摘要

注册制全面推行后,我国证券市场发生了显著变化,同时也对投资者的保护问题带来了新的挑战。投资者保护和证券市场发展之间存在着紧密而不可分割的关系。投资者是证券市场的基石,他们的信心直接关系到市场的稳定和发展。投资者保护和证券市场发展之间存在着相互促进的关系。加强投资者保护是推动证券市场健康发展的重要手段,而证券市场的发展又需要不断加强和完善投资者保护制度。因此,应该高度重视投资者保护的重要性,不断完善相关制度措施,为证券市场的长期稳定发展提供坚实保障。2020年3月,新修订的《证券法》正式实施:新颁布的证券法在强化投资者保护机制方面做出了多方位的改进,其中明确规定了先行赔付制度,并将其与证券投资者保护基金以及民事诉讼手段相结合,构建了一个多元化的投资者权益纠纷解决方案。然而,现行的投资者保护系统仍暴露出一些显著缺陷,例如准入门槛较高、运作效率相对低下、投资者实际维权难度较大、保护覆盖面不够广泛以及保障力度尚显不足等挑战。

对此,本文借鉴美国公平基金制度,结合我国国情试图构建本土化的公平基金制度,以此来弥补现有投资者保护体系之不足,提高投资者信心,从而促进证券市场平稳健康发展。

全文共分以下四个部分:

第一部分介绍了我国构建公平基金制度的法理基础。当前我国证券市场存在中小投资者众多、证券侵权频发的问题。并且,注册制改革后,对投资者保护提出了新要求。公平基金制度作为公共补偿手段具有高效、便捷的特征,能够很好满足我国证券投资者保护的现实需求,弥补我国现有投资者保护体系的不足,解决我国证券执法中存在的先行(刑)后民问题。并且,我国的顶层设计要求以及证监会具备的执法基础为我国建立公平基金制度提供了强有力的支持。

第二部分对我国现有投资者保护体系存在的不足进行分析,得出确有必要引入公平基金制度来弥补现有体系不足的结论。第一,我国证券民事诉讼门槛高且效率低下,难以对投资者形成有效保护,并且证券诉讼会大大增加司法压力;第二,我国投资者保护基金难以落实。自其建立以来,相关实践经验少之又少,并且能够进行赔付的资金对于投资者来说实在是杯水车薪;第三,先行赔付制度虽具备高效性,但先行赔付制度适用范围有限,对于内幕交易及操纵市场这类较为隐蔽的侵权行为所造成的损害,先行赔付制度难以保全。另外,先行赔付制度不具备强制性,其赔付与否需要不法行为人的"良心发现";最后,行政和解制度

适用条件严苛, 且缺乏透明度, 难以对投资者形成有效保护。

第三部分对美国公平基金制度进行介绍。美国的公平基金的建立也是起因于 投资者保护的缺失,其发展过程也是 SEC 权力扩展史。从基金成立条件、资金 来源、基金管理及分配四个方面分析了公平基金的运作模式。从美国公平基金十 余年的实践经验进行实证分析,得出公平基金制度能够有效保护投资者权益,并 且不存在有学者提出的"循环困境"或对投资者的过度补偿问题。

第四部分具体阐述了如何构建我国公平基金制度。首先,应坚持民事赔偿责任有限和分权制衡两大原则;其次,应将内幕交易作为建立公平基金的试点,既可以弥补现有体系之不足,还能减小阻力;最后提出应对公平基金的使用分配进行监管,以期最大化保证投资者利益。

【关键词】公平基金 投资者保护 注册制 投资者监管

Abstract

After the full implementation of the registration system, China's securities market has undergone significant changes, and it has also brought new challenges to the protection of investors. There is a close and inseparable relationship between investor protection and the development of the securities market. Investors are the cornerstone of the securities market, and their confidence is directly related to the stability and development of the market. There is a mutually reinforcing relationship between investor protection and the development of the securities market. Strengthening investor protection is an important means to promote the healthy development of the securities market, and the development of the securities market needs to continuously strengthen and improve the investor protection system. Therefore, we should attach great importance to the importance of investor protection and constantly improve relevant institutional measures to provide a solid guarantee for the long-term stable development of the securities market. In March 2020, the newly revised Securities Law was officially implemented: the new law improved the investor protection system from many aspects, clarified the advance compensation system, and formed a diversified dispute resolution system to protect investors together with the securities investor protection fund and civil litigation, but the existing investor protection system is still There are problems such as high threshold, low efficiency, difficult to protect rights, limited scope of protection, and insufficient security. In this regard, this article draws on the U. S. fair fund system and tries to build a localized fair fund system based on China's national conditions, so as to make up for the shortcomings of the existing investor protection system and improve investor confidence, so as to promote the stable and healthy development of the securities market.

