No.

In the Supreme Court of the United States

NEIL PHILLIPS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether the Second Circuit erred in concluding, contrary to the Fifth Circuit, that a criminal prosecution for violation of the Commodity Exchange Act, 7 U.S.C. § 9(c)(1), can be based on trades that are explicitly excluded from the scope of that statute.

2. Whether the Commodity Exchange Act applies extraterritorially to a swap purchased by a foreign entity whenever a U.S. bank serves as prime broker or a U.S. entity is the swap's ultimate counterparty — even where the defendant had no knowledge of the counterparty's connection to the United States.

PARTIES TO THE PROCEEDING

The parties to this proceeding are the petitioner, Neil Phillips, a citizen of the United Kingdom, and the respondent, the United States. Because the indictment in this case was originally filed under seal, Phillips was also known as "Sealed Defendant 1" in the proceedings below.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Phillips*, No. 24-1908, United States Court of Appeals for the Second Circuit (Judgment entered on September 3, 2025);
- *United States v. Phillips*, No. 22-cr-00138, United States District Court for the Southern District of New York (Judgment entered on June 28, 2024); and
- C*ommodity Futures Trading Comm'n v. Glen Point Capital Advisors LP*, No. 22-cv-10589, United States District Court for the Southern District of New York (Stayed on March 7, 2023, pending conclusion of criminal case).

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TABLE OF AUTHORITIES

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Cases

Abitron Austria GmbH v. Hetronic Int'l, Inc.,
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Aspire Commodities, L.P. v. GDF Suez Energy N. Am., Inc.,
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RJR Nabisco, Inc. v. Eur. Cmty.,
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Salomon Forex, Inc. v. Tauber,
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Staples v. United States,
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United States v. Eisenberg,
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United States v. Epskamp,
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United States v. Fields,
500 F.3d 1327 (11th Cir. 2007) 32, 33

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An Act to Amend the Commodity Exchange Act to Strengthen the Regulation of Futures Trading, to Bring All Agricultural and Other Commodities Traded on Exchanges Under Regulation, and for Other Purposes (The 1974 Act), Pub. L. No. 93–463, 88 Stat. 1389 (1974)..... 6, 22

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Dodd Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), Pub. L. 111-203, 124 Stat. 1376 ..... 9, 24

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Federal Rule of Criminal Procedure 29..... 1, 15

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Bank for Int'l Settlements, *OTC derivatives statistics at end-June 2025* (Dec. 8, 2025), https://www.bis.org/publ/otc_hy2512.htm..... 21

Bank for Int'l Settlements, *Triennial Central Bank Survey: OTC foreign exchange turnover in April 2025* (Sept. 2025), https://www.bis.org/statistics/rpfx25_fx.pdf 11, 21

Futures Contract, Black's Law Dictionary (12th ed. 2024) 5

Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 Fed. Reg. 56,924 (Sept. 14, 2020) 27

GAO, Perspectives on the Swaps Push-Out Rule (Sept. 2017), https://www.gao.gov/assets/gao-17-607.pdf 22

ISDA, *Global FX Derivatives Market Overview: Size, Structure and Uses (March2026),* https://www.isda.org/a/P1tiE/Global-FX-Derivatives-Market-Overview-Size-Structure-and-Uses.pdf 11, 12, 25

JPMorgan Chase & Co., Annual Report (Form 10-K) at 278 (2017), https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chaseand-co/investor-relations/documents/quarterly-earnings/2017/4th-quarter/2017-10-k.pdf 22

Rena S. Miller, Cong. Rsch. Serv., R48451, *Introduction to Derivatives and the Commodity Futures Trading Commission* 4 (2025) 9, 10, 21

Thomas Monteiro et al., "GW Platt Foreign Exchange Bank Awards 2024—Global, Regional And Country Winners," *Global Finance* (Dec. 27, 2023), available *at* https://us01.z.antigena.com/l/wJ-mOkIUVgkcOSBoR67PNXSesjqCbOvmLVLBZnVsDNMTOvXKf-qYaXfjftsLLivweniAygCqriMrwtOINh8_v2ru4sBvuTyG19h4ZiTX9ume7TFfBuvhX8xGXXkyh6pfCXjiBq9RYJQYiqLc4mIgkbIckCB3MGvlulpGm~KRk8L0tLmgmoy8vo1bxAiG1bHaMoR1SpCCdtiwiWBc3jcWKwKZ1ORsDrTg4iZg16DJJXeZEeRHBMrE1FT~-4I 12

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"Exchange Stabilization Fund," U.S. Dep't of Treas. (2026) *available at* https://home.treasury.gov/policy-issues/international/exchange-stabilization-fund..... 12

Christopher Whittall, *Prime Brokerage: the Multi-Billion Dollar Cash Cow Redefining Banks' Trading Divisions, IFR (Mar. 2, 2024),* https://www.ifre.com/people-and-markets/2041785/prime-brokerage-the-multi-billion-dollar-cash-cow-redefining-banks-trading-divisions 26

PETITION FOR A WRIT OF CERTIORARI

Petitioner Neil Phillips respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The decision of the court of appeals (Pet. App.1a-59a) is reported at 155 F.4th 102. The decision of the district court denying Phillips's Rule 29 motion for acquittal and Rule 33 motion for a new trial (Pet. App.75a-177a) is reported at 2024 WL 1300269. The decision of the district court denying Phillips's motion to dismiss the indictment (Pet. App.178a-219a) is reported at 690 F. Supp.3d 268.

JURISDICTION

The United States Court of Appeals for the Second Circuit affirmed Phillips's conviction on September 3, 2025. Phillips's motion for rehearing or rehearing *en banc* was denied on December 22, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The Commodity Exchange Act (CEA) provides that:

> It shall be unlawful for any person, directly or indirectly, to use or employ, or attempt to use or employ, in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance

> in contravention of such rules and regulations as the Commission shall promulgate.

7 U.S.C. § 9(c)(1); *see also* 17 C.F.R. § 180.1(a)(1) (prohibiting manipulation in connection with a swap).

It further provides that "[e]xcept as provided in paragraph (2), nothing in this chapter . . . governs or applies to an agreement, contract, or transaction in . . . foreign currency." 7 U.S.C. § 2(c)(1). This provision is commonly known as the "Treasury Amendment" to the CEA. *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 469 (1997). Paragraph (2) in turn provides that:

> This chapter applies to, and the Commission shall have jurisdiction over, an agreement, contract, or transaction described in paragraph (1) that is--
>
> > **(i)** a contract of sale of a commodity for future delivery (or an option on such a contract), or an option on a commodity (other than foreign currency or a security or a group or index of securities), that is executed or traded on an organized exchange;
> >
> > **(ii)** a swap; or
> >
> > **(iii)** an option on foreign currency executed or traded on an organized exchange that is not a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934.

7 U.S.C. § 2(c)(2).

Finally, the CEA provides that:

> [t]he provisions of this chapter relating to swaps . . . shall not apply to activities outside

> the United States unless those activities . . . have a direct and significant connection with activities in, or effect on, commerce of the United States.

7 U.S.C. § 2(i)(1).

Knowing violations of the CEA and its regulations are felonies punishable by a fine of up to $1 million, 10 years' imprisonment, or both. 7 U.S.C. § 13(a)(5).

INTRODUCTION

For fifty years, Congress has made a deliberate and consistent choice: the global, decentralized market for foreign currency spot transactions (the "FX spot market") will not be regulated by the Commodity Exchange Act. Congress first made that choice in 1974, when – in the same legislation that first recognized currencies as a commodity – it explicitly exempted "transactions in foreign currency" from CEA regulation. It has reaffirmed that choice through every subsequent amendment to the statute, each time leaving the spot market's categorical exemption untouched, even as it extended the CEA's reach to swaps, retail transactions, and on-exchange options.

The decision below eviscerates that choice. Neil Phillips, a U.K. citizen and South African native, while in South Africa, traded the South African rand through a Singaporean branch of a Japanese bank in a transaction whose counterparty was British, whose broker was British, and whose prime broker was the London branch of JPMorgan. Every actor Phillips knew about, every entity he dealt with, every transaction he executed was outside the United States. Yet the Second Circuit affirmed his felony criminal conviction under the CEA on the theory that his trades had a "direct and significant connection with activities in .

. . commerce of the United States" – a connection supplied entirely by internal risk transfers within Morgan Stanley (from its U.K. entity to a New York trading desk) and JPMorgan's role as an intermediary which, by all accounts, never stood to lose a single dollar.

This case presents two independently cert-worthy questions. First, whether trades that Congress has expressly exempted from regulation can provide the predicate for criminal and civil enforcement actions under the CEA, merely because those trades allegedly affected a covered transaction. The Second Circuit's answer splits with the Fifth Circuit, which has consistently held that transactions exempt from the CEA cannot form the basis of a CEA violation, even when the government repackages them as part of a "scheme" affecting a regulated instrument. That split requires this Court's resolution.

Second, whether a foreign business's internal intra-company risk transfer that the defendant knew nothing about or a prime broker arrangement that did not expose any U.S. entity to any risk of loss satisfies the CEA's requirement of a "direct and significant connection with activities in . . . commerce of the United States." 7 U.S.C. § 2(i). The Second Circuit's answer effectively inverts the presumption against extraterritoriality for swap transactions. Because U.S. financial institutions hold roughly 60 percent of global prime brokerage market share, under the standard adopted below, wholly foreign swap transactions would regularly be pulled within the CEA's reach. That standard equally ensnares foreign market participants who had no knowledge that their ultimate counterparty was American.

Both questions implicate the $730 trillion global derivatives market, the federal government's management of the dollar's foreign exchange rate, and the ability of foreign sovereigns — including the United States's closest allies — to regulate their own financial systems. The Court should grant certiorari.

STATEMENT OF THE CASE

A. Statutory Background

Regulation of "volatile and esoteric" commodities markets under the Commodity Exchange Act has expanded slowly and carefully over the span of nearly a century. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 355, 360-67 (1982). That regulation began with futures contracts. *Id.* at 355. Futures contracts are "agreement[s] to buy or sell a standardized asset . . . at a fixed price at a future time." *Futures Contract*, Black's Law Dictionary (12th ed. 2024). They enable market participants to operationalize their "judgment about expected market conditions at the time of delivery" – in other words, to lock in a future price for a commodity based on whether they think the commodity's price will go up or down. *Merrill Lynch,* 456 U.S. at 357. Because of that feature, futures contracts play an important role in protecting a commodities market from rapid price swings, *id.* at 358; however, they can also be used as a tool for speculation, *id.* at 358-59.

"Because Congress has recognized the potential hazards as well as the benefits of futures trading, it has authorized the regulation of commodity futures exchanges" since the 1920s. *Id.* at 360. Initially, that regulation applied only to grain futures. *Id.* But over time, Congress increased its scope to cover other agricultural commodities, like cotton, rice, butter, and

eggs. *Id.* at 360-62, 362 n.17. In 1974, Congress further expanded the statute to "include nonagricultural commodities." *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 469 (1997). As a result, the CEA's definition of "commodities" came to include everything from corn to copper to currencies. *See* 7 U.S.C. § 1a(9).

As Congress expanded the types of commodities covered by the CEA, it expanded the statute's reach over different types of commodities-related *transactions* as well. For example, in the 1974 amendments, Congress extended the CEA's reach to "options" contracts related to those commodities. *See* An Act to Amend the Commodity Exchange Act to Strengthen the Regulation of Futures Trading, to Bring All Agricultural and Other Commodities Traded on Exchanges Under Regulation, and for Other Purposes (The 1974 Act), Pub. L. No. 93–463, 88 Stat. 1389 (1974). While futures involve an actual sale, to be executed at a future date, "options" allow a buyer to purchase the right (but not the obligation) to buy a commodity at a specific rate and time. *Dunn*, 519 U.S. at 469-70.

However, when it came to the specific case of foreign currencies, the Treasury Department cautioned Congress to carefully limit jurisdictional expansion. *Id.* While the 1974 bill was pending in the Senate, the Treasury Department "express[ed] concern about the effect that CEA regulation could have on one part of the foreign currency futures market." *Commodity Futures Trading Comm'n. v. Baragosh*, 278 F.3d 319, 325 (4th Cir. 2002). A letter from the Department explained to Congress that:

> Virtually all trading in foreign currencies in the United States is carried on through an

> informal network of banks and dealers. This dealer market, which consists primarily of the large banks, has proved highly efficient in serving the needs of international business in hedging the risks that stem from foreign exchange rate movements. The participants in this market are sophisticated and informed institutions, unlike the participants on organized exchanges, which, in some cases, include individuals and small traders who may need to be protected by some form of governmental regulation.

Id. (quoting S. Rep. No. 93–1131 (Treasury Letter), reprinted in 1974 U.S.C.C.A.N. 5843, 5887–88) (emphasis omitted). Further, it added "that regulation by the new Commission would only burden and confuse traders in the informal dealer market without improving market fairness or transparency." Treasury Letter at 5888–89. "To protect this segment of the market, Treasury proposed an amendment that would 'make clear' that the Commission's jurisdiction over foreign currency futures was limited to 'organized exchanges,'" not "over the counter" (OTC) transactions made directly between sophisticated counterparties. *Baragosh*, 278 F.3d 319, 325 (quoting Treasury Letter at 5889).

As a result of the Treasury Department's intervention, the 1974 amendments bore a currency-specific exception, fittingly known as the "Treasury Amendment." *Dunn*, 519 U.S. at 469-70. It provided that:

> Nothing in this chapter shall be deemed to govern or in any way be applicable to *transactions in foreign currency* . . . unless such

> transactions involve the sale thereof for future delivery conducted on a board of trade.

Id. at 469 (quoting 7 U.S.C. § 2(ii) (1997)).

This Court subsequently confirmed the full breadth of that exclusion. In *Dunn v. Commodity Futures Trading Commission*, it held that the Treasury Amendment applied not only to definite futures contracts for foreign currencies but also to options contracts, under which currencies ultimately might never be exchanged. *Id.* at 469-70. As this Court observed, a "normal reading of the key phrase [transactions in foreign currency] encompasses *all* transactions in which foreign currency is the fungible good whose fluctuating market price provides the motive for trading." *Id.* at 470 (emphasis added). Thus, under the Treasury Amendment, all OTC transactions aimed at foreign currencies fell beyond the scope of the CEA – whether standard futures, options contracts, or any other form of currency-based transaction. *Id.*

Subsequent amendments marginally expanded the CEA's reach. For example, the Commodity Futures Modernization Act of 2000 (CFMA) created exceptions to the Treasury Amendment for on-exchange currency-related futures and options and for OTC "retail" transactions (essentially, options or futures transactions involving less sophisticated counterparties). Commodity Futures Modernization Act of 2000, PL 106–554, December 21, 2000, 114 Stat 2763.

But other transactions remained largely outside of the CEA's scope during this time. For example, "[b]ecause the [CEA] was aimed at manipulation, speculation, and other abuses that could arise from the trading in futures contracts and options, as distinguished from the commodity itself," Congress left

purported "'spot' transactions (transactions for the immediate sale and delivery of a commodity)" and "'cash forward' transactions (in which the commodity is presently sold but its delivery is, by agreement, delayed or deferred)" largely unregulated. *Salomon Forex, Inc. v. Tauber*, 8 F.3d 966, 970 (4th Cir. 1993).

Also unregulated were swaps, a type of complex, OTC derivative[1] trade that "generally [involved] . . . exchang[ing] different cash flows over a set period of time." Rena S. Miller, Cong. Rsch. Serv., R48451, *Introduction to Derivatives and the Commodity Futures Trading Commission* 4 (2025). Indeed, the CFMA explicitly excluded "most financial derivative transactions," including swaps, "from the CEA." Lynn A. Stout, *Derivatives and the Legal Origin of the 2008 Credit Crisis*, 1 Harv. Bus. L. Rev. 1, 21 (2011).

However, after the financial crash of 2008, the CFMA's broad deregulation of OTC derivatives (and credit default swaps specifically) was blamed for creating and hiding systemic risk that exacerbated the crisis. *Id.* at 27. Commenters suggested the crisis "would have been smaller, more confined, and less economically destructive, and might even have been averted entirely" were it not for that deregulation. *Id.*

In reaction, Congress passed the Dodd Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), Pub. L. 111-203, 124 Stat. 1376, which was signed into law on July 21, 2010. Through that Act, Congress again expanded the types of

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[1] "A derivative is a contract that *derives* its value from some underlying asset at a designated point in time." Rena S. Miller, Cong. Rsch. Serv., R48451, *Introduction to Derivatives and the Commodity Futures Trading Commission* 1 (2025) (emphasis added).

transactions subject to the CEA. And for the first time, it explicitly "brought the swaps market into a regulatory framework like that of the futures and options markets."[2] Miller, *supra*, at 1.

However, recognizing the potentially far-reaching effects of those regulatory changes, Congress explicitly limited the jurisdictional reach of the CEA's swap provisions. It provided that the Dodd Frank changes "shall not apply to activities outside the United States unless those activities . . . have a direct and significant connection with activities in, or effect on, commerce of the United States." 7 U.S.C. § 2(i).

Congress also reaffirmed two preexisting exclusions from the CEA. First, it continued to exclude most spot and cash-forward transactions from regulation. *See* 7 U.S.C. § 2(c)(2)(D)(ii)(III) (excluding transactions with actual delivery within a period specified by statute or regulation – *i.e.*, a spot transaction – or with an "enforceable obligation to deliver between a seller and a buyer that have the ability to deliver and accept delivery" – *i.e.*, a cash forward transaction). And second, it largely maintained the Treasury Amendment's exclusion for transactions involving foreign currencies. Though the Dodd Frank Amendment provided exceptions for currency-related *swaps*, it left untouched currency-related spot transactions and currency-related OTC options between banks and other major financial organizations. 7 U.S.C. § 2(c);

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[2] Under the Act, a "swap" was defined to include "any . . . contract . . . that provides for any . . . payment . . . that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence." 7 U.S.C. § 1a(47)(A).

compare 7 U.S.C. § 2(ii) (1999) *with* 7 U.S.C. § 2(c) (2001).

Both sets of exclusions were in place when the transactions giving rise to this case took place, and they remain in place today. 7 U.S.C. § 2 (2017); 7 U.S.C. § 2 (2026).

B. Factual and Procedural Background

1. Modern OTC foreign exchange spot markets are massive, global, and extremely sophisticated.

The OTC foreign exchange (FX) spot market is vast, with daily turnover totaling $3 trillion as of April 2025. Bank for Int'l Settlements, *Triennial Central Bank Survey: OTC foreign exchange turnover in April 2025* (Sept. 2025), https://www.bis.org/statistics/rpfx25_fx.pdf. It is also global, with sales desks in every major financial center, including the United States, the United Kingdom, Singapore, and Hong Kong transacting in this market and "[t]urnover. . . ris[ing] steadily in China, South Korea and India, pointing to a gradual broadening of FX derivatives activity across the region beyond the main financial centers." ISDA, *Global FX Derivatives Market Overview: Size, Structure and Uses*(March2026), https://www.isda.org/a/P1tiE/Global-FX-Derivatives-Market-Overview-Size-Structure-and-Uses.pdf.

By statute, only financial institutions, insurance companies, certain large companies, and governments can participate in the "non-retail" OTC foreign exchange swap market. 7 U.S.C. § 1(a)(18) (defining "eligible contract participant"); 7 U.S.C. § 2(c)(2)(B) (distinguishing "retail" commodity transactions based on whether they involve a party who is not an "eligible

contract participant"). The players in the global foreign currency spot market are also some of the world's most sophisticated financial actors, with activity heavily concentrated among the largest global financial institutions. For example, as of 2023, "JP Morgan, UBS, and Deutsche Bank [we]re the three largest players in the FX trading markets, accounting for roughly 30% of global FX transactions." Thomas Monteiro et al., "GW Platt Foreign Exchange Bank Awards 2024—Global, Regional And Country Winners," *Global Finance* (Dec. 27, 2023), *available at* https://gfmag.com/banking/gw-platt-foreign-exchange-bank-awards-2024-global-and-regional-winners/. "Non-financial customers account[] for" a small and declining share of global FX derivatives turnover – "4.5% . . . in April 2025, down from 5.1% in 2022 and 8.4% in 2013." ISDA, *Global FX Derivatives Market Overview: Size, Structure and Uses*, *supra*.

Nation-states also actively enact monetary policy through these markets. Indeed, federal law explicitly grants the Secretary of the Treasury Department control over the tools for "[s]tabilizing exchange rates" against the dollar – one of which is the "stabilization fund," through which the United States purchases foreign currencies to accomplish that goal. 31 U.S.C. § 5302; "Exchange Stabilization Fund," U.S. Dep't of Treas. (2026) *available at* https://home.treasury.gov/policy-issues/international/exchange-stabilization-fund. And it is no secret that "other governments actively intervene in foreign exchange markets (by buying and selling currencies) in order to influence the value of their currency" as well. Rebecca M. Nelson, Cong. Rsch. Serv., IF10049, *Exchange Rates and Currency Manipulation* (2025), *available at* https://www.congress.gov/crs-product/IF10049.

In other words, the statements of the Treasury Secretary back in 1974 remain true today: OTC foreign currency traders still are not "individuals and small traders who may need to be protected by some form of governmental regulation." *See* Treasury Letter. They are some of the most sophisticated, well-resourced players in the financial world, at least some of whom are expressly authorized by law to engage in transactions with the intention of influencing exchange rates.

2. This case is based on a series of trades within the OTC foreign exchange spot market for South African rand.

The charges against Phillips are based on trades he made in the FX spot market on December 26, 2017. Approximately three months prior to that date, Phillips's London-based hedge fund, Glen Point Capital LLP (Glen Point), purchased an option tied to the USD/ZAR exchange rate (the "Option" or the "One Touch Barrier Option"). Under the terms of the Option, which Glen Point purchased for approximately $2 million, if the USD/ZAR exchange rate reached 12.50 (the barrier rate) by 10:00 A.M. Eastern Standard Time on January 2, 2018, the counterparty who sold the Option to Glen Point was obligated to pay Glen Point and one of its client funds $20 million. Phillips made this purchase based on his view that a particular candidate, Cyril Ramaphosa, would win an upcoming election for president of the African National Congress party in South Africa in December 2017, and that the South African rand would strengthen as a result. At the time Glen Point purchased the Option, the USD/ZAR exchange rate was approximately 14.

Morgan Stanley & Co. International PLC (MS International), a U.K.-based subsidiary of Morgan Stanley, sold the Option to Glen Point through an intermediary. Both MS International and Glen Point were unaware of their counterparty's identity, as is common for this type of transaction. The London branch of J.P. Morgan Chase Bank, N.A. (JPMorgan) served as Glen Point's broker. MS International's broker was the Royal Bank of Scotland PLC (RBS).

In the months leading up to the election, the USD/ZAR exchange rate fluctuated between 14.50 and approximately 13.15. On December 18, 2017, Cyril Ramaphosa was announced as the winner of the election for president of the African National Congress party in South Africa – a momentous political event. Subsequently, the USD/ZAR exchange rate dropped to approximately 12.52, meaning the rand strengthened significantly relative to the dollar. However, the election results were immediately shrouded in uncertainty, and it remained unclear for several days whether the incumbent president, Jacob Zuma, would peacefully hand over power.

Intervening developments over the Christmas holiday convinced Phillips that Zuma would agree to step down. Accordingly, on December 26, Phillips, located in South Africa, sold $725 million USD in exchange for ZAR, betting that the rand would further strengthen against the dollar. The transaction was executed via a series of spot trades executed by a Singapore-based employee of a Japanese bank. For its part, Morgan Stanley's entities executed nearly mirror-image trading that day, purchasing hundreds of millions of USD/ZAR, including $300 million from Glen Point. They also placed nearly $1 billion in bids just above the 12.5 barrier rate. Ultimately, the USD/ZAR

exchange rate reached (and fell below) 12.50, and the Option was triggered. Morgan Stanley cancelled almost all its remaining bids within 11 seconds of the Option triggering. Phillips, in contrast, bought another $100 million in rand. MS International subsequently initiated payment on the Option from its bank account in the United Kingdom which flowed to RBS, JPMorgan, and finally Glen Point.

The next day, when the market caught up with Phillips's prediction, the exchange rate dropped to around 12.25 and remained there for the next five months. The day after that, Phillips sold most of his spot position, consistent with Glen Point's practice of buying back dollars across multiple foreign currencies at the end of the calendar year to decrease risk, close certain positions, and reduce volatility.

3. The proceedings in the district court.

In 2022, the government charged Phillips by indictment with commodities fraud, in violation of 7 U.S.C. § 9(1); wire fraud, in violation 18 U.S.C. § 1343; and conspiracies to commit the same. Shortly before trial, the government elected not to proceed on the wire fraud counts.

At the close of the Government's case, Phillips moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a). The district court reserved decision. Later, the jury returned a verdict acquitting Phillips of conspiracy to commit commodities fraud and finding him guilty of commodities fraud. On December 8, 2023, Phillips renewed his Rule 29 motion and alternatively sought a new trial pursuant to Rule 33(a). The district court denied those motions.

With respect to the applicability of the CEA to Phillips's FX spot trades, the district court acknowledged that "Congress made a considered decision to exclude FX spot transactions from regulation under the United States commodities laws." Pet. App. 93a. Nevertheless, the district court held that Phillips's activity in the unregulated FX spot market could violate the CEA because the spot trades "were used as a means to deceive participants in the swap market, specifically the counterparties to the One Touch Option." Pet. App. 93a-94a.

Regarding extraterritoriality, the district court found that there was insufficient evidence from which a rational jury could have found a domestic application of the CEA, and that almost all the government's attempts to satisfy Section 2(i) failed. However, the district court held that the jury could have found that Phillips's activities had a direct and significant connection to activities in U.S. commerce because Phillips sent a false signal that triggered legal obligations by U.S. entities: Glen Point's ultimate counterparty, MS Capital, and its prime broker, JPMorgan.

4. The Second Circuit affirmed.

The Second Circuit acknowledged that "the CEA … expressly excludes much of the foreign-exchange spot market from direct regulation," an argument Phillips "raise[d] throughout his challenges on the elements of commodities fraud, and elsewhere in his briefs." Pet. App. 16a, 55a.

However, like the district court, the Second Circuit reasoned that "[n]othing in the text of the CEA or corresponding CFTC regulations suggests that trades made in the foreign-exchange spot market cannot constitute a 'manipulative device, scheme, or artifice'

used for the purpose of defrauding a counterparty to a foreign-exchange swap." Pet. App. 55a-56a. And despite the plain text of the statute, the court stated that "[i]t is enough that the CEA regulates swaps, the one-touch barrier option is a swap, and there was sufficient evidence for the jury to conclude beyond a reasonable doubt that Phillips's trades were a 'manipulative device, scheme, or artifice' intended to defraud the counterparty to the option." *Id.* at 56a.

The Second Circuit further held that the CEA applied extraterritorially under Section 2(i) to Phillips's activities at issue here because U.S. entities ultimately held risk on the Option. Specifically, the Second Circuit held that Phillips's conduct had "a direct and significant connection with activities in . . . [U.S.] commerce" based on the "actual and potential" roles of Morgan Stanley Capital Services LLC (MS Capital) and JPMorgan. *Id.* at 33a, 38a. Morgan Stanley has a general practice of internally transferring its risk on this type of transaction to a U.S.-based entity, MS Capital, through an internal "back-to-back" contract, and a witness testified that such a contract would have been used in connection with the Option based on that standard practice. Based on that testimony, the Second Circuit concluded that MS Capital held the $20 million risk on the Option. It also concluded that JPMorgan "would have been on the hook" had Morgan Stanley not paid. *Id.* at 33a. Based on those two connections, the Second Circuit held that "the connection between Phillips's conduct and activities in U.S. commerce was 'of importance' and 'integral.'" *Id.*

The Second Circuit openly acknowledged that "Phillips was unaware that Morgan Stanley Capital was the true counterparty to the option." *Id.* at 37-38a. But it reasoned that the connection between Phillips's

conduct abroad and Morgan Stanley's activities in U.S. commerce was "no less 'integral' or 'important' because Phillips was unaware of [it]." *Id.* at 38a.

REASONS FOR GRANTING THE PETITION

I. This Court should resolve whether the Commodity Exchange Act permits criminal prosecution based on transactions in markets the statute expressly exempts from regulation.

A. The Second Circuit's decision creates a split with the Fifth Circuit.

The Second Circuit's decision creates a split with the Fifth Circuit on whether the Commodity Exchange Act permits prosecution for fraud based on transactions in a market the statute expressly exempts from regulation.

Section 2(c)(1) of the CEA states that "*nothing* in this chapter . . . governs or applies to an agreement, contract, or transaction in foreign currency." (emphasis added). The Second Circuit nonetheless held here that foreign exchange spot transactions may provide the basis for a criminal application of the CEA. Pet. App. 55-56a.

That decision is contrary to multiple decisions from the Fifth Circuit, which for over a decade has held that charges for a fraudulent or manipulative scheme under the CEA cannot be sustained when the underlying transactions that comprise the scheme are exempt from the statute's scope.

In *United States v. Radley*, the Fifth Circuit affirmed the dismissal of an indictment charging wire fraud, price manipulation, and cornering the market in violation of the CEA. 632 F.3d 177, 179-80 (5th Cir.

2011). There, the Fifth Circuit looked to § 2(g) of the CEA, which stated – just as § 2(c)(1) provides here in relation to the FX spot market – that "*No provision* of this chapter . . . shall apply to or govern any agreement, contract, or transaction in a commodity other than an agricultural commodity." *Id.* at 181 (emphasis added). The court rejected the government's narrow interpretation of the exclusion, *id.* at 181-83, and held that the OTC transactions at issue were exempt from the scope of the CEA, *id.* at 184. Because "the only grounds the government alleged for a scheme to defraud are precisely those actions that are exempt" and "the statutory exemption covers all aspects of a transaction," the Fifth Circuit affirmed dismissal of the indictment. *Id.* at 185.

The Fifth Circuit has since reaffirmed that reasoning. *See Aspire Commodities, L.P. v. GDF Suez Energy N. Am., Inc.* 640 F. App'x 358 (5th Cir. 2016) (per curiam) (unpublished). In *Aspire Commodities*, the plaintiffs, participants in the energy derivatives market, brought a private action against an energy company, alleging it had engaged in commodities manipulation in violation of the CEA. *Id.* at 359. The district court dismissed the case, holding that the CFTC had issued an order exempting the Texas electricity market in which the relevant trades had occurred from the underlying provisions of the CEA. *Id.*

On appeal, the plaintiffs argued that the energy company's transactions in the exempt market could nevertheless be the basis of a manipulation claim, because those trades had affected a different, regulated market. *Id.* at 362. Once again, the Fifth Circuit rejected that argument. Although the plaintiffs "complain[ed] that the effects of [the energy company's] manipulation occurred in the [regulated] market, all

of [the] allegedly improper activity occurred in the [exempt] market." *Id.* at 362-63. Accordingly, the Fifth Circuit affirmed dismissal of the case. *Id.*

Here, the Second Circuit reasoned that trades expressly exempted from the CEA's reach can "constitute a 'manipulative device, scheme, or artifice' used for the purpose of defrauding a counterparty" in a covered transaction. Pet. App. 55a-56a. But as the Fifth Circuit made clear in *Radley* and *Aspire Commodities*, the categorical exclusion of a type of transaction from the scope of the CEA does exactly that: It excludes such transactions from the statute's reach.

As the Fifth Circuit held, "exempt" means "exempt": such transactions cannot be the basis of a CEA violation charge. *See Radley*, 632 F.3d at 185. Likewise, here, "nothing" means "nothing": FX spot transactions cannot be the basis of a CEA violation charge either. 7 U.S.C. § 2(c)(1). The Court should grant certiorari to resolve the split between the Second and Fifth Circuits.

B. This issue is exceptionally important.

The question whether the CEA reaches conduct in markets the statute expressly exempts from regulation – and whether the government can circumvent those exemptions by characterizing exempt activity as the instrument of fraud in a regulated market – is one of exceptional importance. Congress has exempted from CEA coverage a range of markets and transaction types. The Second Circuit's ruling that an exemption can be overridden whenever exempt activity affects a regulated instrument leaves the scope of all those exemptions uncertain and subject to prosecutorial repackaging.

The Second Circuit's decision and the conflict it has created with the Fifth Circuit also risk destabilizing global markets, sowing confusion regarding the scope of the CEA, and jeopardizing international comity. The markets at issue are massive and complex. The FX derivatives market had a notional value of $155 trillion as of 2025. Bank for Int'l Settlements, *OTC derivatives statistics at end-June 2025* (Dec. 8, 2025), https://www.bis.org/publ/otc_hy2512.htm. In 2024, the total global notional value of the broader market for over-the-counter (OTC) derivatives – largely, swaps – was $730 trillion. Rena S. Miller, Cong. Rsch. Serv., R48451, Introduction to Derivatives and the Commodity Futures Trading Commission (2025), https://www.congress.gov/crs-product/R48451. The foreign exchange spot market has a daily turnover totaling $3 trillion as of April 2025. Bank for Int'l Settlements, *Triennial Central Bank Survey: OTC foreign exchange turnover in April 2025* (Sept. 2025), https://www.bis.org/statistics/rpfx25_fx.pdf. Due to the scale of those markets and the Dodd-Frank amendments' emphasis on systemic risk, Congress created a framework for overseeing *some*, but not all, of them.

The Second Circuit, however, has extended the CEA's reach to include transactions in explicitly exempted markets based on amounts as small as $20 million. That is a figure the CEA's own regulations characterize as a "de minimis" amount of daily swap activity.[3] 17 C.F.R. § 1.3. And the parties and counterparties to swap transactions are sophisticated

[3] The CFTC has explained that a dealer's swap-related activities are de minimis if they involve "no more than $8 billion in swap dealing activity" in the "preceding 12 months" – equivalent to almost $22 million *per day* for an entire year. 17 C.F.R. § 1.3.

financial institutions, to whom $20 million is a nominal sum. *See* GAO, Perspectives on the Swaps Push-Out Rule (Sept. 2017), https://www.gao.gov/assets/gao-17-607.pdf at 19-20. Indeed, at the time the Option was triggered, the $20 million sum at issue here was less than 0.0008% of JPMorgan's total assets. *See* JPMorgan Chase & Co., Annual Report (Form 10-K) at 278 (2017), https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/investor-relations/documents/quarterly-earnings/2017/4th-quarter/2017-10-k.pdf. Thus, the Circuit's decision sweeps in an extremely broad swath of the massive, international, and explicitly unregulated FX spot market – not to mention other markets Congress has exempted from regulation under the CEA. The Court should grant certiorari to resolve whether this holding is correct.

C. The Second Circuit erred in holding that transactions explicitly excluded from the CEA can be the basis for a commodities fraud conviction under the statute.

The Second Circuit incorrectly held that the foreign spot transactions here may provide the basis for a criminal conviction under the CEA.

1. Congress has consistently and deliberately excluded such transactions from regulation under the CEA.

The very same 1974 statute that first recognized currencies as a commodity under the CEA explicitly *excluded* most transactions in currencies from CEA regulation. *See* 1974 Act, 88 Stat. at 1395. Through the 1974 Act, Congress expanded the CEA's reach from a hodgepodge of agricultural products to all "goods and articles . . . and all services, rights, and

interests in which contracts for future delivery are presently or in the future dealt in" – including currencies. *Id.* But it carefully carved out "transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade" from the statute's new purview. *Id.*

This statutory language speaks for itself. But, lest there be any confusion, here we know precisely why Congress chose that path: Shortly before the bill was passed, the Senate received a letter from the Treasury Secretary proposing the exact language adopted in the statute. S. Rep. No. 93–1131, 93rd Cong. 2d Sess. 6, 1974 U.S.C.C.A.N. 5843, 5889. The letter explained why the Secretary's proposed language was necessary. It pointed out that "[v]irtually all futures trading in foreign currencies in the United States [was] carried out through an informal network of banks and dealers," all of which were "sophisticated and informed institutions" – unlike the participants on organized exchanges, "who may need to be protected by some form of governmental regulation." *Id.* at 5888. And it opined that the draft bill's attempt to regulate such "a complex banking function" would thus risk "confus[ing] an already highly regulated business sector" for no benefit – especially given that that sector's existing regulators, the Comptroller of the Currency and the Federal Reserve, were already "taking action to achieve closer supervision of the trading risks involved." *Id.*

The Senate Committee report for the amended bill echoed that reasoning virtually verbatim. It explained that "[a] great deal of the trading in foreign currency in the United States is carried out through an informal network of banks and tellers . . . more properly supervised by the bank regulatory agencies." *Id.* at

5863. Regulation under the CEA was, therefore, "unnecessary." *Id.*

As this Court has summed up this enactment history, "Congress' broad purpose in enacting the Treasury Amendment was to provide a general exemption from . . . regulation [under the CEA] for sophisticated off-exchange foreign currency trading, which had previously developed entirely free from supervision under the commodities laws." *Dunn*, 519 U.S. at 473.

Subsequent Congressional amendments have narrowed that exemption. For example, the CFMA brought on-exchange options and futures and OTC "retail" transactions under the CEA's umbrella. *See* CFMA, 114 Stat at 2763. And, of course, the Dodd Frank Act extended regulation to swaps, including swaps based on transactions in foreign currencies. 124 Stat at 1641; *see also* 7 U.S.C. § 2(c)(2).

But despite those significant and sweeping interventions – so far-reaching that they prompted the jurisdiction-limiting language at 7 U.S.C. § 2(i) – Congress has never eliminated the exemption for OTC spot transactions in foreign currencies. In fact, it has doubled down on the Treasury Department's role in addressing foreign exchange markets, granting the Secretary of the Department of the Treasury "exclusive control" over the tools for "[s]tabilizing exchange rates." 31 U.S.C. § 5302. Thus, as conceded by the government and acknowledged by the courts below, such "transactions in foreign currencies" remain outside the reach of the CEA. *See* Pet. App. 16a (observing that "the CEA still expressly excludes much of the foreign-exchange spot market from direct regulation," including the specific spot transactions at issue here (citing 7 U.S.C. § 2(c)(1)(A)); Pet. App. 202a ("[T]he Government does not dispute that the CEA does not

reach foreign-currency spot transactions in isolation.”).

2. The Second Circuit’s decision below upends the careful limits Congress has placed on the CEA’s regulation of foreign currency transactions.

