REGULATION OF INVESTMENT MANAGEMENT
CASES and Materials for Study of the U.S. 40 Acts

美国投资管理

经典案例研究

姚承曦 (Chengxi Yao) ◎ 著

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序言

1998 年 3 月，国泰基金、南方基金二家基金公司成立，作为国内首批规范的基金管理公司，开启了“新基金时代”。我国从此有了真正意义上的专业机构投资者。

机构投资者的市场规模是资本市场成熟的重要标志。截至 2018 年 3 月底，我国境内共有基金管理公司 116 家，公募基金资产合计 12.37 万亿元，基金数量 5085 只。值得一提的是，公募基金持有人总户数已经超过 6 亿户，其中，绝大部分基金账户的资产规模在 5 万元以下，公募基金成为普惠金融的典型代表，为投资人创造了可观的回报。二十年来公募基金累计实现利润、为投资者分红均超过 2 万亿元。在这个过程中，公募基金逐步建立了先进的管理制度，具体体现在强制托管、公允估值、组合投资、公开披露、独立运作等制度安排上。并且，公募基金已经发展成为落实信托关系到位、运作模式透明、对持有人利益保护充分的资产管理行业典范。

自 2013 年 6 月《证券投资基金法》正式将私募基金纳入监管范围后，私募基金也已成为大资管行业的新兴重要组成部分，私募基金在阳光化、规范化运作中实现了跨越式发展。截至 2018 年 6 月底，中国证券投资基金业协会（中基协）已登记私募证券投资基金管理人 8776 家，已备案基金 35983 只，基金规模达 2.54 万亿元。此外，还有相当规模的保险资金、养老基金等集合投资的专业机构投资者入市。随着资本市场的不断开放，截至 2018 年 6 月底，累计有 287 家 QFII 机构合计获得 994.59 亿美元、196 家 RQFII 机构合计获得 6158.52 亿元人民币投资额度，境外机构和个人持股规模达 1855 亿美元（约 1.28 万亿元人民币），占 A 股流通股市值的比例为 3.18%。有 147 只保险公司产品投资于 513 只 A 股，合计持有市值 1.37

万亿元，全国社保基金共通过 41 个投资主体持有 555 只 A 股，合计持仓 2436.22 亿元。有 35 家信托公司投资于 82 只 A 股，合计持仓 532.23 亿元。

基金业的发展离不开行业规范的保驾护航：2003 年 10 月，《证券投资基金法》发布，明确了公募基金的法律地位，奠定了行业发展的基石；2009 年《刑法修正案（七）》增加了“利用未公开信息交易罪”、修订“内幕交易、泄露内幕信息罪”部分规定，确立了基金“老鼠仓”和利益输送行为的刑事责任，是基金行业法律规制的重大突破；2012 年 6 月，中国证券投资基金业协会成立，为基金行业自律监管奠定了组织基础；2013 年 6 月，新修订的《证券投资基金法》开始实施；2016 年 2 月，由中国证监会与中国人民银行联合颁布了《货币市场基金监督管理办法》；2017 年 6 月，财政部、中国人民银行和中国证监会联合发布《关于规范开展政府和社会资本合作项目资产证券化有关事宜的通知》；2017 年 8 月，国务院法制办公室发布了《私募投资基金管理暂行条例(征求意见稿)》。我们可以看到，我国基金业在贯彻执行《中共中央关于制定国民经济和社会发展第十三个五年规划的建议》中提出的“健全符合我国国情和国际标准的监管规则，实现金融风险监管全覆盖”方面取得了重要成果，不断完善的制度建设保证了基金业的可持续发展。

当然，与西方发达国家相比，我国的基金业仍然还有很长的路要走。学习和借鉴发达国家资本市场机构投资者监管机制、监管标准和监管理念，对于我国的基金行业的进一步发展，有着重要的理论意义与实践价值。尽管证券投资基金行业在我国得到了蓬勃发展，但近年来尤其是在私募基金领域出现了涉嫌非法集资、高管跑路等问题，甚至引发了群体性事件。私募基金管理公司向非合格投资者推介基金、未按规定办理基金备案手续、未按合同约定向投资者披露基金定期报告、未对投资者风险识别能力和风

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险承担能力进行评估等问题相当普遍。这一系列现实问题都反映了我们加强私募基金监管的迫切需求，无论是从立法还是从具体监管经验方面都有提升的空间。

由汕头大学商学院金融监管学教授姚承曦撰写的“REGULATION OF INVESTMENT MANAGEMENT—CASES AND MATERIALS FOR STUDY OF THE U.S. 40 ACTS”（《美国投资管理经典案例研究》）是我国第一部全面和权威地研究美国证券投资基金及机构投资者监管的专著，填补了资本市场机构投资者规制的空白。

