Extraterritorial application of the korean capital markets act : lessons from securities regulations in the United states

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Abstrak

The Capital Markets Act of Korea has a provision expressly recognising the extraterritoriality of the Act. However, the question still remains how far the reach of the Act extends to cover overseas activities. By reference to the discussions in the United States, this article makes recommendations for the effective and reasonable extraterritoriality of the Act. First, this article proposes to amend the current regulation providing the exemptions from the registration requirements for cross-border offerings. Korea and the United States adopted Regulation IPDS and Regulation S, respectively, to clarify the applicability of the registration requirements to primary offerings in offshore transactions. Unlike Regulation S in the United States, Regulation IPDS in Korea may be interpreted to regulate the offshore offerings causing no harm to domestic investors and markets. In order to avoid unreasonable consequences not intended by the legislator, this article suggests that Regulation IPDS be changed to function as a non-exclusive safe harbour rule. Second, this article proposes a two-tiered approach for discerning the extraterritorial scope of the antifraud rules under the Capital Markets Act. Although the Capital Markets Act has various categories of antifraud provisions, it is still unclear to what extent these provisions may be applicable in the context of transnational securities fraud. Through consideration of the merits of the current regulatory structure in the United States, this article suggests that a more restrictive view be taken toward suits initiated by private claimants, but that a more permissive view be taken toward enforcement proceedings by public regulators.