The Second Circuit’s decision makes an end-run around Congress’s longstanding and explicit decision to exempt OTC foreign currency spot transactions from the CEA. The Second Circuit reasoned that even if Phillips’s spot transactions were unregulated, the One-Touch Barrier Option was subject to CEA regulation as a swap, and the spot transactions were fair game insofar as they affected the Option. Pet. App. 55a-56a. As its logic goes, “[n]othing in the text of the CEA or corresponding CFTC regulations suggests that trades made in the foreign-exchange spot market cannot constitute a ‘manipulative device, scheme, or artifice’ used for the purpose of defrauding a counterparty to a foreign-exchange swap.” *Id*.

This judicial work-around subjects a market Congress has taken a half-century’s worth of pains to shield to precisely the kind of regulation Congress has sought to avoid. To spell out the implications: foreign exchange swaps are often used to hedge currency risk when a party purchases or expects to purchase a large amount of a foreign currency. ISDA, *Global FX Derivatives Market Overview: Size, Structure and Uses*, *supra* at 12. Under the Second Circuit’s reasoning, any spot transaction associated with such hedging may generate exposure under 7 U.S.C. § 9(c)(1).

The government may not attempt to regulate via a back door transactions that Congress has deliberately placed outside its reach from the front. *Cf*

Rehberg v. Paulk, 566 U.S. 356, 361 (2012) (a plaintiff could not bring a conspiracy case based on conduct that was immunized from a substantive claim, as that would "permit through the back door what is prohibited through the front" (quotation marks omitted)); *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 190 (2024) ("[A] government official cannot do indirectly what she is barred from doing directly"). An FX spot transaction used to affect a swap is simply an FX spot transaction. Congress has excluded FX spot transactions from the CEA categorically. Section 2(c)(1) does not say that FX spot transactions are excluded "unless they influence a swap"; it says that "nothing in this chapter . . . governs or applies" to them. The Second Circuit's contrary holding effectively writes that exception out of the statute.

II. This Court should resolve whether the Commodity Exchange Act applies extraterritorially to a swap purchased by a non-U.S. entity whenever a U.S. bank serves as prime broker or a U.S. entity is the swap's ultimate counterparty.

A. This issue is exceptionally important and warrants resolution by this Court.

The question of the CEA's extraterritorial reach is one of exceptional importance to global financial markets and to the United States's relationships with foreign sovereigns. The Second Circuit's decision has created a standard under which extraterritorial application of the CEA is the presumption – not the exception – for international swap transactions. As of 2024, U.S. entities held a market share of nearly 60% of the global prime brokerage market. Christopher Whittall, *Prime Brokerage: the Multi-Billion Dollar Cash Cow*

Redefining Banks' Trading Divisions, IFR (Mar. 2, 2024), https://www.ifre.com/people-and-markets/2041785/prime-brokerage-the-multi-billion-dollar-cash-cow-redefining-banks-trading-divisions. Under the standard adopted below, even a wholly foreign swap transaction, with foreign entities on either side, may be pulled within the CEA's criminal reach – simply because a U.S. financial institution happened to serve as a broker or, entirely unbeknownst to the defendant, ultimately held risk in the background.

The issue of the CEA's extraterritorial reach also bears on principles of international comity and foreign nations' abilities to regulate their own markets. *See Morrison*, 561 U.S. at 269. The CFTC itself has recognized that "in exercising its authority with respect to swap activities outside the United States, the Commission will be guided by international comity principles and will focus its authority on potential significant risks to the U.S. financial system." Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 Fed. Reg. 56,924, 56,928 (Sept. 14, 2020). The Second Circuit's decision failed to account for those guardrails. As a result, the Second Circuit failed to account for how its interpretation of the CEA conflicts with other countries' efforts to regulate their own swap and spot markets and conduct monetary policy.

B. The Second Circuit misconstrued the CEA's extraterritoriality provision.

"It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Abitron Austria*

GmbH v. Hetronic Int'l, Inc., 600 U.S. 412, 417 (2023) (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010)). That "presumption against extraterritoriality" (1) "serves to avoid the international discord that can result when U.S. law is applied" to foreign conduct, and (2) reflects the "commonsense notion that Congress generally legislates with domestic concerns in mind." *Id.* (quoting *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 335-336 (2016)). Even where Congress expressly "provides for some extraterritorial application" in a statute, "the presumption against extraterritoriality operates to limit that provision to its terms." *Morrison*, 561 U.S. at 265 (2010) (citing *Microsoft Corp. v. AT&T Corp.,* 550 U.S. 437, 455-56 (2007)).

Recognizing the potentially far-reaching impact of Dodd Frank's swap regulations, Congress explicitly limited the CEA's reach with respect to swaps. Under those limitations, the CEA's swap-related provisions do "not apply to activities outside the United States unless those activities . . . have a direct *and* significant connection with activities in, or effect on, commerce of the United States." 7 U.S.C. § 2(i) (emphasis added).

Phillips's conduct and activities at the heart of this case were all foreign. Phillips is a national of South Africa and a citizen of the United Kingdom – not the United States. Pet. App. 4a, 7a. He traded on the decentralized and unregulated FX spot market, from South Africa – not the United States. *Id.* at 91a. He made the relevant trades through a Singaporean – not American – branch of a Japanese – not American – bank. *Id.* The alleged purpose behind the trades was to deceive his U.K.-based – not American – counterparty to the One-Touch Barrier Option. *Id.* at 5a. That

option was brokered by a U.K.-based – not American – intermediary, with a U.K.-based – not American – branch serving as prime broker. *Id.* at 5a-6a.

The Second Circuit nonetheless held that the CEA applied extraterritorially to that conduct, ruling that two aspects of the complex transactions at issue here established the requisite relationship between Phillips's activity and United States commerce. First, after the option was brokered – and entirely unbeknownst to Phillips – the U.K.-based counterparty (MS International) offloaded its liability for the option to a U.S.-based affiliate (MS Capital). *Id.* at 5a-6a. Second, the prime broker was a branch of a U.S. bank (and one of the largest banks in the world), JPMorgan. *Id.* at 5a.

But from Phillips's perspective, the first connection was entirely unknown. Phillips was not a party to or involved in any way in the contract shifting that liability. *Id.* at 5a-6a, 126a-127a. And from any perspective it was attenuated from the option he purchased. The second connection the Second Circuit relied on was insufficient as well. As prime broker, JPMorgan served merely as an intermediary between the parties. *Id.* at 5a. It was only "on the hook" in connection with the deal in the hypothetical event that MS Capital did not pay it after it had paid Glen Point's proceeds on the Option. *Id.* at 33a. And, in that unlikely event, it held sufficient collateral from Glen Point to cover any payment dispute. 2d Cir. App. 2753-54. In other words, there was no circumstance under which JPMorgan would be out even a single dollar. If the mere possibility that the largest bank in the world will need to make a payment for which it will suffer no loss is "significant" to its commercial activities, it is difficult to conceive of what is not.

Perhaps realizing how far its reasoning might stretch, the Second Circuit tried to minimize the implications of its holding. It suggested that "a reasonable juror may well understand the $20 million amount at issue in *this* case to be of significance to the U.S. financial institutions' commercial activities." Pet. App. 35a. But there is no meaningful way to distinguish the remote connection to U.S. commerce in *this* case from that of any "run-of-the-mill swap between a foreign and U.S. entity." *Id.* at 35a. As noted above, the CFTC has explained that a dealer's swap-related activities are *de minimis* if they involve less "than $8 *billion* in swap dealing" in the "preceding 12 months." 17 C.F.R. § 1.3 (emphasis added).

The Second Circuit saw no reason "why the extraterritoriality provision and the substantive provisions in the CEA (and the CFTC's regulations interpreting those provisions) must be coextensive." Pet. App. 35a. But that reasoning overlooks practical reality: in an industry where a dealer's swap-related activities must amount to $22 million every day for an entire year to qualify as more than de minimis by the dealer's main regulator, a reasonable juror could not find, beyond a reasonable doubt, that a one-time payout of $20 million like the one at issue in this case was of significance to U.S. commerce.

Worse yet, the Second Circuit's holding threatens international comity and foreign nations' abilities to regulate their own markets. *See Morrison*, 561 U.S. at 269. In a past extraterritoriality case, foreign governments warned that "U.S. judicial interference" in foreign countries' regulatory decisions "risks damaging the mutual respect that comity is meant to protect and could be perceived as an attempt to impose American economic, social and judicial values." Br. of the U.K.

of Great Britain and Northern Ireland as Amicus Curiae Supporting Respondents at 22-23, *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010). So too here. Interpreting Section 2(i) to apply to foreign persons' FX spot transactions conducted abroad would interject U.S. prosecutors into other countries' efforts to regulate swaps and spot transactions and to conduct monetary policy and regulate their own currencies.

And if all this were not already bad enough, the Second Circuit's holding also tramples basic principles of *mens rea*. The court of appeals acknowledged that Phillips was "unaware" of the facts it believed established a connection here to U.S. commerce. Pet. App. 5-6a. But it reasoned that having a "nexus with U.S. commerce" under Section 2(i) is a "jurisdictional" element, not a conduct element, of the statute and the government need not prove *mens rea* as to jurisdictional facts. *Id.* at 38a.

"[T]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo–American criminal jurisprudence." *Staples v. United States*, 511 U.S. 600, 605 (1994). The Second Circuit's reasoning conflicts with those principles. More specifically, this Court has held that criminal statutes should be interpreted to require "that the defendant know the facts that make his conduct illegal" – particularly where, absent knowledge of those facts, the defendant's conduct would be perfectly lawful. *Staples*, 511 U.S. at 619. In *Rehaif v. United States*, 588 U.S. 225 (2019), this Court applied that principle to require proof that a defendant knew the specific fact separate from his conduct – his immigration status – that placed him within the class of persons prohibited from possessing a firearm. The Court rejected the government's argument that the fact in question was

equivalent to a "jurisdictional" fact and thus required no finding of knowledge. *Id.* at 229-31; *see also* Br. of United States at 9, *Rehaif v. United States*, 588 U.S. 225 (2019). Instead, it held that even where Congress does not expressly require knowledge of a particular element that distinguishes criminal from non-criminal conduct, courts should presume that requirement exists unless the statute's text or structure clearly indicates otherwise. *Id.* at 229-31.

The Second Circuit did not grapple with any of those cases. Instead, it invoked its own precedents applying *United States v. Feola*, 420 U.S. 671 (1975), which held that defendants in a federal drug prosecution did not need to know their intended victim was a federal agent, because that fact bore only on federal court jurisdiction. Pet. App. 38a (citing *United States v. Epskamp*, 832 F.3d 154, 167 (2d Cir. 2016), and *United States v. Eisenberg*, 596 F.2d 522, 526 (2d Cir. 1979)). But *Feola* is categorically inapplicable here. The jurisdictional fact in *Feola* determined only which courthouse the defendants would appear in – state or federal. It did not determine whether they were subject to criminal prosecution at all. That is not the case here, where, but for a "direct and significant" connection to activities in U.S. commerce, there would be no criminal prosecution in this country at all.

For that reason, this case is more like *United States v. Fields*, 500 F.3d 1327 (11th Cir. 2007). There, the defendant had been convicted of willfully failing to pay a past due support obligation to his child who resided in another state – a federal felony. *Id.* at 1328. He challenged his conviction on the basis that he had not known that the child had been moved out of state. *Id.* at 1329. The district court upheld the conviction, reasoning that the child's location was a mere

"jurisdictional fact." *Id.* at 1329. But the Eleventh Circuit reversed, holding that Fields's knowledge of his child's location was not merely jurisdictional but instead critical to his conviction. *Id.* The child's location, which was "neither Fields' doing, nor known to him," was the "wholly fortuitous circumstance" by which otherwise noncriminal behavior would be "transformed into a felony." *Id.* at 1333 (quoting *Feola*, 420 U.S. at 678-79). Thus, proof of Fields's knowledge of that fact was necessary to sustain his conviction. *Id.*

This Court should grant review and follow the Eleventh Circuit's lead. A background, inconsequential circumstance that was "neither [a foreign defendant's] doing, nor known to him," should not expose his otherwise non-criminal conduct to prosecution in this country. That cannot be what Congress intended when it required a "direct and significant connection" to U.S. commerce.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted as to both questions presented.

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED SEPTEMBER 3, 2025

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 24-1908-cr
August Term, 2024

UNITED STATES OF AMERICA,

Appellee,

v.

NEIL PHILLIPS,

Defendant-Appellant.

Argued: April 2, 2025
Decided: September 3, 2025

Before: SACK, BIANCO, and MERRIAM, *Circuit Judges.*

Defendant-Appellant Neil Phillips appeals from a conviction for commodities fraud. Phillips, a U.K. citizen and former hedge fund manager, was confident that the South African rand would strengthen against the United States dollar after the results of a South African election. Based on that prediction, he purchased a one-touch barrier option on behalf of his hedge fund that would pay out $20 million if, at any point before the option's expiration date,

the rand-to-dollar exchange rate dropped below 12.50 rand to 1 dollar. About a week before the option's expiration date, Phillips, while in South Africa, instructed a banker in Singapore to sell dollars to buy rand until the exchange rate dropped below the 12.50 needed to trigger the option; the banker obliged, and Phillips's hedge fund was paid the $20 million. The government indicted Phillips in the Southern District of New York for commodities fraud in violation of the Commodity Exchange Act ("CEA"), which regulates derivative financial instruments such as the one-touch barrier option, based on a theory that Phillips traded with the intent to deceive the counterparty to the option into paying out the $20 million. After Phillips was convicted following a jury trial, he moved for acquittal or new trial. The district court (Lewis J. Liman, *Judge*) denied Phillips's motion

On appeal, Phillips contends that the district court erred by (1) failing to instruct the jury on the proper standard for whether Phillips's foreign conduct had a "direct and significant connection with activities in, or effect on, commerce of the United States," as required for the United States to have extraterritorial jurisdiction under the CEA, 7 U.S.C. § 2(i)(1); (2) concluding that there was sufficient evidence of such a connection; (3) failing to properly instruct the jury on Phillips's intent; (4) failing to require the jury to find that Phillips created an artificial price in the dollar-rand exchange market; (5) concluding that there was sufficient evidence that Phillips's fraud was material to a counterparty to the option; and (6) convicting Phillips even though his case presented multiple issues of first impression, in violation of his due process rights. We

conclude that Phillips failed to meet his burden to show that the district court's extraterritoriality instruction was erroneous and that there was sufficient evidence that his conduct had a "direct and significant connection with activities in . . . [U.S.] commerce" because the two financial institutions who had obligations to pay out the option were based in the United States—the sort of connection that, based on the language and context around the enactment of the Dodd-Frank amendments to the CEA, Congress intended to regulate. We also conclude that Phillips failed to meet his burden to show that the district court erred regarding its instruction on intent, its decision not to include an instruction requiring proof of an artificial price, and its conclusion that there was sufficient evidence that Phillips's fraud would have been material to a reasonable investor Finally, we conclude that Phillips had fair notice that his conduct was unlawful, and his due process rights therefore were not violated. Accordingly, the district court's judgment is AFFIRMED.

SACK, *Circuit Judge*:

Neil Phillips, a former hedge fund manager, appeals from his conviction for commodities fraud based on his conduct related to a foreign-exchange derivative. *See United States v. Phillips*, No. 22-cr-138, 2024 WL 1300269 (S.D.N.Y. Mar. 27, 2024). On appeal, he challenges the district court's conclusion that the Commodity Exchange Act ("CEA") applied extraterritorially to his foreign conduct, the court's instructions to the jury on the elements of commodities fraud, the sufficiency of the evidence that his fraud would have been material to a

reasonable investor, and the court's conclusion that his conviction did not violate his right to due process.

For the reasons set forth below, we **AFFIRM** the district court's judgment.

BACKGROUND

A. Glen Point Capital's One-Touch Barrier Option

Phillips, a citizen of the United Kingdom, was the co-founder and co-Chief Investment Officer of a U.K.-based hedge fund, Glen Point Capital. He and his hedge fund operated in the foreign-exchange market, the global market for trading national currencies. The most basic trade in the foreign-exchange market is a "spot" trade, which is simply trading one currency for another—for example, selling South African rand to buy U.S. dollars. The relative value of one currency to another on the spot market—for example, how many rand it costs to buy one dollar—is the "exchange rate" between the two currencies. *See In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 74 F. Supp. 3d 581, 586-87 (S.D.N.Y. 2015); *Exchange Rate*, Black's Law Dictionary (12th ed. 2024). A litany of derivative financial instruments based on exchange rates are also traded in global financial markets. *See*, *e.g.*, *Dennis v. JPMorgan Chase & Co.*, 343 F. Supp. 3d 122, 142-43 (S.D.N.Y. 2018).

Phillips purchased one such derivative instrument on behalf of Glen Point Capital in October 2017. At the time, one U.S. dollar was worth about 14 rand. Phillips was

confident that in December 2017, Cyril Ramaphosa would be elected the new leader of South Africa's ruling party, and if so, the rand would strengthen against the dollar. Based on that prediction, Phillips purchased an option that would pay out if, at some point between October 30, 2017, and January 2, 2018, the exchange rate dropped below 12.50 rand to 1 dollar. This type of option is called a "one-touch barrier option"—if 1 dollar were worth less than 12.50 rand (the "barrier") at any moment ("one touch") during that period, the option would be triggered. Phillips's bet was a long shot: Glen Point Capital paid only about $2 million for the one-touch barrier option, but it would receive $20 million if the option were triggered.

The option that Glen Point Capital purchased was the product of a series of transactions. The London office of Morgan Stanley International—a subsidiary of Morgan Stanley, a financial company headquartered in the United States—wrote and sold the option to a United Kingdom-based broker, JB Drax Honoré ("JB Drax"), through JB Drax's account at the Royal Bank of Scotland ("RBS"), a U.K.-based bank. Glen Point Capital purchased the option through its broker, the London branch of JPMorgan, a bank headquartered in the United States. JPMorgan, functioning as the intermediary between Glen Point Capital and RBS, entered into an identical offsetting option with RBS. JPMorgan, as Glen Point Capital's prime broker, also guaranteed that it would pay $20 million to Glen Point Capital if the option triggered.

JB Drax keeps the counterparties anonymous when it brokers a trade. As a result, Glen Point Capital was

unaware that Morgan Stanley International was on the other side of the option. After writing and selling the option to JB Drax, Morgan Stanley International also entered into an identical offsetting option with a different, U.S.-based Morgan Stanley legal entity—Morgan Stanley Capital Services ("Morgan Stanley Capital").

The upshot of this series of transactions was that Morgan Stanley Capital Services—rather than Morgan Stanley International—was the counterparty that ultimately bore the risk of paying out $20 million if Glen Point Capital's option were triggered. And, whether or not RBS had first fulfilled its obligation to pay JPMorgan the $20 million from Morgan Stanley Capital, JPMorgan would be obliged to pay Glen Point Capital $20 million.

B. Phillips's Trades Trigger the Option

Phillips almost nailed his bet. On December 18, 2017, as Phillips predicted, Cyril Ramaphosa was elected party leader. That day, the value of the rand soared, moving the exchange rate as low as 1 dollar to 12.52 rand—a whisker from 12.50 but not quite enough to trigger the option. The rate soon went back up to around 12.80 and fluctuated between 12.70 to 12.90 for the next couple of days.

Then Phillips decided to take matters into his own hands. On December 20, he told one of his employees, Phil Costa, that Costa might need "to start fucking around in Dollar-Rand" to "lower" the exchange rate. Supp. App'x at 205-06. Phillips acknowledged that the option would not expire for a couple more weeks, but that "it'd be really nice

if we could get it done." Supp. App'x at 206. So, Phillips told Costa that if the exchange rate hit 12.55, they should "lash it through [12.50] tonight." Supp. App'x at 206. But the rate never dropped to 12.55, and Costa did not act. Over the next several days, the rate continued to hover above the 12.50 threshold.

Around the Christmas holiday, Phillips tried again. He was in South Africa at the time. On December 26, around 2:00 a.m. local time—midnight in the United Kingdom, and still Christmas Day in the United States—Phillips logged onto Bloomberg's online trading platform. Because of the holiday and the late hour, American and European markets were closed; with only Asian markets open, the foreign-exchange market was far less liquid than usual, as Phillips acknowledged on a phone call with Costa. Supp. App'x at 209 ("[T]here's no liquidity now in dollar-rand because it's Boxing Day."). On Bloomberg, Phillips directed a banker in Singapore working on behalf of a Japanese bank to begin selling dollars for rand. Just as Phillips had instructed Costa several days earlier, he told the banker that his "aim" was to "trade thru" the 12.50 barrier. Supp. App'x at 524. Phillips specifically asked the banker to "giv[e] bids," Supp. App'x at 521, which meant he was willing to sell dollars to buy rand at whatever price was being bid in the market without trying to get the best price. This was uncommon behavior for Phillips; a trader who worked under Phillips at Glen Point Capital would later testify that Phillips had never told him to "give bids." App'x at 1081-82.

Phillips started by instructing the banker to sell $25 million dollars for rand. That inched the exchange rate down from around 12.58 to 12.5675. He told the banker to sell another $50 million. The price inched down further, but not enough. He told the banker to sell another $200 million—again, not enough. So he told the banker to sell in as many batches of $100 million as would be needed to "get it thru" 12.50. Supp. App'x at 527-30. Ultimately, in less than an hour, Phillips sold $725 million dollars for around 9 billion rand before the exchange rate finally dropped to 12.499.[1] Phillips immediately told the banker to "stop" selling and get him "pro[o]f of the print," so that Phillips could verify that the exchange rate had dipped below 12.50 and cash in on the option. Supp. App'x at 529.

Mission accomplished—except now Glen Point Capital was holding nearly 9 billion in rand that Phillips did not want. On the morning of December 26, a few hours after completing the trades that triggered the option, Phillips told Costa that "at some point we['re] going to have to start buying this shit back," that is, selling rand to buy dollars. Supp. App'x at 209. But because the exchange rate had quickly rebounded to 12.545 after Phillips stopped his overnight trading, Glen Point Capital would be selling most of its rand at a loss. So, Phillips told Costa to wait and see "[i]f [the exchange rate] starts coming down" before selling, but that he did not "want to put any pressure on it." Supp. App'x at 210.

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1. Of course, for Phillips to buy that much rand, someone had to be selling it. One of those sellers was Morgan Stanley, which was selling to hedge its exposure to Phillips's option triggering.

Two days later, on December 28, the exchange rate had dropped to 12.2678, which meant Phillips could sell off the rand at a profit—but before doing so, he saw another opportunity. In addition to the option at 12.50, Glen Point Capital was holding another one-touch barrier option at 12.25. With that option so close to triggering, Phillips told Costa: "[W]e might need to do a job on it." Supp. App'x at 212. A couple of hours later, Costa instructed a trader to sell up to $100 million dollars for rand to "just hit the bids." Supp. App'x at 214-19. The exchange rate dipped below 12.25 after the trader had sold $35 million. Phillips told Costa to stop because "[w]e thru"—that is, through the threshold to trigger the option. Supp. App'x at 389. A few hours after this second one-touch barrier option was triggered, Phillips told Costa to sell off most of the several billion in rand that the fund had purchased on December 26 and 28.

C. Procedural History

In March 2022, a grand jury in the Southern District of New York indicted Phillips for commodities fraud and conspiracy to commit commodities fraud based on his conduct related to the one-touch barrier option.[2] He was arrested while on a family vacation in Spain and spent a month in a maximum-security Spanish prison, where he was physically assaulted multiple times. He was eventually extradited to the United Kingdom and then signed a waiver of extradition to the United States. After

2. Phillips was also indicted for wire fraud and conspiracy to commit wire fraud. However, the government did not elect to try those charges at trial.

his arraignment in the United States, he posted bond and returned to the United Kingdom.

The case went to a jury trial. Before trial, Phillips filed proposed jury instructions, which included, as relevant here, an instruction about whether the CEA reached his conduct, which primarily occurred abroad; an instruction on the proper standard to prove his intent to deceive; and an instruction informing the jury that it could not convict him of commodities fraud without proof that his trading caused an artificial dollar-rand exchange rate. The district court declined to adopt these instructions proposed by Phillips in its ultimate jury charge.

At trial, the government presented fourteen witnesses. Most were not directly involved in the trades but instead spoke generally about the global commodities market, regulatory requirements for commodities traders, and the types of trades that Phillips executed. The government also introduced transcripts of phone calls and records of online chats in which Phillips and his subordinates at Glen Point Capital instructed bankers to make the trades at issue.

At the close of the government's case, Phillips moved for acquittal; the court reserved decision. Phillips then put on his own expert witness, who testified that Phillips could have been buying rand not to influence the dollar-rand exchange rate, but to gain additional exposure to further strengthening of the rand that the fund would lose if the one-touch barrier option was triggered—a strategy referred to as "replacing delta." App'x at 1920-33.

This testimony conflicted with testimony from one of the government's experts, who testified that Phillips's trading was inconsistent with a strategy to replace delta, not to mention the phone calls and online chats in which Phillips said he was buying rand to trigger the option.

The jury convicted Phillips of one count of commodities fraud and acquitted him of the conspiracy count. Phillips moved for acquittal again and, in the alternative, for a new trial. In support of his motion for acquittal, he argued that the jury instruction on whether the CEA gave the United States jurisdiction over his foreign conduct was erroneous and that, even if the jury instruction correctly stated the law, there was insufficient evidence of extraterritorial jurisdiction. He also argued that there was insufficient evidence that he had fraudulent intent or that his fraud was material to Morgan Stanley Capital, the ultimate counterparty to the option. In support of his motion for a new trial, Phillips argued, among other things, that allowing the verdict to stand would cause manifest injustice because he lacked adequate notice that his actions were unlawful.

The district court (Lewis J. Liman, *Judge*) denied Phillips's post-trial motions. *See Phillips*, 2024 WL 1300269, at *33. The court sentenced Phillips to time served, two years of supervised release, and a $1 million fine. Although the court had calculated a 78-to-97-month guidelines range, it varied substantially downward in light of the time Phillips spent in harsh conditions in the Spanish prison and because the recommended sentencing enhancements based on the calculated loss of $18 million overstated the seriousness of Phillips's offense.

DISCUSSION

On appeal, Phillips raises six issues with his conviction: (1) whether the district court properly instructed the jury on the standard for whether Phillips's conduct was directly and significantly connected to activities in United States commerce, as required to determine whether the United States had jurisdiction over Phillips's activities under the CEA; (2) whether, even if that standard was correct, the court erred by determining that it was met here when Phillips's conduct took place abroad; (3) whether the court properly instructed the jury on Phillips's intent to deceive; (4) whether the court erred by not requiring the jury to find that Phillips created an artificial price in the dollar-rand exchange market; (5) whether there was sufficient evidence that Phillips's fraud was material to a counterparty to the option; and (6) whether Phillips's due process rights were violated by lack of fair notice that his conduct was unlawful. We discuss the CEA's framework for regulating financial instruments like the one-touch barrier option before addressing Phillips's arguments.

I. Swaps Regulation under the CEA and Dodd-Frank Act

The Commodity Exchange Act, as administered by the Commodity Futures Trading Commission (CFTC), regulates trades of derivatives in commodities. *See generally* 7 U.S.C. §§ 1-27f. Derivatives, such as futures and options, are contracts that derive their value from the underlying commodities, *Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 372 (D.C. Cir. 2013); commodities, as defined by the CEA, include everything from corn to copper to

currencies, *see* 7 U.S.C. § 1a(9).[3] Trades in commodity derivatives must be made on exchanges designated and regulated by the CFTC. 7 U.S.C. §§ 2, 6. In contrast, the CEA gives the CFTC relatively limited jurisdiction over "'spot' transactions (transactions for the immediate sale and delivery of a commodity) [and] 'cash forward' transactions (in which the commodity is presently sold but delivery is, by agreement, delayed or deferred)." *Salomon Forex, Inc. v. Tauber*, 8 F.3d 966, 970 (4th Cir. 1993). That differential treatment is by design. The CEA was enacted during the Great Depression[4] in response to concerns about "manipulation, speculation, and other abuses that could arise" from trading derivatives; spot and forward transactions were seen as posing less market risk than derivatives. *Id.* at 970-71; *see also* Lynn A. Stout, *Derivatives and the Legal Origin of the 2008 Credit Crisis*, 1 Harv. Bus. L. Rev. 1, 27-29 (2011) (explaining how "speculative trading in derivatives . . . can magnify shocks in underlying markets and amplify them into risks that are many times larger than the underlying market itself").

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3. The CEA's definition of "commodity" enumerates a long list of agricultural products, which for several decades were the only goods covered under the CEA. *See Salomon Forex, Inc. v. Tauber*, 8 F.3d 966, 970-72 (4th Cir. 1993). The CEA's definition of "commodity" was later expanded to include "all other goods and articles, except onions . . . and motion picture box office receipts." 7 U.S.C. § 1a(9); *see Salomon Forex*, 8 F.3d at 971-72. That catch-all language has been applied to metals, currencies, and much more. *See*, *e.g.*, *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 477 (7th Cir. 2002) (copper); *CFTC v. Am. Bd. of Trade, Inc.*, 803 F.2d 1242, 1248-49 (2d Cir. 1986) (currencies).

4. *See* Commodity Exchange Act, ch. 545, 49 Stat. 1491 (1936).

For many years, however, the CFTC lacked authority under the CEA to regulate a form of derivative called a "swap." Rena S. Miller, Cong. Rsch. Serv., R48451, *Introduction to Derivatives and the Commodity Futures Trading Commission* 3-4 (2025). Contrary to futures and traditional options, which contemplate delivery of or performance related to a commodity at some future time, swaps are "pure financial instrument[s] . . . based on the difference between two fluctuating values." *Hershey v. Energy Transfer Partners, L.P.*, 610 F.3d 239, 243 (5th Cir. 2010). An example of a swap is the type of one-touch barrier option at issue here: The parties entered into a contract based on their expectations about the relative value of dollars to rand.

Trading in swaps exploded in the early 2000s leading up to the 2008 financial crisis. Miller, *supra*, at 2. When that crisis occurred, many saw the previous lack of regulation in swaps as a contributing cause. *See id.* at 3; Fin. Crisis Inquiry Comm'n, *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* at xxiv-xxv (2011), https://perma.cc/rsb2-vz2z (concluding that unregulated swaps "contributed significantly" to the 2008 financial crisis, including being at the "center of the storm" when the housing bubble burst).

In response, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or the "Act"). Pub. L. 111-203, 124 Stat. 1376 (2010). The Act's goal was to "promote the financial stability of the United States by improving accountability and

transparency in the financial system." *Id.* at 1376. Among other sweeping regulatory changes, the Act brought much of the swaps market within the CFTC's purview for the first time. *See id.* § 722, 124 Stat. at 1672 (amending 7 U.S.C. § 2(a)(1)(A) to extend CFTC jurisdiction to swaps). It defined "swap" broadly to encompass "any agreement, contract, or transaction . . . that provides for any purchase, sale, payment, or delivery (other than a dividend on an equity security) that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence." *Id.* § 721, 124 Stat. at 1666 (amending 7 U.S.C. § 1(a)(47)).[5] The Act requires "swap dealers" and "major swap participants" to register with the CFTC, centralizes risk management of certain swaps, and imposes extensive reporting requirements on swap market participants. *See Sec. Indus. & Fin. Mkts. Ass'n v. CFTC*, 67 F. Supp. 3d 373, 387 (D.D.C. 2014) (summarizing various requirements added by the Dodd-Frank Act). The Act also amended the CEA to prohibit not only price manipulation, but also fraudulent behavior related to commodity derivatives and the underlying commodities more broadly. Pub. L. 111-203 § 753, 124 Stat. at 1750 (amending 7 U.S.C. § 9(1)); *see*, *e.g.*, *CFTC v. McDonnell*, 287 F. Supp. 3d 213, 217 (E.D.N.Y. 2018) (recognizing that "the amendments to the CEA under the Dodd-Frank Act permit the CFTC to exercise its jurisdiction over fraud that does not directly involve the sale of futures or derivative contracts").

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5. There is no dispute that the one-touch barrier option at issue here is a "swap" under this definition.

Relevant here, however, the CEA still expressly excludes much of the foreign-exchange spot market from direct regulation by the CFTC. *See* 7 U.S.C. § 2(c)(1)(A). In other words, Phillips's spot market sales of dollars to buy rand were not subject to CEA regulation. But *swaps* based on the foreign-exchange market, like the one-touch barrier option, *are* regulated by the CEA after the Dodd-Frank amendments.

In short, the Dodd-Frank amendments to the CEA corralled what had been a Wild West of swaps trading, imposing extensive registration and reporting requirements and civil and criminal penalties for conduct such as fraud, manipulation, and false reporting.

II. Extraterritorial Application of the CEA to Phillips's Conduct

Swaps' "contributions to the 2008 financial crisis were not limited to swaps executed on U.S. soil between U.S. counterparties." *Sec. Indus. & Fin. Mkts. Ass'n*, 67 F. Supp. 3d at 386. Instead, "[t]he swaps market is truly global." *Id.* (citation omitted). Against that backdrop, the Dodd-Frank Act applied the CEA's regulation of swaps not only to domestic conduct, but also to any 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). Whether that extraterritoriality provision extends to Phillips's conduct is the crux of Phillips's appeal.

Phillips contends that the district court erred in two ways in its rulings about whether the CEA gave the government jurisdiction over his conduct. First, he argues that the district court improperly charged the jury on the extraterritorial reach of the CEA because its instruction misinterpreted the standard set by 7 U.S.C. § 2(i)(1). He also argues that, even if the jury instruction correctly stated the legal standard, there was insufficient evidence that his conduct had a direct and significant connection with activities in U.S. commerce.

A. Extraterritoriality Doctrine

"Congress has the authority to enforce its laws beyond the territorial boundaries of the United States." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) (superseded by statute on other grounds). "Whether Congress has in fact exercised that authority," however, "is a matter of statutory construction." *Id.* Because regulation of foreign conduct can cause "clashes between our laws and those of other nations which could result in international discord," *id.*, we presume that statutes apply only to domestic conduct unless Congress evinces a clear intent for the statute to reach foreign conduct, *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 265, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010). Such intent is most obvious, of course, when Congress expressly states that a statute applies to foreign conduct. *See RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 340, 136 S.Ct. 2090, 195 L.Ed.2d 476 (2016).

Congress did just that in the Dodd-Frank amendments to the CEA. By the CEA's own terms, its regulation of swaps extends to "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); *see Prime Int'l Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94, 103 (2d Cir. 2019) (recognizing that § 2(i) "contains, on its face, a clear statement of extraterritorial application" (quotation marks and citation omitted)). But even "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." *Morrison*, 561 U.S. at 265, 130 S.Ct. 2869.

B. Jury Instruction on the CEA's Standard for Extraterritorial Jurisdiction

As the district court acknowledged, "there is a paucity of precedent interpreting Section 2(i)(1)." *Phillips*, 2024 WL 1300269, at *11; *see* Gina-Gail S. Fletcher, *Foreign Corruption as Market Manipulation*, 2020 U. Chi. L. Rev. Online 15, 23 (2020) ("To date, the CEA's manipulation and fraud provisions have not been extended extraterritorially. . . ."). This is only the second case of which we are aware that addresses the extent of foreign conduct covered by § 2(i)(1), and the first appeal to do so.[6]

6. The first case was *CFTC v. Gorman*, No. 21-cv-870 (VM), 2023 WL 2632111 (S.D.N.Y. Mar. 24, 2023), in which the district court summarily concluded that the defendant's misstatements to a Japanese counterparty lacked a "direct or significant connection with activities in, or effect on, commerce of the United States," *id.* at *10-11 (quoting 7 U.S.C. § 2(i)(1)). Also, in *Prime International*

So, beyond the statute's plain language, the district court was left to draft the jury instruction interpreting § 2(i)(1) on a mostly blank slate.

The court's instruction explained that the government must "prove beyond a reasonable doubt" 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.*" App'x at 1563-64 (emphasis added). That emphasized language comes directly from the CEA's extraterritoriality provision, 7 U.S.C. § 2(i)(1). The instruction explained that a connection is "direct" only if "the activity outside the United States directly and immediately affected activity in commerce of the United States without deviation or interruption," and that "[a]n indirect or attenuated connection to commercial activity that occurs in the United States is not sufficient to satisfy this element of the test." App'x at 1564. The instruction then explained that a connection is "significant" only if it is "meaningful or consequential":

> For activity outside the United States to have a significant connection with activity in commerce of the United States, the relationship between the activity outside the United States to the commercial activity in the United States must be of importance. It is not sufficient if the

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Trading v. BP P.L.C., 937 F.3d 94 (2d Cir. 2019), a civil plaintiff argued that § 2(i)(1) applied to the defendant's activities abroad, but we did not reach the issue because the plaintiff had failed to raise that argument in the district court, *id.* at 103-04.

> relationship between the conduct outside the United States and that inside the United States is random, fortuitous, attenuated or merely incidental. The conduct in the United States must be integral rather than ancillary.

App'x at 1564-65.

C. Phillips's Challenges to the Extraterritoriality Instruction

Phillips argues that the court's instruction misinterpreted 7 U.S.C. § 2(i)(1) in two ways. First, Phillips contends that conduct in the swaps market has a "direct and significant connection with activities in . . . [U.S.] commerce" under § 2(i)(1) only when the conduct "pose[s] a systemic risk to the U.S. financial system." Appellant's Br. at 28. Second, Phillips claims that the court should have clarified that the jury must find that Phillips's foreign trading activities were significant to activities in U.S. commerce—not that the activities in U.S. commerce have some significance to Phillips's foreign trading activities—for § 2(i)(1) to apply.

i. Legal Standard and Standard of Review

"A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." *United States v. Zheng*, 113 F.4th 280, 298 (2d Cir. 2024) (quotation marks and citation omitted). Phillips bears the burden to show that "his requested instruction accurately represented the law in

every respect and that, viewing as a whole the charge actually given, he was prejudiced." *Id.* (quotation marks and citation omitted).