该书以普惠金融的代表——共同基金的规制为研究重点，同时对从事集合理财的其他类型的机构，例如：保险资产管理公司、银行集合信托基金、养老与退休基金、资产证券化集合投资基金、私募基金的特殊监管机制进行了阐析。既有对美国《投资基金法》和《投资顾问法》主要监管理念与法规的系统分析，又深入研究了在美国基金监管史上产生重大影响和代表性的经典案例。作者以通俗易懂的英文风格行文，将抽象的理论与具体的案例融合，进行了深入而广泛的理论研究与文献综述，尤其是书中大量的代表性案例，详细地阐述了相关规则的历史背景及其借鉴。

姚承曦教授在美国生活了 30 年，有着很强的法学与金融学背景和丰富的监管与实践经验。我相信，该书的出版对我国证券投资基金以及其他机构投资者的监管有着重要的指导意义。

国务院参事室金融研究中心研究员
民革中央经济委员会副主任
何杰
二〇一八年八月

Foreword

As of the end of 2017, the aggregate value of assets managed by United States registered investment companies, comprised of mutual funds, exchange-traded funds, closed-end funds, and unit investment trusts, totaled $22.5 trillion. Mutual funds are the dominant format, accounting for $18.7 trillion of this amount. Approximately 45.4% of all U.S. households own investment company shares (figures from Investment Company Institute's 2018 Fact Book (58th ed.). Registered funds serve as investment vehicles through which ordinary citizens save for retirement, education of their children and other financial goals. Investment companies make available to investors of modest means diversification and professional management. Through the financial markets, professional fund managers allocate the savings of millions of individuals to businesses and governments. This allocation of capital, in turn, stimulates economic growth and job creation, as businesses that rely on financial markets use this capital to fund their enterprises, develop new technologies and hire employees. Over the 78 years since enactment of the Investment Company Act of 1940 (1940 Act), this virtuous cycle has continued to operate, albeit with occasional slowdowns.

The bulk of investment company investors are individuals of limited wealth and little experience with financial institutions. Laws, and confidence that those laws will be enforced, are necessary if these investors are to trust their savings to anonymous institutions. The 1940 Act is largely the result of a report produced between 1938 and 1940 by the U.S. Securities and Exchange Commission (SEC) documenting excesses and abuses in the investment company industry. Industry leaders recognized that responsible regulation would contribute greatly to regaining public confidence and cooperated in crafting the new law. The SEC's report documented numerous instances of self-dealing and overreaching by fund insiders, and insiders' use of pyramid ownership structures to control funds while risking a disproportionately small amount of capital. In the 1920's, few mutual funds existed; closed-end funds dominated the market. Many of these funds were controlled by large financial institutions that also earned revenue from underwriting and brokerage businesses. To earn underwriting fees, these firms caused the funds that they

controlled to purchase securities of dubious value. The contents of fund portfolios were not disclosed to investors. Thus, this abuse was not readily detectable. Firms caused controlled funds to engage in excessive securities trading to generate commissions for affiliated brokers. Funds diluted the value of fund shares sold to the public by issuing shares to insiders as compensation or at discounted prices. If share prices fell, funds would sometimes repurchase shares selectively from insiders or affiliates. Closed-end funds used substantial amounts of leverage, and that leverage magnified the profits from a generally rising stock market. Partly due to this, closed-end fund shares traded at double digit premiums to the value of the securities that they held. With the precipitous fall of stock prices in late 1929 and subsequent depression, debt servicing requirements left little or no income for distribution to shareholders. As losses mounted, and investors needed cash, sellers outnumbered buyers, and closed-end fund share prices fell from steep premiums to discounts. Losses were less severe among the few mutual funds available at that time. Because of the need to meet redemption requests, these funds used little or no leverage. Nevertheless, the entire investment company industry's image was tarnished.

The provisions of the 1940 Act were designed to address specific, recently experienced, and not just theoretical, excesses and abuses. First, the 1940 Act severely limits leverage by closed-end funds by requiring at least 300% asset coverage for borrowings and 200% asset coverage for preferred stock. (An exception was later made for "business development companies" (BDCs), *i.e.*, public venture capital companies regulated as a specialized type of closed-end funds, for which asset coverage must be at least 150%.) Mutual funds are limited to bank borrowings, and these must have asset coverage of at least 300%. Next, the 1940 prohibits a fund adviser or its affiliates from issuing securities to, or buying assets from the fund that it manages. Moreover, a fund may not purchase a security from an underwriting syndicate if its adviser or an affiliate of the adviser is a member of that syndicate. In addition, a fund may not engage in a joint enterprise or transaction if its adviser, principal underwriter, promoter or any of their affiliated persons participates in the transaction as principal. This last provision is particularly expansive. Determining exactly what conduct constitutes a prohibited joint transaction has frustrated fund lawyers for decades. In this regard, Professor Yao's discussion does not provide an answer, but she identifies the important cases and commentaries.

