英美法案例精选系列丛书　英文版

美国证券法

Securities Regulation Of U.S.A

唐丽子　编著

对外经济贸易大学出版社

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总　序

自1984年设立国际法专业以来，对外经济贸易大学法学院（原国际经济法系）已经走过了20个年头。在20年的时间里，经过几代人的努力，在培养懂法律、懂经贸和熟练运用外语（英语）的综合型人才、满足国内市场和国际市场的人才需求的道路上，对外经济贸易大学法学院已成为国内外经贸法律教育中一个具有自己特色和风格的人才培养基地和输送站。

对外经济贸易大学法学院的教学特色体系是从“国际商法”开始的，为了适应国际经贸全球化的发展潮流，我们希望，从对外经济贸易大学法学院走出的人才能够从国际化的视角理解和把握我国的法律，并且客观地认识不同国家的法律、国际法律之间的相互作用和影响。为此目的，我院几代教师编辑的教材，包括案例教材，都在强调具有国际化视角的教学和比较研究的重要性。

对外经济贸易大学法学院以独特的教学方法——案例教学和双语教学为代表，旨在通过引导学生对“原汁原味”的英文案例的阅读和研讨，既学习不同国家在国际商贸领域的法律原理和规则，也通过对经典案例事实和纠纷场景的分析，帮助学生认识现实生活中经贸活动的规律和特点。

我们多年的教学实践已经证明：案例教学对于培养学生发现和归纳问题、分析和处理问题的综合能力，对于培养学生在错综复杂的事实和现象中分清真伪和主次、结合事实和法律推理的能力有直接的促进作用。

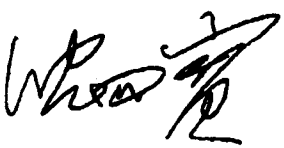
除了国际商法以外，对外经济贸易大学法学院国际法专业的

另一个教学和研究方向是以 WTO 法律为主的国际经济法（公法）。本套英文案例选编丛书包含了这样两个方面的内容。

我院鼓励教师在教学、科研和法律实践中全面拓展才能和发掘潜力，同时，我们强调：教师的工作应以教学为中心，科研和法律实践为提升教师的专业素质、提高教学水平而服务。参与本套丛书编写的同志都是我院具有多年教学经验的中青年教师，本套丛书是他们在对自己的教学心得的积累和总结的基础上精心编辑而成的，是他们对多年摸索的教学方法的总结；本套丛书也是我院几代人的教学成果的延续，更是我院“211 工程”建设成果的组成部分。

20 年来，我们欣慰地看到：对外经济贸易大学法学院的教学风格和特色也得到国家和社会的认可：早在 20 世纪七、八十年代，我院就经批准设有可招收国际经济法专业方向的硕士点和博士点；我院的“国际商法”教材和案例教材也广为流传；2002 年我院的国际法专业被评为国家重点建设学科，现又增设了博士后流动站；学生和教师的规模日益扩大。我衷心希望：我院有更多的教师和学生加入案例教学和双语教学的尝试和探索中来，保持和发展特色，早日走上国际人才培养和学科全面发展的道路。

对外经济贸易大学
法学院　院长



2004 年 7 月

前　言

1929年至1933年"大崩溃"(The Great Crash)的结果导致《1933年证券法》(the Securities Act of 1933)、《1934年证券交易法》(the Securities Exchange Act of 1934)的制定[①]。目前美国证券法律体系由以下部分构成:

第一,联邦成文证券法。联邦成文证券法最主要的包括证券法、证券交易法。证券法调整证券的发行,即调整一级市场[②](preliminary market);证券交易法调整证券的交易,即调整二级市场(secondary market)。除证券法和证券交易法外,还包括《1935年公用事业控股公司法》(the Public Utility Holding Company Act of 1935)、《1939年信托证券法》(the Trust Indenture Act of 1939)、《1940年投资公司法》(the Investment Company Act of 1940)、《1940年投资顾问法》(the Investment Advisers Act of 1940)、《1970年证券投资者保护法》(the Securities Investor Protection Act of 1970)、《1984年内幕交易制裁法》(Insider Trading Sanction Act of 1984)、《1988年内幕交易与证券欺诈执行法》(Insider Trading and Securities Fraud Enforcement Act of 1988)、《1995年私人证券诉讼改革法》(Private Securities Litigation Reform Act of 1995)及《2002年萨班纳斯——奥利克斯法》(the Sarbanes-Oxley Act of