The parties dispute the applicable standard of review for Phillips's challenges to the extraterritoriality instruction. Phillips says that we should review *de novo* the district court's interpretation of § 2(i)(1) as reflected in its instruction. *See*, *e.g.*, *United States v. Applins*, 637 F.3d 59, 72 (2d Cir. 2011) (explaining that challenges to jury instructions are reviewed *de novo*). The government counters that Phillips forfeited all challenges to the jury instruction on extraterritoriality because he did not renew his objections after the court rejected his preferred instruction, and that we should therefore review for plain error. *See*, *e.g.*, *United States v. Hunt*, 82 F.4th 129, 138 (2d Cir. 2023) (explaining that unpreserved objections to jury instructions are reviewed for plain error).

Phillips preserved his argument that the instruction should have defined "significant" to require proof of systemic risk. When a party objects and explains his objection, he need not keep objecting to preserve an issue for appeal if "it was evident in the circumstances that renewal of the objection would be futile because the court had clearly manifested its intention to reject the objection." *United States v. Grote*, 961 F.3d 105, 115 (2d Cir. 2020). That is what happened here. Phillips offered his own instruction on extraterritoriality that would have required proof that Phillips's "activities related to the swap . . . pose[d] a systemic risk to the United States financial system in order for them to have a direct

and significant connection with activities in, or effect on, commerce of the United States," App'x at 305-06. The court orally expressed skepticism about Phillips's instruction but did not immediately reject it. Phillips then offered a written and oral explanation for his position. When the court circulated a proposed charge on the morning of jury selection, it recognized that the parties had "made objections [to the jury instructions] before." App'x at 583. Under these circumstances, even though Phillips did not renew his objection after the court's final extraterritoriality instruction lacked the language he had proposed, any further objection "would have been a mere formality[] with no reasonable likelihood of convincing the court to change its mind" because Phillips had already "argued [his] position to the district judge, who rejected it." *Thornley v. Penton Publ'g, Inc.*, 104 F.3d 26, 30 (2d Cir. 1997); *see also Girden v. Sandals Int'l*, 262 F.3d 195, 202 (2d Cir. 2001) ("[A] failure to object after a charge is given is excused where . . . a party makes its position clear . . . and the trial judge is not persuaded.").

Conversely, Phillips failed to preserve his argument that the court's instruction should have clarified that, to satisfy § 2(i)(1)'s "significant connection" requirement, the jury must find that Phillips's swap-related activities were "integral rather than ancillary" to activities in U.S. commerce, App'x at 1565, not that some U.S. commercial activities were integral to Phillips's swap-related activities. Phillips never presented this argument before the district court by way of either his proposed jury instruction or an objection at the charge conference after reviewing the district court's intended charge. The district

court lacked notice of Phillips's argument, so the argument is forfeited and plain error review applies. *See United States v. Vilar*, 729 F.3d 62, 88 (2d Cir. 2013) (explaining that when a defendant "fails to make a specific and timely objection to a district court's jury charge," plain error review applies). Under plain error review, we may reverse only when "(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Miller*, 954 F.3d 551, 557-58 (2d Cir. 2020) (quotation marks and citation omitted).

ii. Meaning of "Significant" in § 2(i)(1)

Again, the CEA's jurisdiction extends to foreign activities 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). Phillips theorizes that because the word "significant" modifies both "connection with activities in" and "effect on" "commerce of the United States," and it would take a lot for a fraudulent commodity trade to have a "significant . . . effect on" the entire system of U.S. commerce, it should also take a lot—as Phillips puts it, a "systemic risk" to the U.S. economy—for a "connection with activities in the United States" to be "significant." Appellant's Br. at 32-36.

Phillips's proposed instruction is divorced from the plain meaning of § 2(i)(1). First, the ordinary meaning of the word "significant" is expansive; it is not limited to

magnitudes as large as "systemic." *See*, *e.g.*, Black's Law Dictionary (12th ed. 2024) (defining "significant" as "[o]f special importance; momentous, as distinguished from insignificant"). The ordinary meaning is not altered by the context of § 2(i)(1). § 2(i)(1) is disjunctive: it covers activities that have a "direct and significant connection with activities in . . . [U.S.] commerce" *or* a "direct and significant . . . effect on [U.S.] commerce." Phillips's efforts to trigger the one-touch barrier option may have lacked a significant *effect on* U.S. commerce writ large; he committed a $20 million fraud in a multi-trillion-dollar industry. But contrary to Phillips's interpretation, that does not mean his activities lacked a significant *connection with* activities in U.S. commerce. Congress's choice of wording suggests that it intended to regulate commodities trading abroad that has a direct and significant connection with commercial activities occurring in the United States, but when there is no such connection, to regulate only trading with a direct and significant effect on the U.S. economy. In other words, Congress set a far higher bar for the government to clear before it may regulate conduct that lacks direct and important ties to the United States. Phillips's interpretation would collapse the distinction such that "significant connection" and "significant effect" mean essentially the same thing—a systemic risk to U.S. commerce—despite Congress's decision to use two different words in disjunctive clauses. *See Pulsifer v. United States*, 601 U.S. 124, 149, 144 S.Ct. 718, 218 L.Ed.2d 77 (2024) ("In a given statute, the same term usually has the same meaning and different terms usually have different meanings.").

Language in other provisions of the CEA further undercuts Phillips's preferred instruction. When Congress wants to limit the CEA's reach to "systemically important" activities, it says so: Another section of the CEA requires an entity to register as a "major swap participant" if it is "systemically important or can significantly impact the financial system of the United States." 7 U.S.C. § 1a(33). When a statute "use[s] one term"—significant—"in one place, and a materially different term"—systemically important—"in another, the presumption is that the different term denotes a different idea." *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 458, 142 S.Ct. 1783, 213 L.Ed.2d 27 (2022) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012)). Congress could have limited the CEA's jurisdictional scope to activities that are "systemically important to the financial system of the United States," but it chose not to. Phillips has failed to show that his requested instruction accurately represents the law. *See Zheng*, 113 F.4th at 298.

Unlike Phillips's proposed instruction, the district court's instruction was consistent with § 2(i)(1). The instruction 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," App'x at 1564—the exact standard stated in § 2(i)(1). The instruction explained 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." App'x at 1564. These definitions are consistent with the typical meanings of "direct" and "significant." *See*, *e.g.*, Black's Law Dictionary (12th ed. 2024) (defining "direct" as "[f]ree from extraneous influence; immediate" and "significant" as "[o]f special importance; momentous, as distinguished from insignificant").

The court's interpretation of § 2(i)(1) as reflected in the jury instruction is also consistent with customary principles of international law. Courts presume that Congress drafts statutes so as not to conflict with international law unless the statute's text or broader context suggests otherwise. *See United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (L. Hand, *J.*) (explaining that courts interpret statutory language in light of "the limitations customarily observed by nations upon the exercise of their powers"). Here, international law treatises suggest that nations customarily regulate foreign conduct when "there is a genuine connection between the subject of the regulation and the state seeking to regulate," such as "conduct . . . being committed . . . against its nationals." Restatement (Fourth) of Foreign Relations Law § 407 & cmt. c.; *see also* Restatement (Third) of Foreign Relations Law § 403(2) & cmt. h (1987) (noting that nations customarily regulate foreign activities such as commodities trading that "has [a] substantial, direct, and foreseeable effect upon *or in* the [country]" and when there are "connections, such as nationality, residence, or economic activity . . . between that state and those whom

the regulation is designed to protect" (emphasis added)); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164, 124 S.Ct. 2359, 159 L.Ed.2d 226 (2004) (deriving international law principles from the Restatement (Third) of Foreign Relations Law when interpreting a statute's meaning). For example, the European Union prohibits fraud and manipulation related to "financial instruments . . . the price or value of which depends on or has an effect on the price or value of a financial instrument" listed or traded on EU markets even for "actions and omissions" that occur outside the EU. Reg. EU No. 596/2014, art. 2, 2014 O.J. (L 173) 1, 17.

The district court's instruction regarding § 2(i) properly "limit[ed] that provision to its terms." *Morrison*, 561 U.S. at 265, 130 S.Ct. 2869. Phillips has failed to meet his burden of showing that his proposed instruction was right and the district court's instruction was wrong. *See Zheng*, 113 F.4th at 298; *United States v. Jimenez*, 96 F.4th 317, 322 (2d Cir. 2024) (holding that the defendant "fail[ed] to meet his burden of establishing error because the district court's jury instruction . . . was a correct statement of the law").

iii. "Significant" to Whom?

As explained above, unlike for his challenge about systemic risk, Phillips forfeited his argument that the instruction on extraterritoriality should have more clearly defined "significant connection" to mean that the connection must be important to U.S. commercial activities, not just to Phillips's foreign swaps activities.

Plain error review therefore applies. *See Vilar*, 729 F.3d at 88. To establish plain error, Phillips must demonstrate, among other things, that the alleged error was "clear or obvious, rather than subject to reasonable dispute," and that there is "a reasonable probability that the jury would not have convicted him absent the error." *United States v. Marcus*, 628 F.3d 36, 42 (2d Cir. 2010) (quotation marks and citation omitted).

Phillips cannot show that the alleged error is clear or obvious because the district court's jury instructions as a whole demonstrate that the connection must be significant and important to activities in U.S. commerce. *See United States v. Sabhnani*, 599 F.3d 215, 237 (2d Cir. 2010) ("We emphatically do not review a jury charge on the basis of excerpts taken out of context, but in its entirety." (quotation marks and citation omitted)). Phillips focuses only on the portion of the district court's jury instruction stating that the "[t]he conduct in the United States must be integral rather than ancillary," App'x at 1564-65, which he contends "does not clearly identify to whom or to what the conduct must be 'integral,'" Appellant's Br. at 39 n.11. However, he ignores the context in which that instruction was given. The district court first instructed the jury that it must find that Phillips's activities related to the one-touch barrier option must have "a direct *and* significant connection with activities in commerce of the United States." App'x at 1564 (emphasis added). It then immediately explained that a connection is "direct" "if the activity outside the United States *directly and immediately affected* activity in commerce of the United States without deviation or interruption." App'x at 1564

(emphasis added). With that context, the district court then explained that "significant" means "meaningful," "consequential," "of importance," and "integral." App'x at 1564-65. Because the district court already made clear that the "direct" prong of the conjunctive test is measured by its effect on U.S. commercial activities, a reasonable juror would surely understand that the "significant" prong of that test does the same. In addition, the alleged error could not be plain because the district court's interpretation of 7 U.S.C. § 2(i)(1) was an issue of first impression and not contrary to its plain text. See *United States v. Weintraub*, 273 F.3d 139, 152 (2d Cir. 2001) (explaining that a reviewing court "typically will not find [plain] error where the operative legal question is unsettled" (quotation marks and citation omitted)). Accordingly, we cannot conclude that the extraterritoriality instructions as a whole were clearly or obviously erroneous.

Moreover, even if the district court had more specifically stated that significance must be determined from the perspective of U.S. commercial activities, there is not "a reasonable probability that the jury would not have convicted him absent the error." *Marcus*, 628 F.3d at 42 (quotation marks and citation omitted). As discussed below, there was sufficient evidence for the jury to conclude that Phillips's foreign swap activities were of significance to commercial activities in the United States.

D. Sufficiency of the Evidence that the Court Had Extraterritorial Jurisdiction under the CEA

Phillips next asserts that, even if the court's instruction correctly described the CEA's extraterritorial

reach, the evidence at trial was insufficient to support a finding that his conduct had "a direct and significant connection with activities in . . . [U.S.] commerce" under § 2(i)(1). For this sufficiency challenge, we must affirm "if, viewing all the evidence in the light most favorable to the prosecution, . . . *any* rational trier of fact could have found . . . beyond a reasonable doubt" that Phillips's conduct had a direct and significant connection with activities in U.S. commerce. *United States v. Middlemiss*, 217 F.3d 112, 117 (2d Cir. 2000) (quotation marks and citation omitted); *see also Applins*, 637 F.3d at 76 (noting that because "we must credit every inference that could have been drawn in the government's favor," a defendant bringing a sufficiency challenge "bears a heavy burden" (quotation marks and citation omitted)).

In its opinion on Phillips's post-trial motions, the district court concluded that the connection was direct and significant. The court first rejected as insufficient several purported "connections" alleged by the government: that some of the trades matched on servers located in the United States, that copies of Phillips's Bloomberg chats were saved onto servers located in the United States, that the payout of the option was ultimately transferred to a Glen Point Capital account in New York after several intervening steps, and that Glen Point Capital's American clients received some of that paid-out money in New York. *See Phillips*, 2024 WL 1300269, at *14-15 (explaining that these "incidental and insubstantial ties to the United States" could not meet, individually or collectively, the § 2(i)(1) standard). But the court concluded that the jury could have found that two connections to "activities in . . . [U.S.]

commerce" were "direct and significant": (1) JPMorgan, Glen Point Capital's prime broker that facilitated the sale of the option, is a U.S. financial institution and (2) Morgan Stanley Capital, the substantive counterparty to the option, is also a U.S. financial institution. *Id.* at *16-17. We agree.

i. Evidence of a Direct Connection

A rational jury could have found that Phillips's conduct related to the one-touch barrier option was directly connected to activities in U.S. commerce based on the conduct's relationship with JPMorgan. Phillips, on behalf of Glen Point Capital, purchased the option directly from its broker, JPMorgan. To be sure, Phillips purchased the option through JPMorgan's London branch, but a branch of a bank is not typically considered a separate legal entity from the parent bank. *See Bayerische Landesbank, N.Y. Branch v. Aladdin Cap. Mgmt. LLC*, 692 F.3d 42, 51 (2d Cir. 2012). Even setting that aside, though, Glen Point Capital entered into its contract to purchase the option with "JPMorgan Chase Bank, N.A.," which the contract expressly noted is a U.S. bank. Supp. App'x at 653-57 (contract terms detailing the "Transaction entered into between JPMorgan Chase Bank, N.A. . . . and Glen Point Capital" and noting that JP Morgan Chase Bank, N.A. is organized "under the laws of USA" with its main office in "Columbus, Ohio"). A jury could rationally find that manipulation related to an agreement entered into with a U.S. bank is directly connected to activities in U.S. commerce under § 2(i)(1).

There was also sufficient evidence, drawing all inferences in favor of the government as we are required to do, to allow the jury to find a direct connection with Morgan Stanley Capital, another U.S. financial institution. As the district court properly instructed the jury, a connection is "direct" if "the activity outside the United States directly and immediately affected activity in commerce of the United States without deviation or interruption." App'x at 1564; *see also Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 108 (2d Cir. 2016) (interpreting a "direct effect" in the Foreign Sovereign Immunities Act's extraterritoriality provision as one that "follow[s] as an immediate consequence of the defendant's activity" (citation modified)). Morgan Stanley Capital was required to pay $20 million as an immediate consequence of Phillips's actions that triggered the option.

Phillips claims the connection to Morgan Stanley Capital was indirect because it occurred only through a series of transactions and Glen Point Capital lacked a contractual relationship with Morgan Stanley Capital. But even though Glen Point Capital purchased the option through a broker, the relationship between a defendant and a fraud victim is usually not rendered indirect just because a broker facilitated the transaction. *See Atlantica Holdings*, 813 F.3d at 103, 113-14 (holding that the defendant's misrepresentations about the value of securities had a "direct effect" on the securities' buyers in the United States even though the securities were bought through a broker). And, although Phillips could not have known that Morgan Stanley Capital was on the other side

of the option because JB Drax shielded the counterparties' identities, a connection "need not be foreseeable to be direct." *Id.* at 115. There was sufficient evidence for a rational jury to find that the connection was direct.

ii. Evidence of a Significant Connection

A rational jury could also have concluded that these direct connections between Phillips's trading and activities in U.S. commerce were "significant" to those U.S. commercial activities under 7 U.S.C. § 2(i)(1). As further discussed in the next section, the evidence at trial showed that Phillips manipulated the dollar-rand exchange rate to defraud the counterparty to the one-touch barrier option out of $20 million. The ultimate counterparty forced to pay the $20 million was Morgan Stanley Capital. If Morgan Stanley Capital had not paid the option, JPMorgan would have been on the hook as Glen Point Capital's prime broker. Because the actual and potential victims of Phillips's manipulative scheme were U.S. financial institutions, a rational jury could have found that the connection between Phillips's conduct and activities in U.S. commerce was "of importance" and "integral." App'x at 1564-65 (jury instructions on the meaning of "significant" in 7 U.S.C. § 2(i)(1)).

Our conclusion that the victim of fraud being a U.S. financial institution can render the connection between foreign activity and U.S. commerce "significant" is consistent with the purposes of the Dodd-Frank amendments and customary international law. The Dodd-Frank Act's stated goal was to "improve accountability

and transparency in the financial system." Pub. L. 111-203, 124 Stat. at 1376. In support of that goal, Congress amended the CEA to "augment the [CFTC's] existing authority to prohibit fraud and manipulation." *Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation*, 76 Fed. Reg. 41398, 41401 (July 14, 2011) (CFTC explaining amendments to 7 U.S.C. § 9(1)); *see also* 7 U.S.C. § 5(b) (stating as a purpose of the CEA to "deter and prevent price manipulation or any other disruptions to market integrity" and "to ensure the financial integrity of all transactions subject to this chapter"). Congress added an extraterritoriality provision that would apply those expanded antifraud protections to at least some foreign conduct. *See* 7 U.S.C. § 2(i). And it is entirely within the bounds of customary international law for such an extraterritoriality provision to regulate "conduct . . . being committed . . . against [a country's] nationals." Restatement (Fourth) of Foreign Relations Law § 407 & cmt. c. *See also* Restatement (Third) of Foreign Relations Law § 403 & cmt. h (noting that nations customarily regulate foreign activities such as commodities trading when there are "connections, such as nationality, residence, or economic activity . . . between that state and those whom the regulation is designed to protect"). As the district court put it, "Phillips acted to defraud the ultimate counterparty to [the one-touch barrier option], whoever that may be, but the United States does not share his indifference to his victim's identity." *Phillips*, 2024 WL 1300269, at *17.

Phillips cautions that finding a direct and significant connection here sends us careening down a slippery slope in which 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 "necessarily creates a direct and significant connection to U.S. commercial activities under Section 2(i)." Appellant's Br. at 51-52. Direct, perhaps. But significance depends on context. A run-of-the-mill swap between a foreign and U.S. entity may not in all circumstances be "significant" to activities in U.S. commerce under the CEA. However, a reasonable juror may well understand the $20 million amount at issue in *this* case to be of significance to the U.S. financial institutions' commercial activities. Although Phillips points out that certain registration and reporting requirements under the CEA do not kick in unless a swaps trader is trading billions of dollars in swaps, none of those cited provisions use the word "significant," and Phillips advances no arguments as to why the extraterritoriality provision and the substantive provisions in the CEA (and the CFTC's regulations interpreting those provisions) must be coextensive. *See* 7 U.S.C. § 1a(49)(D) (defining "swap dealer" to exclude entities that "engage in a de minimis quantity of swap dealing"); *id.* § 6s (imposing registration and reporting requirements on "swap dealers"); 17 C.F.R. § 1.3 (setting the de minimis exception for certain requirements at $8 billion daily average exposure from swaps trades). In short, just because the CEA does not concern itself with all foreign swap activities in which a broker or ultimate counterparty is a U.S. entity does not mean that it is unconcerned with *this* connection.

Phillips submits that if Congress intended for the CEA's extraterritorial reach to turn on whether a U.S. entity was a victim of a crime, it would have worded § 2(i)(1) differently. In support, he points to statutes that expressly apply extraterritorially when a U.S. citizen is harmed. *See, e.g.*, 18 U.S.C. § 37(b)(2) (criminalizing violence at airports abroad when the victim is a U.S. national). We disagree. That the CEA covers any swaps-related conduct that has a "direct and significant connection with activities in . . . [U.S.] commerce" suggests that the statute is meant to cover a *broader* range of activities than just those in which a U.S. entity is harmed. Harm to a U.S. entity is a relevant factor in whether the connection is significant, but not the only consideration. Indeed, that Congress drafted a broad extraterritoriality provision makes sense in light of the swaps market's global nature and the context in which the Dodd-Frank amendments were enacted: Foreign swaps, including swaps engaged in by foreign subsidiaries of U.S. financial services companies, were considered a driving factor in the 2008 financial crisis. *See Sec. Indus. & Fin. Mkts. Ass'n*, 67 F. Supp. 3d at 386.

On a different tack, Phillips argues that the connection to Morgan Stanley Capital was "random," "attenuated," and "incidental"—which, according to the jury instructions' own terms, would mean that the connection was not "significant," App'x at 1564-65. He asserts that because U.K-based Morgan Stanley International sold the option that Glen Point Capital purchased through JPMorgan, and a separate U.S.-based Morgan Stanley entity only took on the risk of the one-touch barrier option because it chose to enter an offsetting option with Morgan

Stanley International as part of Morgan Stanley's risk management policy, the connection between Phillips's trading and activities in U.S. commerce was necessarily "attenuated." Appellant's Br. at 44-45.

But, as a witness from Morgan Stanley testified at trial, such arrangements are "standard practice in the business." App'x at 988. U.S.-based financial services companies often "operate in global swaps markets not only as direct counterparties, but also through relationships with their foreign branches, affiliates, and subsidiaries." *Sec. Indus. & Fin. Mkts. Ass'n*, 67 F. Supp. 3d at 386. These risk-shifting operations "are an integral part of the swap because they assuage counterparty concerns that the foreign affiliate or subsidiary will be unable to meet its swap obligations." *Id.* (quotation marks and citation omitted). And, again, the risks created by these sorts of relationships were widely considered a cause of the 2008 financial crisis. *Id.* When Congress responded to that crisis by bringing swaps under the CEA's purview through the Dodd-Frank Act, we can assume it knew that this is how swaps typically work. It is unlikely that Congress intended for the meaning of a "significant connection" to U.S. commerce in § 2(i)(1) to turn on whether the foreign conduct was connected to a U.S. company—as opposed to a subsidiary of a U.S. company—when the risks to U.S. commerce are the same either way based on standard industry practice.

Nor was the jury required to conclude that the relationship was insignificant merely because Phillips was unaware that Morgan Stanley Capital was the true

counterparty to the option. Section 2(i)(1) focuses on whether Phillips's "activities outside the United States" had a "significant connection with activities in . . . [U.S.] commerce." The connection between Phillips's intentional fraudulent activity abroad and his victim's activities in U.S. commerce is no less "integral" or "important" because Phillips was unaware of the connection. "[W]e have repeatedly refused to find knowledge of the jurisdictional fact to be an essential element in prosecutions under various criminal statutes requiring, for instance, that the criminal acts affect interstate or foreign commerce" unless "the statute itself requires knowledge of the jurisdictional element." *United States v. Epskamp*, 832 F.3d 154, 167 (2d Cir. 2016) (citation modified) (collecting cases). Just as in statutes in which the "element of interstate transportation is merely a jurisdictional element, for which proof of the fact of transportation is proof enough," without an "additional requirement of knowledge," *United States v. Eisenberg*, 596 F.2d 522, 526 (2d Cir. 1979), proof of a direct and significant connection with activities in U.S. commerce is proof enough under 7 U.S.C. § 2(i)(1).

In sum, there was sufficient evidence for a rational jury to find beyond a reasonable doubt that Phillips's actions related to the one-touch barrier option had a direct and significant connection with activities in U.S. commerce.[7]

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7. Because we conclude that there was sufficient evidence that the CEA applied extraterritorially to Phillips's conduct, we need not and do not address the government's alternative argument that there was sufficient evidence that Phillips's conduct occurred domestically in the United States. *See* Gov't Br. at 47-51; *Phillips*, 2024 WL 1300269, at *3-10 (rejecting the government's argument).

III. Commodities Fraud under the CEA

Having concluded that Phillips's actions fell within U.S. jurisdiction, we turn to the substantive elements of commodities fraud. Phillips was convicted of commodities fraud in violation of 7 U.S.C. §§ 9(1) and 13(a)(5) and 17 C.F.R. § 180.1. Section 9(1) prohibits the "use or employ[ment]" of "any manipulative or deceptive device or contrivance" "in connection with any swap" in violation of CFTC regulations. Section 13(a)(5) provides that any such fraudulent scheme is a felony if done "willfully to violate" the CEA or any CFTC regulations promulgated thereunder. The CFTC regulation under which Phillips was charged, 17 C.F.R. § 180.1(a)(1), makes it "unlawful for any person, directly or indirectly, in connection with any swap, . . . to intentionally or recklessly . . . [u]se or employ . . . any manipulative device, scheme, or artifice to defraud."

So, the three elements for liability under those statutory and regulatory provisions are (1) misrepresentation or deception, (2) materiality, and (3) scienter. *CFTC v. S. Tr. Metals, Inc.*, 894 F.3d 1313, 1325 (11th Cir. 2018). Applying those elements here, the district court charged the jury that it must find the following beyond a reasonable doubt to convict Phillips of felony commodities fraud: "(1) that Phillips employed a manipulative device, scheme, or artifice to defraud; (2) that the scheme, untrue statement, act, practice, or course of conduct was in connection with a swap, in that it would be material to a decision by a counterparty to the swap; and (3) that Phillps acted knowingly, willfully, and with an intent to defraud and,

in particular, with an intent to defraud a counterparty to the One Touch Option." *Phillips*, 2024 WL 1300269, at *18 (summarizing elements charged to the jury); *see also* App'x at 1549-50 (jury charge explaining the elements).

On appeal, Phillips raises three issues related to the elements of commodities fraud.

A. Jury Instruction on Phillips's Manipulative Intent

Phillips first challenges the jury instruction on whether he had the requisite manipulative intent to satisfy the first element of commodities fraud. We review the legal standard stated in the jury instruction *de novo.*[8] *See Applins*, 637 F.3d at 72.

The government's theory of commodities fraud in this case turned on trades Phillips made on the open foreign-exchange market—selling several hundred million dollars to buy around 9 billion rand. When trades in commodities or securities are made on an open market, it is often difficult to distinguish lawful trading from fraudulent or manipulative trading. For example, "short

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8. Once again, the government argues that Phillips forfeited any challenge to the jury instruction on intent, so we should therefore review for plain error. We disagree; Phillips consistently argued that the district court should adopt a "sole intent" instruction, *see* App'x at 302, 333, 361, 383, 485-90, which the district court declined to do in fashioning its own jury charge. Under the circumstances apparent in the record, any further objection would have been futile, *see Grote*, 961 F.3d at 115.

selling [stocks]—even in high volumes—is not, by itself, manipulative. . . . To be actionable as a manipulative act, short selling must be willfully combined with something more to create a false impression of how market participants value a security." *ATSI Comms., Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 101 (2d Cir. 2007). That something more is fraudulent intent. "In some cases," such as Phillips's, the intent to deceive or manipulate "is the only factor that distinguishes legitimate trading from improper manipulation." *Set Cap. LLC v. Credit Suisse Grp. AG*, 996 F.3d 64, 77 (2d Cir. 2021) (quotation marks and citation omitted).

To that end, the court instructed the jury that "an act is manipulative if it is designed to deceive or defraud others by sending a false pricing signal to the market," but a transaction is not manipulative "when the market is fully aware of the terms of and purposes behind a transaction." App'x at 1550. The instruction went on to explain:

> What matters is whether the defendant has an intent to inject a false price signal into the market or to mislead others by artificially affecting the price. The question you should ask is whether the defendant acted with the intent to deceive or defraud others by sending a false pricing signal into the market. If there are two purposes for a transaction, one of which is legitimate, and if the transaction would have been done at the same time and in the same manner for the legitimate purpose, it is not manipulative even if the defendant also had

> an intent to deceive or to send a false price signal into the market. On the other hand, if the transaction would not have been done at the same time and in the same manner, except for the intent to mislead, then the transaction is manipulative.

App'x at 1551. Applying those principles to Phillips's case, the court instructed the jury: "[I]f but for an intent to deceive, [Phillips] would not have conducted the transactions in the dollar-rand foreign exchange spot market at the times and in the amounts he did, then those transactions were manipulative." App'x at 1551-52. The court then reiterated that it would "not [be] sufficient that the defendant knew his transactions would affect the dollar-rand exchange rate; instead, he must have made those transactions for the purpose of affecting the exchange rate and defrauding a counterparty to the barrier option contract." App'x at 1553-54. Finally, the court explained that a defendant does "not act willfully or with intent to defraud if he honestly believes that his actions were proper," and that the government bore the burden of proving Phillips's fraudulent intent beyond a reasonable doubt. App'x at 1554.

Phillips bristles at the court's invocation of a but-for causation standard. He argues that a "but-for" standard—whether Phillips would have traded in the same manner but for his intent to deceive—is too relaxed a causation standard to support a criminal conviction. He contends that the court should have instead required

the jury to find that Phillips's *sole* intent was to deceive the counterparty to the option. In Phillips's view, that matters because he intended not only to manipulate the dollar-rand exchange rate, but also to "replace delta"—that is, to gain additional exposure to any further strengthening of the rand that the fund would otherwise lose once the option was triggered.

We find Phillips's arguments unpersuasive. For one, he cherry-picks parts of the court's instruction to suggest that it set too relaxed an intent standard. *See Jones v. United States*, 527 U.S. 373, 391, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999) ("[I]nstructions must be evaluated not in isolation but in the context of the entire charge."). Phillips ignores the limiting role of the court's separate scienter charge, which made clear that the government bore the burden of proving beyond a reasonable doubt "that the defendant acted knowingly, willfully, and with an intent to defraud." App'x at 1549. The court explained that to act willfully means to act "with a purpose to disobey or disregard the law." App'x at 1553. And, as to the intent to defraud, the court explained that Phillips "must have made th[e] transactions for the purpose of affecting the exchange rate and defrauding a counterparty to the barrier option contract." App'x at 1554. Taken as a whole, the court's instruction charged the jury with an intent standard virtually indistinguishable from the sole-intent standard Phillips requested. *United States v. Banki*, 685 F.3d 99, 105 (2d Cir. 2012) ("If the substance of a defendant's request is given by the court in its own language, the defendant has no cause to complain."

(quoting *United States v. Han*, 230 F.3d 560, 565 (2d Cir. 2000))).[9]

In any event, Phillips's challenge fails because his proposed sole-intent instruction is inaccurate. The intent element for specific intent crimes, such as commodities fraud, can usually be satisfied even if the defendant has multiple reasons for taking an action, so long as one reason is the intent to deceive. *See United States v. Technodyne LLC*, 753 F.3d 368, 385 (2d Cir. 2014) (collecting cases). Instead, "when Congress has meant to impose a sole-intent limitation, it has done so expressly." *Id.* (citing 18 U.S.C. § 227(a), which prohibits certain government officials from influencing private entities' employment decisions "with the intent to influence[] *solely* on the basis of partisan political affiliation"). The statutes and regulation under which Phillips was convicted make

9. At oral argument, Phillips insisted that the instruction's reference to but-for causation would sweep in "agreed-upon legitimate trading" that his proposed sole-intent instruction would not reach. Oral Argument at 32:38-33:53. He offered the example of iceberg orders, in which a trader disguises the true amount of demand or supply by making a series of small trades rather than one large trade. But even if one purpose of the typical iceberg order is to obfuscate the trader's true intentions, the court's instructions as a whole make clear that such "agreed-upon legitimate trading" would not be criminal in the absence of fraudulent intent and willfulness, that is, a purpose to disobey the law. *See United States v. Vorley*, No. 10CR00035 (JJT), 2021 WL 1057903, at *6 (N.D. Ill. Mar. 18, 2021) (describing legitimate, non-manipulative purpose for iceberg orders). An iceberg order, like any other open-market transaction, is criminal only in light of affirmative evidence of fraudulent intent and willfulness beyond a reasonable doubt.

no mention of sole intent. And we are unaware of any case in which a court has applied a sole-intent standard for commodities or securities fraud. The district court therefore did not err to the extent that its instruction did not require proof of sole intent.

Phillips's remaining arguments on the intent instruction fare no better. First, he suggests that by instructing the jury that "if the transaction would not have been done at the same time and in the same manner, except for the intent to mislead, then the transaction is manipulative," App'x at 1551, the court impermissibly "'creat[ed] a mandatory presumption that shifted to the defendant the burden of persuasion on the crucial element of intent'" by "encourag[ing] the jury" to "find manipulative intent if Phillips traded at particular times and amounts," Appellant's Br. at 55 (quoting *Francis v. Franklin*, 471 U.S. 307, 325, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985)). For one, that portion of the instruction does not say that the jury must find Phillips guilty if he traded at certain times in certain amounts, nor does it say anything about the burden of persuasion. Conversely, in *Francis*, the Supreme Court held that the defendant's due process rights were violated by an instruction that directed the jury to "presume" that a defendant of sound mind and discretion "intend[s] the natural and probable consequences of his acts but the presumption may be rebutted." 471 U.S. at 315, 105 S.Ct. 1965 (quoting jury instruction). That instruction, unlike the district court's here, erroneously suggested that the defendant bore the burden to rebut a presumption of intent when the government in fact bore the burden to prove intent beyond

a reasonable doubt. *Id.* at 315-25, 105 S.Ct. 1965. And here, just a few lines after the language Phillips challenges, the court's instruction made clear that "[t]he burden is on the government to prove fraudulent intent and thus a lack of good faith, beyond a reasonable doubt." App'x at 1554; *see Jones*, 527 U.S. at 391, 119 S.Ct. 2090 (explaining that "instructions must be evaluated not in isolation but in the context of the entire charge").

Phillips also contends that the court's instruction on intent "improperly invited the jury to determine [his] motive for trading, rather than his intent." Appellant's Br. at 56. To be sure, motive and intent are distinct concepts. *See United States v. Harvey*, 653 F.3d 388, 396 (6th Cir. 2011) ("Motive is what prompts a person to act. . . . Intent refers only to the state of mind with which the particular act is done." (quotation marks and citation omitted)). But motive can be probative of criminal intent. *See United States v. Landesman*, 17 F.4th 298, 323 (2d Cir. 2021). And, once again, the court explained throughout its instruction on intent that it was Phillips's willful intent to deceive, not merely any nefarious motive for trading, that the jury must find beyond a reasonable doubt. *See* App'x at 1552-54; *see also Jones*, 527 U.S. at 391, 119 S.Ct. 2090.

Finally, Phillips suggests that the district court's instruction cannot have stated the correct standard because, if it allowed the jury to find that he intended to deceive Morgan Stanley through his trades, then it just as easily could have supported a finding that *Morgan Stanley* intended to deceive *him* through *its* trades. Phillips grounds that argument in the evidence that, at

the same time that he was selling dollars to buy rand to drop the exchange rate, Morgan Stanley was selling rand to buy dollars—quite likely much of the rand that Phillips bought. But Phillips has not suggested that such conduct was willful in that Morgan Stanley acted with "a purpose to disobey or disregard the law." App'x at 1553. And in any event, his argument is a non sequitur. Even if one could find that Morgan Stanley's conduct was culpable according to the intent instruction, it would not matter for our analysis because Phillips was on trial, not Morgan Stanley. *See United States v. Shapiro*, 29 F. App'x 33, 35 (2d Cir. 2002) (summary order) ("It is no defense to a criminal charge to say that one's victim is also a criminal."); *see also Wayte v. United States*, 470 U.S. 598, 607-08, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985) (explaining that we may not second guess the government's broad discretion over whom and whether to prosecute, so long as the government has probable cause that the accused committed an offense and does not base its decision on constitutionally impermissible factors).

In short, Phillips once again fails to meet his burden to show that "his requested instruction accurately represented the law in every respect and that, viewing as a whole the charge actually given, he was prejudiced." *Zheng*, 113 F.4th at 298 (quotation marks and citation omitted).[10]

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10. Phillips does not challenge the sufficiency of the evidence of his intent to deceive—only the legal standard the court applied. That is no surprise, because there was ample evidence that he acted with intent to deceive the counterparty to the one-touch barrier option by manipulating the exchange rate. Witness

B. Lack of Jury Instruction on Phillips's Creation of an Artificial Price

Phillips next contends that the district court's recitation of the elements of commodities fraud was incomplete. According to Phillips, the jury should also have been instructed that it could not convict him of commodities fraud without proof that his trading created an artificial dollar-rand exchange rate. Once again, we

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testimony and phone and chat records showed that Phillips traded with the intent to trigger the 12.50 and then 12.25 one-touch barrier options, bolstered by the fact that he dumped the billions in rand he had purchased soon after the second option triggered. *See*, *e.g.*, Supp. App'x at 205-06 (Phillips suggesting to a colleague that they "start fucking around in Dollar-Rand" to "lower" the exchange rate), 209 (Phillips telling a colleague that "at some point we['re] going to have to start buying this shit back," that is, selling dollars to buy rand), 521-25 (Phillips telling a banker that his "aim" was to "trade thru 50" and instructing the banker to "give bids"). A government witness also testified that Phillips's trades were inconsistent with a strategy of "replacing delta." Supp. App'x at 80-108; *see United States v. Coscia*, 866 F.3d 782, 798 (7th Cir. 2017) (noting that the defendant's trading patterns were "highly unusual" compared to "those of legitimate traders," which "support[ed] the jury's conclusion of fraudulent intent"). Phillips presented his theory of innocence—that he was actually trading for the legitimate purpose of "replacing delta"—and we can assume the jury rejected it. *See Phillips*, 2024 WL 1300269, at *22 ("The Jury readily could have found that Phillips's sole objective was to move the exchange rate, and not to acquire a particular position in [rand]."); *United States v. Willis*, 14 F.4th 170, 182 (2d Cir. 2021) (holding that "the jury was not required to accept [the defendant's] alternative explanation of innocence" when there was evidence to convict beyond a reasonable doubt).

review this challenge to the jury instructions *de novo.*[11] *See Applins*, 637 F.3d at 72.

Phillips's theory is that, even though he was convicted of a scheme to defraud in violation of 17 C.F.R. § 180.1 instead of price manipulation under 17 C.F.R. § 180.2, his scheme involved open-market manipulation—manipulation by using otherwise lawful transactions on an open market to unlawfully influence the market or market participants. *See* App'x at 1550 (instructing the jury that "the defendant is accused of employing a manipulative device, scheme, or artifice to defraud" and that "[m]anipulation refers to intentional or willful conduct designed to deceive or defraud by controlling or artificially affecting some type of price, in this case, the dollar-rand exchange rate"). According to Phillips, the court therefore should have required the government to prove the traditional elements of open-market manipulation. Those elements are: "(1) [the defendant] possessed an ability to influence market prices; (2) an artificial price existed; (3) [the defendant] caused the artificial prices; and (4) [the defendant] specifically intended to cause the artificial price." *In re Amaranth Nat. Gas Commodities Litig.*, 730 F.3d 170, 173 (2d Cir. 2013) (quotation marks and citation omitted).