The 1940 Act's many specific and detailed prohibitions and requirements might have stifled innovation but for provisions that give the SEC broad authority to grant exemptions from its restrictions by means of orders applicable to specific transactions or funds or by rules more generally applicable to the fund industry. This authority is supplemented by SEC staff no-action letters that do not have the force of law but provide useful guidance on a somewhat expedited basis. Professor Yao's discussion of these ancillary developments is particularly thorough. Included are both the exemptive orders that made exchange traded funds possible, and interval fund experiment under rule 23c-3, a rule that permits a closed-end fund to redeem a limited percentage of its securities at specified, fixed intervals (*e.g.*, each quarter or each year) as an experiment intended, in part, to address the discount at which closed-end fund shares often trade. Also included is a no-action letter issued to Eaton Vance Management during the recent financial crisis to facilitate financing of certain closed-end funds. This letter was issued in coordination with the Internal Revenue Service of the U.S. Department of the Treasury and is an example of regulatory flexibility when circumstances demand it.

Today, as China's gross domestic product (GDP) is poised to surpass that of the United States, its regulated fund market is much smaller both in absolute terms and as a percentage of GDP. This is unsurprising in view of the relatively short time capital markets have had to develop. The potential benefits of a well-regulated investment company industry both to individual investors and the nation are great. Professor Yao provides a well-organized, comprehensive and up to date survey of U.S. fund regulation. She appears to have read and digested not only every case involving the 1940 Act but every important commentary on those cases.

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Branch Chief, Division of Investment Management
U.S. Securities and Exchange Commission (1991 – 2017)
United States
August 2018

美国证券与交易委员会
投资管理司前任官员（一九九一至二〇一七年）

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勤奋与多才多智的图书馆文献与索引工作人员为这本书的研究过程做出了重大贡献，其中包括：汕头大学图书馆学科馆员谢芦青老师、曾昭鸿老师、万庐山老师，美国麻省法院图书馆数位馆员，美国麻省波士顿学院法学院法学文献研究员兼讲师 Karen Breda 老师等。此外，也一并感谢中国清华大学图书馆、中国图书进出口（集团）总公司等单位的大力支持。他们是我的研究工作不可缺少的宝贵资源。

姚承曦
二〇一八年七月
于中国广东汕头大学

Convention Used in Case Editing

Footnote numbering used in edited and excerpted case studies generally consecutively follows the footnote numbering used in the original documents. Where a footnote appearing in an original document is omitted in the edited/excerpted case study, the footnote number sequence of the edited/excerpted case study may differ from the sequence of the original document.

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Statement of President Roosevelt
On Signing Two Statutes to Protect Investors

August 23, 1940
http://www.presidency.ucsb.edu/ws/?pid=15993

"I have just signed the Investment Company Act of 1940 and the Investment Advisers' Act of 1940; . . . They mark another milestone in this Administration's vigorous program—begun in 1933 and supplemented in 1934, . . .—to protect the investor. . . . I have great hopes that the Act which I have signed today will enable the investment trust industry to fulfill its basic purpose as a vehicle to diversify the small investors' risk and to provide a valuable source of equity capital for deserving small and new business enterprises which the investment bankers have been unable to finance."

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Chapter 1 Concept of Investment Company

> " . . . investment companies are affected with a national public interest in that, . . . (2) the principal activities of such companies—investing, reinvesting, and trading in securities—are conducted by use of the mails and means and instrumentalities of interstate commerce, . . . ; (3) such companies customarily invest and trade in securities issued by, and may dominate and control or otherwise affect the policies and management of, companies engaged in business in interstate commerce; (4) such companies are media for the investment in the national economy . . ."
>
> ----Investment Company Act of 1940, § 1(a)

Section 1.1 Primary Engagement: Managing Investments *vs* Operating Business

Laws & Rules Highlight:
"Investment Company": Statutory Definitions & Selected Exclusions
IC Act (15 USC 80a-1 *et seq.*)

