ALM | LAW.COM

New York Law Journal

WHITE-COLLAR CRIME

Reaching Across Borders: Second Circuit Finds U.S. Jurisdiction for Overseas Crime

By Robert J. Anello and Richard F. Albert
October 6, 2025

By **Robert J. Anello**

And **Richard F. Albert**

"United States law governs domestically but does not rule the world," according to the Supreme Court. *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 335 (2016). The reality will often feel quite different for foreign participants in the financial markets who happen to draw the attention of U.S. prosecutors.

In *United States v. Phillips*,—F.4th—, 2025 WL 2528201 (2d Cir. Sept. 3, 2025), a "first of its kind" prosecution, a panel of the Court of Appeals for the Second Circuit interpreted the Commodities Exchange Act (CEA) to permit broad U.S. jurisdiction over manipulation of the derivatives markets carried out overseas.

Following on the heels of *United States v. Lopez*, 143 F.4th 99 (2d Cir. 2025), in which a different panel of the Second Circuit interpreted the honest services wire fraud statute to apply to overseas commercial bribery involving foreign private entities, the *Phillips* ruling offers another example of how the expansive reach of U.S. criminal fraud statutes can impose special hardships on foreign defendants. *See* "Second Circuit Courts Grapple With Supreme Court Fraud Guidance," R. Anello & R. Albert, N.Y.L.J. (Aug. 13, 2025).

In *Phillips*, the Second Circuit interpreted the CEA's extraterritoriality provision to apply to a defendant from whom the U.S. identity of his counterparty was intentionally concealed.

Phillips is another in a line of decisions that expansively permit U.S. prosecutions for conduct taking place overseas, while paying little heed to the extra hardships imposed on defendants forced to defend themselves in a foreign courtroom.

As courts and commentators have recognized, such burdens include language barriers, unfamiliarity with a foreign legal system, lack of local resources and support, juror bias against foreigners, the inability to procure exculpatory witnesses or other evidence located on foreign territory, and the greater likelihood of being denied bail.

Until perhaps the Supreme Court gives greater weight in interpreting cross-border statutes to the special hardships faced by foreign

defendants, defense counsel must assertively use all available procedural tools to try to reduce these disadvantages.

The Series of Transactions That Ensnarled Phillips

In Oct. 2017, Neil Phillips, the co-founder and former co-Chief Investment Officer of U.K.-based hedge fund Glen Point Capital, purchased a derivative known as a "one-touch barrier option" for $2 million. The option was structured so that Glen Point would receive $20 million if the exchange rate dropped below 12.50 rand/1 dollar within a certain time period.

Phillips' alleged manipulation of the market was straightforward. When the exchange rate stubbornly hovered at 12.55 rand/1 dollar, Phillips supposedly directed a banker in Singapore to sell dollars ($725 million) for rand (around $9 billion) to cause the rate to drop so he could cash in his option at a substantial profit.

Unlike the alleged manipulation, the structure of the option was complicated. The option was the product of a series of transactions. Originally, the London office of Morgan Stanley International (a subsidiary of U.S.-headquartered Morgan Stanely) wrote and sold the option to U.K.-based broker JB Drax Honoré through the broker's account at the U.K.-based Royal Bank of Scotland (RBS). Glen Point purchased the option from JB Drax through Glen Point's broker, the London branch of U.S. headquartered JPMorgan.

The U.K.-based JPMorgan guaranteed that it would pay $20 million to Glen Point if the option triggered. Behind the scenes, Morgan Stanley International had entered into an offsetting option with U.S.-based Morgan Stanley Capital Services, which ultimately bore the risk of the payout if Glen Point triggered the option.

Because JB Drax had a practice of keeping counterparties anonymous, Glen Point remained unaware of what entities were on the other side of the transaction, and their identity did not matter insofar as Glen Point would be paid out by JPMorgan regardless.

A grand jury in the Southern District of New York indicted Phillips for commodities fraud charges. He was arrested while on a family vacation in Spain, and spent one-month in a Spanish prison where he was physically assaulted. Phillips was extradited to the United Kingdom before relenting and signing a waiver of extradition to the United States.

In preparation for trial, Phillips filed proposed jury instructions concerning whether the CEA reached his overseas conduct, among other issues, which the district court did not adopt. He ultimately was convicted of one count of commodities fraud, while being acquitted of a conspiracy charge. Judge Lewis J. Liman sentenced him to time served, two years of supervised release, and a $1 million fine.

How Far Does the Commodities Exchange Act Reach?

As an initial matter, the Second Circuit clarified that the CEA applies to the type of option Glen Point purchased. Historically the Commodities Futures Trading Commission (CFTC) lacked authority to regulate financial instruments based on the difference between two fluctuating values (swap), but the Dodd-Frank Act brought much of the swaps market under CFTC's jurisdiction through amendments to the CEA.

Trades in the foreign-exchange market, however, remained largely excluded from direct regulation. Phillips contended that because the government's theory of fraud was based on his trades in the foreign-exchange market, his conviction could not stand.

The court disagreed, concluding that Phillips' trading activity was within the ambit of the CEA because "[i]t is enough that the CEA regulates swaps" and the one-touch barrier option was a swap. *Phillips*, 2025 WL 2528201, at *19.

Having found that the CEA applied to the type of transaction at issue, the court moved on to Phillips' jurisdiction-related arguments. Unlike, for example, the mail and wire fraud statutes, the CEA includes explicit language added through Dodd-Frank Act amendments providing the statute applies extraterritorially in certain cases.