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11. The government once again argues that we should review for plain error. We disagree. Phillips proposed the artificial price instruction to the district court, the court rejected it, and any further objection would have been unlikely to change the court's position. *See Grote*, 961 F.3d at 115 (holding that once the district court makes clear its position on an objection, further objections are unnecessary to preserve an issue for appellate review).

Phillips's proposed instruction fails to grapple with how the Dodd-Frank amendments expanded the CEA's anti-fraud measures. *Amaranth* involved a previous version of the CEA that was in effect before the Dodd-Frank Act amended 7 U.S.C. § 9(1) and before the CFTC promulgated 17 C.F.R. § 180.1. *See Amaranth*, 730 F.3d at 173 n.1 (acknowledging that the Dodd-Frank amendments did not apply). The Dodd-Frank amendments made it "unlawful for any person, directly or indirectly, to use or employ . . . in connection with any swap . . . any manipulative or deceptive device or contrivance, in contravention of [CFTC] rules and regulations." 7 U.S.C. § 9(1) (2010). Before the Dodd-Frank Act, there was no such provision, so the government's only option would have been a market-manipulation theory. *See* 7 U.S.C. § 9 (2000) (making it unlawful to "manipulat[e] or attempt[] to manipulate . . . the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity"). We presume Congress added the new language for a reason. *See United States v. Dai*, 99 F.4th 136, 139 (2d Cir. 2024).

The reason seems to be that Congress, consistent with the Dodd-Frank Act's purposes, intended to cover a broader swath of fraudulent and manipulative activity in swaps markets. *See* 76 Fed. Reg. at 41401 (CFTC recognizing that Congress intended, by amending § 9(1), to "augment the [CFTC's] existing authority to prohibit fraud and manipulation"). That intent is apparent from Congress's choice to model the new § 9(1) on the Securities Exchange Act's § 10(b). *Compare* 7 U.S.C. § 9(1) ("It shall be unlawful for any person . . . to use or employ, or

attempt to use or employ, in connection with any swap . . . any manipulative or deceptive device or contrivance, in contravention of [CFTC] rules and regulations. . . ."), *with* 15 U.S.C. § 78j(b) ("It shall be unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of [SEC] rules and regulations. . . .").[12] *See also* 76 Fed. Reg. at 41399 (July 14, 2011) (CFTC noting that 7 U.S.C. § 9(1) is "virtually identical" to 15 U.S.C. § 78j(b)).

"Traditionally, courts have looked to the securities laws when called upon to interpret similar provisions of the CEA." *Loginovskaya v. Batratchenko*, 764 F.3d 266, 272 (2d Cir. 2014) (quoting *Saxe v. E.F. Hutton & Co.*, 789 F.2d 105, 109 (2d Cir. 1986)). Looking to § 10(b) of the Securities Exchange Act and the corresponding regulations, we have held that creation of an artificial price is not an element of an anti-fraud or anti-manipulation claim so long as the defendant had fraudulent or manipulative intent. *See Set Capital*, 996 F.3d at 77-78 (concluding that the plaintiff in a private civil action for securities fraud plausibly alleged

12. The corresponding CFTC regulations authorized by § 9(1) were likewise modeled on the SEC regulations authorized by § 10(b) of the Securities Exchange Act. *Compare* 17 C.F.R. § 180.1(a)(1) ("It shall be unlawful for any person . . . in connection with any swap . . . to [u]se or employ, or attempt to use or employ, any manipulative device, scheme, or artifice to defraud. . . ."), *with* 17 C.F.R. § 240.10b-5(a) ("It shall be unlawful for any person . . . [t]o employ any device, scheme, or artifice to defraud . . . in connection with the purchase or sale of any security.").

a "manipulative act" despite an absence of allegations that the defendant's trades artificially affected the security's price); *see also SEC v. Vali Mgmt. Partners*, 2022 WL 2155094, at *2 (2d Cir. June 15, 2022) (summary order) (rejecting defendants' argument that SEC's manipulation theory of liability required proof of an artificial price). Other circuits have held the same. *See Koch v. SEC*, 793 F.3d 147, 153-54 (D.C. Cir. 2015) ("[I]ntent—not success—is all that must accompany manipulative conduct to prove a violation of the Exchange Act and its implementing regulations."); *GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189, 206 (3d Cir. 2001) (holding that § 10(b) of the Securities Exchange Act does not require proof that the "allegedly unlawful activities had an effect on the price of the stock"); *Chemetron Corp. v. Bus. Funds, Inc.*, 718 F.2d 725, 728 (5th Cir. 1983) (same).

We see no reason to interpret the CEA's language differently from nearly identical language in the Securities Exchange Act. As the CFTC recognized when promulgating Rule 180.1—under which Phillips was convicted—"a violation of [17 C.F.R. § 180.1] may exist in the absence of any market or price effect." 76 Fed. Reg. at 41401.

That conclusion is buttressed by reading 7 U.S.C. § 9 in full. Another subsection, § 9(3), provides: "In addition to the prohibition in [§ 9(1)], it shall be unlawful for any person, directly or indirectly, to manipulate or attempt to manipulate the price of any swap. . . ." That subsection, unlike § 9(1), does not require proof of fraudulent intent. Instead, it preserves the prohibition against manipulation

that lacks fraudulent intent from the pre-Dodd-Frank version of § 9—but only when the defendant's actions in fact created an artificial price, as determined by the four elements set out in *Amaranth*. *See Amaranth*, 730 F.3d at 173 n.1 (noting that interpretation of CFTC Rule 180.2, which uses language identical to § 9(3),[13] "'will be guided' by existing law on commodities manipulation" (quoting 76 Fed. Reg. at 41407)). Under § 9(3), if the government can prove the *Amaranth* elements, it can still punish, for example, manipulation "based on the abuse of market power, rather than fraud." *CFTC v. Parnon Energy Inc.*, 875 F. Supp. 2d 233, 244-46 (S.D.N.Y. 2012). But here, because the government pursued its case based on § 9(1) rather than § 9(3), it did not need to prove artificial price so long as it proved fraudulent intent.

Based on the language of the CEA and corresponding regulations, the context surrounding their enactment, and our interpretation of analogous provisions in the Securities Exchange Act, we conclude that Phillips has not met his burden to show that his proposed instruction requiring proof of an artificial price accurately represented the law. *See Zheng*, 113 F.4th at 298.

C. Materiality of Phillips's Misrepresentation

Phillips next asserts that the evidence at trial was insufficient to prove beyond a reasonable doubt that his deception was material to the victims of his fraud. His

13. *See* 17 C.F.R. § 180.2 ("It shall be unlawful for any person . . . to manipulate or attempt to manipulate the price of any swap. . . .").

sufficiency challenge fails if any rational jury could have found beyond a reasonable doubt that his conduct was material to the victims. *See Middlemiss*, 217 F.3d at 117. A "misrepresentation is material if it is capable 'of influencing the intended victim,'" *United States v. Johnson*, 945 F.3d 606, 614 (2d Cir. 2019) (quoting *Neder v. United States*, 527 U.S. 1, 24, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)), or "important in making an investment decision," *Vilar*, 729 F.3d at 89. The standard is whether a reasonable investor would have been influenced by the misrepresentation, not whether the targets of the misrepresentation—here, Morgan Stanley Capital and JPMorgan—were in fact influenced. *See United States v. Litvak*, 889 F.3d 56, 66 (2d Cir. 2018) (explaining that "materiality is judged according to an objective standard" (quoting *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 459, 133 S.Ct. 1184, 185 L.Ed.2d 308 (2013))); *see also Vilar*, 729 F.3d at 89 (noting that a showing of materiality requires that the misrepresentation be "important" in decision-making, but does not require a showing of "actual reliance").

There was sufficient evidence for a rational jury to find beyond a reasonable doubt that Phillips's efforts to manipulate the dollar-rand exchange rate would have been material to a reasonable financial institution in deciding whether to pay out the one-touch barrier option. Witnesses employed by both Morgan Stanley and JPMorgan testified that if their company knew a counterparty to their option was trading with the intent to trigger the option, they might not pay out the option. *See* App'x at 976-77 (Morgan Stanley banker testifying that it "would be important to know" if a "counterparty engaged in trading that

was intentionally designed to trigger" a barrier option); App'x at 1368-69 (JPMorgan banker testifying that it is "important to . . . know that a counterparty engaged in trading that was intentionally designed to trigger a barrier event" and that such knowledge "would be an important factor" in JPMorgan's "willingness . . . to pay" out the option). Phillips counters that these witnesses were not actually involved in the transactions in question. But that is irrelevant because materiality is an objective standard. *See Litvak*, 889 F.3d at 66.

* * *

We have yet to address a point that Phillips raises throughout his challenges on the elements of commodities fraud, and elsewhere in his briefs: that because the government's theory of fraud was based on his trades in the foreign-exchange spot market, his prosecution and conviction were somehow an impermissible backdoor attempt to defy Congress's decision not to directly regulate that market, 7 U.S.C. § 2(c)(1)(A). We find his stance to be meritless.

Recall that, under 17 C.F.R. § 180.1(a)(1), it is "unlawful for any person, directly or indirectly, in connection with any swap, . . . to intentionally or recklessly . . . [u]se or employ . . . any manipulative device, scheme, or artifice to defraud." Nothing in the text of the CEA or corresponding CFTC regulations suggests that trades made in the foreign-exchange spot market cannot constitute a "manipulative device, scheme, or artifice" used for the purpose of defrauding a counterparty to

a foreign-exchange swap. It is enough that the CEA regulates swaps, the one-touch barrier option is a swap, and there was sufficient evidence for the jury to conclude beyond a reasonable doubt that Phillips's trades were a "manipulative device, scheme, or artifice" intended to defraud the counterparty to the option.

In sum, the district court did not err regarding any of Phillips's challenges as to the elements of commodities fraud.

IV. Due Process and Fair Notice

Finally, Phillips argues that, even if the district court got the law right at every step, his conviction violated his due process rights because he lacked fair notice that the CEA's anti-fraud provisions applied to his conduct related to the one-touch barrier option. Phillips suggests that he lacked notice of the legal standard on each issue discussed above, but he focuses on the application of the CEA's extraterritoriality provision to his conduct. Phillips is correct that, at the time of his actions, no court had addressed whether conduct like his involved a "direct and significant connection with activities in . . . [U.S.] commerce" under 7 U.S.C. § 2(i)(1); as the district court acknowledged, this was a "first of its kind" prosecution under § 2(i)(1), App'x at 2336, with a "paucity of precedent" interpreting the statute, *Phillips*, 2024 WL 1300269, at *11. We review the factual determinations related to Phillips's due process claims for "clear error" but review the "ultimate determination of whether due process

has been violated" *de novo. Epskamp*, 832 F.3d at 160 (quotation marks and citation omitted).

The Fifth Amendment's Due Process Clause requires that a criminal statute "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989 (1954). This "requires only that the law . . . not lull the potential defendant into a false sense of security, giving him no reason even to suspect that his conduct might be within [the] scope" of criminal law. *Rubin v. Garvin*, 544 F.3d 461, 469 (2d Cir. 2008) (citation modified). Under this standard, due process is not "violated simply because the issue is a matter of first impression." *Ponnapula v. Spitzer*, 297 F.3d 172, 183 (2d Cir. 2002). Even for issues of first impression, a defendant has fair notice so long as the applicable statutes "made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States v. Lanier*, 520 U.S. 259, 267, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997).

Extraterritorial application of a statute also does not necessarily vitiate fair notice. When Congress "expressly intends for a statute to apply extraterritorially," as it did in the CEA, "the burden is a heavy one for a defendant seeking to show that extraterritorial application of the statute violates due process." *Epskamp*, 832 F.3d at 168 (citation modified). Fair notice "does not require that . . . defendants understand that they could be subject to criminal prosecution *in the United States* so long as they would reasonably understand that their conduct

was criminal and would subject them to prosecution somewhere." *Id.* at 169 (emphasis in original) (quoting *United States v. Al Kassar*, 660 F.3d 108, 119 (2d Cir. 2011)).

A jury instruction that requires the government to prove scienter can mitigate concerns that a defendant lacked fair notice. *See Rubin*, 544 F.3d at 467-69. Here, the district court instructed the jury that it must find beyond a reasonable doubt that Phillips was "aware that what he was doing . . . was unlawful." App'x at 1553. Such an instruction was a prerequisite for a felony conviction under 7 U.S.C. § 13(a)(5), which requires proof of a "willful[]" violation of the CEA or its corresponding regulations and specifies that a person may not be convicted if he "proves that he had no knowledge of such rule or regulation."

There was sufficient evidence for the jury to find that Phillips knew his actions were unlawful. It was presented with evidence that Glen Point Capital's policies prohibited fraud and market manipulation, and that Phillips and Glen Point Capital were licensed commodities traders in the United States subject to training about the CEA. *See Phillips*, 2024 WL 1300269, at *32 (summarizing evidence on Phillips's knowledge about commodities fraud, including that Phillips passed an examination as part of becoming a registered commodities trader in the U.S. that covered the CEA's fraud and manipulation provisions). It would be disingenuous to contend that Phillips, a registered U.S. commodities trader and sophisticated market participant, had "no reason even to suspect" that his deceptive trading "might be within [the] scope" of the CEA, as would be

required to prove a due process violation. *Rubin*, 544 F.3d at 469. Instead, the jury found that he knowingly violated the CEA and that he acted with the intent to defraud the counterparty to the one-touch barrier option, whoever and wherever that counterparty may be.

The evidence shows that Phillips, at minimum, should have known that his actions constituted commodities fraud in the United States. When he took those actions, he accepted the risk that he might be subject to prosecution in the United States. Phillips's prosecution and conviction therefore did not violate his right to due process.

CONCLUSION

We have considered Phillips's remaining arguments and conclude that they lack merit. For the foregoing reasons, we **AFFIRM** the judgment of the district court.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED JUNE 28, 2024

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case Number: 1:22-CR-00138-LJL-1
USM Number: 38384-510

UNITED STATES OF AMERICA

v.

NEIL PHILLIPS

Sean Hecker, Jenna Dabbs, & David Gopstein
Defendant's Attorney

Filed June 28, 2024

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court,

☑ was found guilty on count(s) 2 of the Indictment
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
7 U.S.C. §§ 9(1), 13(a)(5); 17 C.F.R. § 180.1; and 18 U.S.C. § 2	Commodities Fraud	8/28/2022	2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) 3 and 4 ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

6/25/2024
Date of Imposition of Judgment

Lewis J. Liman
Signature of Judge

Lewis J. Lima, United States District Judge
Name and Title of Judge

6/25/24
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Time Served.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 pm on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows: _____

Defendant delivered on _____ to _____ at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Two (2) years.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.

2. You must not unlawfully possess a controlled substance.

3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two

periodic drug tests thereafter, not to exceed 72 drug tests per year of supervision.

☑ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*

4. ☐ You must make restitution in accordance with 18 U.S.C. § 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*

5. ☑ You must cooperate in the collection ofDNA as directed by the probation officer. *(check if applicable)*

6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

Appendix B

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4. You must answer truthfully the questions asked by your probation officer.

5. You must live at a place approved by the probation officer. If you plan to change where you live or

anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person

without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

Appendix B

SPECIAL CONDITIONS OF SUPERVISION

The defendant must provide the probation officer with access to any requested financial information.

The defendant must not incur new credit charges or open additional lines of credit without the approval of the probation officer unless he is in compliance with all of his financial obligations to the Court, including the fine imposed.

The defendant will be permitted to reside in the locations of his current residences in the city of London, and in South Africa without further application to the Court. If the defendant intends to live elsewhere, he will have to apply to the Court for modification of the terms of his supervised release.

As a modification to Standard Condition #1 - The defendant shall report via phone call to the probation office in the Southern District of New York within 72 hours of his arrival in the location where he intends to reside.

The defendant must return to the area in which he intends to reside within 48 hours.

The defendant shall be supervised by the Southern District of NY.

CRIMINAL MONETARY PENALTIES ***

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution ***	Fine
TOTALS	$ 100.00	$0.00	$1,000,000.00
		AVAA Assessment*	**JVTA Assessment****
		$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims or Trafficking Act of^2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for

offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____ , or

☑ in accordance with ☐ C, ☐ D, or ☑ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of $ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after the date of this judgment; or

D ☐ Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of $ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (*e.g., 30 or 60*

days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

The one million dollar (1,000,000.00) fine will be payable by June 25, 2025.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number
Defendant and Co-Defendant Names
(including defendant number) Total Amount

Joint and Several Amount | Corresponding Payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED MARCH 27, 2024

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

22-cr-138 (LJL)

UNITED STATES OF AMERICA,

v.

NEIL PHILLIPS,

Defendant.

Filed March 27, 2024

OPINION AND ORDER

LEWIS J. LIMAN, United States District Judge:

Defendant Neil Phillips ("Phillips") moves for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29, or, in the alternative, for a new trial pursuant to Federal Rule of Criminal Procedure 33. Dkt. No. 94. For the following reasons, the motion is denied.

BACKGROUND

On March 3, 2022, a grand jury sitting in the Southern District of New York returned a four-count indictment

against Phillips. Dkt. No. 2 (the "Indictment"). The Indictment alleged that Phillips was the co-founder and co-Chief Investment Officer of a hedge fund in the United Kingdom, Glen Point Capital ("Glen Point"), that purchased a "one touch" digital barrier option (the "One Touch Option") for the United States dollar ("USD")/ South African rand ("ZAR") currency pair. *Id.* ¶¶ 3, 10. Under the One Touch Option, Glen Point would be entitled to a $20 million payment if the USD/ZAR exchange rate fell below 12.50 at any point prior to January 2, 2018. *Id.* ¶ 10. According to the Indictment, while located in South Africa, Phillips fraudulently triggered the One Touch Option by directing a large number of spot trades (the "Boxing Day Trades") between shortly before midnight on December 25, 2017, and the early morning of December 26, 2017, in which he sold $725 million USD for ZAR. *Id.* ¶¶ 18, 20. Count One charged Phillips with conspiracy to commit commodities fraud under Title 7, United States Code, Sections 9(1) and 13(a)(5), and Title 17, Code of Federal Regulations, Section 180.1, in violation of Title 18, United States Code, Section 371. *Id.* ¶¶ 30–32. Count Two charged him with commodities fraud, in violation of Title 7, United States Code, Sections 9(1) and 13(a)(5), and Title 17, Code of Federal Regulations, Section 180.1. *Id.* ¶¶ 33–34. Count Three charged Phillips with conspiracy to commit wire fraud under Title 18, United States Code, Section 1343, in violation of Title 18, United States Code, Section 371. *Id.* ¶¶ 38–39. Count Four charged him with wire fraud in violation of Title 18, United States Code, Section 1343. *Id.* ¶¶ 38–39. Phillips pleaded not guilty to all four counts on January 5, 2023. Dkt. No. 11.

On April 28, 2023, Phillips moved to dismiss the Indictment. Dkt. No. 21. He argued that the allegations in the Indictment did not support the charged offenses, Dkt. No. 22 at 6, and that the Government's novel interpretation of the commodities fraud statute violated due process, *id.* at 26. The Government opposed Phillips's motion. Dkt. No. 24. On September 1, 2023, the Court denied Phillips's motion to dismiss "without prejudice to [Phillips] making a Rule 29 motion for judgment of acquittal after the close of the Government's evidence and, if the Rule 29 motion is not granted then, after the close of all evidence." Dkt. No. 36 at 1.

The Government filed a letter on September 25, 2023 "inform[ing] the Court and the defense that it d[id] not intend to proceed at trial on Counts Three and Four of the Indictment." Dkt. No. 37 at 1. Although the Government maintained that "it could adduce evidence sufficient to support a guilty verdict" on the conspiracy to commit wire fraud and wire fraud counts, the Government "acknowledge[d] that the jury and the Court may well find otherwise." *Id.* Consequently, the parties proceeded to trial solely on Counts One and Two.

After voir dire and jury selection on October 16, 2023, the Court held a six-day trial. The Government called the following witnesses in its case-in-chief: Graeme Henderson, a foreign-exchange ("FX") derivatives salesperson at JB Drax Honoré, Trial Transcript ("Trial Tr.") 85:7, 87:21; Jeffrey Gourdji, a staff operations specialist at the FBI, *id.* at 117:15; Nicholas Croix, a former analyst at Glen Point, *id.* at 198:11, 203:1; Mahesh Narayanan, an engineer

manager at Bloomberg, *id.* at 298:1; Srinivasan Iyer, a former FX salesperson at Nomura, *id.* at 308:17–20; Samer Oweida, the global head of FX and emerging markets at Morgan Stanley, *id.* at 409:19–21; Nicholas Burrlock, the head of liquidity management at Euronext FX, the successor company to the foreign exchange FastMatch, *id.* at 457:10–458:4; Richard Gerbasi, manager of the FX matching engine Refinitiv, *id.* at 648:24–469:23; Maria Silveira, executive director of the FX operations department at JPMorgan, *id.* at 475:21–476:10; David Coratti, former head trader at Glen Point, *id.* at 505:6–9; Richard Lyons, the Government's expert witness, *id.* at 592:11; Krista Santoro, chief compliance officer for JPMorgan's swap dealers and the North America head of currencies and emerging markets compliance, *id.* at 815:1–3; Jennifer Sunu, compliance director for the National Futures Association, *id.* at 838:24–25; and Bruno Salemme, a special agent with the FBI, *id.* at 852:21.

At the close of the Government's case-in-chief, Phillips moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(a). *Id.* at 938:5–7. He argued that there was insufficient evidence that he would not have placed the Boxing Day Trades but for an intent to manipulate the USD/ZAR exchange rate. *Id.* at 938:11–25. According to Phillips, the evidence instead showed that he had placed those trades "to replace the delta"—i.e., exposure to ZAR—"that he was losing on the one-touch that would have otherwise expired on January 2nd." *Id.* at 939:5–6. Phillips also argued that the Government impermissibly sought to apply the commodities fraud statute extraterritorially, as the evidence neither

established a domestic application of the statute nor satisfied the statutory requirements for regulating foreign activities. *Id.* at 946:23–947:2. The Court reserved decision on Phillips's motion, pursuant to Federal Rule of Criminal Procedure 29(b). *Id.* at 948:23–949:2. Phillips subsequently called his sole witness: Andrew Newman, the expert for the defense. *Id.* at 952:8. The parties then delivered their summations to the Jury, after which the Court charged the Jury on the governing law and the Jury retired for deliberations.

The following day, the Jury returned a verdict, finding Phillips not guilty of conspiracy to commit commodities fraud on Count One, *id.* at 1390:9, and guilty of commodities fraud on Count Two, *id.* at 1390:5. Phillips filed the instant motion on December 8, 2023. Dkt. No. 94. The Government opposed the motion on January 19, 2024, Dkt. No. 102, and Phillips replied on February 5, 2024, Dkt. No. 104. The Court heard oral argument on Phillips's motion on March 15, 2024.

LEGAL STANDARD

Federal Rule of Criminal Procedure 29 provides that "on the defendant's motion" a court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). "[A] district court will grant a motion to enter a judgment of acquittal on grounds of insufficient evidence if it concludes that no rational trier of fact could have found the defendant guilty beyond a reasonable doubt." *United States v. Berry*, 2022 WL 1515397, at *3 (S.D.N.Y.

May 13, 2022) (Nathan, J.) (quoting *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003)). As the Second Circuit has explained, "[a] defendant challenging the sufficiency of the evidence bears a heavy burden, because the reviewing court is required to draw all permissible inferences in favor of the government and resolve all issues of credibility in favor of the jury verdict." *United States v. Kozeny*, 667 F.3d 122, 139 (2d Cir. 2011). "The Court affirms a conviction as long as '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Scales*, 2022 WL 673258, at *1 (S.D.N.Y. Mar. 7, 2022) (emphasis in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)), *aff'd*, 2023 WL 8643279 (2d Cir. Dec. 14, 2023). Consequently, "[a] judgment of acquittal can be entered 'only if the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt.'" *United States v. Cuti*, 720 F.3d 453, 461 (2d Cir. 2013) (quoting *United States v. Espaillet*, 380 F.3d 713, 718 (2d Cir. 2004)); *see also United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000) ("If the court concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, the court must let the jury decide the matter." (cleaned up)). By contrast, "if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted." *United States v. Temple*, 447 F.3d 130, 137 (2d Cir. 2006) (quoting *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972)). "[T]he evidence must be viewed in conjunction, not in isolation," *United States v. Persico*, 645 F.3d 85, 104 (2d Cir. 2011) (quoting

United States v. Eppolito, 543 F.3d 25, 45 (2d Cir. 2008)), "since one fact may gain color from others," *Berry*, 2022 WL 1515397, at *3 (quoting *United States v. Tramunti*, 500 F.2d 1334, 1338 (2d Cir. 1974)).

Under Federal Rule of Criminal Procedure 33, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). "Generally, the trial court has broader discretion to grant a new trial under Rule 33 than to grant a motion for acquittal under Rule 29, but it nonetheless must exercise the Rule 33 authority 'sparingly' and in 'the most extraordinary circumstances.'" *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001) (quoting *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992)). "In the exercise of its discretion, the court may weigh the evidence and credibility of witnesses. At the same time, the court may not wholly usurp the jury's role." *Autuori*, 212 F.3d at 120 (citation omitted). "The defendant bears the burden of proving that he is entitled to a new trial under Rule 33, and before ordering a new trial pursuant to Rule 33, a district court must find that there is 'a real concern that an innocent person may have been convicted.'" *United States v. McCourty*, 562 F.3d 458, 475 (2d Cir. 2009) (quoting *Ferguson*, 246 F.3d at 134). Accordingly, "the court must examine the entire case, take into account all facts and circumstances, and make an objective evaluation, keeping in mind that the ultimate test for such a motion is whether letting a guilty verdict stand would be a manifest injustice." *United States v. Landesman*, 17 F.4th 298, 330 (2d Cir. 2021) (quoting *United States v. Alston*, 899 F.3d 135, 146 (2d Cir. 2018)).

DISCUSSION

I. Motion for Judgment of Acquittal

Phillips contends that the Court must enter a judgment of acquittal on Count Two because no reasonable jury could find beyond a reasonable doubt: that his actions supported a domestic application of the commodities fraud statute, Dkt. No. 94 at 17; that his conduct had a sufficient connection to activities in commerce of the United States, *id.* at 26; that he acted with the requisite intent, *id.* at 45; or that the charged scheme would have been material to a reasonable market participant in the position of a counterparty to a swap, *id.* at 57. The Government contests each of those assertions. Dkt. No. 102 at 1–3.

A. Domestic Application

According to Phillips, the evidence at trial does not establish a domestic application of the commodities fraud statute because "[a]lmost nothing relevant to the charged offense occurred in the United States." Dkt. No. 94 at 18. In response, the Government avers that there was ample evidence for the jury to find a domestic application of the statute, because Phillips's "scheme involved manipulative trading in the United States; manipulative orders placed over a server in the United States; a false price signal sent to a bank in the United States; and the consummation of the fraud through the receipt of $20 million at a bank account in the United States." Dkt. No. 102 at 11.

The current test for when United States law governs financial frauds involving foreign conduct is of a relatively

recent vintage. Prior to 2010, the Second Circuit applied a "conduct test" and an "effects test" to determine "whether there [was] sufficient United States involvement to justify the exercise of jurisdiction by an American court."[1] *Itoba Ltd. v. Lep Grp. PLC*, 54 F.3d 118, 122 (2d Cir. 1995) (internal quotation marks omitted). The conduct test was "met whenever (1) 'the defendant's activities in the United States were more than "merely preparatory" to a . . . fraud conducted elsewhere' and (2) the 'activities or culpable failures to act within the United States "directly caused" the claimed losses.'" *SEC v. Berger*, 322 F.3d 187, 193 (2d Cir. 2003) (quoting *Itoba*, 54 F.3d at 122); *see Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1337 (2d Cir. 1972) (Friendly, J.). Under the effects test, courts applied United States law to "wrongful conduct [abroad that] had a substantial effect in the United States or upon United States citizens." *Berger*, 322 F.3d at 192; *see Schoenbaum v. Firstbrook*, 405 F.2d 200, 208 (2d Cir. 1968), *modified on other grounds*, 405 F.2d 215 (1968) (en banc); *see also Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261–62 (2d Cir. 1989) ("The anti-fraud laws of the United States may be given extraterritorial reach whenever a predominantly foreign transaction has substantial effects within the United States."). Yet these tests were not mutually exclusive, as "an admixture or combination of the two" could also demonstrate that United States law applied. *Itoba*, 54 F.3d at 122. Although

1. Although "'[j]urisdiction' is a chameleon word" with several possible meanings, the Court uses jurisdiction in this Opinion to describe "prescriptive[ ] jurisdiction," i.e., "the reach of a nation's (or any political entity's) laws." *United States v. Prado*, 933 F.3d 121, 132–33 (2d Cir. 2019).

developed in the context of securities law, the Second Circuit used those same tests to assess the reach of the United States's prohibition on commodities fraud. *See Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045 (2d Cir. 1983); *see also Societe Nationale d'Exploitation Industrielle des Tabacs et Allumettes v. Salomon Bros. Int'l*, 928 F. Supp. 398, 403 (S.D.N.Y. 1996) ("The principles governing extraterritorial jurisdiction of the securities laws are applicable in deciding the same issue under the commodities laws."). The conduct and effects tests proved seminal, as Courts of Appeals across the country adopted the Second Circuit's framework.[2]

But the Supreme Court repudiated the conduct and effects tests in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010). Addressing the extraterritorial reach of the United States's proscription on securities fraud under Section 10(b) of the Securities Exchange Act of 1934, the *Morrison* Court criticized the conduct and effects tests as depending on judicial policy judgments regarding whether Congress would have "wished the precious resources of United States courts and law enforcement agencies to be devoted to [transnational frauds] rather

2. *See, e.g.*, *SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977); *Robinson v. TCI/US W. Commc'ns Inc.*, 117 F.3d 900, 906 (5th Cir. 1997); *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 667 (7th Cir. 1998); *Cont'l Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 421–422 (8th Cir. 1979); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424–425 (9th Cir. 1983); *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987); *see also Tamari v. Bache & Co. (Leb.) S.A.L.*, 730 F.2d 1103, 1107 (7th Cir. 1984) (applying the conduct and effects tests to commodities fraud).

than leave the problem to foreign countries." *Id.* at 257 (quoting *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir. 1975) (Friendly, J.)).[3] The Court viewed the Second Circuit's tests as being "unpredictable and inconsistent" in application and difficult to administer, *id.* at 259–260; *see also Cavello Bay Reins. Ltd. v. Shubin Stein*, 986 F.3d 161, 166 (2d Cir. 2021), and having eschewed the presumption against extraterritoriality, *Morrison*, 561 U.S. at 261; *see also Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 219 (2d Cir. 2014) (Leval, J., concurring). The Supreme Court therefore abrogated the entirety of conduct and effects jurisprudence as "judicial-speculation-made-law," and adopted a new test based on a presumption or "canon of construction" that "Congress ordinarily legislates with respect to domestic, not foreign matters," and that "'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Morrison*, 561 U.S. at 255, 261 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). As the Court later expressed it, the *Morrison* presumption against extraterritoriality "rests on 'the commonsense notion that Congress generally legislates with domestic concerns in mind.'" *WesternGeco LLC v. ION Geophysical Corp.*, 585 U.S. 407, 412 (2018) (quoting *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)). It also "reflects concerns of international comity insofar as it 'serves to protect against unintended clashes between our laws and those of

3. The Supreme Court elsewhere described the Second Circuit as having ruled that the reach of the federal securities laws extends to all matters over which the United States had prescriptive jurisdiction. *Morrison*, 561 U.S. at 256–57.

other nations which could result in international discord.'" *Yegiazaryan v. Smagin*, 599 U.S. 533, 541 (2023) (quoting *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 115 (2013)). In *Morrison*, the Court emphasized that those concerns are particularly acute in the context of financial frauds, because "the regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, . . . and many other matters." 561 U.S. at 269. Indeed, the United Kingdom, France, and Australia each filed amicus briefs in *Morrison* "complain[ing] of the interference with foreign securities regulation that application of § 10(b) abroad would produce."[4] *Id.*

There are two ways a case can overcome *Morrison*'s presumption against extraterritoriality: First, "[i]f Congress has provided an unmistakable instruction that the provision is extraterritorial, then claims alleging exclusively foreign conduct may proceed, subject to 'the limits Congress has (or has not) imposed on the statute's foreign application.'" *Abitron Austria GmbH v. Hetronic Int'l, Inc.*, 600 U.S. 412, 418 (2023) (quoting *RJR Nabisco,*

4. Phillips argues that the circumstances of his arrest demonstrate the risk of interference with foreign law in this case: "It is particularly telling that the U.S. Attorney's Office, after obtaining an indictment March 3, 2022, kept that indictment under seal for five months, while Mr. Phillips continued to reside in London and conduct his business from there, only unsealing the indictment and effecting his arrest when he traveled to Spain on vacation in August 2022. It is not difficult to infer that the government specifically sought to avoid having to overcome the U.K.'s extradition precedent, in light of the fact that the conduct in this case so clearly centers on activity in or relating to the U.K." Dkt. No. 94 at 44–45.

Inc. v. Eur. Cmty., 579 U.S. 325, 337–38 (2016)). Second, "[i]f the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad." *RJR Nabisco*, 579 U.S. at 337. Courts typically consider these inquiries in that order, but they "have the discretion to begin" with the second. *WesternGeco*, 585 U.S. at 413; *see also Force v. Facebook, Inc.*, 934 F.3d 53, 74 n.28 (2d Cir. 2019). The Court exercises that discretion here.

Although *Morrison* addressed the extraterritorial reach of the proscription on securities fraud, the Supreme Court's rejection of the conduct and effects tests also upended the Second Circuit's commodities law jurisprudence, since the Circuit had applied those same tests to transnational commodities frauds. *See Psimenos*, 722 F.2d at 1045; *see also Starshinova v. Batratchenko*, 931 F. Supp. 2d 478, 485 (S.D.N.Y. 2013). Consequently, in *Prime International Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94 (2d Cir. 2019), the Second Circuit abandoned its pre-*Morrison* precedent and instead articulated the focus of the commodities fraud statute, 7 U.S.C. § 9(1), namely: "rooting out manipulation and ensuring market integrity . . . in commodities markets," 937 F.3d at 107; *see* 7 U.S.C. § 5 ("[I]t is further the purpose of this chapter to deter and prevent price manipulation or any other disruptions to market integrity . . . to ensure the financial integrity of all transactions subject to this chapter."). In doing so, the Circuit contrasted the commodities fraud statute with the antifraud provision of the securities laws. Whereas the Securities Exchange Act of 1934 "is focused on

'purchases and sales of securities in the United States,'" *Prime Int'l*, 937 F.3d at 107 (quoting *Morrison*, 561 U.S. at 266), the commodities fraud statute is "not [focused] on the geographical coordinates of the transaction," *id.* Thus, under the commodities fraud statute, "[t]he ultimate question is whether sufficient 'manipulative conduct . . . [occurred] in the United States.'" *United States v. Bankman-Fried*, 2023 WL 4194773, at *11 (S.D.N.Y. June 27, 2023) (quoting *Prime Int'l*, 937 F.3d at 108).

If all of the manipulative conduct occurred abroad, "then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Prime Int'l*, 937 F.3d at 107–08 (quoting *WesternGeco*, 585 U.S. at 414). A more complex analysis is required, however, when some of the relevant conduct took place in the United States while other relevant conduct transpired outside United States territory. In that scenario, the Court must decide whether the domestic or foreign conduct has "primacy for the purposes of the extraterritoriality analysis." *Bascuñán v. Elsaca*, 927 F.3d 108, 122 (2d Cir. 2019) (quoting *WesternGeco*, 585 U.S. at 414). The domestic conduct cannot be "merely incidental," *id.* (quoting *WesternGeco*, 585 U.S. at 414), or "simply a necessary characteristic" of the statutory violation, *Abitron*, 600 U.S. at 23.

The Government resists this interpretation of binding precedent and instead suggests that a court must find a domestic application whenever "conduct relevant to the focus of the [statute] is not 'entirely foreign.'" Dkt. No. 102 at 13 (quoting *In re Platinum & Palladium*

Antitrust Litig., 61 F.4th 242, 268 (2d Cir. 2023)). But the Government's reliance on *Platinum* is misplaced. While the Second Circuit in *Platinum* distinguished *Prime International* as a case in which all of the relevant conduct took place abroad, 61 F.4th at 268, the Circuit did so in *Platinum* only after articulating the governing inquiry as whether "the conduct . . . [was] 'so *predominantly foreign* as to render the claims impermissibly extraterritorial,'" *id.* at 267 (emphasis added) (quoting *Prime Int'l*, 937 F.3d at 107); *see Parkcentral*, 763 F.3d at 216 (concluding the securities fraud "claims in this case are so predominantly foreign as to be impermissibly extraterritorial"); *see also Morrison*, 561 U.S. at 266 ("[I]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." (emphasis in original)). And the Circuit sustained the complaint against a challenge that it was impermissibly extraterritorial only after concluding that "much of the alleged manipulation [charged in the complaint] was domestic." *Platinum*, 61 F.4th at 268.

Based on the Supreme Court's domestic application framework and the Second Circuit's recent elucidation of the purpose of the commodities fraud statute, the Court provided—without objection from Phillips, *see* Trial Tr. 1156:8–10—the following instruction to the Jury:

> [T]he Government can meet its burden [to show a sufficient relationship to the United States]

> by proving that the relevant conduct occurred in the United States. Relevant conduct means the actions taken by the defendant—or his co-conspirators—to manipulate the USD/ZAR exchange rate in order to fraudulently trigger a $20 million payment under the barrier option contract and defraud the counterparties to that contract. For conduct to be considered relevant, it must be relevant to the focus of the commodities fraud statute. The focus of the commodities fraud statute is rooting out manipulation and ensuring integrity in swaps markets. For conduct to be relevant to that focus, it is not sufficient that the conduct is a necessary characteristic of the scheme or that it has an effect in the United States. Rather, liability must be premised on the conduct that occurred in the United States. Relevant conduct in the United States must be essential, rather than merely incidental, to the charged scheme. Put differently, the relevant conduct in the United States must have primacy.

