

THE REVIEW OF  
**SECURITIES & COMMODITIES  
REGULATION**

AN ANALYSIS OF CURRENT LAWS AND REGULATIONS  
AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

Vol. 54 No. 12 June 16, 2021

## INSIDER TRADING IN COMMODITIES MARKETS: AN EVOLVING ENFORCEMENT PRIORITY

*The CFTC and the DOJ both now pursue enforcement actions against trading in commodities based on misappropriation of confidential information. The authors discuss the recent cases.*

By Douglas K. Yatter, Sohom Datta, and Cameron J. Sinsheimer \*

Among the many changes resulting from the Dodd-Frank Act, one that has been slow to develop, but broad in its significance, is the assertion of authority by the Commodity Futures Trading Commission (“CFTC”) to police insider trading and misappropriation of confidential information in commodities markets. As the primary regulator for derivatives across a wide range of markets, spanning agriculture, energy, interest rates, and beyond, the CFTC had limited authority to address insider trading throughout most of its history. Starting in 2015, however, the agency began bringing enforcement actions against individuals and companies for trading based on misappropriation of confidential information. Since then, the CFTC has brought a series of actions that provide insight into the scope of its new authority, and it has devoted substantial resources to pursuing new cases. Recent enforcement actions in 2020 and early 2021 have continued this trend.

This article reviews the evolution of the CFTC’s insider trading enforcement authority, summarizes the agency’s recent cases, and highlights key developments, including the advent of “tipper” liability, the use of data

analytics to identify potential misconduct, and the emergence of parallel criminal enforcement actions. Financial institutions and market participants should be aware that the CFTC — and now also the Department of Justice — will continue to be on the lookout for additional cases to pursue in this emerging area of enforcement.

### LIMITED HISTORICAL AUTHORITY

Prior to the Dodd-Frank Act, the CFTC had limited authority to police the use of non-public information in its markets, as the Commodity Exchange Act (“CEA”) included provisions prohibiting insider trading only with respect to misuse of information by the CFTC’s own personnel and those of the exchanges and self-regulatory organizations it oversees.<sup>1</sup> The CFTC had no insider trading tool of general applicability to the markets.

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<sup>1</sup> CEA § 9(d), 7 U.S.C. § 13(d) (2008) (regarding “any Commissioner of the Commission or any employee or agent thereof”); CEA § 9(e), 7 U.S.C. § 13(e) (2008) (regarding “an employee . . . of a board of trade, registered entity, or registered futures association”).

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