The full text is divided into the following four parts:

The first part introduces the legal basis for building a fair fund system in China. At present, there are many small and medium-sized investors and frequent securities infringement in China's securities market. Moreover, after the reform of the registration system, new requirements have been put forward for investor protection. As a public compensation method, the fair fund system has the characteristics of

efficiency and convenience, which can well meet the actual needs of China's securities investor protection, make up for the shortcomings of China's existing investor protection system, and solve the problems of leading (criminal) in China's securities law enforcement. Moreover, China's top-level design requirements and the law enforcement foundation of the China Securities Regulatory Commission have provided strong support for the establishment of a fair fund system in China.

The second part analyzes the shortcomings of China's existing investor protection system, and concludes that it is really necessary to introduce a fair fund system to make up for the shortcomings of the existing system. First, the threshold of China's securities civil litigation is high and inefficient, which makes it difficult to effectively protect investors, and securities litigation will greatly increase judicial pressure; second, it is difficult to implement China's investor protection fund. Since its establishment, there has been very little relevant practical experience, and the funds that can be compensated are really a drop in the bucket for investors. Third, although the advance compensation system is efficient, the scope of application of the advance compensation system is limited, which is caused by relatively hidden infringements such as insider trading and market manipulation. For damage, the advance compensation system is difficult to preserve. In addition, the advance compensation system is not mandatory, and whether the compensation is paid or not requires the "conscience discovery" of the wrongdoers. Finally, the administrative settlement system is subject to strict conditions and lacks transparency, so it is difficult to effectively protect investors.

The third part introduces the U. S. equity fund system. The establishment of fair funds in the United States is also due to the lack of investor protection, and its development process is also the history of SEC power expansion. The operation mode of the fair fund is analyzed from four aspects: fund establishment conditions, source of funds, fund management and distribution. From the empirical analysis of more than ten years of practical experience of the U. S. Fair Fund, it is concluded that the fair fund system can effectively protect the rights and interests of investors, and there is no "circular dilemma" or excessive compensation for investors raised by scholars.

The fourth part elaborates on how to build China's fair fund system. First of all,

we should adhere to the two principles of limited liability for civil compensation and separate checks and balances. Secondly, insider trading should be used as a pilot to establish a fair fund, which can not only make up for the shortcomings of the existing system, but also reduce resistance. Finally, it is proposed to supervise the use and distribution of fair funds in order to maximize the interests of investors.

(Key words) Fair Fund; Investor Protection; Registration System; Investor Supervisio

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引言

(一) 研究背景和意义

1、研究背景

2019 年我国以科创板为"试验田",开始试行注册制,2023 年我国资本市场开始全面推行注册制改革。不同于核准制,注册制弱化了行政干预,体现的是市场化思想。一方面注册制改革顺应我国经济高质量发展的要求,作为资本市场基础性建设的一部分,有助于提升市场资源配置效率,促进企业创新发展,进而推动经济结构的优化和升级;但另一方面,注册制下减少了证券监管机关对证券发行的直接控制,而是注重信息披露,将投资产品的价值判断权交给市场。我国证券市场由大量中小投资者构成,其本身缺乏足够的专业知识来面对变幻莫测的证券市场。因此,注册制下,投资者风险进一步提高。确立投资者尤其是中小投资者的核心地位及其权益的有效保障,构成了证券市场稳健发展与繁荣的基础要件。证券法律的制定与执行,以及监管机制的设计与实施,其核心原则之一便是致力于保护投资者的利益,尤其着重维护中小投资者的合法权益。因此,在注册制背景下,构建我国证券投资者公平基金制度,从而完善我国投资者保护体系,显得尤为重要。

