一个重要课题

——从安然事件谈起

在全球经济一体化和新技术革命的背景下，资本市场与产业经济活动之间发生着越来越密切的联系，证券市场以其特有的功能为产业经济活动提供了基本的纽带作用，使技术转化为生产力成为可能，并推动着新一轮技术革命的勃发，证券市场将是新经济时代任何市场都无法替代的，从一定程度上说，全球的经济活动正步入一个崭新的“资本”时代。然而，正当我们以更多的期待去挖掘证券市场的功能机制时，我们却不能不因这一市场所存在的缺陷而重新审视其价值。进入21世纪，发生在全球最大的资本市场——美国证券市场中的一系列公司财务丑闻引发了自1929年经济大萧条以来最大的信任危机，安然公司、世界通讯、施乐、骑士、时代华纳、环球电讯等一个个昔日华尔街中的骄子走下神坛，被置于被告席上，成为公众所唾弃的对象。华尔街财务危机的背后，是公众对公司经理层、董事会、审计师、证券分析师乃至整个市场经济诚信基础的怀疑，正如美国证券交易委员会前主席 Harvery L. Pitt 所言，安然事件、安达信解体、世通公司造假事件与“9.11”事件是美国证券市场近年来遭遇的“四

大危机”。在如此众多的华尔街丑闻中，特别值得一提的是安然事件，这不仅因为安然公司是推倒美国新经济时代财务丑闻的第一张多米诺骨牌，而且，在安然事件中，“百年老店”安达信会计师行也因逃避责任销毁安然审计档案而在2002年6月被联邦大陪审团裁定为“妨碍司法罪”，并最终解体。连续4年被美国《财富》杂志评为“最具有创新精神的公司”——安然公司却成为了华尔街中造假者的典型，认真剖析安然公司的财务欺诈行为，对于讨论证券市场的制度建设问题，提高监管水平，都是不无裨益的。

一、安然事件的基本情况[①]

（一）安然的崩溃

1985年，在休斯敦天然气公司与内布加拉斯州的北方联合天然气公司（InterNorth）合并的基础上，成立了以后的安然公司（Enron Corp）。这家公司的历史虽然不长，但是，它是1986年美国政府新能源政策最大的受惠者之一。按照1986年美国的新能源政策，能源供应实行市场化，不但价格管制开始放松，而且允许将交易功能与输送功能分开，允许管道公司独立于天然气交易之外。安然公司正是在这一发展机遇下介入能源交易的领域，作为能源交易中的“中间人”，安然公司利用巨大的能源现货生产能力和采购能力，与对手实现现货市场和期货市场的价格对冲，从而分享着双重利润，即作为能源供应商的生产利润以及作为交易商所获得的交易利润。自20世纪90年代以来，由于美

① 参见李扬、王国刚主编：《华尔街的堕落》，社会文献出版社2003年版；陈志武等：《谁揭穿安然》以及《安然之谜》，载于《财经》2002年第1期；陈立彤：《安然破产之后》，载于《财经》2002年第3、4期合刊本。

国经济持续高速的发展，安然公司一直创造着新经济时代的奇迹：1996～2000年，其销售收入从133亿美元增加到1 008亿美元，增长6.58倍；净利润从5.84亿美元上升到9.79亿美元。如此骄人的成绩不得不令世人刮目相看，美国《财富》杂志在2000年的调查中将其列入500强公司，其创新能力居于微软、英特尔等大公司之前。与“高成长”的业绩相联系，安然公司的股票成为华尔街证券分析师和投资者所追捧的“宠儿”，其股价从1997年的21元启动，到2000年中期，已达90多美元的创记录水平，涨幅高达328%。不幸的是，随着美国经济增长速度的放慢，支撑安然公司大厦的种种神话风光不再，在巨额的债务面前，安然公司不得不于2001年12月2日正式申请破产。

