

REGULATION OF SECURITIES OFFERINGS AND INVESTMENT BANKING  
CASES and Materials for Study in U.S. Securities Act of 1933

# 美国证券发行 经典案例教程

姚承曦 David A. Sirignano 著



 中国金融出版社

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by

Chengxi Yao/姚承曦 and David A. Sirignano

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责任编辑：刘 钊 曹亚豪

责任校对：刘 明

责任印制：陈晓川

### 图书在版编目 ( CIP ) 数据

美国证券发行经典案例教程 ( Meiguo Zhengquan Faxing Jingdian Anli Jiaocheng ) /  
姚承曦, David A. Sirignano 著. —北京: 中国金融出版社, 2012.11

ISBN 978 - 7 - 5049 - 6642 - 1

I. ①美… II. ①姚…②S… III. ①有价证券—销售—案例—美国—教材  
IV. ①F837.125

中国版本图书馆CIP数据核字 ( 2012 ) 第242972号

出版

发行

**中国金融出版社**

社址 北京市丰台区益泽路2号

市场开发部 ( 010 ) 63266347, 63805472, 63439533 ( 传真 )

网上书店 <http://www.chinafph.com>

( 010 ) 63286832, 63365686 ( 传真 )

读者服务部 ( 010 ) 66070833, 62568380

邮编 100071

经销 新华书店

印刷 保利达印务有限公司

尺寸 187毫米 × 252毫米

印张 37.5

字数 810千

版次 2012年11月第1版

印次 2012年11月第1次印刷

定价 58.00元

ISBN 978 - 7 - 5049 - 6642 - 1/F. 6202

如出现印装错误本社负责调换 联系电话 ( 010 ) 63263947

**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](http://www.sec.gov)

# ***In Perspective: Securities and Financial Regulation***

## **PowerPoint:**

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

## Overview: U.S. 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](http://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





## *Foreword*—美国法学者序

A constant theme in China's reform and development since the late 1970s has been increased openness and integration into the world economy. In the first stage, that meant openness with respect to production and trade in agriculture. The decollectivization of agriculture and the opening of the domestic market to foreign investors was an important first step. During the late 1980s and 1990s, the transformation of the state owned sector and increased openness to private ownership marked another significant milestone in the reform process. Central to that was China's openness to international trade. Increased openness to trade marked the beginning of China's integration into world markets.

The next stage of China's development required a further step in integration, including liberalization of capital markets. Liberalization of financial services and capital markets is already well underway. As with trade, liberalization of domestic capital markets and integration into world capital markets requires a sophisticated understanding of the legal frameworks that govern an integrated market. It is perhaps still non-controversial to observe that U.S. capital markets are the deepest and most complex in the world. If China is to successfully complete its integration into global capital markets, Chinese lawyers, regulators and businessmen must have a thorough understanding of that legal framework.

The legal framework governing capital markets and the larger issue of the rule of law are central to the next steps in China's reform. More so than in other aspect of the economy, financial and capital markets require a robust rule of law in order to be successful. Without a minimum of legal protections, investors are hard pressed to hand over their money in large quantities. It is precisely the protections offered to investors through the disclosure regimes that give investors the confidence required to commit large amounts of capital through otherwise anonymous markets.

Professor Chengxi Yao and Mr. David Sirignano now present a casebook for Chinese law and business students that focuses on the U.S. disclosure regime. This casebook is an important contribution to the work of helping Chinese law students to understand the regulation of the capital markets. The casebook appropriately focuses on the central role of U.S. securities regulation in understanding global capital markets. The casebook includes all of the most important securities cases that a law student—Chinese or American—will need to know in order to develop a comprehensive understanding of securities regulation.



Of course, Professor Yao and Mr. Sirignano go one step further. By highlighting Chinese filings and the experience of Chinese corporations in accessing U.S. capital markets, Professor Yao and Mr. Sirignano are able to reach out to Chinese students and make concepts real that might otherwise be abstract. This casebook provides opportunities to learn about current issues important to the Chinese business and investment community, including reverse mergers, spin-offs, and Internet based crowd-funding, among others. The recent amendments to the 1933 Act as embodied in the JOBS Act, in particular, make the question of crowd-funding very appropriate for study.