Id. at 1363:11–1364:3.

Phillips argues that no rational jury applying this instruction could find that his actions supported a domestic application of the commodities fraud statute. Dkt. No. 94 at 18. He contends that the relevant conduct here was overwhelmingly foreign: The One Touch Option involved several foreign actors. Glen Point, a hedge fund based in the United Kingdom, *id.* at 369:10, entered into that option with the United Kingdom office of JPMorgan,

acting as prime broker, *id.* at 482:23–24; Gov. Ex. 555 at 4; Gov. Ex. 556 at 5. Functionally, JPMorgan served as an intermediary for the One Touch Option, as JPMorgan also entered into an offsetting option with the United Kingdom-based Royal Bank of Scotland ("RBS") that same day. Trial Tr. 483:9–25; Gov. Ex. 551. JB Drax Honoré, yet another United Kingdom financial institution, Trial Tr. 126:16–22, executed a further offsetting option with Morgan Stanley & Co. International PLC ("Morgan Stanley International"), a United Kingdom entity, through JB Drax Honoré's account at RBS, Gov. Ex. 570; *see also* Trial Tr. 424:8–14 (explaining the purpose for using JB Drax Honoré's "give-up account" at RBS was to ensure that "if JB Drax Honoré went out of business, the credit risk and the make-whole function on this [option] . . . would lie with RBS"). Moreover, Phillips's conduct that triggered the option's barrier all occurred outside the United States. Phillips, a resident of the United Kingdom, Gov. Ex. 514 at 25, placed the Boxing Day Trades while in South Africa, Trial Tr. 865:6–7, on behalf of Glen Point, based in the United Kingdom, *id.* at 369:10. To effectuate those transactions, he sent instructions to a salesperson in Singapore, *id.* at 369:12, who worked for Nomura, a Japanese bank, *id.* at 308:14. Nomura then executed those trades from its Singapore trading desk. *Id.* at 369:15. Thus, Phillips asserts that "[t]his predominantly foreign conduct did not come close to what is required for a domestic application." Dkt. No. 94 at 18 (internal quotation marks omitted).

Phillips is correct that the conduct occurring in the United States did not enjoy primacy over that occurring

abroad. The ties to the United States are too meager and attenuated to establish that Phillips's fraud occurred "within the territorial jurisdiction of the United States." *Morrison*, 561 U.S. at 255 (quotation omitted). Although the Government stresses several aspects of Phillips's scheme that involved the United States, each is precisely the kind of factor that the Second Circuit once found meaningful under the conduct and effects tests but that no longer suffices in the wake of *Morrison*. Adopting the Government's domestic application theory would therefore be tantamount to resurrecting the conduct and effects tests that formerly governed commodities fraud actions, under the guise of a capacious interpretation of relevant conduct.

First, the Government argues that Phillips's "manipulative trading took place in the country—specifically, on FastMatch." Dkt. No. 102 at 15. The evidence before the Jury showed that the FX spot market is decentralized, as parties transact over several digital platforms that match trades in locations throughout the world. *See* Trial Tr. 460:25–461:24, 469:7–25. After Phillips instructed the salesperson at Nomura to purchase ZAR "thru the market," Gox. Ex. 446 at 11, Nomura executed some of the Boxing Day Trades on the foreign exchange FastMatch through its servers located in Secaucus, New Jersey, Trial Tr. 462:5–11, 463:10–466:1; *see* Gov. Ex. 200A. Nomura's use of trading servers in the United States establishes a domestic application here, according to the Government, just as it would in a securities- or wire-fraud case. Dkt. No. 102 at 16.

The Government's argument, however, misstates the focus of the Commodity Exchange Act ("CEA") and confuses the market which was the object of Congress's concern with the market which was the means through which Phillips perpetrated his fraud. The domestic application inquiry under the CEA looks to where conduct relevant to Congress's "focus . . . on rooting out manipulation and ensuring market integrity" occurred. *Prime Int'l*, 937 F.3d at 107. Congress's focus was not, as in the securities fraud statute, the "purchases and sales of securities in the United States," *Cavello Bay Reins.*, 986 F.3d at 166 (quoting *Morrison*, 561 U.S. at 266); *see also Williams v. Binance*, ––– F.4th ––––, 2024 WL 995568, at *4 (2d Cir. Mar. 8, 2024), or, as in the wire fraud statute, the use of "wires [of the United States] in furtherance of a scheme to defraud," *Bascuñán*, 927 F.3d at 122 (emphasis omitted). Moreover, the market in which Congress determined to root out manipulation was the swap market, not the FX spot market where the trades on FastMatch occurred. The Government has conceded that "the spot trades, on their own, were [not] criminal." Dkt. No. 24 at 10. Indeed, Congress made a considered decision to exclude FX spot transactions from regulation under the United States commodities laws, *see* 7 U.S.C. § 2(c)(1)(A); *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 2016 WL 5108131, at *17 (S.D.N.Y. Sept. 20, 2016), so manipulation of the USD/ZAR spot market does not in itself violate United States law. Accordingly, what makes the FX spot trades relevant here is not that they deceived participants in the FX spot market but rather that they were used as a means to deceive participants in the swap market, specifically the counterparties to the One Touch

Option. Dkt. No. 24 at 10. As those trades "sent a false signal about the supply and demand [that] artificially moved the price [of ZAR] to trigger the barrier" under that option, Dkt. No. 32 at 31:14–16, they communicated a false price signal to Morgan Stanley and JPMorgan in their capacities as counterparties to the One Touch Option, *see also id.* at 31:9–13 ("Glen Point was not the only one that was looking at this exchange rate to make a barrier determination, there was also the counterparty to the option that was also looking at the barrier, as was the intermediary who was the one that set up the transaction.").

It thus cannot be that the happenstance that some of the trades that transmitted a false price signal occurred over FastMatch servers in the United States is sufficient to show that the conduct relevant to Congress's focus occurred primarily in the United States. To the contrary, the conduct relevant to rooting out fraud in the swap market occurred primarily abroad. Phillips engaged in deceptive conduct when he sent the instructions to engage in manipulative trades from South Africa to a Nomura salesperson in Singapore, thereby transmitting a false price signal that would eventually travel via the FX spot market to the counterparties to the One Touch Option. Nomura's use of FastMatch's servers in New Jersey was merely incidental to the fraud here. Indeed, when Nomura followed Phillips's directions to purchase ZAR through the market, some of the Boxing Day Trades matched on servers in London. *See* Trial Tr. 467:5–7. The fact that the trades Phillips placed occurred partially in the United States thus is too slender a reed to support

the conclusion that the relevant conduct in the United States has "primacy." *WesternGeco*, 585 U.S. at 416 (quoting *Morrison*, 561 U.S. at 267). Were it enough that the false price signal arose from trades in the United States, then any transaction between two foreign nationals (even between foreign nationals residing in the same country), with no other contacts to the United States, would fall within the reach of the CEA based solely on the transmission of a misrepresentation through the United States. *Cf. Cavello Bay Reins. Ltd. v. Stein*, 2020 WL 1445713, at *9 (S.D.N.Y. Mar. 25, 2020), *aff'd*, 986 F.3d 161. That result might make sense and comport with congressional intent if Congress had intended to regulate the FX spot market in the United States. It also might make sense if Congress intended to regulate the use of servers in the United States to perpetrate a fraud, much as Congress regulates the use of the mails and the wires in the United States under other statutes. But the Government charged Phillips with commodities fraud under the CEA and Congress's relevant focus in the CEA was on fraud in the swaps market and not in the FX spot market.

Thus, Nomura's use of FastMatch servers in the United States merely establishes that "United States [FX] markets were used to consummate the alleged fraud." *Psimenos*, 722 F.2d at 1047. Under the pre-*Morrison* conduct test, the Second Circuit concluded that where "[t]rading activities on United States commodities markets were significant acts without which" the victim's losses could have not occurred or the fraud could not have been committed, United States law would apply, even if "most of

the fraudulent misrepresentations alleged in the complaint occurred outside the United States." *Id.* at 1044, 1048. The Circuit reached that conclusion by inferring that "Congress . . . did [not] want United States commodities markets to be used as a base to consummate schemes concocted abroad." *Psimenos*, 722 F.2d at 1046; *see also IIT, an Int'l Inv. Tr. v. Cornfeld*, 619 F.2d 909, 1018 (2d Cir. 1980) (Friendly, J.) (reasoning that Congress did not intend "to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners"). Perhaps, as these prior cases suggest, there are sound policy reasons for Congress to prohibit "schemes concocted overseas and consummated by . . . acts transpiring in this country." *In re Alstom SA*, 406 F. Supp. 2d 346, 383 (S.D.N.Y. 2005). But in abrogating the conduct and effects tests, the Supreme Court admonished that that determination was for Congress, not the courts. *Morrison*, 561 U.S. at 261. Consequently, no matter what Congress hypothetically might think about the role of FastMatch's servers in the Boxing Day Trades, that policy consideration cannot alter the focus of the commodities fraud statute that Congress in fact enacted.

Second, the Government stresses that Phillips "sen[t] his manipulative commands" via messages in a Bloomberg chat that "traveled through Bloomberg's servers in the United States." Dkt. No. 102 at 19. That theory also lacks a meaningful limiting principle. At trial, Narayanan testified that "every message that gets sent [though Bloomberg's] system gets replicated or copied across both of our data centers, in New York and in New Jersey. So this had to be

true for every message" that Phillips sent in his Bloomberg chat with the Nomura salesperson. Trial Tr. 303:16–19. Yet Narayanan's testimony does not indicate that Phillips's Bloomberg chat messages were sent *through* the servers in the United States to the Nomura salesperson. Instead, Narayanan stated that those messages were merely duplicated onto Bloomberg's servers. That incidental and ancillary process does not render Phillips's manipulative conduct predominantly domestic. Courts have held that fraudulent communications made on websites and other digital platforms based in the United States directly to victims in the United States fall within domestic applications of the commodities fraud statute. *See Barron v. Helbiz Inc.*, 2023 WL 5672640, at *7 (S.D.N.Y. Sept. 1, 2023); *Bankman-Fried*, 2023 WL 4194773, at *11; *CFTC v. Reynolds*, 2021 WL 796683, at *4 (S.D.N.Y. Mar. 2, 2021). However, the Second Circuit has maintained that fraudulent statements made abroad that are merely "accessible in the United States . . . [or] repeated here" are insufficient to alter the nature of an otherwise "predominantly foreign" transaction. *Parkcentral*, 763 F.3d at 201; *see also Laydon v. Coöperatieve Rabobank U.A.*, 55 F.4th 86, 97 (2d Cir. 2022) (holding a conspiracy to place false bids from foreign trading desks did not support a domestic application of the commodities manipulation statute notwithstanding "several instances of communications that were made from or went through the United States"). It follows that the mere duplication of Bloomberg chats that were not intended for the United States onto servers here is inadequate. Given the ubiquity of Bloomberg chat in the global financial industry, *see* Dkt. No. 94 at 40, treating the copying of chat messages

on Bloomberg's servers in the United States as sufficient to support a domestic application of the commodities fraud statute would subvert the "basic premise of our legal system that, in general, 'United States law governs domestically but does not rule the world.'" *RJR Nabisco*, 579 U.S. at 335 (quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007)). Doing so would leave little or no room for foreign regulators to craft and apply their own rules, creating precisely the clash of regulatory regimes that *Morrisons*'s presumption against extraterritoriality seeks to avoid.

At oral argument, the Government asserted that the use of American services like Bloomberg is simply "[t]he way that modern finance works," Oral Argument Transcript ("Oral Arg. Tr.") 47:8, and suggested that the importance of those services for the global financial system supports the conclusion that Congress intended to keep them free of fraud, even when a perpetrator acts abroad, *see id.* at 57:2–58:9.[5] Again, the Government's theory echoes the Second Circuit's pre-*Morrison* case law. The thrust of the conduct test was to ensure that "foreign citizens and corporations" could not "use this country" in order "to further fraudulent . . . schemes." *Psimenos*, 722 F.2d at 1048 (quoting *Hotz*, 712 F.2d at 425); *see also IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975) (Friendly, J.). However, the *Morrison* Court rejected the notion that courts should consider whether a defendant had used "the United States as a 'base' for

5. However, the Government disclaimed the similarly expansive theory that "that because this was a dollar-based transaction, jurisdiction is appropriate here." Oral Arg. Tr. 81:2–3.

fraudulent activities in other countries," reasoning that this factor was simply too indeterminate "to administer." 561 U.S. at 258 (quoting *Vencap*, 519 F.2d at 1017–18). *Morrison* mandates what the Court viewed as a more straightforward inquiry: whether conduct relevant to the statute's focus was predominantly domestic. *See Cavello Bay Reins.*, 986 F.3d at 166 (observing the *Morrison* Court "opted instead for a bright-line rule"). Since the duplication of Phillips's Bloomberg chats onto servers in the United States is plainly insufficient under that standard, the Court cannot apply United States law to Phillips's scheme merely because he made use of the United States to further a fraud.

Third, the Government avers that Phillips's narrative of the One Touch Option's serpentine path from Glen Point to JPMorgan, RBS, JB Drax Honoré, and Morgan Stanley International is incomplete. Dkt. No. 102 at 20. While Morgan Stanley International was the immediate counterparty to JB Drax Honoré, it also entered into a further offsetting option with Morgan Stanley Capital, an entity based in the United States, such that Morgan Stanley Capital ultimately held the risk from the One Touch Option with Glen Point. Trial Tr. 440:3–441:3. Consequently, the Government argues a reasonable jury could find that Phillips's fraud fell within a domestic application of the commodities fraud statute because the Boxing Day Trades sent a "false price signal" that went to Morgan Stanley Capital in the United States when Phillips triggered the One Touch Option. Dkt. No. 102 at 20–21. That theory too is insufficient to sustain the Jury's verdict. As explained above, Phillips engaged in fraudulent

conduct abroad when he placed the Boxing Day Trades from South Africa via trading instructions to the Nomura salesperson in Singapore. Once Phillips had generated a false price signal by sending the trading instructions with an intent to defraud the counterparties to the One Touch Option, he had committed fraud. His transmission of the trading instructions therefore fell squarely within the commodities fraud statute's focus "on rooting out manipulation and ensuring market integrity." *Prime Int'l*, 937 F.3d at 107; *see Abitron*, 600 U.S. at 423 ("Because Congress has premised liability on a specific action . . ., that specific action would be the conduct relevant to [the statute's] focus."). By contrast, Morgan Stanley Capital's *receipt* of the resulting false price signal was unnecessary. The fact that Phillips's falsehood successfully reached its intended target undoubtedly supports the conclusion that Phillips traded in order to defraud the counterparties to the One Touch Option; however, Morgan Stanley Capital need not have relied upon or been deceived by that signal. *See* Trial Tr. 1352:2–4. Indeed, even if Morgan Stanley Capital had somehow failed to observe the USD/ZAR exchange rate when Phillips drove it through the 12.5 barrier, his actions would have implicated the anti-manipulation focus of the commodities fraud statute all the same. Thus, notwithstanding Morgan Stanley Capital's eventual receipt of a false price signal, Phillips engaged in the relevant fraudulent conduct abroad.[6]

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6. In urging the Court to adopt an expansive conception of relevant conduct that encompasses the impact of Phillips's actions on Morgan Stanley Capital, the Government analogizes to the rule that "venue lies both in the district where a . . . communication in furtherance of a crime was made and where it was received." *United States v. Lange*, 834 F.3d 58, 70 (2d Cir. 2016); *see* Dkt. No.

The Government asserts that Morgan Stanley Capital's receipt of a false price signal nevertheless supports a domestic application because "[s]ending the false price signal to the relevant parties—one of which was Morgan Stanley in the United States—was central to the crime." Dkt. No. 102 at 21. But the Second Circuit has rejected the premise that a foreign fraud becomes domestic whenever an individual abroad acts for the purpose of deceiving persons in the United States. In *Parkcentral*, the plaintiffs alleged that the defendants had made false statement in Germany "intended to deceive investors worldwide," including within the United States. 763 F.3d at 216. The Circuit deemed that allegation insufficient, however, since "the relevant actions in this case [remained] predominantly German" for purposes of "the presumption against extraterritoriality." *Id.* (citing *Morrison*, 561 U.S. at 266). So too here: Although Phillips's placed the Boxing Day Trades from South Africa in order to generate a false price signal that would reach the counterparties to the One Touch Option—including Morgan Stanley Capital—the conduct relevant to the focus of the commodities fraud statute was still "so predominantly foreign as to be impermissibly extraterritorial." *Id.*

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104 at 21. But that analogy is inapt because venue determinations depend not only on "the site of the defendant's acts," but also on "the locus of the *effect* of the criminal conduct." *Lange*, 834 F.3d at 71 (emphasis added) (quoting *United States v. Royer*, 549 F.3d 886, 895 (2d Cir. 2008)); *see also Royer*, 549 F.3d at 894 ("We have stated that 'venue is proper in a district where . . . the defendant intentionally or knowingly *causes* an act in furtherance of the charged offense to occur.'" (emphasis added) (quoting *United States v. Svoboda*, 347 F.3d 471, 483 (2d Cir. 2003))).

Indeed, the Government's theory would resurrect the pre-*Morrison* effects test, under which "[t]he anti-fraud laws of the United States [were] given extraterritorial reach whenever a predominantly foreign transaction ha[d] substantial effects within the United States." *Consol. Gold Fields*, 871 F.2d at 261–62. Courts developed the effects test to vindicate Congress's presumed interest in "protect[ing] domestic investors and domestic markets from foreign [financial] frauds." *OSRecovery, Inc. v. One Groupe Int'l, Inc.*, 354 F. Supp. 2d 357, 366 (S.D.N.Y. 2005). Notably, the Government asserted at oral argument that Phillips's false price signal implicated that very concern. *See* Oral Arg. Tr. 54:22–55:2 (contending the "false price signal" was "core to United States interests . . . [in] regulating fraud that involves the victim here, ultimately the Morgan Stanley entity that was in the U.S."). Applying the commodities fraud statute here based on the receipt by Morgan Stanley Capital in the United States of the "injurious" false signal that the Boxing Day Trades created would surely further the effects test's laudable goal. *In re SCOR Holding (Switz.) AG Litig.*, 537 F. Supp. 2d 556, 562 (S.D.N.Y. 2008) (quoting *Schoenbaum*, 405 F.2d at 206). Yet the Supreme Court in *Morrison* criticized the view that courts should apply United States law whenever a foreign fraud has "*some* effect on American [financial] markets or investors." 561 U.S. at 257 (emphasis added). The *Morrison* Court warned that the effects test had permitted courts to deem mere byproducts of foreign actions sufficient to extend United States law, based on nebulous notions of what "was 'necessary to protect American investors.'" *Id.* at 256 (quoting *Schoenbaum*, 405 F.2d at 206). The Government's argument regarding

Morgan Stanley Capital's receipt of the false price signal thus shares the same features of the effects test that the *Morrison* Court deemed unacceptable judicial policymaking.

Finally, the Government argues that it proved a domestic application of the commodities fraud statute because, by triggering the One Touch Option, Phillips's fraud resulted in payments to "bank accounts in the United States." Dkt. No. 102 at 21. While the Government asserts without a supporting citation that *Phillips* received those payments, *see id.* ("Receiving the payments in the United States was also the defendant's conduct."), even if the Court were to attribute the receipt of those payments to Phillips personally, the acceptance of bank transfers was not "manipulative conduct," *Bankman-Fried*, 2023 WL 4194773, at *11 (quoting *Prime Int'l*, 937 F.3d at 108). To the contrary, when Phillips received those payments, his fraud was already complete, as explained above. *See* Trial Tr. 1352:2–4 (instructing the Jury that commodities fraud "does not require proof that the counterparty to the swap was actually deceived or lost money or property as a result of the scheme"). The payments were therefore consequences, rather than components, of Phillips's manipulative conduct. That distinction is fatal to the Government's argument. Mere "'ripple effect[s]' or chain[s] of events that resemble[ ] a falling row of dominoes commencing" with manipulative actions taken abroad, *Prime Int'l*, 937 F.3d at 108, are too "attenuated" to support a domestic application of the commodities laws, *id.* at 106. Otherwise, in an era of interconnected financial markets, victims distantly removed from a foreign fraud

could thrust American law onto overwhelmingly foreign transactions. *Cf. Parkcentral*, 763 F.3d at 215–16 ("[I]t would subject to U.S. securities laws conduct that occurred in a foreign country, concerning securities in a foreign company, traded entirely on foreign exchange."); *WesternGeco*, 585 U.S. at 412–13 (noting the "international discord" that results from imposing United States law to foreign conduct subject to the laws of other nations (quoting *Arabian Am. Oil Co.*, 499 U.S. at 248)).

Under the pre-*Morrison* conduct test, courts were less concerned with extending United States law when "no relevant interest of the United States was [otherwise] implicated," so long as a case presented "some additional factor tipping the scales" in favor of applying American statutes. *Eur. & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 129 (2d Cir. 1998). And courts held that the use of "New York City bank accounts to receive [relevant] funds" was precisely such a factor. *Leonard v. Garantia Banking Ltd.*, 1999 WL 944802, at *6 (S.D.N.Y. Oct. 19, 1999), *aff'd*, 213 F.3d 626 (2d Cir. 2000). But *Morrison* was particularly critical of the Second Circuit's tip-the-scales inquiry, given "the difficulty of applying [that] vague formulation[ ]." 561 U.S. at 258. *Morrison* therefore demands that courts look to a statute's "exclusive focus," regardless of whether extraneous considerations suggest the application of United States law would be desirable. *Id.* at 268. As Phillips's receipt of payments in United States bank accounts falls beyond the focus of the commodities fraud statute, that factor cannot establish a domestic application.

Based on the evidence at trial, no reasonable jury could find that this case constituted a domestic application of the commodities fraud statute. For the sake of analytical clarity, the Court has addressed each of the domestic ties cited by the Government in order; however, those aspects remain insufficient when considered together, as they share a common flaw. None addresses the location where Phillips's manipulative conduct occurred. Instead, they depend on matters that were incidental or peripheral to Congress's focus of rooting out manipulation and ensuring the integrity of the swaps market. Those ties to the United States fit comfortably into the conduct and effects jurisprudence that once governed securities and commodities fraud cases in this Circuit. Yet *Morrison* abrogated those precedents in favor of a narrow inquiry that does not incorporate the broader connections and interests the Government emphasizes here. Thus, because Phillips's conduct abroad relevant to the focus of the commodities fraud statute has "primacy," *Bascuñán*, 927 F.3d at 122, the Government "failed to [prove] a proper domestic application," *Prime Int'l*, 937 F.3d at 107.

B. Extraterritorial Application

As *Morrison* explained, a domestic application is not the only way to overcome the presumption against territoriality, as that "principle represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate." 561 U.S. at 255. The Court therefore must determine whether "Congress has provided an unmistakable instruction that the [commodities fraud] provision is

extraterritorial," *Abitron*, 600 U.S. at 418, and, if so, whether this case comports with "the limits Congress has (or has not) imposed on the statute's foreign application," *RJR Nabisco*, 579 U.S. at 337–38.

In ruling on Phillips's motion to dismiss the Indictment, the Court held that the commodities fraud statutes applies extraterritorially to swap-based conduct pursuant to 7 U.S.C. § 2(i)(1). Dkt. No. 36 at 13. Neither party invites the Court to revisit that ruling. Section 2(i)(1) provides: "The provisions of this chapter relating to swaps that were enacted by the Wall Street Transparency and Accountability Act of 2010 ["Dodd-Frank"] (including any rule prescribed or regulation promulgated under that Act), shall not apply to activities outside the United States unless those activities . . . have a direct and significant connection with activities in, or effect on, commerce of the United States." 7 U.S.C. § 2(i)(1); *see Prime Int'l*, 937 F.3d at 103 n.6 (explaining "Dodd-Frank . . . amended the CEA to apply extraterritorially to certain swap-related activities" in Section 2(i)(1)). Dodd-Frank amended the commodities statute to add the antifraud provision at issue here. Pub. L. 111-203, 124 Stat. 1376, 1750 (2010) (codified at 7 U.S.C. § 9(1)); *see Prime Int'l*, 937 F.3d at 103 n.6. By its terms, Section 2(i)(1) is disjunctive. Swap-related activities outside the United States are subject to the commodities antifraud statute[7] when they have

7. The Court is cognizant that Section 2(i)(1) also extends swaps-related jurisdiction to "a wide array of areas" beyond the antifraud provision, "including '[c]apital adequacy,' 'swap data recordkeeping,' 'margining . . . for uncleared swaps,' 'trade confirmation,' and 'external business conduct standards.'" Dkt. No.

either "a direct and significant connection with activities in . . . commerce of the United States" *or* "a direct and significant . . . effect on[ ] commerce of the United States." 7 U.S.C. § 2(i)(1). At the charge conference, the Government informed the Court that it did not intend to "argue to the jury that there was a direct and significant effect in [its] summation." Trial Tr. 1145:12–13. With Phillips's consent, *id.* at 1145:22–24, the Court eliminated that portion of its instruction. Accordingly, the sole basis for applying the commodities fraud statute extraterritorially before the Jury in this case was if Phillips's activities had a direct and significant connection with activities in commerce of the United States.

At present, there is a paucity of precedent interpreting Section 2(i)(1). *See* Gina-Gail S. Fletcher, *Foreign Corruption as Market Manipulation*, U. Chi. L. Rev. Online 1, 8 (Jan. 8, 2020) ("To date, the [commodities statute's] manipulation and fraud provisions have not been extended extraterritorially and, therefore, it remains to be seen how courts will respond."). The Court therefore consulted several sources to illuminate Section 2(i)(1)'s meaning and develop an appropriate jury instruction. *Cf.* William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. Rev. 1718, 1721 (2021) (arguing that "textualism" provides false promises with respect to predictability, neutrality, and the rule of law and urging courts to consider certain legislative evidence of meaning).

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102 at 32 (alterations in original) (quoting Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45292, 45331–45336 (July 26, 2013)).

The Court first examined dictionaries to determine the plain meaning of both "direct," *see Direct*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/direct ("proceeding from one point to another in time or space without deviation or interruption"); *Direct*, Oxford English Dictionary, https://www.oed.com/dictionary/direct ("[s]traight; undeviating in course; . . . without intermediation or intervening agency; immediate"), and "significant," *see Significant*, Black's Law Dictionary (11th ed. 2019) ("[o]f special importance; momentous, as distinguished from insignificant"); *Significant*, Oxford English Dictionary, https://www.oed.com/dictionary/significant ("[s]ufficiently great or important to be worthy of attention; noteworthy; consequential, influential . . .; noticeable, substantial, considerable"). The dictionary definitions of those terms, however, were not sufficient to give meaning to the statutory language. They do not, for example, provide any measure for determining what is "significant" or when relations should be considered "direct."

Accordingly, the Court also considered Dodd-Frank's purpose and legislative history. *See Panjiva, Inc. v. U.S. Customs & Border Prot.*, 975 F.3d 171, 176 (2d Cir. 2020) (explaining a court may consult legislative history when the terms of a statute are "unclear" (quoting *Nwozuzu v. Holder*, 726 F.3d 323, 327 (2d Cir. 2013))). Congress added the relevant statutory language just three days after the Supreme Court decided *Morrison* and held that Congress must clearly express an affirmative intent to give a law

extraterritorial effect.[8] And the language Congress enacted in Section 2(i)(1) bears a striking resemblance to the test the Solicitor General proposed in *Morrison* for assessing whether the antifraud provision of the securities laws applies extraterritorially: "[A] transnational securities fraud violates Section 10(b) when the fraud involves *significant* conduct in the United States that is material to the fraud's success. Under that standard, the United States . . . must be integral, rather than ancillary, to the fraud." Brief for the United States as Amicus Curiae Supporting Respondents, *Morrison*, 561 U.S. 247 (No. 08-1191), 2010 WL 719337, at *16 (emphasis added). It thus appears that Congress intended to reach at least some of the conduct that the executive branch considered sufficient to support the extraterritorial application of the federal securities laws but that the Supreme Court had rejected in *Morrison*. *See* 561 U.S. at 270–72.

The Court further consulted the language that Congress had used in the extraterritoriality provisions enacted in other statutes but chose not to use in Dodd-Frank on the presumption that "Congress knows how to draft broad provisions when it aims to do so." *De Dandrade v. DHS*, 367 F. Supp. 3d 174, 191 (S.D.N.Y. 2019), *aff'd sub nom. Moya v. DHS*, 975 F.3d 120 (2d Cir. 2020). For example, the Foreign Corrupt Practices Act extends jurisdiction to "any United States person [who] corruptly do[es] any act outside the United States in furtherance" of foreign bribery offenses, "irrespective

8. *See* Michael Greenberger, *Too Big to Fail—U.S. Banks' Regulatory Alchemy*, 14 J. Bus. & Tech. L. 197, 209, 305 & n.344 (2019).

of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce." 15 U.S.C. § 78dd-2(i)(1). Congress tellingly chose not to ground application of Dodd-Frank on United States nationality. *See Vencap*, 519 F.2d at 1016 ("Although the United States has power to prescribe the conduct of its nationals everywhere in the world, Congress does not often do so." (citations omitted)). Congress's approach in Dodd-Frank was relatively measured. It demands a direct and significant nexus between foreign swap-related conduct and United States commerce, not that the conduct at issue be committed by a United States person.

The Court further assessed how courts interpret the cognate term "direct" as that term is used in other extraterritorial statutes on the understanding that the same terms used in other portions of the United States Code should be given the same or similar interpretation. *See Smith v. City of Jackson, Miss.*, 544 U.S. 228, 233 (2005) (plurality) ("[W]hen Congress uses the same language in two statutes having similar purposes, . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."); *Northcross v. Bd. of Ed. of Memphis City Sch.*, 412 U.S. 427, 428 (1973); *Nat'l Coal. on Black Civic Participation v. Wohl*, 512 F. Supp. 3d 500, 512 (S.D.N.Y. 2021). For example, the Foreign Sovereign Immunities Act states that a "foreign state shall not be immune from the jurisdiction of courts of the United States" when sued for "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). Interpreting that provision, the Supreme

Court has reasoned that "an effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity,'" and is not "too remote and attenuated." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). The Second Circuit has similarly observed that "[t]he common sense interpretation of a 'direct effect' is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption." *Martin v. Republic of South Africa*, 836 F.2d 91, 95 (2d Cir. 1987) (quoting *Upton v. Empire of Iran*, 459 F. Supp. 264, 266 (D.D.C.1978)). Another analogous extraterritorial provision can be found in the Foreign Trade Antitrust Improvements Act, which provides "Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce . . . with foreign nations unless such conduct has a direct, substantial, and reasonably foreseeable effect on trade or commerce which is not trade or commerce with foreign nations." 15 U.S.C. § 6a(1)(A). Interpreting that provision, the Second Circuit emphasized that the Supreme Court's Commerce Clause jurisprudence prior to its landmark decision in *Wickard v. Filburn*, 317 U.S. 111 (1942), also depended on "directness," and that those opinions had held "effects on interstate commerce" were inadequate when they "were merely 'incidental,' 'indirect', or 'remote.'"[9] *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 412 (2d Cir. 2014) (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 230 (1948)).

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9. While the Second Circuit ultimately interpreted Section 6a(1)(A) as demanding "a reasonably proximate causal nexus," it did so based on the statute's "the separate 'reasonabl[e] foreseeab[ility]' requirement" that is notably absent from the text of Section 2(i)(1). *Lotes Co.*, 753 F.3d at 411.

As *Lotes Co.*'s survey of Commerce Clause precedent indicates, principles of interstate jurisdiction offer useful guidance for parsing statutes conferring international jurisdiction. Indeed, "[w]e normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent." *Ryan v. Gonzales*, 568 U.S. 57, 66 (2013); *see United States v. Martin*, 974 F.3d 124, 139 (2d Cir. 2020). When states assert jurisdiction over out-of-state defendants, the Supreme Court has held jurisdiction is proper if a suit arises out of "contacts [that] proximately result from actions by the defendant himself that create a 'substantial connection' with the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (emphasis added) (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)). Consequently, "a defendant [can]not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *Id.* (quoting *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 774 (1984)); *see also U.S. Bank Nat'l Ass'n v. Bank of Am. N.A.*, 916 F.3d 143, 150 (2d Cir. 2019); *Chang v. Gordon*, 1997 WL 563288, at *6 (S.D.N.Y. Sept. 8, 1997) (contrasting "random," "fortuitous," or "attenuated" contacts with "integral" ones for purposes of personal jurisdiction).

Finally, the Court drew from precepts of customary international law. More than two centuries ago, the Supreme Court held that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (Marshall, C.J.). That principle—known as the *Charming Betsy* doctrine—remains an essential guide when courts ascertain the territorial limits of United States law, based on the notion

that what the United States does with respect to conduct occurring within the territory of another state, another state would be justified doing with respect to conduct occurring within the territory of the United States. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004); *In re: Vitamin C Antitrust Litig.*, 8 F.4th 136, 144 n.8 (2d Cir. 2021). Importantly, the *Charming Betsy* doctrine is a canon of statutory interpretation that illuminates when Congress has exercised prescriptive jurisdiction. *See United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (L. Hand, J.) ("[W]e are not to read general words . . . without regard to the limitations customarily observed by nations upon the exercise of their powers . . . . We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States."); *see also Att'y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 128 (2d Cir. 2001). It is not a substantive limitation on Congress's legislative power. *See United States v. Yousef*, 327 F.3d 56, 86 (2d Cir. 2003); *United States v. Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir. 1983) ("If it chooses to do so, [Congress] may legislate with respect to conduct outside the United States, in excess of the limits posed by international law. As long as Congress has expressly indicated its intent to reach such conduct, 'a United States court would be bound to follow the Congressional direction unless this would violate the due process clause of the Fifth Amendment.'" (quoting *Leasco*, 468 F.2d at 1334)).[10]

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10. In denying Phillips's motion to dismiss the Indictment, the Court explained that "[i]n order to apply extraterritorially a federal criminal statute to a defendant consistently with due

As an interpretive principle, the *Charming Betsy* doctrine must be distinguished from the presumption against extraterritoriality. Justice Scalia, the author of the majority opinion in *Morrison*, explained that the *Charming Betsy* doctrine is "'wholly independent' of the presumption against extraterritoriality." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting in part) (quoting *Arabian Am. Oil Co.*, 499 U.S. at 264 (Marshall, J., dissenting)). Consequently, "even where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." *Id.*; *see also In re Maxwell Commc'n Corp. plc ex rel. Homan*, 93 F.3d 1036, 1047 (2d Cir. 1996); *United States v. Garcia Sota*, 948 F.3d 356, 362 (D.C. Cir. 2020).

To discern the relevant principles of customary international law, this Court followed the Supreme Court in consulting the Third Restatement of Foreign Relations Law of the United States. *See F. Hoffmann-La Roche*, 542 U.S. at 164; *Hartford Fire Ins.*, 509 U.S. at 818 (Scalia, J., dissenting in part). Section 402(1)(c) of the Restatement articulates the general principle that

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process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair." *United States v. Antonius*, 73 F.4th 82, 87 (2d Cir. 2023) (alteration in original) (quoting *United States v. Epskamp*, 832 F.3d 154, 168 (2d Cir. 2016)); *see* Dkt. No. 36 at 17. But, like his motion to dismiss, Phillips's instant motion does not raise a due process challenge "for lack of the required territorial nexus." Dkt. No. 36 at 18.

"a state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory."[11] Restatement (Third) of Foreign Relations Law § 402(1)(c) (1987); *accord Yousef*, 327 F.3d at 91 n.24. The Restatement also includes a section on the specific context of securities and, as relevant here, commodities regulation. *See* Restatement (Third) of Foreign Relations Law § 416 cmt. c (1987). That section indicates a state can exercise prescriptive jurisdiction when "conduct has, or can reasonably be expected to have, a substantial effect" on the financial holdings of "United States nationals or residents" or when "the persons sought to be protected are United States nationals or residents." *Id.* § 416(2); *see Banque Paribas London*, 147 F.3d at 129 n.15. In either case, however, "such exercise of jurisdiction [must be] reasonable in the light of § 403." Restatement (Third) of Foreign Relations Law § 416(2) (1987); *see also AVC Nederland B.V. v. Atrium Inv. P'ship*, 740 F.2d 148, 155 (2d Cir. 1984). Under § 403, "[t]he 'reasonableness' inquiry turns on a number of factors including, but not limited to," *Hartford Fire Ins.*, 509 U.S. at 818 (Scalia, J., dissenting in part): "the extent to which the activity . . . has [a] substantial, direct, and foreseeable effect upon or in the territory" and "the connections, such as nationality, residence, or economic activity . . . between

11. The Third Restatement's disjunctive approach differs from the conjunctive view espoused in earlier sources. *See Aluminum Co. of Am.*, 148 F.2d at 444 (agreements in restraint of trade violate United States law, "though made abroad, if they were intended to affect imports *and* did affect them." (emphasis added)); Restatement (Second) of Foreign Relations Law § 18(b)(ii)–(iii) (1965).

that state and those whom the regulation is designed to protect." Restatement (Third) of Foreign Relations Law § 403(2) (1987). These background principles establish that, when an individual engages in conduct abroad, the *ex ante* foreseeability of an impact on the United States and the *ex post* consequences for United States persons are both relevant to whether prescriptive jurisdiction is permissible.

Drawing on these interpretive sources, the Court charged the Jury:

> [T]he Government can meet its burden [to show a sufficient relationship to the United States] by proving that an activity of the defendant or his co-conspirators[12] outside the United States related to the barrier option contract had a direct and significant connection with activities in commerce of the United States.
>
> For a connection or effect to be "direct," it must be immediate. A connection to an activity in commerce of the United States is direct if the activity outside the United States directly and immediately affected activity in commerce of the United States, without deviation or interruption. An indirect or attenuated connection to commercial activity

12. The Jury acquitted Phillips of Count One, conspiracy to commit commodities fraud. Trial Tr. 1390:9. Accordingly, the Court considers only the activities of Phillips and not those of any alleged co-conspirators.