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① Marc I. Steinberg, Understanding Securities Law, Lexis Publishing, 3th edition, at 1. 为方便起见,本书将《1933年证券法》简称为:证券法或33年证券法;《1934年证券交易法》简称为:证券交易法或34年证券交易法;本书所称的证券法和证券交易法均包括其修正案。

② 一级市场也称为发行市场。

2002)等。联邦证券法律最核心的内容一是信息披露(disclosure),通过信息披露为股东和投资者提供足够的信息,以便其做出相关的决定。二是禁止操纵(manipulation)和欺诈(deception),以促进对投资者的保护和维护市场的公平和秩序。

第二,各州根据其特定情况,从保护投资者的利益出发,制定适用于本州的证券法,即"蓝天法"(blue sky law)。堪萨斯州(Kansas)于1917年制定蓝天法,成为第一个制定蓝天法的州。目前,所有的州都制定了不同形式的蓝天法,适用于其境内和证券有关的活动。该法规通常规范以下行为:

1. 证券发行和正当的买卖;

2. 投资顾问、经纪商、交易商及其机构持照经营;

3. 证券公开发行的登记;

4. 确定证券是否符合某些标准,这些标准经常被称为"价值"或者"公平、公正、公允"标准[①]。

第三,美国证券交易委员会(Securities Exchange Commission)(以下简称"SEC")根据证券交易法的授权,制定调整美国证券市场及有关中介机构的各类规则。

第四,法院尤其是联邦最高法院的判例。

美国证券法可谓是当今世界范围内处于先导地位的法律。其立法原则和立法技术不仅为英美法系所采纳,也为众多大陆法系国家和地区所借鉴。我国自20世纪90年代建立证券市场以来,就证券市场的立法、监管模式等重大问题,在充分尊重国情的基础上,也重视借鉴美国证券法先进的立法技术,这在1993年制定的《股票发行与交易管理暂行条例》及1999年7月1日生效的《中华人民共和国证券法》中均有明显的体现。目前,我国立法机关正在

① Marc I. Steinberg, Understanding Securities Law, Lexis Publishing, 3th edition, at 1.

进行证券法的修订工作，在修订证券法的过程中，进一步借鉴外国先进的立法技术更为必要。笔者近年来在教授中国证券法的同时，投入了相当的时间和精力学习和研究美国证券法，尤其是对美国证券法律制度的完善有重大影响的案例。本书收集了二十七个美国著名证券案例，希望本书能使学生从总体上了解美国证券案例所创设的证券法律原则，也希望能为我国证券法的修改尽薄锦之力。

本书选编的案例，主要源自 Securities Regulation: Cases and Materials by Richard W. Jennings, Harold Marsh, Jr., John C. Coffee, Jr. and Joel Seligman. Securities Regulation: Cases and Materials by James D. Cox, Rober W. Hillman, Donald C. Langevoort. Securities Regulation by David L. Ratner. Fundamentals of Securities Regulation by Louis Loss, Joel Seligman. Corporations Law and Policy: Materials and Problems by Lewis D. Solomon, Donald E. Schwartz, Jeffrey D. Bauman and Elliott J. Weiss 及 www.lexis.com 等。

因编者本人的专业及英语水平有限，在编著本书的过程中难免存在疏漏和错误，敬请读者批评指正。

唐丽子

2004 年 12 月于对外经济贸易大学法学院

目　录

第一章　证券定义

何谓证券？布莱克法律辞典(《Black's Law Dictionary》)对其有四种解释，首先是担保义务人履行义务的一种保证。其次是持有人持有股票/债券/政府债券及选购权等金融工具的凭证①。我国台湾地区知名学者曾世雄在《票据法论》中认为，证券之意义，分为两个层面：一为物理形态之纸张，即证券为一记载文字之纸张。二为法律角度，其为表彰一定法律关系之书据，即证券实质上为表彰私权利之书据②。

证券既是证券市场交易的对象，也是各国证券法调整及规范的对象。多数国家证券法及相关法律对其进行法律定义。如大陆法系的德国③，我国台湾地区④等。

美国法关于何谓证券，既通过联邦成文法予以规定，又通过判例法进行补充和完善。

首先，联邦成文法。33年证券法、34年证券交易法、公用事业

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① 《Black's Law Dictionary》, 7th edition, at 1358.

