

<<美国证券交易经典案例教程>>

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内容概要

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--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。

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作者简介

姚承曦，现任中国广东汕头大学商学院金融与证券监管学教授。姚承曦在美国证券业工作近二十年，包括证券监管部门和证券业界工作经历。历任美国全国证券交易商协会（NASD）法律顾问处律师，纳斯达克股票市场（NASDAQ）国际市场法律顾问，纽约股票交易所（NYSE）券商监管部高级法律顾问，和纽交所国际部亚太地区（包括中国上市公司）和加拿大国家上市公司经理。正业界，姚承曦先后任大型综合型券商公司监察副总裁和资本市场法律顾问；其后在全球最大共同基金集团Fidelity Investments任国际市场监管副总裁。姚承曦的监管范围包括：证券零售市场、资本市场、投资管理、美国国内市场和国际市场。

姚承曦获美国波士顿学院法学院法学博士学位（Juris Doctor），乔治敦大学法学研究中心金融与证券监管学硕士学位（LLM in Securities and Financial Regulation）。期间获乔治敦优秀研究生奖，及全美法学院国际金融研究奖。此前，姚承曦在中华人民共和国获联合国译员训练班研究生文凭，英美文学硕士学位，及英文本科文凭。姚承曦的英文专著，“Stock Market and Futures Market in the People's Republic of China.”由牛津大学出版社在美国、英国及中国香港发行。

David A. Sirignano, David A. Sirignano is a partner in the Washington, D. C. office of Morgan Lewis & Bockius LLP. and CO-Head of the firm's Securities Practice. Mr. Sirignano focuses on international and domestic corporate finance, mergers and acquisitions, and SEC regulation. He was former Chair of the Corporate Reporting and Disclosure Subcommittee of the American Bar Association, Federal Regulation of Securities Committee. He was Co-Chair of the ABA Task Force on Cross-Border Offerings and Acquisitions. He has also served on the Corporate Finance Advisory Committee of FINRA.

Before joining the firm in 1999, he was Associate Director for International Corporate Finance in the United States Securities and Exchange Commission's Division of Corporation Finance. In that position, he developed SEC policy on cross-border offerings, acquisitions, and listings, including offshore Internet offerings, international disclosure and accounting standards, as well as international corporate governance guidelines. He also advised the SEC Division of Enforcement on financial fraud cases and cross-border offering abuses. Mr. Sirignano was an adjunct professor at Georgetown University Law Center, where he taught the Course on Mergers and Acquisitions.