To the extent one can deem the U.S. experience successful, and it's not altogether obvious that it is given the experience of recent years, then by increasing the pool of Chinese-trained lawyers and regulators with a comprehensive understanding of U.S. securities regulation, then Professor Yao and Mr. Sirignano do a service for the next generation of Chinese securities regulation. Chinese regulators may, through the work of Professor Yao and Mr. Sirignano, learn and improve on China's current regulatory structure.

Brian JM Quinn  
Boston College Law School  
September 2012

## **Foreword—中国经济学者序**

对于力图进军国际市场、参与国际竞争的我国企业来说，全球资本市场的重要性已日益显著。要在当今全球一体化的商品市场展开竞争，进入西方发达国家的资本市场，获得直接融资的机会，对于中国企业无疑意义重大。因此，企业家们应了解国外先进资本市场的运作和管理，熟悉其监管体系。这有助于我们有效地与国外市场中的投资者、会计师、投资银行家、股票分析师、金融机构、监管人员及其他国际同行接触共事，顺利推进企业加入国际竞争行列的进程。我国企业到美国股票交易所上市，依据国际财务准则如实公布公司财务状况和运营结果，坦诚披露风险和前景，接受透明市场中各种因子的监督和制约，是企业成功走向国际化的重要标志。

高效率的国际资本市场为世界级公司所必不可少。同时，须高度重视建造适合于中小企业和微型企业发展的多层次资本市场。中小企业是国家经济发展的基石，是创造就业的主力军；许多突破性的技术创新源自于中小或微型企业。应用新金融管理理念，资本市场应对中小企业的融资开拓多条渠道。例如，较之于“以上市标准监管企业”为模式、适用于大型企业的融资渠道，中小型企业融资渠道可采用“以合格投资者标准监管投资者”为模式，或采用“地方企业、就地融资、证券注册豁免”监管模式；并探索多种既降低企业融资成本、又不负面影响投资者保护的监管理论和实践。

由中国汕头大学商学院姚承曦教授和美国前联邦证券与交易委员会官员 David Sirignano 合著的 Regulation of Securities Offerings and Investment Banking: Cases and Materials for Study in U.S. Securities Act of 1933 《美国证券发行经典案例教程》，从金融与监管的角度，系统并突出中国企业特色，介绍了美国证券发行市场的运行机制和监管理论。诚然，美国资本市场的监管体系不一定全面满足我国资本市场的需要。然而，知己知彼，百战不殆。作为全球第二大经济体的中国，要使更多的大型企业在国际经济领域纵横捭阖，促进更多的中小型企业成长壮大，实现国民经济持续高速增长，高效、健康和多层次的中国资本市场起的作用将举足轻重。研究和掌握美国资本市场的历史发展、运作与管理，乃为期望在国内外资本市场有所作为的我国学生所必修之课。

**马庆泉**

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**二〇一二年十月**

**本书获汕头大学研究出版基金资助**

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# **SUMMARY OF CONTENTS**

## **Basic Objectives of the Securities Act of 1933:**

Referred to as the “*truth in securities*” law, the Securities Act of 1933 has two basic objectives:

1. To require that investors receive financial and other significant information concerning securities being offered for public sale; and
2. To prohibit deceit, misrepresentations, and other fraud in the sale of securities.