② 曾世雄等著：《票据法论》，中国人民大学出版社出版，第1页。

③ 德国有价证券交易法(该法于1994年7月24日通过，1998年9月9日修订)第2条："本法所称指的有价证券一即使对其并不开具证书一为可以在市场上进行交易的：(1)股票、代表股票的证书、债券、红利股票、期权证书；和(2)其他相当于股票或债券的有价证券。有价证券也包括资本投资公司或外国的投资公司所发行的股票。"

④ 我国台湾地区"证券交易法"(该法于1968年首次颁布，1981年、1983年、1988年、1997年及2000年先后对相关内容进行修订)第6条规定："本法所称有价证券，谓政府债券、公司股票、公司债券及经财政部核定之其他有价证券。新股认购权利证书，新股权利证书及前项各有价证券之缴款凭证，或表明其权利之证书，视为有价证券。前二项规定之有价证券，未印制表示其权利之实体有价证券者，亦视为有价证券。"

控股公司法及1940年投资公司法均采用列举的方式，对何谓证券作了规定[①]。

其次，判例法。尽管上述联邦成文法对何谓证券作了广泛的列举，但日新月异的金融工具投放市场，纷繁复杂的金融交易产生法律争议时，仅凭成文证券法，往往难以作出判定。美国法院，尤其是联邦最高法院通过大量的司法判例来实质性地对证券进行解释。本章选列的案例，为联邦最高法院在不同历史时期对“证券”概念进行了解释。

Securities & Exchange Commission v. W. J. Howey Co.

Supreme Court of the United States, 1946

① 1933年证券法第2条第1项规定：本法所称证券，除依其情形另有他指外，指任何票据、股票、库存股份、债券、无担保债券、债务凭证、任何分享利润协议之参与或权益证书、担保——信托凭证、公司成立前认股证明、可转让股份、投资合同、表决权信托证书、证券存托凭证、石油、天然气或其他矿权中部分未分割权利、或任何一般通认为证券之权益或工具、或上述各种证券之权利参加分配书、临时权益凭证、收据、保证、股权认股证书、股份认购之权利。1934年证券交易法第3条第1款第10项对证券的定义与1933年法大致一样，但该法将未满9个月的票据排除在证券定义之外。1940年投资公司法第2条第36项规定：证券，指任何票据、股票、库存股票；债券、公司信用债券、债务凭证、盈利分享协议下的权益证书、组建前证书或认购书，可转换股票、投资契约、股权信托证、证券、石油或煤气或其他矿产权上的小额未分配利益、买入期权、卖出期权或套利交易证券、有关证券的优惠证明(包括其中的利息或根据其价值计算出的利息)、在国家级证券交易所进行的与外汇有关的买入期权、卖出期权及套利交易、或通常被称为“证券”的任何利益及金融工具，以及参与上述任一金融工具的投资的证明、对上述任一金融工具拥有利益的证明，上述任一金融工具的临时性证明和上述任一金融工具的认购权证。

328 *U. S.* 293

MR. JUSTICE MURPHY delivered the opinion of the Court. This case involves the application of § 2 (1) of the Securities Act of 1933 to an offering of units of a citrus grove development coupled with a contract for cultivating, marketing and remitting the net proceeds to the investor.

The Securities and Exchange Commission instituted this action to restrain the respondents from using the mails and instrumentalities of interstate commerce in the offer and sale of unregistered and non-exempt securities in violation of § 5 (a) of the Act. The District Court denied the injunction, and the Fifth Circuit Court of Appeals affirmed the judgment. We granted certiorari on a petition alleging that the ruling of the Circuit Court of Appeals conflicted with other federal and state decisions and that it introduced a novel and unwarranted test under the statute which the Commission regarded as administratively impractical.

The respondents, W. J. Howey Company and Howey-in-the-Hills Service, Inc., are Florida corporations under direct common control and management. The Howey Company owns large tracts of citrus acreage in Lake County, Florida. During the past several years it has planted about 500 acres annually, keeping half of the groves itself and offering the other half to the public "to help us finance additional development." Howey-in-the-Hills Service, Inc., is a service company engaged in cultivating and developing many of these groves, including the harvesting and marketing of the crops.

Each prospective customer is offered both a land sales contract and a service contract, after having been told that it is not feasible to

invest in a grove unless service arrangements are made. While the purchaser is free to make arrangements with other service companies, the superiority of Howey-in-the-Hills Service, Inc., is stressed. Indeed, 85% of the acreage sold during the 3-year period ending May 31, 1943, was covered by service contracts with Howey-in-the-Hills Service, Inc.