- § 3(a)(1) (***primarily investment business***: *three alternative tests of ICs*)
  - § 3(a)(1)(A) (***classic/orthodox IC:*** *issuer is or holds out as being "engaged* ***primarily*** *in" investment company business*)
  - § 3(a)(1)(B) (*archaic IC: issuer of face-amount certificates of installment type*)
  - § 3(a)(1)(C) (***presumptive/prima facie IC:*** *issuer "****engaged*** *in" investment company business and having over* ***40%*** *of its total assets on an unconsolidated basis in "****investment securities****"*)
- § 3(b) (***primarily non-investment business***: *exclusions from* ***§ 3(a)(1)(C)***)
  - § 3(b)(1) (*self-operating exclusion: excludes an* ***issuer*** *"****primarily*** *engaged in"* ***non****-investment company business, directly or through* ***wholly-owned*** *subsidiaries*)
  - § 3(b)(2) (*SEC exemptive order exclusion: excludes an* ***issuer*** *"****primarily*** *engaged in"* ***non****-investment company business, directly, or through* ***majority-owned*** *subsidiaries, or through* ***controlled*** *companies conducting* ***similar*** *types of businesses*)
  - § 3(b)(3) (*excludes* ***wholly-owned subsidiaries*** *of industrial corporate parent: where both parent and subsidiaries are presumptive ICs solely due to § 3(a)(1)(C), and parent company is excluded from IC by § 3(b)(1) or § 3(b)(2)—requirements designed to prevent a parent company from circumventing § 3(a)(1)(C) by downstreaming all its*

investments into a wholly-owned subsidiary)

- § 3(c) (***<u>specific types of issuers</u>***: *exclusions from* ***§ 3(a)***)
  - §§ 3(c)(1) & 3(c)(7) (*exclusions for private investment funds*)
  - § 3(c)(2) (*exclusions for brokers, dealers, and underwriters*)
  - § 3(c)(3) (*exclusions for banks, bank common trust funds, and insurance companies*)
  - §§ 3(c)(5)(A)-(B)-(C) (*exclusions for commercial finance (factoring & sales financing) companies, and mortgage banking issuers*)
  - § 3(c)(11) (*exclusions for qualified pension and profit-sharing plans, bank collective investment funds and insurance company separate accounts consisting solely of assets of such qualified plans*)

Laws & Rules Highlight:
"Investment Company": Selected SEC Safe Harbor Exemptions*

17 CFR §§ 270.0-1 *et seq.*

*Safe harbor rules obviate the need for case-by-case SEC exemptive order process under § 3(b)(2). [IC-10937, 44 FR 66608 (1979)]. "A determination under either § 3(b)(2) or § 3(b)(1) that an issuer primarily is engaged in a noninvestment business also means that it is not an investment company under § 3(a)(1)." [IC-19566, 58 FR 38095, 38096 n.10 (1993)]

Rule 3a-1 Certain Prima Facie Investment Companies

*Rule 3a-1 deems certain "**prima facie**" ICs under § 3(a)(1)(C) "**not to be in fact**" ICs **if** the issuer **(1)** is a prima facie IC solely by virtue of § 3(a)(1)(C); **(2)** consolidating with its wholly-owned subsidiaries, has no more than 45% of assets invested in and no more than 45% of net income derived from investment securities; and **(3)** is not a special situation investment company; and it has primary control over controlled companies, which are not ICs and through which the issuer engages in non-investment business.*

[Certain Prima Facie Investment Companies, IC-10937, 44 FR 66608 (1979); IC-11551, 46 FR 6879 (1981)]

Rule 3a-2 Transient Investment Companies

*Rule 3a-2 excludes "**transient ICs**" from §§ 3(a)(1)(A) and 3(a)(1)(C), **if** the issuer **(1)** does not hold itself out as being engaged primarily in investment business; **(2)** has a bona fide intent to be primarily engaged in a noninvestment business within the safe harbor period; and **(3)** is subject to a maximum safe harbor period of one year and one reliance on the safe harbor rule in any three-year period—to both accommodate temporary investment needs of transient ICs and prevent circumvention of IC Act by non-transient ICs.*

[Transient Investment Companies, IC-10943, 44 FR 67152 (1979); IC-11552, 46 FR 6882 (1981)]

Rule 3a-3 Certain Investment Companies Owned by Companies Which Are Not Investment Companies

*Rule 3a-3 **extends § 3(b)(3)** statutory exclusion for **wholly-owned subsidiaries** of corporate parent, and deems certain subsidiaries not to be IC, where **(1)** such **subsidiaries** solely due to specified technical reasons do not meet § 3(b)(3) statutory exclusion; **(2) corporate parent** is not an IC under § 3(a), or is excluded from IC by § 3(b)(1) or § 3(b)(2), or is deemed not to be an IC under Rule 3a-1; and **(3) corporate parent and wholly-owned subsidiaries** on a consolidated basis have no more than 45% of assets in and no more than 45% of net income from investment securities, as a safeguard to prevent use of corporate structural arrangement to circumvent IC Act. Notwithstanding Rule 3a-3 exclusion for the subsidiaries, the parent and subsidiary relationships can be collapsed and the totality of the corporate arrangement be deemed an IC under § 3(a)(1)(A).*

[Certain Investment Companies Owned by Companies Which Are Not Investment Companies, IC-10944, 44 FR 67150 (1979); IC-11553, 46 FR 6884 (1981)]

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