How 2nd Circ. Decision Extends CFTC's Extraterritorial Reach

By **Chad Silverman, Daniel Merzel and Isabelle Lelogeais** (November 25, 2025)

Chad Silverman

Daniel Merzel

Isabelle Lelogeais

On Sept. 3, the U.S. Court of Appeals for the Second Circuit concluded in U.S. v. Phillips that the swap-regulating provisions of the Commodity Exchange Act extend to entirely foreign conduct if a victim of the conduct is based in the U.S.[1]

Viewed against the backdrop of the Second Circuit's 2019 holding in Prime International Trading Ltd. v. BP PLC that "the conduct-regulating provisions of the CEA … apply only to domestic conduct, and not to foreign conduct,"[2] as well as the U.S. District Court for the Southern District of New York's 2023 endorsement in U.S. Commodity Futures Trading Commission v. Gorman of the view that the swap provisions reach foreign conduct "only" if the conduct poses "'systemic risks' to the U.S. financial system,"[3] this recent Second Circuit decision represents a new, sweeping application of the CEA to foreign transactions, at least with respect to swaps.

In U.S. v. Phillips, the Second Circuit evaluated a jury's application of an instruction interpreting Section 2(i)(1) of the CEA, which provides for U.S. jurisdiction over foreign swap activities that "have a direct and significant connection with activities in, or effect on, commerce of the United States."[4]

The court determined that the jury was reasonable in finding that the conduct at issue had a direct and significant connection to U.S. commerce, even though the extent of the U.S. nexus was (1) the involvement of a U.S. broker acting as a principal; and (2) an ultimate U.S. counterparty that was the alleged victim of Phillips' conduct.

While the impact of this decision remains to be seen, the ruling suggests that there is a heightened risk that predominantly foreign swap transactions will be susceptible to U.S. regulation and enforcement when U.S. counterparties are involved.

The Alleged Conduct

Neil Phillips, a British citizen, was the co-founder of U.K. hedge fund Glen Point Capital, which operated in the foreign currency derivatives markets. In October 2017, Phillips, predicting that Cyril Ramaphosa would be elected the new leader of South Africa's ruling party and that the South African rand would strengthen against the U.S. dollar, purchased a "one-touch barrier" option that would pay out in his favor if the exchange rate between the rand and the dollar dropped to 12.50 between Oct. 30, 2017, and Jan. 2, 2018.

A one-touch barrier option is a binary option that is triggered the moment the barrier — in this case, 12.50 — is touched, even if the exchange rate remains there for only an instant. Glen Point stood to earn a $20 million payout if the rand-dollar exchange rate reached that level.

Glen Point purchased the option from a broker, the London branch of a large U.S. financial institution, on a principal-to-principal basis. The ultimate counterparty, unbeknownst to Glen Point, was a U.K. affiliate of a large U.S. bank. Also unbeknownst to Glen Point, the U.K. counterparty in turn entered into a transaction with one of its U.S. affiliates to offset its risk from the transaction. As a result, the U.S. affiliate bore the ultimate responsibility for paying the $20 million to Glen Point if the option was triggered.

Phillips correctly predicted the outcome of the South African leadership election and its general impact on the strength of the rand relative to the dollar. However, by Dec. 26, 2017, the rate had not quite dropped to 12.50. Phillips allegedly instructed traders to sell the dollar against the rand until the market traded low enough to trigger his barrier option, securing the $20 million payout.

The Relevant Jury Instruction

On these facts, Phillips was indicted and ultimately convicted of commodities fraud in October 2023 in the Southern District of New York.

To convict Phillips, the jury first had to find that his conduct, which took place entirely abroad, was nevertheless covered by the CEA. Section 2(i)(1) of the CEA provides that the CEA applies to swap activities "outside the United States" that "have a direct and significant connection with activities in, or effect on, commerce of the United States."[5] The one-touch barrier option otherwise met the definition of a swap under the CEA.

At trial and on appeal, Phillips challenged the court's jury instruction on Section 2(i)(1), which "informed the jury that the government could 'meet its burden' for an extraterritorial application of the CEA 'by proving that an activity of the defendant … outside the United States related to the barrier option contract had a direct and significant connection with activities in commerce of the United States."