The land sales contract with the Howey Company provides for a uniform purchase price per acre or fraction thereof, varying in amount only in accordance with the number of years the particular plot has been planted with citrus trees. Upon full payment of the purchase price the land is conveyed to the purchaser by warranty deed. Purchases are usually made in narrow strips of land arranged so that an acre consists of a row of 48 trees. During the period between February 1, 1941, and May 31, 1943, 31 of the 42 persons making purchases bought less than 5 acres each. The average holding of these 31 persons was 1.33 acres and sales of as little as 0.65, 0.7 and 0.73 of an acre were made. These tracts are not separately fenced and the sole indication of several ownership is found in small land marks intelligible only through a plat book record.

The service contract, generally of a 10-year duration without option of cancellation, gives Howey-in-the-Hills Service, Inc., a leasehold interest and "full and complete" possession of the acreage. For a specified fee plus the cost of labor and materials, the company is given full discretion and authority over the cultivation of the groves and the harvest and marketing of the crops. The company is well established in the citrus business and maintains a large force of skilled personnel and a great deal of equipment, including 75

tractors, sprayer wagons, fertilizer trucks and the like. Without the consent of the company, the land owner or purchaser has no right of entry to market the crop; thus there is ordinarily no right to specific fruit. The company is accountable only for an allocation of the net profits based upon a check made at the time of picking. All the produce is pooled by the respondent companies, which do business under their own names.

The purchasers for the most part are non-residents of Florida. They are predominantly business and professional people who lack the knowledge, skill and equipment necessary for the care and cultivation of citrus trees. They are attracted by the expectation of substantial profits. It was represented, for example, that profits during the 1943 - 1944 season amounted to 20% and that even greater profits might be expected during the 1944 - 1945 season, although only a 10% annual return was to be expected over a 10-year period. Many of these purchasers are patrons of a resort hotel owned and operated by the Howey Company in a scenic section adjacent to the groves. The hotel's advertising mentions the fine groves in the vicinity and the attention of the patrons is drawn to the groves as they are being escorted about the surrounding countryside. They are told that the groves are for sale; if they indicate an interest in the matter they are then given a sales talk.

It is admitted that the mails and instrumentalities of interstate commerce are used in the sale of the land and service contracts and that no registration statement or letter of notification has ever been filed with the Commission in accordance with the Securities Act of 1933 and the rules and regulations thereunder.

Section 2 (1) of the Act defines the term "security" to include

the commonly known documents traded for speculation or investment. This definition also includes "securities" of a more variable character, designated by such descriptive terms as "certificate of interest or participation in any profit-sharing agreement","investment contract" and "in general, any interest or instrument commonly known as a 'security'." The legal issue in this case turns upon a determination of whether, under the circumstances, the land sales contract, the warranty deed and the service contract together constitute an "investment contract" within the meaning of § 2 (1). An affirmative answer brings into operation the registration requirements of § 5 (a), unless the security is granted an exemption under § 3 (b). The lower courts, in reaching a negative answer to this problem, treated the contracts and deeds as separate transactions involving no more than an ordinary real estate sale and an agreement by the seller to manage the property for the buyer.

The term "investment contract" is undefined by the Securities Act or by relevant legislative reports. But the term was common in many state "blue sky" laws in existence prior to the adoption of the federal statute and, although the term was also undefined by the state laws, it had been broadly construed by state courts so as to afford the investing public a full measure of protection. Form was disregarded for substance and emphasis was placed upon economic reality. An investment contract thus came to mean a contract or scheme for "the placing of capital or laying out of money in a way intended to secure income or profit from its employment." This definition was uniformly applied by state courts to a variety of situations where individuals were led to invest money in a common

enterprise with the expectation that they would earn a profit solely through the efforts of the promoter or of some one other than themselves.

By including an investment contract within the scope of § 2 (1) of the Securities Act, Congress was using a term the meaning of which had been crystallized by this prior judicial interpretation. It is therefore reasonable to attach that meaning to the term as used by Congress, especially since such a definition is consistent with the statutory aims. In other words, an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise. Such a definition necessarily underlies this Court's decision in *S. E. C. v. Joiner Corp.*, 320 *U. S.* 344, and has been enunciated and applied many times by lower federal courts. It permits the fulfillment of the statutory purpose of compelling full and fair disclosure relative to the issuance of "the many types of instruments that in our commercial world fall within the ordinary concept of a security." It embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.

The transactions in this case clearly involve investment contracts as so defined. The respondent companies are offering something more than fee simple interests in land, something different from a