The CEA's extraterritorial jurisdiction provision expressly regulates "activities outside the United States" that have a "direct and significant connection with activities in, or effect on, commerce of the United States." 7 U.S.C. §2(i)(1). Even "when a statute provides for some extraterritorial application," however, "the presumption against extraterritoriality operates to limit that provision to its terms." *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010). At the crux of *Phillips* is how much contact with the United States is required for the CEA to apply.

On appeal, and as a matter of first impression, Phillips argued that the district court erred in instructing the jury on the jurisdictional standard under the CEA. The instructions explained that to satisfy the "direct" requirement, the foreign conduct must "directly and immediately" affect commercial activity in the United States "without deviation or interruption." App'x at 1563-64.

To satisfy the "significant" requirement, the court instructed the jury that the connection must be "meaningful or consequential." App'x at 1564-65. Phillips argued that the court should have defined "significant" to require proof of conduct that "pose[s] a systemic risk to the U.S. financial system" and that the jury should have received clarification that the connection must be important to U.S. commercial activities, not just to a defendant's foreign trading activities.

The Second Circuit found that Phillips had failed to preserve his second argument, but concluded no plain error existed and the district court had properly instructed the jury on the extent of foreign conduct covered by §2(i)(1).

What "Direct" and "Significant" Mean In Practice

Having found no issue with the jury instructions, the court moved on to Phillips' second argument that the district court erred in finding on post-trial motions that the government had presented sufficient evidence for a reasonable jury to conclude that the evidence presented at trial demonstrated a "direct" and "significant" connection to U.S. commerce, as required by the CEA.

The district court had found that either Glen Point's use of JPMorgan's London branch as its prime broker that facilitated the sale of the option *or* Morgan Stanley Capital's role as a substantive counterparty to the option sufficed to "directly" connect Phillips' conduct to activities in U.S. commerce. The district court also concluded that a rational jury could have found the direct connections "significant" to U.S. commercial activities.

The Second Circuit agreed on the sufficiency rulings. As for JPMorgan's involvement establishing a "direct" connection to the U.S., the panel explained that "a branch of a bank is not typically considered a separate legal entity from the parent," and that the contract into which Glen Point entered to purchase the option expressly listed JPMorgan as a U.S. bank.

"[M]anipulation related to an agreement entered into with a U.S. bank" is, the court determined, "directly connected to activities in U.S. commerce under §2(i)(1)." *Phillips*, 2025 WL 2528201, at *10. Alternatively, Morgan Stanley Capital's involvement also was enough to directly connect Phillips' foreign conduct to the U.S., reasoned the court, since the U.S. institution was required to pay $20 million when Phillips' actions triggered the option.

The Second Circuit rejected Phillips' arguments that the connection was indirect due to the series of transactions that took place and Glen Point's

lack of a contractual relationship with Morgan Stanley Capital.

The court relied on the principles that "the relationship between a defendant and a fraud victim is usually not rendered indirect just because a broker facilitated the transaction," and "a connection 'need not be foreseeable to be direct.'" *Phillips*, 2025 WL 2528201, at *11.

Having found "direct" connections, the court went on to consider whether the connections between Phillips' trading and activities in U.S. commerce were "significant" to U.S. commerce. The court answered "yes" because the actual and potential victims of Phillips' scheme, even if unknown to him, were U.S. financial institutions.

The ultimate counterparty forced to pay out the $20 million was Morgan Stanley Capital, and if that entity did not pay, JPMorgan was on the hook as Glen Point's prime broker. A rational jury, the court explained, could have found that the $20 million at issue here was of significance to the U.S. financial institutions' commercial activities.

The court acknowledged that every swap purchased by a non-U.S. entity that uses a U.S. bank as its broker or has a U.S. entity as its ultimate counterparty could establish a "direct" connection under the CEA, but took comfort in the fact that the "significant" requirement would effectively function to avoid the slippery slope of creating jurisdiction over manipulation related to all run-of-the-mill swaps between a foreign and U.S. entity.

Fundamental Fairness for Foreigners?

Related to the case being a "first of its kind" prosecution, Phillips contended that his conviction violated his due process rights because he lacked fair notice that the CEA's extraterritorial provision could apply to his conduct. The Second Circuit disagreed. The court explained that where a statute expresses intent to apply extraterritorially, a defendant faces a heavy burden to show that an application of the statute violates due process.

Phillips had not met that burden. Because Phillips and Glen Point were licensed commodities traders in the U.S., the court found "[i]t would be disingenuous" to contend that Phillips had no reason to suspect that his deceptive trading conduct "might be within [the] scope" of the CEA, as a due process violation requires. *Phillips*, 2025 WL 2528201, at *20. As seen in *Phillips*, extra licenses create extra expectations that traders received notice of their potential liability under U.S. law, even where there is a "paucity of precedent" on the matter.

Conclusion

As foreign defendants accused of largely foreign conduct are permitted to be hauled into U.S. courts under expansive interpretations of criminal statutes, a lack of "fair notice" is just the beginning of the many practical hardships they may experience in the U.S. judicial system.

It remains to be seen whether consideration of these special burdens may have more impact on the Supreme Court in a future decision assessing the exterritorial reach of the CEA or another criminal statute deployed by federal prosecutors intent on extending their reach across the globe.

Robert J. Anello *and* **Richard F. Albert** *are members of Morvillo Abramowitz Grand Iason & Anello, P.C.* **Emily Smit**, *an associate at the firm, assisted in the preparation of this column.*