2、研究意义

近年来,我国证券市场规模迅速壮大,吸引了大量投资者涌入,普通民众参与证券投资的现象日益普遍。然而,在这一蓬勃发展的表象之下,证券市场亦凸显出一系列亟待解决的问题。我国证券市场频繁发生虚假信息披露、内幕交易及市场操纵事件,此类案件的数量已与美国市场相当,甚至隐隐有超越的趋势。这些违法行为严重侵害了投资者,尤其是广大普通投资者的合法权益,从而对证券市场的持续健康发展构成了重大威胁。但现有规范资源对受损投资人的救济效果却差强人意。优化营商环境也提出了对证券市场中小投资者的保护。国际证监会组织(International Organization of Securities Commissions,"IOSCO")在其相关文件中指出,现代证券监管体系的核心宗旨被明确为三个方面,首要任务是切实保障投资者权益,其次是维护市场公平竞争环境、高效运作和信息公开透明,并且强调了防范化解系统性风险的重要性。在最近召开的第五次全国金融工作会议上,特别强调了加强对中小投资者权益的实质性保护,并且随着股票发行注册制的全面推行,强化对证券投资者保护的要求更为迫切。公平基金法律制度被认为是一个有力工具,旨在响应并满足不断提升投资者保护水平的需求。

目前我国对证券市场欺诈行为规范有民事诉讼、投资者保护基金、先行赔付、行政

论我国证券投资者公平基金制度的构建

和解等保护措施,然而,当前的投资者保护体系在索赔机制上存在明显短板,证券民事诉讼的立案条件严苛,导致投资者面临高昂的维权成本难题。尽管先行赔付制度已在针对虚假陈述和欺诈发行案件中启用,但对于内幕交易和操纵市场等其他类型案件的保护并不充分。此外,现行的先行赔付制度本质上属于一种和解性质的安排,并未设定对违法行为人必须先行赔偿的硬性约束,这无疑削弱了对受损投资者实际获得赔偿的保障程度。公平基金制度在美国已践行十年有余,有大量案例可供我们研究。该制度作为一种关键的公共补偿机制,在证券执法领域中发挥着重要作用,同时也是构建一套完整且系统化的投资者损害赔偿解决方案不可或缺的一部分,并且是对"公私合作"证券执法模式的一种创新的实践尝试。

站在整体视角审视,我国资本市场经历了深层次变革,无论是引入股票发行注册制还是创立科创板,都对监管部门提出了更为严格的标准和挑战。与此同时,弱化前端行政监管的趋势有可能引发更多的证券违规行为。因此,在深化改革的过程中,强化对证券侵权行为的惩治力度及加强投资者损失的补偿机制成为至关重要的环节,唯有如此才能确保市场秩序的稳定,巩固投资者对资本市场的信任基础。值得一提的是,公平基金法律制度具备一项独特优势,即能通过单个机关的一项程序,同时完成对非法行为的惩处和对受损投资者的合理赔偿,这一综合解决方案相较于其他方法展现出难以比拟的优势。

(二)研究现状

公平基金制度作为一种旨在保障投资者权益、维护市场公平性的重要机制,近年来 在国外学术界受到了广泛的关注。众多学者从多个角度对公平基金制度进行了深入研究, 探讨了其理论基础、实践效果以及未来发展方向。

国外学者普遍认为,公平基金制度的核心在于通过合理的制度安排,确保投资者在市场交易中享有平等的权益,防止市场操纵和内幕交易等不公平行为的发生。同时,公平基金制度也有助于提高监管效率,降低监管成本,促进金融市场的健康发展。

Verity Winshipa 对公平基金制度提出三点质疑:一是实际补偿程度差,二是存在责任循环困境,三是分配程序的正当性问题。¹

Urska Velikonja 教授基于实证研究对质疑做出了回应。她认为,由公共执法机构对受损投资者进行补偿是一种行之有效且可实施的方案,并进一步指出 SEC 是最适宜承

¹ Verity Winship, Fair Funds and the SEC's Compensation of Injured Investors, Florida Law Review, 60 FLORIDA LAW REVIEW 1103, at 1114(2008).

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