----The Laws That Govern the Securities Industry: Securities Act of 1933,  
[www.sec.gov](http://www.sec.gov)

- Chapter 1.      **Securities Offerings: Registration Requirement and Exemptions**
- Chapter 2.      **Materiality and Civil Liability**
- Chapter 3.      **Underwriting and Statutory Underwriter**
- Chapter 4.      **Prospectus; Free Writing Prospectus; Illegal Offer**
- Chapter 5.      **Innovative Financial Products and Internet Offerings**



# Chapter 1      Securities Offerings: Registration Requirement and Exemptions

*The purpose of the registration requirement is to protect investors by promoting full disclosure of information thought necessary to informed investment decisions.*

----SEC v. Ralston Purina Co., 346 US 119 (1953)

*Whenever pursuant to this title the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.*

----Section 2(b) of Securities Act of 1933: Consideration of Promotion of Efficiency, Competition, and Capital Formation. 15 USC §77b(b)

## *Section 1.1      Public Offerings: The Disclosure System*

### Section 5. Prohibitions Relating to Interstate Commerce and the Mails

***“Unless a registration statement is in effect as to a security, it shall be unlawful for any person, . . . to sell such security . . . .”*** Securities Act of 1933, 15 USC §77e(a)

#### **1.1.1      Overview of Registration Process**

评论： 证券发行程序概述

Section 5 of the Securities Act of 1933, the “heart” of the statute, generally requires that all public offerings of securities be registered with the SEC. The registration process for public offerings classifies issuers into **four classes**:

- ***non-reporting*** issuers, i.e. issuers not required to file reports pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934, such as an IPO issuer;
- ***Unseasoned reporting*** issuers, i.e. reporting issuers with a reporting history of less than 12 calendar months;
- ***Seasoned reporting*** issuers, i.e. reporting issuers with a reporting history of at least 12 calendar months;

- **Well-known seasoned reporting** issuers (or “WKSIs”), i.e. seasoned reporting issuers meeting certain size thresholds.

**Three principal registration forms and processes** are used by US issuers (other than investment companies) for registering securities under the Securities Act of 1933: *Form S-1* (and equivalently, Form F-1 for non-US issuers), *Form S-3* (and equivalently, Form F-3 for non-US issuers), and *Form S-3ASR* (and equivalently, Form F-3ASR for non-US issuers). Issuer eligibility criteria for each type of form and process include the following:

- Form S-1: general form of registration statement for all companies. The S-1 issuers include all issuers who are not eligible for Form S-3, i.e. **non-reporting issuers** and **unseasoned reporting issuers**.
- Form S-3: registration statement for specified transactions by certain issuers. The S-3 issuer must have been subject to the Exchange Act reporting requirements for at least *12 calendar months* and is current in its reporting, i.e. **seasoned reporting issuers**.
- Form S-3ASR: **automatic shelf registration** statement of securities of well-known seasoned issuers. The S-3ASR issuers, or **WKSIs**, are those seasoned reporting issuers which must (1) meet the S-3 eligibility requirements; and (2)(A): in the case of a **common equity offering**, have at least \$700 million common equity public float worldwide, or alternatively \$75 million common equity public float worldwide plus \$1 billion aggregate principal amount in non-convertible securities issued in the past three years, or (2)(B): in the case of a **non-common equity offering**, have issued \$1 billion aggregate principal amount in non-convertible securities in the past three years. A Form 3-ASR statement and any post-effective amendment become effective immediately upon filing with the SEC, and will become public upon such filing.

Each registration statement has two parts. **Part I: Information Required in Prospectus**, includes items such as Risk Factors; Use of Proceeds; Plan of Distribution; Description of Securities to be Registered; Information with respect to the Registrant (which includes, among others, management’s discussion and analysis of financial condition and results of operations or MD&A); and Material Changes. **Part II: Information Not Required in Prospectus**, includes Financial Statement Schedules (as specified by Regulation S-X Rules §§210.5-04 and 7-05) and Exhibits (as set forth in Regulation S-K Rule §229.601). While not **presented in** the prospectus, financial statement schedules and the exhibits (the latter include, e.g. underwriting agreement; bylaws and articles of incorporation of the issuer; letter regarding unaudited interim financial information; accountants’ consents and reports; opinions of counsel; and issuer’s Exchange Act reports incorporated by reference into the registration statement) are **filed as part of** the registration statement, meaning, being subject to the liability standards applicable to the registration statement.