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THE EXTRATERRITORIAL REACH OF THE COMMODITY EXCHANGE ACT

In this article, the authors review the extraterritorial application of the Commodity Exchange Act in recent court decisions, government enforcement actions, and Commodity Futures Trading Commission interpretations. They find the application to be uneven and, in some instances, conflicting, and not necessarily always consistent with the Supreme Court's principles of extraterritorial application.

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I. INTRODUCTION

This article reviews the uneven judicial and administrative precedents and policies regarding when the Commodity Exchange Act (“CEA” or “the Act”)¹ and the regulations of the Commodity Futures Trading Commission (“Commission” or “CFTC”)² will apply to commodity and derivatives transactions occurring outside the borders of the United States. This is an important issue for market participants in non-U.S. and U.S. markets alike who, for purposes of their legal compliance and management of legal risk, need to know

when activity in non-U.S. markets will be deemed to fall within the scope of the CEA, subjecting them to CFTC regulation, U.S. private actions, and U.S. government investigations and prosecutions.

The extraterritorial scope of the CEA comes into play relatively often due to the global nature of the markets for commodities and their financial derivatives. The prices for a commodity and its derivatives in one global location potentially can affect the prices for the same or similar products around the world. Market participants who have suffered losses from transactions occurring outside the U.S. often have attempted to bring their damage claims in the U.S. courts by alleging a U.S. nexus and violations of the CEA for the offshore trading. Similarly, the CFTC and the U.S. Department of Justice (“DOJ”) have pursued prosecutions alleging CEA

¹ 7 U.S.C. § 1, *et seq.*

² Title 17 of the Code of Federal Regulations (“CFR”).

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INSIDE THIS ISSUE

• **DISGORGEMENT RECONSIDERED: RULE 105 AND THE ADVISER-CLIENT DIVIDE**, Page 325