> that occurs in the United States is not sufficient to satisfy this element of the test.
>
> "Significant" in this context means meaningful or consequential. For activity outside the United States to have a significant connection with activity in commerce of the United States, the relationship between the activity outside the United States to the commercial activity in the United States must be of importance. It is not sufficient if the relationship between the conduct outside the United States and that inside the United States is random, fortuitous, attenuated, or merely incidental. The conduct in the United States must be integral, rather than ancillary.

Trial Tr. 1364:4–1365:1.

Phillips contends that no reasonable jury could find that the Government proved a direct and significant connection to activities in commerce of the United States beyond a reasonable doubt. Dkt. No. 94 at 26. In contesting that assertion, the Government revisits many of the same ties to the United States that it argues established a domestic application of the commodities fraud statute. But most of those links, whether viewed individually or collectively, are equally inadequate under Section 2(i)(1), as they are either indirect or insignificant. Though the Government emphasizes that a portion of the Boxing Day Trades matched on FastMatch's servers in New Jersey, Dkt. No. 102 at 33, the Court's conclusion that Nomura's

use of those servers was merely incidental precludes the Government from proving a significant connection through such an ancillary nexus to commerce in the United States, *cf. Kashef v. BNP Paribas SA*, 442 F. Supp. 3d 809, 822 (S.D.N.Y. 2020) (Nathan, J.) ("The only connection between [defendant's] tortious conduct and the federal government is . . . clearing money through the United States. But that alone does not mandate application of federal law."). The trades could have matched on any number of servers, in any number of locations, with the same effect. *Cf. Daou v. BLC Bank., S.A.L.*, 42 F.4th 120, 132 (2d Cir. 2022).

Likewise, the duplication of the trading instructions that Phillips sent the Nomura salesperson via Bloomberg chat onto servers in New York and New Jersey, *see id.* at 36, was not consequential or important enough to be significant or to establish an integral connection between Phillips's swap-related conduct and activities in the commerce of the United States, *see Sonterra Cap. Master Fund Ltd. v. Credit Suisse Grp. AG*, 277 F. Supp. 3d 521, 590 (S.D.N.Y. 2017) (explaining the allegation that defendants "coordinated their manipulation of CHF LIBOR through Bloomberg terminal electronic communications transmitted through servers located in New York" was insufficient to confer jurisdiction because "[s]uch contacts would be merely random, fortuitous, or attenuated" (internal quotation marks omitted)); *see also Laydon v. Mizuho Bank, Ltd.*, 2015 WL 1515358, at *3 (S.D.N.Y. Mar. 31, 2015). There is no evidence Phillips knew that the Bloomberg chats would be copied onto servers in the United States, and the fact that they were copied did not contribute to the fraud. The fraud would

have been committed in precisely the same manner if the Bloomberg chats had not been duplicated on servers in the United States. Moreover, on the Government's theory, a foreign nation would be justified in regulating the conduct of two United States nationals occurring entirely in the United States, based on the mere unintended fortuity that the false communication from one United States citizen landed on a server located in the foreign nation before it reached the other United States citizen. *See* Oral Arg. Tr. 52:22–54:1.

The Government contends that the transfer of settlement funds into New York bank accounts "satisf[ies] the 'direct and significant' test that this Court articulated for the jury." Dkt. No. 102 at 37. But those bank transfers were indirect for purposes of Section 2(i)(1), because they followed the same winding path as the underlying options. Morgan Stanley, with a London-based "internal party" account and New York-based "external party" account, transferred the payment to RBS's bank account in New York, Gov. Ex. 573; Trial Tr. 441:23–443:5. That payout reached Phillips only after a JPMorgan account in London transferred funds to a JPMorgan account in New York and then further transmitted those funds to the accounts of Glen Point and its client in New York. *Id.* at 491:25–492:4, 493:4–7. No reasonable jury could find that this sinuous set of funds transfers constituted a direct connection sufficient to apply the commodities fraud statute to Phillips's swap-related activities abroad. *See EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro, S.A.*, 894 F.3d 339, 350 (D.C. Cir. 2018) (Sentelle, J., dissenting) ("[Losses] flowed from the EIG Funds to EIG Sete Parent, to EIG

Sete Holdings, to FIP Sondas, and only ultimately to Sete itself. . . . This does not seem to comport with normal understandings of 'direct,' which is defined as 'stemming immediately from a source.'" (quoting *Direct*, Merriam-Webster Dictionary, http://www.merriamwebster.com/dictionary/direct)); *cf. Casio Comput. Co. v. Sayo*, 2000 WL 1877516, at *26 (S.D.N.Y. Oct. 13, 2000) ("[Defendants] opened bank accounts in the State of New York and wire transferred funds to, from, or through New York. . . . [Although] the wire transfers reached bank accounts in the United States, such conduct by defendants does not satisfy the level of minimum contacts required to assert personal jurisdiction over them.").

Additionally, the Government asserts that Phillips's American clientele, including an entity that received a payout from the One Touch Option, and registration with the Commodity Futures Trading Commission ("CFTC") through the National Futures Association ("NFA") furnish a direct and significant connection between Phillips's swap-related conduct and activities in commerce of the United States. Dkt. No. 102 at 40. That theory is deficient too. Congress tellingly did not extend jurisdiction under Section 2(i)(1) whenever the defendant is a United States person, as it did in the Foreign Corrupt Practices Act. Similarly, Congress could have made all persons registered in the United States subject to the substantive provisions of the CEA—no matter where the underlying conduct occurs—but it chose not to do so. Instead, Congress predicated jurisdiction on the existence and character of connections between the activities abroad and those in the commerce of the United States. The

connections from Phillips's American client and NFA registration are insufficient under that test. Phillips's United States client unquestionably benefitted from the aforementioned bank transfers. *See* Gov. Ex. 553. But this connection is simply an inversion of the Government's unavailing argument regarding the fund transfers: Some of the funds transmitted from Morgan Stanley went to Phillips's client in the United States. Yet just as the movement of funds from Morgan Stanley into the United States bank accounts of Glen Point and Phillips's client was too remote from Phillips's swap-related conduct to provide a direct connection, so too is the benefit Phillips's client derived upon receiving those funds excessively attenuated to satisfy Section 2(i)(1). Phillips's prior registration with the CFTC, by way of the NFA, is equally inadequate. Gov. Ex. 513. There was no immediate connection between Phillips's Boxing Day Trades in the unregulated FX spot market and that registration. And Phillips's registration with the CFTC was, at most, ancillary to his fraud in connection with the One Touch Option.

Whether viewed individually or collectively, these theories prove too much. If accepted they would expand United States swap regulations to a vast array of transactions around the globe based on incidental and insubstantial ties to the United States. Virtually any swap entirely between foreign parties located abroad would be subject to United States law as long as it involves or affects a United States person—even if the relationship to the United States was random and incidental. Congress does not lightly impinge on the interests of foreign nations in regulating conduct within their own borders. *See*

Morrison, 561 U.S. at 269. And the text of Section 2(i)(1) demonstrates that Congress did not depart from that norm here.

The commodities fraud statute extends to Phillips's conduct, however, because the Jury could have found Section 2(i)(1) was satisfied based on two far more substantial ties between his activities abroad and activities in the commerce of the United States: namely, the connections between the Boxing Day Trades and the commercial activities of JPMorgan, as Glen Point's prime broker and formal counterparty, and Morgan Stanley Capital, as the substantive counterparty to the One Touch Option. Dkt. No. 102 at 37–38, 41.

First, the relationship between Phillips's conduct outside the United States and the conduct of JPMorgan in United States commerce was both "direct and significant." 7 U.S.C. § 2(i)(1). In connection with the Boxing Day Trades, Glen Point signed two agreements with JPMorgan, pursuant to which JPMorgan agreed to act as the seller to Glen Point of the One Touch Option. Gov. Exs. 555, 556. While JPMorgan transferred the investment position associated with the One Touch Option by entering into an offsetting option with RBS, Gov. Ex. 551—forging the first link in a chain of options that ultimately led to Morgan Stanley Capital—JPMorgan remained contractually bound to Glen Point on the One Touch Option. Consequently, when Phillips engaged in his manipulative trades triggering the barrier option, his conduct immediately impacted JPMorgan—a bank in the United States—by virtue of its obligations under the agreement with Glen Point. The connection to JPMorgan,

as prime broker and counterparty, was also "significant." 7 U.S.C. § 2(i)(1). JPMorgan bore exclusive responsibility for providing the settlement payment from the One Touch Option to Glen Point and its client, *see* Trial Tr. 500:19–501:7, and that payout was the aim of Phillips's fraudulent conduct. As such, JPMorgan was integral to Phillips's swap-related activities. And the relationship to JPMorgan here constitutes a "connection with activities in . . . commerce of the United States." 7 U.S.C. § 2(i)(1). The One Touch Option contracts signed by Glen Point prior to the manipulative trading at issue here, specified that Glen Point's counterparty was "JPMorgan Chase Bank, N.A." Gov. Exs. 555 at 2, 556 at 3. Every page of those contracts stated, in bold print: "JPMorgan Chase Bank, National Association. Organised under the laws of USA with limited liability. Main Office: 1111 Polaris Parkway, Columbus, Ohio 43240 USA." Gov. Exs. 555 at 2–6, 556 at 3–7. Accordingly, from the plain terms of the One Touch Option contracts, the connection to the United States was manifest and foreseeable. *See* Restatement (Third) of Foreign Relations Law § 403(2)(a) (1987). Because JPMorgan Chase Bank, N.A.'s prime brokerage services and options transacting were both business activities and part of the United States economy, the bank's position as prime broker and counterparty here furnished a connection to activities in commerce of the United States. Thus, based on JPMorgan's pivotal role in the One Touch Option whose barrier Phillips intentionally triggered through his trades, a reasonable jury could find that Phillips's swap-related conduct had a direct and significant connection with activities in commerce of the United States for purposes of Section 2(i)(1).

Phillips retorts that JPMorgan cannot satisfy Section 2(i)(1) in this case because the One Touch Option contracts stated that the relevant JPMorgan office for the transaction was in London, rendering any connection indirect. Dkt. No. 94 at 42; *see* Gov. Exs. 555 at 4, 556 at 5. But a bank's foreign branch office is not a separate entity from its parent. *See Greenbaum v. Handlesbanken*, 26 F. Supp. 2d 649, 653 (S.D.N.Y. 1998) (Sotomayor, J.). As a result, Phillips's trades had an uninterrupted connection to JPMorgan's United States entity.[13] Phillips also suggests that the connection from JPMorgan's role as prime broker was insignificant "as JPMorgan was not the counterparty required to pay the notional amount when the option triggered." Dkt. No. 94 at 42. However, the evidence before the Jury established just the opposite: JPMorgan was the *only* formal counterparty to One Touch Option, Gov. Exs. 555, 556, so it was the sole entity contractually obligated to pay Glen Point and its client when the option triggered. Indeed, the subsequent bank transfers made that conclusion even more apparent. Morgan Stanley did not transmit funds directly to Glen

13. The formal unity of United States banks and their foreign branches also carries serious economic consequences. For example, in 2012 JPMorgan suffered "a multi-billion dollar trading loss stemming in part from positions in a credit-related swap portfolio managed through its London Chief Investment Office. The relationship between the New York and London offices of J.P. Morgan that were involved in the credit swaps that were the source of this loss demonstrates the close integration among the various branches . . . of U.S. financial institutions, which may be located both inside and outside the United States." 78 Fed. Reg. at 45924.

Point and its client. *See* Gov. Ex. 573. JPMorgan did. Trial Tr. 491:25–492:4, 493:4–7. And Silveira, the executive director of FX operations at JPMorgan, stated that the bank treated its right to payment from RBS and obligation to pay Glen Point and its client "quite independently," *id.* at 500:25, such that JPMorgan's obligation to Glen Point under the One Touch Option and its activities that were the product of Phillips's manipulative trading were not contingent on the receipt of funds from RBS. Phillips's attempt to minimize JPMorgan's direct and significant role in his swap-related fraud therefore lacks merit.

Second, Phillips's conduct abroad had a direct and significant connection to the conduct in United States commerce of Morgan Stanley Capital, the ultimate risk-bearing counterparty on the One Touch Option. Although Morgan Stanley Capital's receipt of the false price signal in the United States was not itself domestic activity within the "focus" of the commodities fraud statute so as to make Phillips's conduct domestic, it is precisely the type of nexus that Congress had in mind when it extended the reach of the statute to conduct abroad that has a "direct and significant" connection with activities in the commerce of the United States. As with JPMorgan, that connection was immediate since Phillips's Boxing Day Trades breached the barrier on Morgan Stanley Capital's One Touch Option. The relationship between Phillips's conduct abroad and Morgan Stanley Capital's obligations under the One Touch Option was direct, rather than derivative, because Morgan Stanley Capital was Glen Point's ultimate counterparty on that option. Phillips is thus incorrect when he contends that the connection to Morgan Stanley

Capital was attenuated, since its interest in the One Touch Option derived from an internal "transfer [of] risk" from Morgan Stanley International. Dkt. No. 94 at 41. The testimony at trial establishes that the transaction between the two Morgan Stanley entities was not merely a matter of balance sheets. Nor did it constitute a ripple effect of Phillips's trading. To the contrary, Morgan Stanley's global head of FX—Samer Oweida—explained that when Morgan Stanley International entered into the option with JB Drax Honoré, before the manipulative trading, Morgan Stanley International also executed a "back-to-back trade" by entering into an identical, offsetting option contract with Morgan Stanley Capital. Trial Tr. 440:5–21. The "contract" between the Morgan Stanley entities is crucial. *Id.* at 440:19. Because the Boxing Day Trades directly triggered *that* option's barrier, Phillips's conduct had an uninterrupted connection to Morgan Stanley Capital's swap-related activities under the One Touch Option.

The connection to Morgan Stanley Capital was also significant. It was not random, fortuitous, attenuated, or merely incidental. The evidence established that Phillips traded in order to defraud the ultimate counterparty to the One Touch Option. Accordingly, triggering the One Touch Option's barrier was not, as Phillips suggests, an "incidental" byproduct of his actions, Dkt. No. 104 at 25, but rather their inextricable and integral purpose.

Unlike the activities of JPMorgan in United States commerce, there is no evidence that the conduct of Morgan Stanley Capital was foreseeable. Phillips did not know the

identity of the party who assumed the ultimate risk on the One Touch Option. He therefore did not know that Morgan Stanley Capital bore that risk. Nor is there evidence that such information was available to him. The identity of Glen Point's ultimate counterparty was concealed through the layers of transactions involved in the One Touch Option. However, the Court concludes that the unforeseeability of Morgan Stanley Capital is not fatal to the Jury's verdict. The Court did not instruct the Jury that the activities in commerce of the United States must have been foreseeable to provide a basis for the application of United States law or to satisfy Section 2(i)(1). While foreseeability is relevant, it is not a sine qua non to either the application of Section 2(i)(1) or prescriptive jurisdiction generally. Section 2(i)(1) itself does not speak to foreseeability but rather to directness and significance. Although those terms are reasonably understood to ensure that the activities abroad are sufficiently connected to activities in United States commerce such that the statute does not run afoul of principles of international law, international law does not limit the United States to regulating only that conduct abroad that has a foreseeable impact on the United States. *See* Restatement (Third) of Foreign Relations Law § 402(1)(c) (1987). States can regulate foreign conduct based on actual and intended domestic impacts alike. *Id.* And it is eminently reasonable to do so in cases like this one, where "those whom the regulation is designed to protect" have meaningful "connections, such as nationality, residence, or economic activity," to the United States. *Id.* § 403(2)(b). Thus, applying the statute to Phillips's conduct is faithful both to Congress's language and to the principles of customary international

law it is presumed to respect. Simply put, Phillips acted to defraud the ultimate counterparty to One Touch Option, whoever that may be, but the United States does not share his indifference to his victim's identity. Accordingly, the actual connection between the Boxing Day Trades and the activities of Morgan Stanley Capital pursuant to the One Touch Option was significant under Section 2(i)(1).

Phillips further argues that any ties to Morgan Stanley Capital cannot support the Jury's verdict because "the arrival of an amorphous signal is not even an identifiable 'activity.'" Dkt. No. 104 at 24. But that argument mistakes the connection for the connected. The signal may not itself be an activity—just as it was not "conduct relevant to the [commodities fraud] statute's focus" for purposes of a domestic application. *WesternGeco*, 585 U.S. at 414 (quoting *RJR Nabisco*, 579 U.S. at 326). However, that signal established a meaningful relationship between Phillips's trading activities and the activities of JPMorgan and Morgan Stanley Capital. By triggering the One Touch Option's barrier, Phillips's Boxing Day Trades had a direct and significant connection to the performance both by JPMorgan and Morgan Stanley Capital of their contractual obligations under that option. And as to Morgan Stanley Capital, just like JPMorgan, its swap-related activities are clearly commercial. Furthermore, because Morgan Stanley Capital is a United States financial institution, Trial Tr. 440:23–441:3, its swaps business is part of the United States financial sector and thus United States commerce. By breaching the barrier of Morgan Stanley Capital's One Touch Option, Phillips's conduct abroad therefore had a direct and significant

connection to activities in "commerce of the United States." 7 U.S.C. 2(i)(1).

The Government's narrower interpretation of Section 2(i)(1), based on the connections to JPMorgan and Morgan Stanley Capital, also comports with Congress's purpose in enacting Dodd-Frank: "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system . . ., [to] protect the American taxpayer by ending bailouts, [and] to protect consumers from abusive financial services practices." 124 Stat. at 1376. Dodd-Frank pursued its stated goal, in part, by strengthening anti-fraud enforcement because fraud in the United States financial sector jeopardizes the integrity and stability of the wider United States economy; it diminishes the credibility of American markets and inflicts unpredictable losses on United States businesses and individuals. *See* Jacob J. Lew, *Eight Years After the Financial Crisis: How Wall Street Reform Strengthened Our Financial System and Laid the Foundation for Long-Run Growth*, 19 N.Y.U. J. Legis. & Pub. Pol'y 611, 618 (2016); Michael H. Hurwitz, *Focusing on Deterrence to Combat Financial Fraud and Protect Investors*, 75 Bus. Law. 1519, 1543 (2020) ("[F]inancial fraud can—and often does—have widespread repercussions, . . . shaking confidence in the fairness and even stability of the financial markets."); *see also SEC v. Palmisano*, 135 F.3d 860, 866 (2d Cir. 1998) ("[T]he deterrence of securities fraud . . . encourag[es] investor confidence, increas[es] the efficiency of financial markets, and promot[es] the stability of the securities industry."). As Congress recognized in enacting Section 2(i)(1), those threats are not purely internal.

When sufficiently proximate to and intertwined with American commerce, foreign activities can also subvert the resiliency of the United States financial sector. *See SIFMA v. CFTC*, 67 F. Supp. 3d 373, 388 (D.D.C. 2014). A fraud orchestrated and conducted abroad, but perpetrated on a United States prime broker or swap counterparty, undermines the soundness of the domestic markets for prime brokerage services and swaps. If individuals outside the United States can defraud their American prime brokers and swap counterparties with impunity, then those markets will lack the very accountability Dodd-Frank sought to ensure. Neither the text of Section 2(i)(1) nor its legislative context permits that dubious result.

C. Intent to Trigger the One Touch Option

As it went to the Jury, the commodities fraud charge of which Phillips was convicted required the Jury to find beyond a reasonable doubt the following elements: (1) that Phillips employed a manipulative device, scheme, or artifice to defraud; (2) that the scheme, untrue statement, act, practice, or course of conduct was in connection with a swap, in that it would be material to a decision by a counterparty to the swap; and (3) that Phillips acted knowingly, willfully, and with an intent to defraud and, in particular, with an intent to defraud a counterparty to the One Touch Option. Trial Tr. 1349:8–21.

With respect to the first element, Phillips argues that that there was insufficient evidence to prove that an intent to affect the USD/ZAR exchange rate and thereby trigger the One Touch Option was the "but-for" cause of

his Boxing Day Trades. Dkt. No. 94 at 45. He contends, to the contrary, that he "traded with a legitimate purpose to replace the delta on his One Touch Option." *Id.* at 48. The Government responds that Phillips's argument "hinges on ignoring crucial evidence of defendant's guilt . . . and drawing inferences that the jury had good reason, and certainly was entitled, to reject." Dkt. No. 102 at 42.

When trading on the open market is manipulative presents a vexing issue of federal law. *See Markowski v. SEC*, 274 F.3d 525, 528 (D.C. Cir. 2001); Daniel R. Fischel & David J. Ross, *Should the Law Prohibit "Manipulation" in Financial Markets?*, 105 Harv. L. Rev. 503, 510 (1991). The Supreme Court has explained that the term manipulation is "virtually a term of art," *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976), that "refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by affecting market activity," *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476 (1977); *see also Ernst & Ernst*, 425 U.S. at 199 (defining securities manipulation as "intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities") Yet manipulation is not limited to wash trades, matched orders, or rigged prices. Rather, it extends to "the full range of ingenious devices that might be used to manipulate [asset] prices," *Santa Fe Indus.*, 430 U.S. at 477, and occurs when a defendant "inject[s] inaccurate information into the marketplace," *Noto v. 22nd Century Grp., Inc.*, 35 F.4th 95, 106 (2d Cir. 2022); *see also SEC v. O'Brien*, 2023 WL 3645205, at *9 (S.D.N.Y. May 25, 2023).

The Second Circuit has therefore held that "a defendant may manipulate the market through open-market transactions." *Set Cap. LLC v. Credit Suisse Grp. AG*, 996 F.3d 64, 77 (2d Cir. 2021); *see SEC v. Vali Mgmt. Partners*, 2022 WL 2155094, at *2 (2d Cir. June 15, 2022) (summary order); *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 100–02 (2d Cir. 2007). However, the distinction between manipulative and legitimate open-market trading is not easily captured in words. The Second Circuit has stated that a manipulative trade is one that misleads investors "to believe 'that prices at which they purchase and sell securities are determined by the natural interplay of supply and demand, not rigged by manipulators,'" *ATSI*, 493 F.3d at 100 (quoting *Gurary v. Winehouse*, 190 F.3d 37, 45 (2d Cir. 1999)), and has instructed courts to "ask whether a transaction sends a false pricing signal to the market," *id.*; *see also Set Cap.*, 996 F.3d at 77 ("Deception is the gravamen of a claim for market manipulation, and 'the market is not misled when a transaction's terms are fully disclosed.'" (quoting *Wilson v. Merrill Lynch & Co., Inc.*, 671 F.3d 120, 130 (2d Cir. 2011)). But whether a transaction sends a false price signal to the market would seem to be the effect of a manipulative act and not its defining characteristic. And whether the demand from a purchase order or the supply from a sell order is "natural" must depend on some antecedent (and undefined) determination of what, in a financial market, is natural and what is not. To date, the Second Circuit has merely observed that it is not a defense that trades are "visible to the market and reflect[ ] otherwise legal activity," and that "[o]pen-market transactions that are not inherently manipulative may constitute manipulative

activity when accompanied by manipulative intent." *Set Cap.*, 996 F.3d at 77; *see Vali Mgmt. Partners*, 2022 WL 2155094, at *1; *see also SEC v. Hwang*, 2023 WL 6124041, at *13 (S.D.N.Y. Sept. 19, 2023) (concluding the SEC plausibly alleged manipulative intent based on the allegation that defendant "traded to increase the prices of names in which [it] held long positions and reduced the prices of securities in which [it] hel[d] short positions").

In ruling on Phillips's motion to dismiss the Indictment, the Court rejected his argument that the Boxing Day Trades could not be manipulative because they were made in the open market with willing participants. Dkt. No. 36 at 28. The Court explained that the Indictment alleged that "to accomplish his goal of breaching the 12.50 USD/ZAR exchange rate, [Phillips] engaged in what could be characterized as deceptive conduct": he traded in high volumes over a relatively short period of time on Christmas and Boxing Day when the market was particularly illiquid for the avowed purpose of moving the exchange rate below 12.50. *Id.* at 28–29. The Court determined that if the Jury ultimately found that Phillips placed those trades to move the market, his trades were akin to conduct that courts in the Circuit had deemed manipulative, such as "marking the close" by executing orders at the close of the market in order to affect prices. *Id.* at 29. After all, the relevant "transaction" must be understood broadly as including the amount and timing of the trade, since a transaction injects false information into the market "if the prohibited intent alters the trade in *any* material respect." *SEC v. Kwak*, 2008 WL 410427, at *4 n.10 (D. Conn. Feb. 12, 2008) (emphasis added); *cf. Royer*, 549 F.3d at 900 ("[D]efendants

sought to artificially affect the prices of various securities by directing the AP site subscribers to trade . . . at times and in manners . . . that were dictated not by market forces, but by defendants' desire to manipulate the market for their own benefit. It would be hard to imagine conduct that more squarely meets the ordinary meaning of 'manipulation.'").

At the same time, however, the fact that a trade may "influence prices," *GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189, 204 (3d Cir. 2001), does not make it illegal, even if the trader knows it will affect prices. All trades reflect supply and demand and therefore send a price signal to the market that can impact prices. *See CFTC v. Kraft Foods Grp., Inc.*, 153 F. Supp. 3d 996, 1020–21 (N.D. Ill. 2015); *see also* F.A. Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519, 526 (1945) (explaining how "the price system" serves as "a mechanism for communicating information"). Sophisticated traders are constantly aware that their transactions will impact prices, and it is permissible for a trader to "rationally incorporate this effect into her investment decisions." *In re Amaranth Nat. Gas Commodities Litig.*, 587 F. Supp. 2d 513, 539 n.167 (S.D.N.Y. 2008), *aff'd*, 730 F.3d 170 (2d Cir. 2013). It is for that reason that the Court concluded that the appropriate test for whether a trade is "manipulative" is a "but for" one. It is not illegal for a trader to conduct a transaction for a genuine reason other than to send a price signal, but with the knowledge that her trade will also have a price impact that increases the value of other assets she holds. "[O]nly intent, not knowledge, can transform a legitimate transaction into manipulation." *Id.* at 539; *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 27

F. Supp. 3d 447, 470 (S.D.N.Y. 2014) (same). Thus, a trader who wants to take a substantial long position in an asset and believes an efficient way of acquiring that position is to buy in large quantities before an anticipated price movement may do so, even if she knows that the effect of her purchase will be to increase the value of assets already in her portfolio and she welcomes that effect. Her trades will not inject false information into the market. Although the trader welcomes the increase in the value of her preexisting portfolio, if she would have placed those trades regardless of that effect on her portfolio, then her trades reflect the "natural interplay of supply and demand." *ATSI*, 493 F.3d at 100 (quoting *Gurary*, 190 F.3d at 45). On the other hand, if the trader would not have transacted but for the desire to harness that price effect to increase the value of her preexisting portfolio—i.e., if the overriding purpose of the trade is to send a price signal—then the presence of some other reason that would not have been a sufficient basis for the trader to engage in the transaction will not inoculate the trading activity. Regardless of the other objective, the trade will be a function of the intent to send a price signal, rather than the result of the natural interplay of supply and demand. The price signal it sends will be "false."

Accordingly, the Court concluded that the Judge Holwell aptly articulated the rule in *SEC v. Masri*: "in order to impose liability for an open market transaction, the [Government] must prove that *but for* the manipulative intent, the defendant would not have conducted the transaction." 523 F. Supp. 2d 361, 372 (S.D.N.Y. 2007) (emphasis in original).

In charging the Jury, the Court therefore provided the following instruction on manipulative intent[14]:

> Here, the defendant is accused of employing a manipulative device, scheme, or artifice to defraud. Manipulation is a term of art when used in connection with financial markets. Manipulation refers to intentional or willful conduct designed to deceive or defraud by controlling or artificially affecting some type of price, in this case, the dollar-rand exchange rate. Because market participants ordinarily assume that prices, such as exchange rates, are determined by the natural interplay of supply and demand—that is, the prices determined by available information and market forces—an act is manipulative if it is designed to deceive or defraud others by sending a false pricing signal to the market. Consequently, a transaction is not manipulative when the market is fully aware of the terms of and purposes behind a transaction, as that transaction will not mislead or deceive the market. Keep in mind that the mere fact that a transaction affected market prices does not render it manipulative.

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14. Although it required the Jury to assess Phillips's intent in placing the Boxing Day Trades, this instruction technically concerned the *actus reus* of the charged commodities fraud. As explained *infra*, the Court provided the Jury with a separate instruction on the necessary *mens rea*. *See* Trial Tr. 1353:14–16 ("The third element of commodities fraud is that the defendant participated in the manipulative scheme knowingly, willfully, and with the intent to defraud.").

An act can be manipulative even if it is conducted on the open market or through ordinary market activity, such as by placing an order to buy or sell, or by actually buying and selling. In some cases a defendant's intent to manipulate a price is all that distinguishes legitimate trading from manipulative trading. Similarly, in some cases, the determination of whether an activity is manipulative can only be made by placing the activity in context and considering whether it is part of a pattern of trading activity. What matters is whether the defendant has an intent to inject a false price signal into the market or to mislead others by artificially affecting the price. The question you should ask is whether the defendant acted with the intent to deceive or defraud others by sending a false pricing signal into the market. If there are two purposes for a transaction, one of which is legitimate, and if the transaction would have been done at the same time and in the same manner for the legitimate purpose, it is not manipulative even if the defendant also had an intent to deceive or to send a false price signal into the market. On the other hand, if the transaction would not have been done at the same time and in the same manner, except for the intent to mislead, then the transaction is manipulative. Thus, if but for an intent to deceive, the defendant would not have conducted the transactions in the dollar-rand foreign exchange spot market at the times and in the amounts he did, then those transactions were manipulative.

Trial Tr. 1350:10–1352:3. Of course, as the Court also charged the Jury, in order to convict Phillips, it was not sufficient to find that he engaged in manipulative activity. *Id.* at 1349:20–21. The Jury would also have to conclude that acted with the requisite intent—namely, to defraud a counterparty to the swap. *See id.* at 1353:24–1354:4.

The Government adduced ample evidence at trial for a reasonable jury to find that Phillips would not have placed the Boxing Day Trades in USD/ZAR in the FX spot market but for an intent to generate a price signal that would trigger the One-Touch Option, and that Phillips's competing explanation of those trades—namely, that he traded as part of a "delta replacement" strategy—was spurious.[15] The evidence supported, and it was uncontested, that in entering the One-Touch Option Phillips was making a bet that a new leader, Cyril Ramaphosa, and his allies would prevail in the 2017 election to the leadership of the African National Congress ("ANC"), the dominant

15. At oral argument, Phillips remarked that the Government relied on "circumstantial" evidence to prove his intent to trigger the barrier. Oral Arg. Tr. 99:24–100:2, 104:23–25. However, "direct evidence is not required; in fact, the government is entitled to prove its case solely through circumstantial evidence, provided, of course, that the government still demonstrates each element of the charged offense beyond a reasonable doubt." *United States v. Graziano*, 616 F. Supp. 2d 350, 358 (E.D.N.Y. 2008) (quoting *United States v. Lorenzo*, 534 F.3d 153, 159 (2d Cir. 2008)) (cleaned up), *aff'd*, 391 F. App'x 965 (2d Cir. 2010); *see also United States v. Gillon*, 2023 WL 8177113, at *2 (2d Cir. Nov. 27, 2023) (summary order) ("If competing inferences arise, we defer to the jury's choice, no matter whether the evidence under review 'is direct or circumstantial.'" (quoting *Persico*, 645 F.3d at 105)).

political party in South Africa, over the allies of the incumbent President Jacob Zuma and that the election of Ramaphosa would strengthen the ZAR against the USD. *See* Trial Tr. 239:12–240:4, 264:3–8. On December 18, 2017, the ANC held an election for its top six leadership positions. *See id.* at 892:17–25. Phillips's bet appeared to pay off as initial reports suggested that Ramaphosa and his allies were poised to win five of those six positions, Gov. Ex. 407 at 19, and the market reacted positively to the news, resulting in a surge in the price of ZAR, Def. Ex. 506 at 2. But the USD/ZAR exchange rate did not reach the One Touch Option's 12.50 barrier in the immediate aftermath of the top-six election. *See* Trial Tr. 912:11–18 (explaining the exchange rate went to 12.52). Moreover, once the votes were counted, the election results also proved less favorable to Ramaphosa than initially thought. While Ramaphosa won the position of President, Def. Ex. 506 at 2, Zuma's allies secured three of the other top six positions, producing a "stalemate," Trial Tr. 862:22–24. On December 19, 2017, the ZAR depreciated and the exchange rate retreated from the 12.50 barrier. Def. Ex. 506 at 2.

On Wednesday, December 20, 2017, the ANC held elections for its larger governing body, the National Executive Committee ("NEC"). *See* Trial Tr. 862:18–20. The ZAR/USD exchange rate was still above the One-Touch Option's barrier level. *See* Gov. Ex. 610. Phillips had a phone call with a Glen Point trader named Phillip Costa, Trial Tr. 122:15–16, 225:3–5, who confirmed that the USD/ZAR exchange rate was 12.5750, Gov. Ex. 103-T at 2. After discussing how the market was still waiting for "ANC member results," Phillips replied: "I might need

you to start fucking around in Dollar-Rand tonight. . . . So we're going to just try to offer it lower and see how much gets taken out. . . . Maybe try to break it lower." *Id.* at 2–3. Phillips added: "let's try and get this [unintelligible] fucking moving. We've got enough time, we've got like fifteen days. But it'd be really nice if we could get it done." *Id.* at 3. Though left unsaid, the approximately fifteen days corresponded with the date on which the One Touch Option expired, *see* Gov. Ex. 555 at 3, 556 at 4, at which point it would be irrelevant whether the exchange rate breached the barrier. Referring explicitly to 12.50, the One Touch Option's barrier level, Phillips instructed Costa to try to get the exchange rate below that level if the opportunity presented itself: "[L]et's just see where we—when we get NEC, what goes on, and what goes on [with] Dollar-Rand. But if we get it through fifty-five . . . let's just go fucking lash it through fifty tonight." *Id.* Yet that opportunity eluded Phillips on December 20, as the exchange rate remained above 12.55 and the barrier was not breached. *See* Gov. Ex. 610 (indicating the exchange rate reached 12.574). At 3:00 A.M. on December 21, 2017, the NEC results were announced: Ramaphosa's allies had secured the balance of power. Trial Tr. 862:18–21. Notwithstanding Ramaphosa's electoral victory, some feared that Zuma would refuse to cede control over the ANC to Ramaphosa. *Id.* at 266:8–25.

Phillips's instructions via Bloomberg chat to the Nomura salesperson to place the Boxing Day Trades a few days later, on December 25, 2017, similarly evinced a manipulative intent. At that point, there were eight days left before the One-Touch Option would expire and become

worthless. At 11:49 P.M. London time on December 25, 2017, Phillips asked the Nomura salesperson to sell $25 million USD for ZAR. Gov. Ex. 446 at 10. The salesperson did and told Phillips that the exchange rate had dropped "down to a low of 12.5675." *Id.* at 12. Phillips then gave an instruction that specifically referenced the figure of 12.50. He directed the salesperson to sell another $50 million USD for ZAR and to "try [to] get thru 50 [i.e., 12.50] in[ ]5 mins." *Id.* at 12–13. Phillips was explicit regarding his objective: "My aim[ ]is to trade thru 50." *Id.* at 13. And he continued to be explicit about his goal of lowering the exchange rate. Before the salesperson had finished selling the first $50 million, Phillips instructed Nomura to sell another $50 million USD for ZAR and repeated "Need to get it thru 50. Now. 4990." *Id.* As the salesperson completed those trades, he warned Phillips "[I] imagine there is much more depth on the bid the closer we get to 12.50." *Id.* at 14. Phillips asked "how much," and the sales person replied "[I']d say something like 150." *Id.* Phillips responded by directing the salesperson to sell "Up[ ]to 200" million USD, "Thru 50." *Id.* He reiterated: "Need it to trade thru 50. 4990 is fine." *Id.* With $25 million left to sell within that limit, the Nomura salesperson told Phillips that "5075 is the low so far." *Id.* at 15. The Jury could have found Phillips was emphatic in his desire to move the exchange rate. He instructed the salesperson to "Sell ano[ther] 100. Get it thru." *Id.* The salesperson did, but the exchange rate only fell to 12.5050. *Id.* Phillips asked, "How much more u think to break 50," to which the salesperson replied "at least another 200." *Id.* Phillips then directed Nomura to "Sell 100 pls. Try [to] get it thru." *Id.* at 16. After the salesperson had sold $90 million of that

order, Phillips inquired what the lowest trade was. *Id.* The salesperson answered "5025 is the low." *Id.* Phillips ordered Nomura to sell "Another 100" million USD. *Id.* The salesperson informed Phillips that he had sold $10 million USD at 12.5000 "but reuters not showing that yet." *Id.* at 17. Phillips said "Sell 100. . . . Try to get it thru now." *Id.* Approximately one minute later, the salesperson wrote "we just sold at 4990." *Id.* at 18. Phillips requested "pro[o]f of the print" and ordered Nomura to "[s]top" trading. *Id.* By that point, Phillips had sold a total of $725 million USD for ZAR in less than an hour. *Id.* at 19.

The language from the chats is telling. *See Koch v. SEC*, 793 F.3d 147, 154 (D.C. Cir. 2015); *cf. United States v. Brown*, 937 F.2d 32, 37 (2d Cir. 1991) ("Conceivably, the tape alone might have supported a jury's finding of . . . intent."). The Jury could have found that Phillips's objective was not to acquire a particular amount of ZAR. He started the chat with an instruction to sell $25 million. It was only after being informed that the trade did not result in the exchange rate breaking the barrier and triggering the option that he then gave an instruction to sell an additional $50 million. And Phillips continued to give instructions to sell USD and purchase ZAR only after being informed that prior transactions had not resulted in the exchange rate going below 12.50. Finally, once the exchange rate broke the 12.50 barrier, Phillips stopped selling USD and buying ZAR. That Phillips repeatedly asked the salesperson how much additional ZAR he would need to purchase to bring the exchange rate through that barrier, and at one point directed Nomura to sell "*Up*[ ]*to* 200" million USD, Gov. Ex. 446 at 14 (emphasis

added), corroborates Phillips's stated goal of altering the exchange rate and suggests that he hoped to do so as inexpensively as possible. The Jury readily could have found that Phillips's sole objective was to move the exchange rate, and not to acquire a particular position in ZAR.