<<美国证券交易经典案例教程>>

书籍目录

In Perspective : Securities and Financial Regulation

Foreword 序言

SUMMARY OF CONTENTS

TABLE OF CONTENTs

CHAPTER 1 REGULATORY STRUCTURE

Section 1.1 1 Competition and Regulation : The SEC and the CFTC

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

1.1.2 Index Participations : Securities or Futures?

1.1.3 Futures and Options on Single Stock and on Stock

Indexes : Securities , Futures , Security Futures

Section 1.2 Regulation of Financial Gatekeepers

1.2.1 Auditor Independence and Oversight by PCAOB Board

1.2.2 Credit Rating Agency NRSRO Designation

Section 1.3 Securities Industry Self-Regulation

1.3.1 Concept of “ Statutory Supervisor ”

1.3.2 The Shingle Theory

1.3.3 Suitability Doctrine : Application to Online

Brokerage

CHAPTER 2 MARE : ET STRUCTURE

Section 2.1 Exchange Markets, OTC Markets, and Customer DMA

2.1.1 NASDAQ Competing Dealers Model ; NYSE Hybrid Auction Model ; HN Liquidity Model

2.1.2 ATs and Concept of “ Exchange ”

2.1.3 OTC Markets for Non-Listed Equities : OTCBB and Pink

Sheets

2.1.4 Customer Direct Market Access to Exchanges and ATs

2.1.5 Multiple Trading of Standardized Options in Listed

Stocks

Section 2.2 National Market system : Market Competition and Order

Competition

2.2.1 Concept of “ Best Execution

2.2.2 Concept of “ Customer Order Protection ”

2.2.3 The NMS System : Transparency , Competition , Fairness

Efficiency

2.2.4 Inter-Market Surveillance for Cross-Market Trading

Activities

CHAPTER 3 PUBLIC COMPANY TRANSPARENCY

Section 3.1 Periodic Reporting and Other Disclosure by Public Company

3.1.1 Periodic Reports by China. Based US Public Company & IFRS as Global Accounting Standards

3.1.2 US Public Company Doing Business in China & Foreign Corrupt Practices Act

<<美国证券交易经典案例教程>>

3.1.3 Issuer Selective Disclosure & Regulation FD (Fair Disclosure)

Section 3.2 Mandatory Disclosure by Certain Shareholders

3.2.1 Potential for Corporate Control : Disclosure by 5% Threshold Beneficial Owner

3.2.2 Decoupling by Derivatives : who Is “ Beneficial Owner ” ?

CHAPTER 4 PROPHYLACTIC REGULATION OF MANIPULATION

Section 4.1 Manipulation in Financial Markets

4.1.1 Concept of Manipulation

4.1.2 Market Gaming by NBBO Manipulation

Section 4.2 Transactions for Corporate Control

4.2.1 Tender Offer : ALL-Holders and Best-Price Requirements

4.2.2 Takeover Battle : what Is Tender Offer?

Section 4.3 Trading during Securities Distribution

4.3.1 short Sale Restriction in Advance of Follow-on/Secondary Offering

4.3.2 Market Making Restriction Section

4.4 Short Selling

4.4.1 Prohibition of Manipulative Naked Short Selling

4.4.2 Regulation of Short Sale : Order Marking ; Locate ; Circuit

Breaker Close-Out

CHAPTER 5 FRAUD IN CONNECTION WITH THE PURCHASE OR SALE OF A SECURITY

Section 5.1 Insider Trading Liability Theories

5.1.1 Classical Theory of Insider Trading Liability

5.1.2 Tipper-Tippee Liability Theory ; Temporary Insider

Concept

5.1.3 Misappropriation Theory ; Prophylactic Prohibition

Theory

Section 5.2 Private Damages Action for Fraud

5.2.1 Elements of Private Securities Fraud Action ; Theory of Economic Loss

5.2.2 In Pari Delicto Doctrine (Equal Fault Concept)

Section 5.3 Transnational Securities Fraud in Globalized Securities Market

5.3.1 Reach of US Insider Trading Law Enforcement

5.3.2 Limit on Extraterritorial Application of US Securities

Laws to

Foreign-Cubed Private Action

<<美国证券交易经典案例教程>>

章节摘录

To state a claim for securities fraud under § 10 of the Securities Act of 1934 and Rule 10b-5, plaintiffs must demonstrate: (1) a misrepresentation or omission of a material fact in connection with the purchase or sale of a security; (2) scienter on the part of the defendant; (3) reliance on the misrepresentation; and (4) damage resulting from the misrepresentation. See *Sowell v. Butcher & Singer, Inc.*, 926 F.2d 289, 296 (3d Cir. 1991). Because plaintiffs have demonstrated that a genuine issue of material fact exists as to the elements of their securities fraud claim, we will reverse the district court. The parties agree that a broker-dealer owes to the client a duty of best execution. They further agree that a broker-dealer, by accepting an order without price instructions, impliedly represents that the order will be executed in a manner consistent with the duty of best execution and that a broker-dealer who accepts such an order while intending to breach that duty makes a misrepresentation that is material to the purchase or sale. The parties differ, however, on whether a trier of fact could conclude from this record that the implied representation made by the defendants included a representation that they would not execute at the NBBO price when prices more favorable to the client were available from sources like SelectNet and Instinet. As we explain hereafter, this difference can be resolved only by determining whether, during the class period or some portion thereof, it was feasible for the defendants to execute trades through SelectNet and Instinet when prices more favorable than the NBBO were being quoted there. This is a matter concerning which the record reflects a material dispute of fact. If such prices were reasonably available and the defendants, at the time of accepting plaintiffs' orders, intended to execute them solely by reference to the NBBO, they made a material misrepresentation in connection with the purchase or sale of the securities involved. If a finder of fact could infer, in addition, that the defendants' implied representation was knowingly false or made with reckless indifference, it would follow that summary judgment for the defendants was inappropriate. The duty of best execution, which predates the federal securities laws, has its roots in the common law agency obligations of undivided loyalty and reasonable care that an agent owes to his principal. ' Since it is understood by all that the client-principal seeks his own economic gain and the purpose of the agency is to help the client-principal achieve that objective, the broker-dealer, absent instructions to the contrary, is expected to use reasonable efforts to maximize the economic benefit to the client in each transaction. The duty of best execution thus requires that a broker-dealer seek to obtain for its customer orders the most favorable terms reasonably available under the circumstances. See, e.g., *Sinclair v. SEC*, 444 F.2d 399, 400 (2d Cir. 1971) (fiduciary duty requires broker-dealer "to obtain the best available price" for customers' orders); *Arleen W. Hughes*, 27 S.E.2d 629, 636 (1948) ("A corollary of the fiduciary's duty of loyalty to his principal is his duty to obtain the best price discoverable in the exercise of reasonable diligence."). *aff'd sub nom. Hughes v. SEC*, 174 F.2d 969 (D.C. Cir. 1949). Accord *Order Execution Obligations*, Exchange Act Release No. 37, 619A, 61 Fed. Reg. 48290, 48322 (Sept. 12, 1996) ("Final Rules"). That is, the duty of best execution requires the defendants to execute the plaintiffs' trades at the best reasonably available price. While ascertaining what prices are reasonably available in any particular situation may require a factual inquiry into all of the surrounding circumstances, the existence of a broker-dealer's duty to execute at the best of those prices that are reasonably available is well-established and is not so vague as to be without ascertainable content in the context of a particular trade or trades. As the SEC has recognized on a number of occasions, the scope of the duty of best execution has evolved over time with changes in technology and transformation of the structure of financial markets. For example, before the creation of NASDAQ, a broker in an over-the-counter market satisfied her duty of best execution by contacting at least three market makers prior to executing a client's order. See *Order Execution Obligations*, Exchange Act Release No. 36, 310, 60 Fed. Reg. 52792, 52793 (Oct. 10, 1995) ("Proposed Rules"). With the advent of NASDAQ and the NBBO computer system providing instant access to the best bid and offer available nationwide, the standard for satisfying the duty of best execution necessarily heightened.

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