The district court instructed the jury that a connection is "'direct' only if it 'directly and immediately affected activity in [U.S.] commerce … without deviation or interruption,'" and "'significant' only if 'meaningful or consequential' and 'of importance' to 'commercial activity in the United States.'"[6]

Phillips argued that foreign swap-related activity cannot have a "direct and significant connection with activities in … [U.S.] commerce" unless "the conduct 'pose[s] a systemic risk to the U.S. financial system.'"[7] He further argued that even if the instruction correctly interpreted Section 2(i)(1), there was insufficient evidence for the jury to conclude that his trading had a "direct and significant connection" to activities in U.S. commerce.

The Second Circuit's Decision

On appeal, the Second Circuit rejected Phillips' challenge to the jury instruction, finding that the text of Section 2(i)(1) does not require that activities pose a "systemic risk" in order to have a direct and significant connection with activities in U.S. commerce.

The court emphasized that the statute provides for extraterritorial application where there is a significant effect on or connection with U.S. commerce, and that while Phillips' conduct may not have had a significant effect on U.S. commerce, it may have had a significant connection with it.[8] The court noted that to require a systemic risk would essentially "collapse the distinction" between "effect on" and "connection with," and that each side of

this textual disjunctive must represent a meaningfully different standard.[9]

With this interpretation, the Second Circuit implicitly rejected, in part, CFTC v. Gorman, where the Southern District of New York had endorsed the view that "direct and significant" in this context "'reach[es] only 'systemic risks' to the U.S. financial system."[10]

The Second Circuit panel also rejected Phillips' challenge as to the sufficiency of the evidence, concluding that a jury could reasonably find that the involvement of the U.S. broker — Glen Point's direct, principal-to-principal counterparty — and the ultimate U.S. counterparty constituted direct and significant connections to U.S. commerce.

That the court deemed this connection "direct and significant" is impactful in the context of the swap markets, where sophisticated U.S. financial institutions have a large presence and where market participants often transact at arm's length with intermediaries. Given this interpretation, it may be the case that a substantial number of otherwise foreign swap transactions will now be subject to the CEA, including, as was the case here, where the market participants are unaware of the U.S. nexus.

Indeed, Phillips did not know the counterparty's identity, and he argued that the connection to the ultimate counterparty was not "direct" because "it occurred only through a series of transactions and Glen Point Capital lacked a contractual relationship" with the counterparty.[11] Nevertheless, the court found that "a connection 'need not be foreseeable to be direct,'"[12] and that the existence of intervening counterparties likewise did not qualify as a disruption.

The court also rejected Phillips' argument that the connection was not significant, reasoning that "actual and potential victims of Phillips's manipulative scheme" who were based in the U.S. may fairly be considered a "significant" connection.[13]

Takeaway

In his brief, Phillips warned of a slippery slope — toward a point where "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" has "a direct and significant connection to U.S. commercial activities" under the CEA — and this worry may prove to be a legitimate one.[14]

The Second Circuit emphasized in its opinion that "significance depends on context," and that a "run-of-the-mill swap between a foreign and U.S. entity" may not be significant even if a $20 million one-touch barrier option is.

However, some would say that, in the swap market, a $20 million trade is very much run-of-the-mill, making it difficult to say where courts and litigants in future cases should draw the line. What is clear is that market participants should anticipate the possibility that foreign swap transactions involving U.S. counterparties could be deemed subject to regulation and enforcement under the CEA.

Chad E. Silverman is a partner at Skadden Arps Slate Meagher & Flom LLP. He previously served as a senior trial attorney at the CFTC.

Daniel Merzel is counsel at Skadden.

Isabelle Lelogeais is an associate at the firm.

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[1] United States v. Phillips, Dkt. No. 24-1908-cr, at *38 (2d Cir. Sept. 3, 2025).

[2] Prime Int'l Trading Ltd. v. BP P.L.C, 937 F.3d 94, 105 (2d Cir. 2019).

[3] CFTC v. Gorman, No. 21-870 (VM), 2023 WL 2632111, at *9 n.9 (S.D.N.Y. Mar. 24, 2023).

[4] 7 U.S.C. § 2(i)(1).

[5] 7 U.S.C. § 2(i)(1).

[6] Phillips at *29.

[7] Phillips at *22 (citation omitted).

[8] See Phillips at *27.

[9] See Phillips at *28.

[10] Gorman, 2023 WL 2632111 at *9 n.9.

[11] Phillips at *37.

[12] Phillips at *38.

[13] Phillips at *38–39.

[14] Phillips at *40.