The timing and structure of the Boxing Day Trades further support the inference that Phillips engaged in the trades not because of a trading strategy that involved the acquisition of ZAR but to send a price signal. Phillips placed the trades between 11:49 P.M. on Christmas and 12:45 A.M. on Boxing Day. *Id.* at 10, 18. The evidence at trial established that due to those holidays, global FX markets were unusually illiquid. *See* Trial Tr. 124:6–24 (explaining Boxing Day is a holiday in the United Kingdom and "if London is on a holiday most of the London satellite currencies, i.e., emerging markets linked in the London time zone would be less liquid than they would be during a fully day in London"); *id.* at 252:12 ("Like most other holidays, there tends to be less liquidity."). Indeed, the Nomura salesperson advised Phillips that "liquidity [was] very thin," as soon as Phillips began placing the Boxing Day Trades. Gov. Ex. 446 at 10; *see also* Trial Tr. 331:13–25. As the Government's expert testified, liquid markets are more difficult to manipulate because "in a liquid market I can go in and do a transaction and maybe even a large transaction and have no impact on price." Trial Tr. 604:13–5. Accordingly, a reasonable jury could conclude that the timing of the Boxing Day Trades indicated that Phillips traded with a manipulative intent. *See Set Cap.*, 996 F.3d at 77; *CFTC v. Amaranth Advisors, L.L.C.*, 554

F. Supp. 2d 523, 534 (S.D.N.Y. 2008) (Chin, J.) (explaining that executing purchase orders at or near the close of the market, when it is easier to affect prices, can constitute manipulation).

Moreover, Phillips's conduct shortly after the Boxing Day Trades reinforces the view that he placed those trades to momentarily move the exchange rate, rather than to acquire a position in ZAR. Hours after placing the Boxing Day Trades, Phillips called Costa again. Gov. Ex. 105T. During their conversation, Phillips explained that he hoped to offload the ZAR he had just purchased: "[T]here's no liquidity now in dollar-rand because it's Boxing Day. But . . . at some point we [are] going to have to start buying this shit back. . . . If it starts coming down, we'll start talking about it. I don't want to put any pressure on it." *Id.* at 2–3.

Phillips did not immediately sell the ZAR he had just accumulated, but the Jury could have found that the only reason for his delay was to effect another manipulation of the exchange rate. Glen Point held another one-touch option which would trigger a $10 million payout upon the exchange rate hitting the barrier rate of 12.25 before January 15, 2018. Gov. Ex. 602; Trial Tr. 719:23–720:2. The sale of ZAR for USD would have raised the exchange rate even further above the barrier rate of 12.25. *See* Gov. Ex. 105T at 3. So Phillips did not sell ZAR before the barrier option could be triggered. Instead, Phillips purchased ZAR before immediately selling it. *See* Trial Tr. 724:24–1; Gov. Ex. 603. On December 28, 2017, Costa told Phillips that the exchange rate was 12.2678. Gov. Ex.

108-T at 2. Phillips responded: "Okay. We might have to do a job on it." *Id.* Phillips subsequently instructed Costa via Bloomberg chat to sell $100 million USD for ZAR. Gov. Ex. 414 at 6. Approximately a minute and a half later, with the exchange rate below 12.25, Phillips told Costa "stop . . . . We thru." *Id.* Having triggered the 12.25 one-touch option, Phillips sold nearly all of the ZAR he had purchased through the Boxing Day Trades. *See* Gov. Ex. 630. In short, a reasonable jury could find that Phillips had no economic reason for the Boxing Day Trades other than to affect the exchange rate and trigger the One Touch Option.

Phillips denies that this considerable evidence is sufficient. Instead, Phillips maintains that when he mentioned "fucking around in Dollar-Rand" on his December 20, 2017 call with Costa, Gov. Ex. 103-T at 2–3, he meant placing small trades to test market liquidity, Dkt. No. 104 at 38, that his chat messages on Boxing Day were inconsistent with an intent to move the market price to trigger the barrier option, Dkt. No. 94 at 56 n.27, and that he effected the Boxing Day Trades not to trigger the One Touch Option's barrier but for the innocent purpose of replacing the delta on the soon-expiring One Touch Option to maintain Glen Point's expose to ZAR, *id.* at 48. The jury was not required to accept any, much less all, of that theory. *See United States v. Mason*, 479 F. App'x 397, 399 (2d Cir. 2012) (summary order) ("Even assuming that Mason has posited a plausible counter-interpretation of the evidence, the jury was not compelled to accept it where, as here, there was sufficient evidence to support the government's interpretation of the evidence."); *United*

States v. Todisco, 667 F.2d 255, 261 (2d Cir. 1981) (per curiam) ("The court and jury were free to reject D'Angelo's 'innocent' interpretation of the telephone calls.").

Phillips's argument regarding the December 20 call was not based on the account of any witness to that call but on a strained reading of the testimony of a Glen Point trader, Coratti. On cross-examination, Coratti confirmed that it was common for Glen Point "to occasionally go into the market [and] place relatively small trades to try to see where the market was." Trial Tr. 563:9–12. He was then asked "Sometimes you might mess around with small trades and see where the buyers and sellers were actually in the market, yes?" *id.* at 563:15–16, and he answered "Yeah, I wouldn't use the term mess around, but you would trade to see liquidity," *id.* at 563:19–20. It was on that basis that Phillips asked the Jury to conclude that when he told Costa on December 20 he might need "to start fucking around in Dollar-Rand," all he meant was an exercise in price exploration. But not only did Coratti have no knowledge of the December 20 trades, he also was not asked to explain—and did not explain—why, if all Phillips was trying to do was price exploration, he would have mentioned trying to "break . . . lower" the 12.50 exchange rate, or the date of the expiration of the One Touch Option fifteen days later. Gov. Ex. 103-T at 2. The Jury plainly did not have to accept Phillips's argument and could have concluded that the December 20 call reflected an early formulation of Phillips's plan to move the exchange rate below 12.50 in order to trigger the One Touch Option.

Phillips's explanation of the Bloomberg chat messages with the Nomura salesperson on Boxing Day is no more

persuasive. Phillips did not defend the language of those chats but instead argued that, if his real objective was to trigger the One-Touch Barrier option, he need not have traded through the 12.50 level with the increased cost and risk that would have created for Glen Point but could simply have stopped once the exchange rate touched the 12.50 barrier. Phillips asserts now, as he did to the Jury, that "it is inconceivable that everyone but Neil Phillips—a 30-year veteran in this in this market and a seasoned portfolio manager—knew that fact, or that Mr. Phillips believed that a one touch option needed to trade *through* the strike price." Dkt. No. 94 at 56 n.27. And he highlights that during the Boxing Day Trades, after the Nomura salesperson informed Phillips "its bid at the figure [i.e., 12.50] now we just sold 10 [million USD] there," Gov. Ex. 446 at 17, Phillips nevertheless directed Nomura to sell another $100 million USD for ZAR, *id.* ("Sell 100. . . Try get it thru now."). According to Phillips, this trade showed that he did not place the Boxing Day Trades in order to trigger the One Touch Option and "that he would have traded at the same time and in the same manner absent an intent to trigger the option." Dkt. No. 94 at 55.

From all of the evidence before it, however, the Jury could have concluded either that Phillips had a mistaken understanding of when the option would be triggered or, more likely, that he wanted to ensure that he had a trade that was "through the barrier" because there can be uncertainty whether a barrier is triggered on a decentralized market like that for spot FX and, with the stakes as high as they were, he wanted to avoid any objection that the option had not been triggered. Recall

that on his December 20, 2017 call with Costa, Phillips mentioned the One Touch Option—and specifically cited its upcoming expiration date—yet said, "if we get it through fifty-five . . . let's just go fucking lash it *through* fifty tonight." Gov. Ex. 103-T at 3 (emphasis added). Based on that call, a reasonable jury could conclude that Phillips's similar insistence on trading through 12.50 in his Bloomberg chat messages to the Nomura trader also reflected Phillips's interest in triggering the One Touch Option. Indeed, Phillips's emphatic directives in those chats for Nomura to trade through 12.50, even though doing so required purchasing $725 million of ZAR, followed by his subsequent sale of that position shortly thereafter, reveal that Phillips made the trades to trigger the option. And when the salesperson apprised Phillips that Nomura had traded at 12.50, the salesperson observed that "low print has been 12.5000 we gave 10 there but reuters not showing that yet." Gov. Ex. 446 at 17; *see also id.* at 15 (stating after a prior trade "bbg [i.e., Bloomberg] composite sho[wi] ng 4980 but that is wrong"). A reasonable jury could also determine that Phillips traded through the barrier because he held another one touch option with a barrier of 12.25, and once an exchange rate passes through one "technical level" like 12.50 it tends to quickly move to another technical level, like 12.25, where there is increased bidding. *See* Trial Tr. 269:20–271:6.

More fundamentally, the Jury was not required to accept (and a reasonable jury could easily have rejected) Phillips's argument throughout trial that he placed the Boxing Day trades to replace the delta on the soon-expiring One Touch Option and maintain Glen Point's

exposure to ZAR. *E.g.*, *id.* at 66:4–13. As noted above, an option's delta refers to the exposure to an asset the option creates; the delta accordingly fluctuates with changes in asset prices. *See id.* at 115:3–14; *see also id.* at 233:22–25 ("Delta is a term in options which represents the equivalent exposure, if it was outright instead of an option. The delta for an option is a function of many different variable at any given point in time, and it can change quite a lot."). Phillips maintains that the evidence showed Glen Point regularly replaced delta on its options and tracked and managed the exposure from its various positions through risk reports. Dkt. No. 94 at 47. He further asserts that, by using Glen Point's risk report from December 22, 2017, he "almost perfectly replaced his delta on Boxing Day." *Id.* at 47, 51. He justifies his decision to trade on Boxing Day, rather than any other day leading up to the expiration of the One Touch Option, by stressing the "uncertainty surrounding the ANC election . . . going into the Christmas weekend," *id.* at 47, and arguing that a Christmas sermon by the Archbishop of Cape Town exhorting Ramaphosa to quickly replace Zuma "signaled Zuma's sooner-than-expected exit," *id.* at 53. Accordingly, Phillips avers that he placed the Boxing Day Trades when he did to capitalize on the favorable effect the sermon would have on the ZAR as markets reacted to Ramaphosa's clearer path to power. Dkt. No. 104 at 34–35.

"[T]he government need not negate every theory of innocence." *United States v. Aguiar*, 737 F.3d 251, 264 (2d Cir. 2013) (quoting *Autuori*, 212 F.3d at 114); *see also United States v. Akefe*, 2010 WL 2899805, at *15 (S.D.N.Y. July 21, 2010) ("The presence of other possible inferences

does not change the fact that the evidence presented by the Government was sufficient."). And, despite Phillips's vigorous presentation of a competing interpretation of his actions, "this is not a case where the evidence 'gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence.'" *Akefe*, 2010 WL 2899805, at *15 (quoting *United States v. Martinez–Sandoval*, 2003 WL 1442454, at *5 (S.D.N.Y. Mar. 6, 2003)). The Jury could have easily rejected each part of his theory. *See United States v. Soto*, 959 F.2d 1181, 1185 (2d Cir. 1992) (rejecting a sufficiency of the evidence challenge where there was evidence at trial that was "inconsistent with" defendant's theory of innocence); *see also United States v. Varanese*, 417 F. App'x 52, 54–55 (2d Cir. 2011) (summary order) ("[Although defendant] argues that different interpretations apply to the actions he took—this argument ignores that 'it is the task of the jury, not the court, to choose among competing inferences,' and moreover, that according to this court, the jury ultimately chose the more plausible ones." (quoting *United States v. Martinez*, 54 F.3d 1040, 1043 (2d Cir. 1995))).

Phillips's argument that Glen Point had a practice of replacing delta is based on the testimony of Coratti, the former head trader at Glen Point, that Glen Point regularly "exchanged delta" on its options. Dkt. No. 94 at 48. But, as the Government adduced and emphasized at trial, there is a critical difference between "delta exchange," the subject of that testimony, and "delta replacement," the theory of the defense. Coratti explained that delta exchange occurs when a party enters into an option with a bank and simultaneously conducts a spot trade with the same bank

at an agreed-upon price that yields a delta equal to the option. Trial. Tr. 517:25–17. Delta replacement, according to the defense, involves "going into the market and buying a spot position because an option might be expiring," *id.* at 519:7–10; *see also id.* at 539:5–6 ("Q. Now you wouldn't call that delta exchange; correct? A. Yes."). Coratti stated that he could not recall any specific examples of Glen Point executing such a spot trade. *Id.* at 519:11–19. Phillips argues that the distinction Coratti drew between delta exchange and "delta replacement," elevates form over substance. Dkt. No. 104 at 28. Coratti acknowledged that the "concept" of the two strategies is the same—"taking on delta that you want to have in a context in which you might have just lost it." Trial Tr. 539:7–10. However, while the underlying concept might be the same, the strategies are not. Lyons, the Government's expert, testified that the transactions are "quite different" because with delta exchange the trader and bank remain risk neutral, *id.* at 760:2–7, whereas with delta replacement a party maintains its exposure to the risks and potential rewards of an asset at a particular point in time during the trade, *id.* at 760:10–17. There was no evidence presented at trial that Glen Point engaged in delta replacement. A reasonable jury could therefore find that delta replacement, unlike delta exchange, was not a common practice at Glen Point, such that Phillips's explanation of the Boxing Day Trades was less plausible.

Phillips further relies on evidence that Glen Point tracked its delta on risk reports that Phillips regularly received, Dkt. No. 94 at 49, and that the Boxing Day Trades "resulted in an almost perfect replacement" of

the One Touch Option's $759 million delta described in the "last delta risk report . . . Phillips received prior to the Boxing Day trading," *id.* at 51. But there were serious weaknesses to that argument as well. First, a reasonable jury would not have necessarily found the correlation between the $759 million delta listed on the risk report and the $725 million of ZAR Phillips purchased through the Boxing Day Trades as perfect or probative as Phillips suggests. Instead, such a jury could find that the $34 million discrepancy between those amounts casts serious doubt on the proposition that Phillips conducted the Boxing Day Trades simply to replace the delta on the One Touch Option. Second, the evidence showed that Phillips had altered Glen Point's risk reports, limiting them to reflect only the delta from certain options, so the Boxing Day Trades did not perfectly replace Glen Point's exposure to ZAR. In a December 8, 2017 Bloomberg chat to Jonathan Fayman, Phillips's co-Chief Investment Officer at Glen Point, Trial Tr. 156:4–7, Phillips wrote: "I've remarked all our options in zar . . . and I've taken out a[ ]lot of the deltas too." Gov. Ex. 404 at 15. Fayman responded that doing so "makes sense" since "the delta really [are] noise." *Id.* And Coratti explained that options with later expiration dates and more distant barrier levels have deltas that can distract from near-term investment decisions on more time-sensitive and likely to trigger barrier options. Trial Tr. 573:22–574:11. But Lyons testified that Phillips's removal of the delta from those options disguised the actual effect of the Boxing Day Trades on Glen Point's portfolio: a $400 million *increase* in

delta. *Id.* at 731:19–733:12.[16] Consequently, a rational jury could find that Phillips's risk reports and purported delta replacement strategy did not create leave a reasonable doubt as to the purpose of the Boxing Day Trades.

Likewise, the Jury could have found that the defense never offered a plausible explanation for the suspicious timing of the Boxing Day Trades. Phillips contends that he traded when he did because uncertainty regarding control of the ANC lingered after December 20, 2017, but a Christmas sermon by the Archbishop of Cape Town urging a swift transition of leadership from Zuma to Ramaphosa and his allies "decreased post-election uncertainty" and portended a strengthening of the ZAR. Dkt. No. 94 at 54–55. Of course, trading to profit from the market's expected reaction to a material event is not manipulative. *See CFTC v. Gorman*, 587 F. Supp. 3d 24, 41 (S.D.N.Y. 2022) (observing that "trading strategies intended to anticipate and respond to prevailing market forces" are "legitimate" (quoting *Masri*, 523 F. Supp. 2d at 367)). Yet Phillips tellingly fails to cite any evidence indicating that *he* thought the Christmas sermon was important. *See* Dkt. No. 94 at 54–55. As explained above, his statements when placing the Boxing Day Trades and expressing his

16. Phillips observes that Lyons's calculations relied on the mid-price, i.e., the midpoint between the best offer and best bid on the trading platform, rather than the transaction price. Dkt. No. 104 at 33; *see* Trial Tr. 782:18–21. But a reasonable jury could conclude that any deviation between those prices would not offset the significant discrepancy Lyons identified between the delta of Glen Point's portfolio as a whole and the delta disclosed in the modified risk reports.

desire to sell ZAR shortly thereafter strongly suggest that Phillips's focus was triggering the One Touch Option, not capitalizing on the market's expected reaction to a sermon. *See United States v. Harry*, 2023 WL 4865829, at *1 (D. Conn. July 31, 2023) ("The evidence must be viewed in 'totality, not in isolation.'" (quoting *United States v. Huezo*, 546 F.3d 174, 178 (2d Cir. 2008))). Phillips nevertheless stresses Coratti's testimony that Phillips "would have been very focused on something like" the Christmas sermon. Trial Tr. 570:6–7. Coratti made that generic statement in reference to a December 23, 2017 news article that a Nomura salesperson sent to Phillips, Fayman, Costa, Coratti, and several other traders at Glen Point. Def. Ex. 511. However, the Jury could have readily found that the article undermines Phillips's explanation for trading on Boxing Day. First, the article indicates that the public, and thus the market, was well aware of the substance of the Archbishop's sermon before Christmas,[17] as the article stated that the Archbishop's sermon was "expected to exert pressure on Ramaphosa to force Zuma out." *Id.* at 2. Second, the article's lede—and headline—reported that, prior to the sermon, the ANC's leadership had planned "secret meetings . . . [for] after Christmas to discuss ways

17. In cross-examining Phillips's expert witness, the Government also introduced evidence that the Archbishop of Cape Town was a longstanding critic of Zuma, such that his Christmas sermon was not a significant development. Trial Tr. 1070:11–1074:6. As Phillips correctly observes, that evidence is irrelevant for purposes of his renewed Rule 29 motion, which challenges the sufficiency of the evidence in the Government's case-in-chief. Dkt. No. 104 at 35 n.24. But that evidence remains relevant to Phillips's Rule 33 motion for a new trial, discussed *infra*.

to manage Jacob Zuma's exit." *Id.* at 1. By December 23, Ramaphosa had already been elected president of the ANC, Def. Ex. 506 at 2, and his allies had won control of the NEC, Trial Tr. 862:18–863:1. As a result, the Jury could conclude the sermon was not a material political development because Ramaphosa's ascent and Zuma's resignation were assured. *See* Def. Ex. 511 at 2–3 ("Had Nkosazana Dlamini-Zuma been elected ANC president, Zuma would have been cushioned, but now his supporters accept that an early departure is inevitable.").

Finally, Phillips's emphasis on the Christmas sermon stands in tension with his delta replacement theory: If the sermon had dramatically altered the expected value of the ZAR, then it would make little sense for Phillips to rely on the risk report he received on December 22, 2017 to ascertain the delta he needed to replace. *See* Trial Tr. 148:25–149:2 (recognizing "delta increases as you get closer to the barrier of the option").

Thus, the evidence at trial was sufficient for a reasonable jury to find—as the Jury did here—that the but-for reason, if not the sole reason, that Phillips placed the Boxing Day Trades was to trigger the One Touch Option. Based on that evidence, the Jury easily could have concluded that the Government satisfied the first element of commodities fraud. *See United States v. Kinney*, 211 F.3d 13, 18 (2d Cir. 2000) ("Assessing this evidence in the light most favorable to the government, as we must, we find it was sufficient to establish that defendant[ ] acted with the requisite criminal fraudulent intent.").

D. Materiality

Phillips's last Rule 29 challenge to the sufficiency of the evidence asserts that no reasonable jury could have found that his manipulative scheme was material to a decision by a counterparty to the swap. Dkt. No. 94 at 57. His argument is twofold: First, Phillips contends that participants in the swap market "fully anticipate that counterparties will manage their risk, including by engaging in trading around the barrier that may have the effect of causing the barrier to be breached." *Id.* at 61. As that trading is both commonplace and expected, an objectively reasonable counterparty to the One Touch Option would not have deemed the Boxing Day Trades significant. *Id.* at 61–62. Second, even if the Boxing Day Trades would be important to a reasonable counterparty, Phillips argues that the Government failed to prove that they "could influence a *decision*" by that counterparty with respect to the One Touch Option. *Id.* at 58 (emphasis added); *see also id.* at 60; Dkt. No. 104 at 41. The Government retorts that the testimony at trial concerning the expectations of both JPMorgan and Morgan Stanley would enable a reasonable jury to find that Phillips's scheme was material beyond a reasonable doubt. Dkt. No. 102 at 59.

The Court instructed the Jury that Phillips's scheme had to be material to a counterparty to the One Touch Option in order to constitute a scheme "in connection" with that option. Interpreting a provision of the Securities Litigation Uniform Standards Act ("SLUSA") that applies to "a misrepresentation or omission of a material fact in

connection with the purchase or sale of a covered security," 15 U.S.C. § 78bb(f)(1), the Supreme Court held that "[a] fraudulent misrepresentation or omission is not made 'in connection with' such a 'purchase or sale of a covered security' unless it is material to a decision by one or more individuals (other than the fraudster) to buy or to sell a 'covered security,'" *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377, 386 (2014) (quoting § 78bb(f)(1)). SLUSA's language is remarkably similar to the commodities statute's prohibition on the use of a manipulative or deceptive device or contrivance "in connection with any swap." 7 U.S.C. § 9(1). Accordingly, the Court interpreted Section 9(1) as requiring Phillips's manipulative or deceptive device or contrivance to be material. *See* Dkt. No. 36 at 24–25.

Under a well-established definition of materiality, "[a] misrepresentation is material if it is capable 'of influencing the intended victim.'" *United States v. Johnson*, 945 F.3d 606, 614 (2d Cir. 2019) (quoting *Neder v. United States*, 527 U.S. 1, 24 (1999)). Or, in a related formulation, a deception is material if it "has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it [is] addressed.'" *United States v. Calderon*, 944 F.3d 72, 85 (2d Cir. 2019) (alterations in original) (quoting *Neder*, 527 U.S. at 16). Materiality is an objective standard that depends on a deception's capacity to influence the decision of a reasonable person in the position of the relevant decisionmaker. *See United States v. Litvak*, 889 F.3d 56, 66 (2d Cir. 2018) ("[T]he determination of the materiality of a misstatement or omission 'is an objective one.'" (quoting *TSC Indus., Inc.*

v. Northway, Inc., 426 U.S. 438, 445 (1976))); *United States v. Frenkel*, 682 F. App'x 20, 22 (2d Cir. 2017) (summary order). "Whether a given omission or misrepresentation is material 'is a mixed question of law and fact that the Supreme Court has identified as especially well suited for jury determination.'" *Landesman*, 17 F.4th at 340 (quoting *United States v. Litvak*, 808 F.3d 160, 175 (2d Cir. 2015)).

Yet SLUSA and Section 9(1) also differ in a critical respect: while the former forbids frauds "in connection with *the purchase or sale* of a covered security," 15 U.S.C. § 78bb(f)(1) (emphasis added), the latter extends more broadly to deceits "in connection with any swap," 7 U.S.C. § 9(1). Consequently, the Court determined that Section 9(1) encompasses frauds that "reach beyond the formation of a swap to all events critical in the lifecycle of a swap, including those that trigger the swap." Dkt. No. 36 at 25.

Thus, under Section 9(1), a manipulative or deceptive device or contrivance must be material to a counterparty's decision with respect to some aspect of the swap, though that decision need not concern the purchase or sale of that swap and can instead consist of a decision related to the triggering and payout of a swap. As the Court instructed the Jury:

> Here, in order to be in connection with a swap, the scheme must be material to a decision by a counterparty to the swap, which means that the scheme must have the natural tendency to influence or be capable of influencing the counterparties to the swap. That does not

> require proof that the counterparty to the swap was actually deceived or lost money or property as a result of the scheme, so long as there is proof that the scheme to defraud was conducted with the purpose of defrauding a counterparty to the swap and was at least capable of affecting that counterparty's conduct or decision with respect to the swap. Materiality is an objective standard, so you need not decide that the scheme in fact influenced the counterparty. Instead, you must find beyond a reasonable doubt that the scheme would be significant to a reasonable market participant in the position of the counterparty to the swap.

Trial Tr. 1352:23–1353:13.

According to Phillips, the Boxing Day Trades would be insignificant to a reasonable market participant because it is foreseeable that a party to a one touch option may trade near a barrier to manage risk and that those trades could trigger the option's barrier. Dkt. No. 94 at 61. Indeed, in the agreements underlying the One Touch Option, JPMorgan disclosed that it could engage in hedging strategies such as "buying and selling, on a dynamic basis, exposure to the asset underlying the option in the spot, cash or derivatives markets," and that those strategies "have the potential to result in large and directionally unfavorable movements for our counterparties, particularly around the reference period, fixing period/window, our expiries of the option." Gov. Exs. 555 at 4, 556 at 5. JPMorgan included the same disclosure in the offsetting option

it entered into with RBS. Gov. Ex. 551 at 3. Likewise, Morgan Stanley's option with JB Drax Honoré explained that Morgan Stanley "regularly trades in the foreign exchange spot, forward, futures and options markets with respect to currencies included in the Currency Pair, as part of its dealing activities with other customers and its market making and hedging activities," and that those "activities may affect the Spot Exchange Rate, and thus the probability that a Barrier Event will occur." Gov. Ex. 570 at 3. Witnesses who worked at Morgan Stanley, Trial Tr. 453:3–21, JB Drax Honoré, *id.* at 162:23–163:24, and Glen Point, *id.* at 270:6–19, also testified that participants in the FX swap market expected their counterparties to trade near the barrier. Consequently, Phillips contends that a reasonable counterparty to the One Touch Option would have anticipated trading like the Boxing Day Trades and known that those trades could affect the USD/ZAR exchange rate, so his trades were immaterial. Dkt. No. 94 at 61.

A key premise of Phillips's argument is that the purpose behind trades near a barrier is irrelevant: if parties are expected to engage in hedging and trading strategies to control their exposure to a one-touch option, there would be nothing particularly unusual or significant about a party engaging in trading for the purpose of triggering the option as the exchange rate approached the barrier. But the Jury need not have accepted that premise in light of the contrary testimony at trial. Santoro, the Chief Compliance Officer for JPMorgan's swap dealers, explained that she had been involved in discussions at JPMorgan regarding whether barrier options had been

triggered. Trial Tr. 817:10–13. She said that "[g]enerally" the decisive question in those discussions was "whether or not the market has observably traded at [the barrier] level." *Id.* at 817:14–17. But Santoro added that whether the market had traded at the barrier level was not the sole consideration. She stated that JPMorgan does not expect counterparties to barrier options to trade in order to intentionally cause a barrier event to occur, *id.* at 817:18–21, and that it would be important for JPMorgan to know whether a counterparty to an option had done so, *id.* at 817:22–25. Oweida, Morgan Stanley's global head of FX, similarly remarked that Morgan Stanley does not expect its counterparties to one-touch options to engage in trading with the intent to trigger barrier events. *Id.* at 427:17–22. He observed that Morgan Stanley does not "price in" the risk that a counterparty will place such trades when valuing one-touch options. *Id.* at 428:19–23. And Oweida testified that, when trading occurs at a barrier level, it would be important to Morgan Stanley to know if the counterparty to a one-touch option had engaged in trading that was intentionally designed to trigger that barrier. *Id.* at 428:15–18. Henderson, an FX derivative salesperson at JB Drax Honoré, recognized that trading near a barrier for either a legitimate or illegitimate purpose could trigger an option, yet he differentiated between the two and suggested that the latter would be "problematic." *Id.* at 163:5–7, 163:25–165:5. Based on Santoro, Oweida, and Henderson's testimony, a jury could conclude that a reasonable counterparty to the One Touch Option would find it significant that Phillips placed the Boxing Day Trades to intentionally trigger the option's barrier.

Moreover, a jury could reasonably infer why the purpose behind a trade near a barrier would matter to a reasonable counterparty. Any trading near a barrier can push the exchange rate toward or away from the barrier. But, other things being equal, a counterparty to an option who trades in order to trigger a barrier is more likely to achieve that result than one who trades to hedge against risks or for other legitimate purposes. Henderson testified that trading for a "legitimate" purpose would be "unlikely" to trigger a barrier, though he acknowledged it "could happen." *Id.* at 164:21–165:5. And the Boxing Day Trades themselves illustrate why transactions conducted for the purpose of triggering a barrier are more likely to do so. Phillips placed those trades at a time when liquidity was particularly low, such that his trades would have a greater effect on the exchange rate. By contrast, a market participant engaging in foreseeable, legitimate trades may not have chosen such a high-impact moment to transact. Additionally, when the exchange rate remained stubbornly above 12.50 despite Phillips's hundreds of millions of dollars in spot transactions, Phillips persisted in placing further orders until he traded through 12.50. A reasonable jury could infer that Phillips's perseverance resulted from his intent to trigger the barrier, and that a party engaging in legitimate trades may not have traded in the same volume. Consequently, while financial institutions often trade near the barriers of their FX options, market participants have a compelling reason to view trading *intended* to trigger a barrier as both distinct and significant.

The evidence therefore establishes that it would be important for a reasonable counterparty to the One

Touch Option to know whether Phillips had engaged in manipulative trades in order to trigger the option's barrier. Indeed, the Second Circuit has held that testimony similar to that of Santoro and Oweida—that a defendant's deception was important—supports a finding of materiality. *See United States v. Gramins*, 939 F.3d 429, 446–47 (2d Cir. 2019); *Litvak*, 808 F.3d at 175–76.

But importance alone is insufficient. *See United States v. Rigas*, 490 F.3d 208, 234 (2d Cir. 2007) ("'[R]elevance' and 'materiality' are not synonymous."). Rather, as Phillips correctly notes, his scheme also had to be important to a counterparty's decision with respect to the swap. Dkt. No. 94 at 57. He asserts that the Government did not put forward any evidence indicating that his trades, even if significant to a reasonable counterparty, would be capable of affecting that counterparty's conduct or decision with respect to the One Touch Option. Dkt. No. 104 at 41–42.

Phillips errs in suggesting that the evidence at trial failed to establish that his scheme was relevant to any decision related to the One Touch Option. *See id.* at 58. To the contrary, Santoro testified that whether a counterparty to a barrier option had traded to intentionally trigger the barrier would be an "important factor" for JPMorgan's "willingness . . . to pay a settlement amount" under that option. Trial Tr. 818:1–6. In response, Phillips simply denies that JPMorgan was a counterparty to the One Touch Option because Morgan Stanley, not JPMorgan, was "the true risk-taking counterparty" on that option. Dkt. No. 94 at 60. Regardless of the economic substance that resulted from the cascade of options between

JPMorgan, RBS, JB Drax Honoré, and Morgan Stanley, the contracts between Glen Point and JPMorgan meant that as a formal matter JPMorgan was indeed Glen Point's counterparty. Gov. Exs. 555, 556. And under those agreements, JPMorgan had the contractual right to dispute Glen Point's determination that the barrier had been triggered and thereby initiate a dispute-resolution process in which three independent dealers would assess whether the option had been validly triggered. *See* Gov. Ex. 559 at 36. Consequently, a reasonable jury could find that Phillips's scheme was objectively material to JPMorgan's decision of whether to pay the One Touch Option's settlement amount or instead challenge the validity of the barrier event.

Oweida testified that when Morgan Stanley determines whether to pay the settlement amount on a one-touch option, the fact that trading has occurred at the barrier level is "very important." Trial Tr. 428:4–7. But he clarified that Morgan Stanley's position was premised on its expectation that those trades will be conducted for legitimate purposes, rather than to intentionally trigger an option. *Id.* at 428:8–14. From these statements, it would be reasonable for a jury to infer that whether a barrier has been intentionally triggered through trading could affect the willingness of a reasonable party in Morgan Stanley's position to validate that triggering event and pay the resulting settlement amount. Santoro's testimony regarding JPMorgan's willingness to pay under similar circumstances lends further support to that inference, given the objective nature of the materiality inquiry. *See id.* at 818:1–6. Moreover, under its option agreement

with JB Drax Honoré, Morgan Stanley was the "Barrier Determination Agent," so it had the "sole and absolute discretion" to declare a triggering event and that declaration would "be conclusive in the absence of manifest error." Gov. Ex. 570 at 2. As a result, the testimony of Oweida and Santoro indicates that Phillips's scheme was "capable of affecting" Morgan Stanley's decision to declare that the option had been triggered and make a corresponding settlement payment. Trial Tr. 1353:6–7. Thus, there was sufficient evidence for a reasonable jury to find that the Government proved the materiality of Phillips's scheme for a swap counterparty in Morgan Stanley's position beyond a reasonable doubt.

Because the evidence at trial supported the Jury's conclusion that Phillips's scheme was material, Phillips is not entitled to a judgment of acquittal on that element. *See United States v. Bilzerian*, 926 F.2d 1285, 1299 (2d Cir. 1991) ("Since the question of materiality is especially well suited for jury determination, and defendant has not demonstrated a lack of sufficient evidence to support that body's conclusion, there is no basis to set aside the . . . fraud convictions.").

II. Motion for a New Trial

Alternatively, Phillips urges the Court to grant a new trial under Federal Rule of Criminal Procedure 33, contending that several purported errors rendered his prosecution "precisely the 'extraordinary' case in which a new trial is warranted." Dkt. No. 94 at 64 (quoting *Ferguson*, 246 F.3d at 134). The Government responds

that Phillips has not established a "manifest injustice," so his motion for a new trial must be denied. Dkt. No. 102 (internal quotation marks omitted).

Phillips begins his motion for a new trial with a footnote stating that "[a]ll arguments made with respect to [his] Rule 29 motion are hereby incorporated in his Rule 33 motion by reference." Dkt. No. 94 at 64 n.32. Although "a Rule 33 motion may properly be granted even where a Rule 29 motion is denied," when a defendant contests the weight of the evidence "the Rule 33 inquiry requires an objective evaluation of the evidence and an assessment of whether the evidence preponderates heavily against the verdict." *Landesman*, 17 F.4th at 331. Considering the "reliable trial evidence as a whole" and "defer[ring] to the jury's resolution of conflicting evidence," the guilty verdict here was not a "manifest injustice." *United States v. Archer*, 977 F.3d 181, 188–89 (2d Cir. 2020). As the Court's resolution of Phillips's Rule 29 motion makes clear, the weight of the evidence supported the Jury's finding that Phillips committed commodities fraud beyond a reasonable doubt. *See United States v. Sterling*, 2023 WL 3765005, at *8 (E.D.N.Y. June 1, 2023); *United States v. Kissi*, 2022 WL 4103640, at *6 (S.D.N.Y. Sept. 8, 2022), *aff'd*, 2024 WL 658622 (2d Cir. Feb. 16, 2024). Through vigorous advocacy at trial, Phillips presented a competing theory of the evidence. However, despite that alternative explanation, the Court is "left with the unmistakable conclusion" that the Jury adopted the correct interpretation of Phillips's conduct. *Archer*, 977 F.3d at 190. And even if the Court found Phillips's theory more persuasive, "the preponderates heavily standard does not permit a district

court to elevate its own theory of the evidence above the jury's clear choice of a reasonable competing theory." *Id.* at 197. As a result, Phillips's motion for a new trial based on the weight of the evidence lacks merit.

Second, Phillips suggests that the Government gained an unfair advantage at trial because "it received a detailed preview of [his] defense" when he met with the Government, presented his position, and urged the Government "to reconsider whether this case should proceed to trial." Dkt. No. 94 at 64. But defendants not infrequently meet with prosecutors to explain their understanding of the evidence and seek to persuade the prosecutors to forgo enforcement actions, particularly in cases involving complex financial crimes like the scheme at issue here. *See* Robert S. Bennett et al., *Internal Investigations and the Defense of Corporations in the Sarbanes-Oxley Era*, 62 Bus. Law. 55, 84 (2006). Those dialogues are salutary, as they encourage expeditious resolutions of cases and fairer and better-informed exercises of prosecutorial discretion. In agreeing to hear a defendant's version of events, however, the Government does not forego its right to reject the defense's position and proceed to trial on its own competing understanding of the facts. Penalizing the Government for meeting with Phillips here would also disincentivize the Government from participating in similar discussions in the future and thus disserve the defendants who would otherwise benefit from the opportunity to present their cases to prosecutors. As sophisticated defense counsel like Phillips's attorneys here are undoubtedly aware, voluntary presentations to prosecutors entail strategic risks: "If these tactics are

unsuccessful, of course, the defense will be disadvantaged . . . since they eliminate the element of surprise and allow the prosecutors to prepare their witnesses, legal arguments and evidence to blunt the anticipated defense." Lawrence S. Goldman & Jill R. Shellow-Lavine, *Pre-Indictment Representation in White-Collar Cases*, Champion, June 2000, at 18, 21. Accordingly, in deciding whether to present a client's case to the prosecution, counsel must exercise the kind of strategic discretion that defines the role of a criminal defense attorney. *See generally Strickland v. Washington*, 466 U.S. 668, 689 (1984) (emphasizing "the wide latitude [defense] counsel must have in making tactical decisions"). The mere fact that the meeting between Phillips's attorneys and the Government had downside risk for Phillips does not negate the voluntariness of that presentation or the fairness of the Government's use of any insights from that meeting at the subsequent trial:

> It may be true, as [defendant] argues, that prosecutors gained a tactical advantage from getting a preview of his lawyers' take on the evidence. But . . . this cannot be considered unfair. If [defendant] did not want the government to know how he would defend the charge pending against him, his lawyers should not have discussed their contentions with the prosecutors.

United States v. Novak, 2014 WL 3882963, at *3 (N.D. Ill. Aug. 7, 2014).