安然神话的崩溃直接缘起于2001年3月5日美国《财富》杂志的一篇题为《安然股价是否高估?》的文章，文中首次公开表示了对安然公司财务“黑箱”现状的疑虑，文章质疑道：“为安然欢呼的人也不得不承认：没有人能搞得清安然的钱到底是怎么挣得！原因是安然历来以‘防范竞争对手’为由拒绝提供任何收入或利润细节，把这些细节以商业秘密的名义保护起来。而其提供的数据又通常过于繁琐和混乱不清，连标准普尔公司负责财务分析的专业人员都无法弄清数据的来由。不管是极力推荐安然的卖方分析师，还是想证明安然不值得投资的买方分析师，都无法打开安然这只黑箱。”同年5月6日，美国波士顿一家名叫“Off Wall Street”的证券分析公司也发表了一份类似的有关安然的分析报告，在报告中，该分析公司指出：安然的营运利润率在2000年第四季度为2.08%，到2001年度进一步降为1.59%。此外，安然在会计处理方法上存在着通过关联交易增加利润的重大嫌疑。与此同时，一家名叫The Street.com的投资网站于2001年8月30日和10月22日两次对安然公司的财务现状发表分析文章，认为安然的2001年第二季度的利润很大部分来自于关联交易，没有这些“对

倒”交易，安然第二季度每股利润可能只达到30美分左右，而不是公布的45美分。此外，安然公司通过两个关联企业Marlin2信托基金和Osprey信托基金复杂的交易举债达34亿美元，但这些债务从未在安然的季报和年报中披露。

在媒体对安然公司财务现状进行猛烈抨击的过程中，市场本身也对安然股票的真实价值回归进行了探求。一家为客户寻找卖空股票对象的名叫Kynikos Associate的对冲基金公司发现，其不仅无法读懂安然省略了许多项目的年报和季报，而且，安然的内部人交易记录显示了安然公司的管理层加快抛售公司股票的进程。内部人士出售主要有三波，分别发生在2000年12月到2001年2月、5月到7月、11月。其中，2001年初接任安然CEO职务并于2001年8月辞职的斯格林出售最多。因此，安然公司的股票价格与其真实价值之间存在着严重的背离嫌疑。

在市场各方的压力下，安然不得不决定对过去数年的财务进行重审，把其中的一些关联企业一起并入安然的财务报表中。2001年11月8日，安然宣布，在1997年至2000年间由关联交易共虚报了5.25亿美元的利润。随着安然公司与另一家公司并购谈判的失败，2001年12月2日，安然正式向法庭申报破产，破产清单中所列资产高达498亿美元，成为美国历史上最大的破产企业之一。2002年1月15日，纽约证券交易所宣布对安然股票进行摘牌处理。

（二）安然神话的谜底

根据安然公司2001年11月8日向SEC提交的8－K报告以及新闻媒体披露的有关资料，在安然公司高速成长的神话背后，其造假主要集中在以下两个方面。

第一，造假的基本思路：主要是成立了众多关联企业，建立了复杂的公司体系，并以此逃避法律监管。有关资料显示，安然

公司所设立的各类子公司和合伙公司数量多达3 000个，众多的关联企业为安然公司进行操纵利润、发展融资业务带来了诸多便利。在实践中，设立这些公司的目的多种多样，有的是为转移利润，有的是为融资目的而设立，也有的是为了逃避税收。通过这种“金字塔”式的多层控股链方式，安然公司实际上以较少的资金控制了一个庞大的体系，不仅实现了企业的扩张，而且，为日后通过会计处理等方法增加利润提供了最基本的便捷条件。

第二，具体做假手段主要有以下四种方式：

一是通过“特殊目的实体”（Special purpose entity，简称SPE，或Special purpose vehicle，简称SPV）从事表外融资，高估利润和减少负债。所谓“特殊目的实体”是公司在融资过程中所创设的一种资产证券化的特殊载体，其基本交易结构是：资产的原始权益人将要证券化的资产剥离出来，出售给一个特设机构，该机构以其获得的这项资产的未来现金收益为担保发行证券，以证券发行收入支付购买证券化资产的价款，以证券化资产产生的现金流向证券投资者支付本息。资产证券化在一定程度突破了传统的股票、债券等融资渠道的缺陷，成为一些大公司在融资过程广泛采用的一种手段。安然公司正是利用了“特殊目的实体”有意高估利润和减少负债。按照美国现行会计惯例，如果非关联方对一个SPE的股权性投资占该实体资产总额的比例超过3%，且公司不拥有50%以上的股权，即使该特别实体的风险主要由上市公司承担，上市公司也无须将该特别实体纳入合并财务报表的编制范围。安然公司正是利用这个只注重法律形式，不顾经济实质的会计惯例，设立了大量的“特别目的实体”，以此作为隐瞒负债、掩盖损失的工具。在安然公司所设计的“金字塔”构图中，一般均以50%的持股形式出现，因此，“特殊目的实体”的负债在安然公司的财务报表中根本无须体现。而事实上，安然公司正是通过将子公司的资产剥离给基金，让后者以