In his third challenge, Phillips contends that the Government unfairly "argued to the jury about 'missing,' 'deleted,' or 'zeroed out' deltas, creating an air of nefariousness around what the government knew was routine practice at Glen Point." Dkt. No. 94 at 65–66. The evidence at trial demonstrated that Phillips, in his own words, "t[ook] out a[ ]lot of the deltas" from ZAR options on Glen Point's risk reports. Gov. Ex. 404 at 15. As a result, the Government's references to missing, deleted, or zeroed out deltas on certain ZAR options at Glen Point were "literally true and therefore unobjectionable." *United States v. Waldman*, 240 F.2d 449, 451 (2d Cir. 1957); *see also United States v. Lumiere*, 249 F. Supp. 3d 748, 764 (S.D.N.Y. 2017). Unsurprisingly, the Government argued that the omission of these deltas from Glen Point's risk reports was consistent with the Government's theory of guilt. *See, e.g.*, Trial Tr. 1230:1–7. Just as predictably, Phillips contended that this practice was both commonplace and sensible. *See, e.g.*, *id.* at 1297:4–20. Far from revealing a manifest injustice warranting a new trial, the parties' countervailing characterizations of Phillips's elimination of the deltas of certain options from the risk reports illustrate the fair opportunity both sides had to present their case to the Jury.

Fourth, according to Phillips, the Government engaged in misconduct in its closing argument when it "told the jury that the delta replacement theory and the significance of the Christmas weekend events in South Africa were lawyer-created cover stories." Dkt. No. 94 at 66. As an initial matter, while the Government noted that the Phillips's attorneys had presented those explanations

at trial and argued that they were a cover story for his crime, the Government did not describe the explanations as the inventions of Phillips's lawyers. *See, e.g.*, Trial Tr. 1185:6–9 ("[T]his delta replacement theory that you have been hearing throughout trial from the defense, the one about the archbishop speech, is a cover story[;] it's made up after the fact."). And the Government's argument in its summation that the theory of innocence Phillips expounded at trial was fabricated was permissible advocacy, since the Government was "entitled to respond to the evidence, issues, and hypotheses propounded by the defense." *United States v. Marrale*, 695 F.2d 658, 667 (2d Cir. 1982); *see also United States v. Edwards*, 342 F.3d 168, 181 (2d Cir. 2003) ("The government has broad latitude in the inferences it may reasonably suggest to the jury during summation." (quoting *United States v. Zackson*, 12 F.3d 1178, 1183 (2d Cir. 1993))); *United States v. Taubman*, 2002 WL 548733, at *13 (S.D.N.Y. Apr. 11, 2002), *aff'd*, 297 F.3d 161 (2d Cir. 2002). Moreover, even if the Court were to conclude that the Government's repeated characterizations of Phillips's theory of innocence as a cover story constituted prosecutorial misconduct, Phillips has not shown that those comments were so prejudicial as to warrant a new trial. *See United States v. Banki*, 685 F.3d 99, 120 (2d Cir. 2012) ("[T]he misconduct alleged must be so severe and significant as to result in the denial of [his] right to a fair trial. . . . [I]t must cause substantial prejudice to result in a new trial." (internal quotation marks omitted)). "In other words, this is not the 'rare case in which [alleged] improper comments in a prosecutor's summation are so prejudicial that a new trial is required.'" *United States v. Willis*, 14 F.4th 170,

187 (2d Cir. 2021) (alteration in original) (quoting *United States v. Rodriguez*, 968 F.2d 130, 142 (2d Cir. 1992)).

Fifth, Phillips contends that, in its summation, the Government improperly emphasized irrelevant considerations—such as his registration with the CFTC, Glen Point's New York office and United States clients, and the effect of the Boxing Day Trades on the value of the USD—when urging the Jury to find an extraterritorial application of the commodities fraud statute. Dkt. No. 94 at 67. For the reasons articulated in connection with Phillips's Rule 29 motion, the Court agrees that those factors do not satisfy the "direct and significant connection" requirement of 7 U.S.C. § 2(i)(1) in this case. But Phillips emphasized that he was a foreign businessman who had acted abroad from the outset of the trial. *See, e.g.*, Trial Tr. 59:5–9 ("[T]his case has next to nothing to do with the United States. Mr. Phillips is South African. He lived and worked in London. Neither the placing of the trades nor any of the chats you will see, nor even the purchase of the option at issue took place in the U.S."). As a result, "[t]he prosecutor's comment[s] w[ere] not improper because [they] merely responded to defense counsel's theory of the evidence." *United States v. Johnson*, 659 F. App'x 674, 679 (2d Cir. 2016) (summary order). Furthermore, the Government admonished the Jury in its summation to follow the Court's instructions on the law. Trial Tr. 1183:19–21 ("Now, Judge Liman, after we are done speaking, is going to instruct you on the law, and what he says goes. You follow his instructions, not what I say on this."); *see United States v. Ortega*, 2023 WL 6140929, at *10 (S.D.N.Y. Sept. 20, 2023). Immediately

after the parties' closing arguments, the Court instructed the Jury on the law and explained that the summations were neither evidence, Trial Tr. 1335:22–1336:5; *see United States v. Monegro*, 205 F.3d 1326 (2d Cir. 2000), nor controlling statements of the law, Trial Tr. 1334:2–5; *see United States v. Turner*, 720 F.3d 411, 428 (2d Cir. 2013); *United States v. Azzara*, 132 F. App'x 923, 925 (2d Cir. 2005) (summary order). And the Jury is presumed to have followed the Court's instructions. *See United States v. Green*, 2021 WL 2667129, at *3 (S.D.N.Y. June 29, 2021), *aff'd sub nom. United States v. Johnson*, 2024 WL 254118 (2d Cir. Jan. 24, 2024); *see also Zafiro v. United States*, 506 U.S. 534, 540–41 (1993). Thus, the Government's references to Phillips's general business contacts with the United States in its summation do not necessitate a new trial. *See United States v. Truman*, 581 F. App'x 26, 31 (2d Cir. 2014) (summary order) ("The challenged statements, viewed in context and with the jury instructions in mind, fail to overcome the strong presumption against reversing criminal verdicts because of a prosecutor's statements in summation.").

Sixth, Phillips argues that the Government presented "a patently misleading demonstrative through Bruno Salemme, an FBI agent who had absolutely no knowledge of any of the facts of the case." Dkt. No. 94 at 68. That demonstrative displayed a timeline of events in the 2017 ANC election, beginning with an excerpt from a Bloomberg chat message sent to Phillips that stated: "Just in, unconfirmed reports coming in that Cyril Ramaphosa is prevailing in all five positions except the deputy president position." Trial Tr. 899:5–8. But the demonstrative omitted the remainder of the message,

which added: "they are recounting it." *Id.* at 899:8; *see* Gov. Ex. 407 at 19. Phillips challenges the demonstrative exhibit's omission of "any reference to the uncertainty that surrounded the 2017 election of Cyril Ramaphosa," particularly the "four words from the end of a sentence in a Bloomberg chat that indicated an election recount of high-level ANC positions was ongoing." Dkt. No. 94 at 68. As an initial matter, objections that "demonstrative exhibits 'do not fairly represent the underlying documents,'" go to an exhibit's "weight" rather than its "admissibility." *Cooper Crouse-Hinds, LLC v. City of Syracuse*, 2022 WL 976903, at *9 (N.D.N.Y. Mar. 31, 2022) (quoting *United States ex rel. Evergreen Pipeline Constr. Co. v. Merritt Meridian Constr. Corp.*, 95 F.3d 153, 163 (2d Cir. 1996)). And Phillips's objections to the demonstrative "were forcefully presented to the jury through the vigorous cross-examination[ ] . . . [by Phillips's] able trial counsel." *United States v. Canova*, 412 F.3d 331, 349 (2d Cir. 2005). Although Phillips asserts that Salemme's lack of personal knowledge thwarted the impact of his cross-examination, Dkt. No. 104 at 45, the Court believes that anyone present for that cross-examination—indeed, any reader of the trial transcript—will reach the opposition conclusion: that Salemme's lack of personal knowledge made the cross-examination exceptionally effective, *see* Trial Tr. 899:4–901:22. Accordingly, the cross-examination of Salemme on the demonstrative exhibit "eliminated any potential prejudice from the incompleteness of the exhibit." *United States v. McLaughlin*, 2018 WL 4854624, at *13 (D. Conn. Oct. 5, 2018), *aff'd*, 949 F.3d 780 (2d Cir. 2019); *see also United States v. McLeod*, 2023 WL 4750123, at *16 (S.D. Cal. July 24, 2023).

Phillips's seventh argument asserts that the Government improperly downplayed the political uncertainty in South Africa leading up to and on Boxing Day, 2017. Dkt. No. 94 at 68. While Phillips may disagree with the Government's position at trial, "[t]he prosecutor was entitled to present to the jury the Government's interpretation of the evidence." *United States v. Zodhiates*, 901 F.3d 137, 146 (2d Cir. 2018). The parties' disagreement over how uncertain the political climate in South Africa was when Phillips placed his trades is precisely the kind of factual dispute that a jury should, and did, resolve based on competing evidence and arguments. *See United States v. Prada*, 2009 WL 10674082, at *1 (S.D. Fla. Feb. 4, 2009) ("[T]hese conflicts . . . were for the jury to resolve."). That evidence was not so unequivocal that the Government's position amounted to prosecutorial misconduct. *See, e.g.*, Gov. Exs. 807 (December 21, 2017 news article indicating that Ramaphosa and his allies held authority in the ANC), 849 (August 11, 2017 news article describing the Archbishop of Cape Town's criticism of the ruling faction that Ramaphosa opposed), 868 (same from April 16, 2017). Thus, the Court will not "usurp the role of the jury in resolving conflicting evidence" on this issue. *United States v. Ramsey*, 2021 WL 5022640, at *2 (2d Cir. Oct. 29, 2021) (summary order).

Finally, Phillips argues it would be a manifest injustice to allow the verdict to stand because he lacked adequate notice that his actions were illegal prior to this prosecution, contrary to both due process and the rule of lenity. Dkt. No. 94 at 69. Yet Phillips's notice argument does not hold water, because the Court instructed the

Jury that to find Phillips liable for commodities fraud the Jury needed to find that he acted "willfully, and with the intent to defraud." Trial Tr. 1353:15–16. As for the former requirement, the Court explained: "'willfully' means to act voluntarily and with a wrongful purpose, that is, with a purpose to disobey or disregard the law. It is not necessary that the defendant knew that he was violating a particular law. It is enough if he was aware that what he was doing was, in general, unlawful." *Id.* at 1353:19–23. The Court then defined acting with an "intent to defraud" as "act[ing] knowingly and with an intent to deceive." *Id.* at 1343:24–25; *see id.* at 1353:25–1354:4 ("Here, it is not sufficient that the defendant knew his transactions would affect the dollar-rand exchange rate; instead, he must have made those transactions for the purpose of affecting the exchange rate and defrauding a counterparty to the barrier option contract."). Furthermore, the Court cautioned the Jury that "[a] defendant does not act willfully or with intent to defraud if he honestly believes that his actions were proper." *Id.* at 1354:5–6. Collectively, these instructions ensured that Phillips's conviction rested on a finding that he acted to violate the law and defraud a counterparty to the One Touch Option, and that he did not believe his conduct was proper. And the evidence at trial supported that finding here. Glen Point held compliance trainings on the prohibitions against fraud and manipulation. Gov. Ex. 438 at 8–9. Additionally, as part of his registration with the NFA, Phillips passed an examination in 2015 that covered *inter alia* the rules against fraud and manipulation. Trial Tr. 848:3–849:2. Phillips's explicit description of his purpose for trading in the Bloomberg messages to the Nomura salesperson,

the structure and timing of the Boxing Day Trades, and Phillips's comments on his calls with Coratti further supported the Jury's finding that Phillips acted willfully and with an intent to defraud. Phillips's assertion that he lacked constitutionally adequate notice that his actions were unlawful is therefore unavailing. *See United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996); *United States v. Riccio*, 43 F. Supp. 3d 301, 307 (S.D.N.Y. 2014); *United States v. Hassan*, 2005 WL 6222864, at *5 (E.D.N.Y. Oct. 12, 2005).

Nor is the rule of lenity applicable. That rule "provides that ambiguities concerning legislative intent in criminal statutes should be resolved in favor of the accused," but the rule "only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute." *United States v. DiCristina*, 726 F.3d 92, 97 (2d Cir. 2013) (internal quotation marks omitted); *see Shular v. United States*, 140 S. Ct. 779, 789 (2020) (Kavanaugh, J., concurring) (explaining a court must "employ[ ] all of the traditional tools of statutory interpretation" before resorting to the rule of lenity); *see also Moskal v. United States*, 498 U.S. 103, 108 (1990) ("[W]e have declined to deem a statute 'ambiguous' for purposes of lenity merely because it was *possible* to articulate a construction more narrow than that urged by the Government." (emphasis in original)). Though the Court consulted several sources of legal authority in fashioning appropriate jury instructions in this case, those sources illuminated the meaning of the relevant statutes, so the Court was not left to "simply guess as to what Congress intended." *United States v. Scott*, 990 F.3d

94, 121 (2d Cir. 2021) (en banc). Consequently, the relevant statutes are not so grievously ambiguous as to implicate the rule of lenity.

The Court concludes that "none of the alleged errors, whether considered individually or collectively, resulted in a miscarriage of justice so as to warrant a new trial under Rule 33." *United States v. Shellef*, 732 F. Supp. 2d 42, 82 (E.D.N.Y. 2010) (Bianco, J.); *see United States v. Perez*, 2021 WL 5999261, at *8 (D. Conn. Dec. 20, 2021). Thus, because Phillips "has not met his burden under Rule 33," his motion for a new trial is denied. *United States v. Mendlowitz*, 2019 WL 6977120, at *2 (S.D.N.Y. Dec. 20, 2019), *aff'd*, 2023 WL 2317172 (2d Cir. Mar. 2, 2023).

CONCLUSION

For the foregoing reasons, Phillips's motion for a judgment of acquittal or, in the alternative, a new trial, Dkt. No. 94, is DENIED. The Clerk of Court is respectfully directed to close Dkt. No. 94.

SO ORDERED.

Dated: March 27, 2024
New York, New York

/s/ Lewis J. Liman
Lewis J. Liman
United States District Judge

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED SEPTEMBER 1, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

22-cr-138 (LJL)

UNITED STATES OF AMERICA,

v.

NEIL PHILLIPS,

Defendant.

Filed September 1, 2023

OPINION AND ORDER

LEWIS J. LIMAN, United States District Judge:

Defendant Neil Phillips ("Defendant" or "Phillips") moves, pursuant to Federal Rule of Criminal Procedure 12(b)(3)(C), to dismiss the indictment against him. Dkt. No. 21. For the following reasons, the motion is denied without prejudice to Defendant making a Rule 29 motion for judgment of acquittal after the close of the Government's evidence and, if the Rule 29 motion is not granted then, after the close of all evidence.

BACKGROUND

On March 3, 2022, a grand jury sitting in the Southern District of New York returned a four-count indictment (the "Indictment") against Defendant. Dkt. No. 2. Count One charges Defendant with conspiracy to commit the crime of commodities fraud under Title 7, United States Code, Sections 9(1) and 13(a)(5), and Title 17, Code of Federal Regulations, Section 180.1, in violation of Title 18, United States Code, Section 371. *Id.* ¶¶ 30–32. Count Two charges him with commodities fraud, in violation of Title 7, United States Code, Sections 9(1) and 13(a)(5) and Title 17, Code of Federal Regulations, Section 180.1. *Id.* ¶¶ 33–34. Count Three charges Defendant with conspiracy to commit the crime of wire fraud under Title 18, United States Code, Section 1343, in violation of Title 18, United States Code, Section 371. *Id.* ¶¶ 38–39. Finally, Count Four charges him with wire fraud in violation of Title 18, United States Code, Section 1343. *Id.* ¶¶ 38–39.

All four counts arise from the same alleged scheme in or about December 2017 to artificially manipulate the United States dollar ("USD")/South African rand ("ZAR") exchange rate in order to trigger a payment under a barrier options contract into which Defendant's hedge fund had entered. *Id.* ¶ 1. At all relevant times Phillips was the co-founder and co-Chief Investment Officer of a hedge fund (the "Hedge Fund") based in the United Kingdom, which was registered in the United States as a commodity pool operator with the Commodity Futures Trading Commission ("CFTC"). *Id.* ¶¶ 3–4.

In October 2017, through a financial services firm that acted as an intermediary on behalf of undisclosed underlying clients, the Hedge Fund purchased a "one touch" digital barrier option for the USD/ZAR currency pair with a notional value of $20 million, a barrier rate of 12.50, and an expiration date of January 2, 2018 (the "One Touch Option"). *Id.* ¶ 10–11. The Indictment alleges that the financial intermediary firm "permits its underlying clients to maintain anonymity in such transactions." *Id.* ¶ 11. The Hedge Fund's counterparty to the One Touch Option was a subsidiary of a bank headquartered in New York, New York ("Bank-1"). *Id.* At no time were the Hedge Fund and Bank-1 aware of the identity of each other. *Id.*

Under the terms of the One Touch Option, in the event that the USD/ZAR exchange rate went below 12.50 at any point prior to on or about January 2, 2018, the Hedge Fund would be entitled to a $20 million payment. *Id.* ¶ 10. The Hedge Fund subsequently allocated the notional value of the One Touch Option to a client fund ("Client Fund-1") such that Client Fund-1 would receive $4,340,000 in the event that the $20 million payment was triggered and the Hedge Fund would receive the remaining $15,660,000. *Id.* ¶ 12.

A bank that was headquartered in Manhattan, New York ("Bank-2") acted as the Hedge Fund's prime broker in connection with the One Touch Option. *Id.* ¶ 13. After the Hedge Fund entered into the One Touch Option, Bank-2 provided the Hedge Fund with a letter agreement setting forth the terms and conditions of the transaction. *Id.* These terms and conditions indicated that the Hedge Fund would

act as the Calculation Agent in connection with the One Touch Option and required the Hedge Fund to "act[ ] in good faith and in a commercially reasonable manner" in that capacity and that the Hedge Fund's "determinations and calculations" would be "binding in the absence of manifest error." *Id.* The letter agreement incorporated by reference the "2005 Barrier Option Supplement" published by the International Swaps and Derivatives Association, Inc., which stated, among other things, that the "Barrier Determination Agent" is "the party who determines whether or not a Barrier Event has occurred and provides notice if it determines that a Barrier Event has occurred" and that the "Barrier Determination Agent shall be the Calculation Agent" unless otherwise specified. *Id.* The 2005 Barrier Option Supplement also stated that the "occurrence of a Barrier Event shall be determined in good faith and in a commercially reasonable manner by the Barrier Determination Agent." *Id.*

Throughout November and mid-December 2017, the USD/ZAR exchange rate fluctuated between approximately 14.50 and approximately 13.15. *Id.* ¶ 14. On or about December 18, 2017, following the announcement that a particular candidate had been elected president of the African National Congress political party in South Africa, the USD/ZAR exchange rate dropped substantially to as low as approximately 12.52, but did not breach the 12.50 barrier. *Id.* ¶ 15. Between shortly before midnight on December 25, 2017 and the early morning of December 26, 2017, faced with the looming expiration of the One Touch Option, Defendant, located in South Africa at the time, directed a large number of spot trades, selling

approximately $725 million for ZAR. *Id.* ¶ 18. Defendant acted through a Singapore-based employee of a third bank (the "FX Trading Bank"). *Id.* The express purpose of these trades was to drive the USD/ZAR exchange rate below 12.50. *Id.* ¶¶ 18, 20. The trades were conducted through a Bloomberg chat room, which included two other employees of the Hedge Fund, one of whom was located in London and the other in New York, New York, and another employee of the FX Trading Bank, who was located in New York, New York. *Id.* ¶ 19. The Indictment does not allege whether either the Hedge Fund employee or the employee of the FX Trading Bank located in New York, New York had any involvement in the trades.

The scheme was successful. At approximately 12:42 a.m. London time on December 26, 2017, the Singapore-based employee of the FX Trading Bank reported to Defendant that he had sold USD for 12.4990 ZAR. *Id.* ¶ 20(h). A pricing service showed the low as 12.4975. *Id.* ¶ 20(i). Phillips directed the Singapore-based employee of the FX Trading Bank to confirm the details with the London-based employee of the Hedge Fund, which was done through the Bloomberg chat room. *Id.* ¶ 20(j). At 12:52 a.m. London time on December 26, 2017, Defendant instructed the London-based employee of the Hedge Fund to notify the intermediary firm through which the Hedge Fund purchased the One Touch Option that the One Touch Option had been triggered. *Id.* ¶ 23. The email that the employee sent to the intermediary firm omitted the fact that the triggering event had occurred as a result of the Hedge Fund's USD/ZAR trades. *Id.* On December 27, 2017, an employee of the Hedge Fund also notified Bank-2

that the One Touch Option had been triggered and again omitted the fact that the triggering event had occurred as a result of the Hedge Fund's spot trading. *Id.* ¶ 24. On December 27, 2017, the Hedge Fund's counterparty to the transaction sent a $20 million wire transfer, which passed through New York, New York, to the broker for the intermediary firm. *Id.* ¶ 25. On December 28, 2023, Bank-2, the Hedge Fund's prime broker, sent a wire transfer of $15,660,000 to one of the Hedge Fund's bank accounts and a wire transfer of $4,340,000 to a bank account of the client of the Hedge Fund; both wires passed through New York, New York. *Id.*

On December 26, 2017, the USD/ZAR spot trades were settled through a settlement bank headquartered in New York, New York (the "Settlement Bank"). *See id.* ¶¶ 9, 26. The Settlement Bank also received settlement instructions from the FX Trading Bank and another bank acting on the Hedge Fund's behalf in the United States. *Id.* ¶ 26. On December 28, 2017, the settlement bank settled currency trades across all eighteen currencies in which it transacts and the FX Trading Bank transferred USD into accounts held at the Federal Reserve Bank of New York and the Settlement Bank transferred USD from an account held at the Federal Reserve Bank of New York to the other bank acting on behalf of the Hedge Fund. *Id.*

DISCUSSION

Federal Rule of Criminal Procedure 7(c)(1) provides that an indictment "must be a plain, concise, and definite written statement of the essential facts constituting the

offense charged." Fed. R. Cr. P. 7(c)(1). "A defendant seeking to challenge the sufficiency of an indictment on a motion to dismiss faces a high hurdle." *United States v. Silver*, 117 F. Supp. 3d 461, 464–65 (S.D.N.Y. 2015); *see also United States v. Pham*, 2022 WL 993119, at *3 (S.D.N.Y. Apr. 1, 2022) (Nathan, J.) ("A defendant faces a high standard in seeking to dismiss an indictment." (citation omitted)). "An indictment is sufficient if it 'first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" *United States v. Stringer*, 730 F.3d 120, 124 (2d Cir. 2013) (quoting *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974)); *see also id.* ("[A]n indictment need 'do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime.'" (citation omitted)).

It is not the function of an indictment to inform the defendant of the evidence or the facts which the Government will use to prove its case. As a general matter, the Government need not show its hands before trial "because an indictment need provide the defendant only a plain, concise, and definite written statement of the essential facts constituting the offense charged." *Pham*, 2022 WL 993119, at *3; *see also Hamling*, 418 U.S. at 117, 94 S.Ct. 2887 ("It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to

be punished.'" (quoting *United States v. Carll*, 105 U.S. 611, 612, 26 L.Ed. 1135 (1881))). The proper remedy "where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused," is not for the indictment to be dismissed; it is for the defendant to request a bill of particulars. *United States v. Chen*, 378 F.3d 151, 163 (2d Cir. 2004) (citation omitted); *see also United States v. Raniere*, 384 F. Supp. 3d 282, 322 (E.D.N.Y. 2019) ("Courts are only required to grant a bill of particulars 'where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused.'" (quoting *Chen*, 378 F.3d at 163)). Even then, however, the defendant is not entitled to "obtain a preview of the government's evidence before trial" or "to learn the legal theory upon which the government will proceed." *United States v. Kang*, 2006 WL 208882, at *1 (E.D.N.Y. Jan. 25, 2006); *see also United States v. Torres*, 901 F.2d 205, 234 (2d Cir. 1990), *abrogated on other grounds by United States v. Marcus*, 628 F.3d 36 (2d Cir. 2010).

It follows then that the function of a motion to dismiss the indictment is limited. "[S]ummary judgment does not exist in federal criminal procedure." *United States v. Aiyer*, 33 F.4th 97, 117 (2d Cir. 2022) (quoting *United States v. Wedd*, 993 F.3d 104, 121 (2d Cir. 2021)). Thus, "the Court will not look beyond the face of the indictment and draw inferences as to proof to be adduced at trial, for the sufficiency of the evidence is [generally] not appropriately addressed on a pretrial motion to dismiss." *United States v. Bankman-Fried*, 680 F.Supp.3d 289, 304 (S.D.N.Y. June 27, 2023) (cleaned up). Instead, on a motion to dismiss, the

court is tasked with determining whether the grand jury has performed its function under the Sixth Amendment to the United States Constitution by finding all of the essential elements of the crime. *See Costello v. United States*, 350 U.S. 359, 363, 76 S.Ct. 406, 100 L.Ed. 397 (1956) ("An indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charge on the merits." (citation omitted)). Thus, "a federal indictment can be challenged on the ground that it fails to allege a crime within the terms of the applicable statute." *United States v. Aleynikov*, 676 F.3d 71, 75–76 (2d Cir. 2012) (cleaned up) (citing *Dowling v. United States*, 473 U.S. 207, 213, 105 S.Ct. 3127, 87 L.Ed.2d 152 (1985)) (holding indictment insufficient where allegation that defendant stole digital property did not allege a crime under the relevant statute); *see also, e.g.*, *United States v. Pirro*, 212 F.3d 86, 92–93 (2d Cir. 2000) (upholding dismissal of tax fraud count of an indictment because the conduct alleged did not violate the applicable statutes); *United States v. Heicklen*, 858 F. Supp. 2d 256, 275–76 (S.D.N.Y. 2012) (dismissing indictment where facts alleged did not constitute the crime of attempting to influence the actions of a juror); *United States v. Kerik*, 615 F. Supp. 2d 256, 271–74 (S.D.N.Y. 2009) (dismissing false-statement charge because defendant's alleged failure to disclose information in response to a question that the court determined was "fundamentally ambiguous" was not a crime as a matter of law). In that instance, the grand jury will not have found one or more of the elements necessary to bind a defendant over for trial. On a motion to dismiss an indictment, the court is also tasked with determining whether the defendant has been sufficiently informed of the crime of which he is accused so as to plead double

jeopardy as a bar to a subsequent prosecution. *See United States v. Resendiz-Ponce*, 549 U.S. 102, 108, 127 S.Ct. 782, 166 L.Ed.2d 591 (2007); *United States v. Stavroulakis*, 952 F.2d 686, 693 (2d Cir. 1992) ("An indictment is sufficient when it charges a crime with sufficient precision to inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events.").

There is an "extraordinarily narrow" "exception to the rule that a court cannot test the sufficiency of the government's evidence" on a pretrial motion to dismiss. *United States v. Sampson*, 898 F.3d 270, 282 (2d Cir. 2018). A court may review the sufficiency of the evidence and determine whether the indictment states a crime if "the government has made what can fairly be described as a full proffer of the evidence it intends to present at trial." *Wedd*, 993 F.3d at 121 (quoting *United States v. Alfonso*, 143 F.3d 772, 776 (2d Cir. 1998)). A speaking indictment alone does not satisfy the "full proffer" requirement; the government must "proffer[ ] *all* of its evidence." *Sampson*, 898 F.3d at 283 (emphasis in original); *see also United States v. Mennuti*, 639 F.2d 107, 108–09 (2d Cir. 1981) (holding that "an affidavit of an Assistant United States Attorney, . . . stating the facts on which it would rely as showing that defendants' alleged acts were within the statute" could be used by a court to test the sufficiency of the evidence). The Government, or the grand jury more precisely, is permitted to give a defendant more detail regarding the evidence against him without assuming the risk that a court will treat such detail as a proffer of all of the evidence.

There are benefits to the Government of providing a full proffer of the evidence before trial. *See Alfonso*, 143 F.3d at 777 n.7. If the Court grants the defendant's motion to dismiss based on the evidence that the Government has presented, the Government will have an opportunity to gather more evidence or to seek a superseding indictment and ask the grand jury to find any elements that a court has found to be lacking. *Cf. United States v. Martinez*, 2023 WL 2118081, at *1 (S.D.N.Y. Feb. 17, 2023) (noting that the Government sought a superseding indictment in response to the defendant's motion to dismiss). Or the Government may take an appeal, challenge the district court's conclusions of law, and attempt to establish before a jury has been empaneled that the Government's evidence is sufficient to establish the defendant's criminal conduct. *See* 18 U.S.C. § 3731 ("In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment . . . as to any one or more counts, or any part thereof."); *United States v. Hoskins*, 902 F.3d 69, 76 (2d Cir. 2018) (concluding that the Government could appeal a court order "dismiss[ing] two significant parts of a count" of the indictment). If the Government elects not to provide a full proffer of its evidence and instead to proceed to trial, it runs the risk that the Court will find the Government's evidence deficient before a jury has returned a verdict, a decision that is unappealable under the Double Jeopardy Clause. *See Fong Foo v. United States*, 369 U.S. 141, 143, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962) (per curiam) (concluding that the Court of Appeals erred when it "set aside the judgment of acquittal [directed by the district court] and directed that the petitioners be

tried again for the same offense" even when the Court of Appeals' ruling that the "acquittal was based upon an egregiously erroneous foundation" was "not without reason"); *see also United States v. Scott*, 437 U.S. 82, 91, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978) ("A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed."). But a district court cannot "*require* the government, before trial, to" make a full proffer of its evidence and thereby "force a summary judgment-like motion on the government." *Sampson*, 898 F.3d at 282 (emphasis in original).

The Government here declined to make a full proffer of its evidence. During oral argument, the Government explicitly stated that "we are not going to make a full proffer at this stage" and indicated that they "underst[ood] the consequences of" making that choice. Dkt. No. 32 at 28, 30. Though the Government proffered additional evidence beyond what was contained in the indictment during oral argument, *see, e.g.*, *id.* at 28–29 (pointing to guidance from the New York Federal Reserve's Foreign Exchange Committee), it was careful to clarify that this evidence did not represent the full universe of evidence it intended to offer at trial, *id.* at 28 (noting that this was "just one example"). Because "[t]he government's brief statement during oral argument . . . cannot fairly be described as a full proffer for purposes of a pretrial ruling on the sufficiency of the evidence," *Alfonso*, 143 F.3d at 777, the Court on this motion is limited to determining whether the Indictment is sufficiently precise to "inform the defendant of the charges he must meet" and contains "enough detail

that he may plead double jeopardy in a future prosecution based on the same set of events," *Stavroulakis*, 952 F.2d at 693. The Court finds that it does.

Defendant argues that the Indictment should be dismissed in its entirety. He first argues that the Commodity Exchange Act ("CEA") counts—Counts One and Two of the Indictment—should be dismissed because the Indictment (1) alleges an impermissible extraterritorial application of the CEA, Dkt. No. 22 at 8–9, 12–15, and (2) does not allege fraudulent conduct involving a transaction covered by the CEA nor a scheme to defraud based on manipulative trading, *id.* at 7–8, 9–12, 15–20. He then argues that the wire fraud counts—Counts Three and Four—must be dismissed because the Indictment fails to allege an actionable omission. *Id.* at 20–26. Finally, Defendant argues that the application of the CEA and the wire fraud statute to his conduct fails to give fair warning in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution. *Id.* at 26–29. The Court addresses each argument in turn.

I. Commodity Exchange Act Counts

Defendant first argues that the CEA counts fail because the Indictment alleges an impermissible extraterritorial application of the CEA. He then argues that the CEA counts fail because the Indictment does not allege fraud in connection with a swap and does not allege that Defendant created an artificial price.

A. Extraterritorial Conduct

Defendant argues that the Indictment alleges an impermissible extraterritorial application of the CEA. Defendant contends that the One Touch Option is not governed by the CEA because it does not "have a direct and significant connection with activities in, or effect on, commerce in the United States." *Id.* at 8 (quoting 7 U.S.C. § 2(i)(1)). He further argues that the One Touch Option cannot be reached by the CEA's antimanipulation provision because Section 6(c)(i) does not contain a "'clear indication of an extraterritorial application' to rebut the presumption against extraterritorial application," *id.* at 12 (citation omitted), and the Indictment does not allege a domestic application of the statute, *id.* at 13–14. The Government counters that Defendant's extraterritoriality argument cannot be addressed before trial, Dkt. No. 24 at 15, and that, even if it can, the Indictment charges a domestic application of the statute, *id.* at 18, or, in the alternative, Section 2(i)(1) represents the required "clear indication of an extraterritorial application" and the One Touch Option falls within the CEA's extraterritorial reach, *id.* at 21.

As a threshold matter, the Court finds that Defendant misunderstands the relationship between Section 2(i) and Section 6(c)(1). Courts employ a two-step framework in applying the presumption against extraterritoriality. *Abitron Austria GmbH v. Hetronic Int'l, Inc.*, 600 U.S. 412, 143 S. Ct. 2522, 2528, 216 L.Ed.2d 1013 (2023). First, a court determines whether "Congress has affirmatively and unmistakably instructed that the provision at issue

should apply to foreign conduct." *Id.* (citation omitted). If Congress has not given the provision extraterritorial effect, a court then addresses whether the suit seeks a permissible domestic application of the provision by identifying the statute's focus and asking "whether the *conduct relevant to that focus* occurred in United States territory." *Id.* (emphasis in original) (citation omitted); *see also Prime Int'l Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94, 102 (2d Cir. 2019) ("[C]ourts must evaluate whether the domestic activity involved implicates the 'focus' of the statute.").

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") was passed in the wake of the 2008 financial crisis "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail', to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes." Pub. L. 111-203, 124 Stat 1376, 1376 (2010). "Title VII of Dodd–Frank amended the [CEA] to 'establish a comprehensive new regulatory framework for swaps,' and vested the [CFTC] with exclusive jurisdiction to implement that framework." *In re Interest Rate Swaps Antitrust Litig.*, 261 F. Supp. 3d 430, 445 (S.D.N.Y. 2017) (citation and footnote omitted). As relevant here, Dodd-Frank amended Section 6(c) of the CEA to add the antimanipulation provision, making it "unlawful for any person, directly or indirectly, to use or employ, or attempt to use or employ, in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules

of any registered entity, any manipulative or deceptive device or contrivance." Pub. L. 111-203, 124 Stat at 1750 (codified at 7 U.S.C. § 9(1)). Dodd-Frank also defined the jurisdiction of the CEA as it relates to swaps by amending Section 2 of the CEA and adding the following language: "The provisions of this Act relating to swaps that were enacted by the Wall Street Transparency and Accountability Act of 2010 (including any rule prescribed or regulation promulgated under that Act), shall not apply to activities outside the United States unless those activities . . . have a direct and significant connection with activities in, or effect on, commerce of the United States." *Id.* at 1673 (codified at 7 U.S.C. § 2(i)(1)).

It is undisputed that Section 6(c)(1) alone "lacks . . . a clear statement of extraterritorial effect." *Prime Int'l Trading, Ltd.*, 937 F.3d at 102 (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 265, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010)). However, reading the statute as a whole—as the Court is required to do, *see Sturgeon v. Frost*, 577 U.S. 424, 438, 136 S.Ct. 1061, 194 L.Ed.2d 108 (2016) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (citation omitted)); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (Courts must interpret a statute "'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into an harmonious whole.'" (citations omitted))—makes clear that Section 6(c)(1) *does* apply extraterritorially when swap-based conduct is at issue. Section 2(i) establishes that all

"provisions of this chapter relating to swaps . . . apply to activities outside the United States [if] those activities . . . have a direct and significant connection with activities in, or effect on, commerce of the United States." 7 U.S.C. § 2(i)(1). Thus, Section 6(c)(1) applies extraterritorially insofar as the activities related to swaps "have a direct and significant connection with activities in, or effect on, commerce on the United States." *Id.*[1]

Whether the conduct alleged in the Indictment—if the Government were to prove nothing more—would constitute an impermissible extraterritorial application of Section 6(c)(1) is not a question appropriately raised on a pretrial motion to dismiss. Case law does not explicitly address whether challenges to the territorial application of a statute are appropriately brought on a pretrial motions to dismiss, *see, e.g.*, *Bankman-Fried*, 680 F.Supp.3d at 309-11 (S.D.N.Y. June 27, 2023) (acknowledging the question but concluding that "the Court need not decide whether it would be premature to dismiss the indictment on

1. *Prime International Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94, can be read to suggest that Section 2(i) does not directly modify Section 6(c)(1). *See id.* at 103 ("[T]he existence of an enumerated extraterritorial command in Section 2(i) reinforces our conclusion that the lack of any analogous directive in either Section 6(c)(1) or Section 9(a)(2) bars their extraterritorial application here."). However, the Circuit did not examine how Section 2(i) modified Section 6(c)(1), because the argument was waived on appeal. *See id.* ("[E]ven a charitable reading of the docket reveals that Plaintiffs neglected to raise this argument until *after* the district court rendered its final judgment." (emphasis in original)). Thus, the Court does not read *Prime International* as foreclosing its interpretation of the relationship between Sections 2(i) and 6(c)(1).

extraterritoriality grounds at this stage"), and the Second Circuit has never spoken directly on the issue. However, the Second Circuit has held that the extraterritorial reach of a criminal statute does not implicate a court's subject matter jurisdiction or its "judicial jurisdiction"—that is, it does not "raise[ ] the question whether a case comes within the judicial power of the court, so that the court possesses the legal power to adjudicate the case." *United States v. Prado*, 933 F.3d 121, 132–33 (2d Cir. 2019). Rather, it implicates a court's "legislative, or prescriptive, jurisdiction[, which] concerns itself with the reach of a nation's (or any political entity's) laws." *Id.* at 133; *see also id.* at 136 ("Specifying the circumstances in which a nation's laws apply extraterritorially typifies a legislature's exercise of *legislative jurisdiction* by defining the statute's reach." (emphasis in original)). The question whether an indictment impermissibly charges extraterritorial conduct is thus a "merits" one. *Id.* at 139; *see also Morrison*, 561 U.S. at 254, 130 S.Ct. 2869 ("[T]o ask what conduct § 10(b) reaches . . . is a merits question."); *see also Fogel v. Chestnutt*, 668 F.2d 100, 106 (2d Cir. 1981) (Friendly, J.) ("[W]hen the plaintiff bases his cause of action upon an act of Congress[,] jurisdiction cannot be defeated by a plea denying the merits of his claim." (first alteration in original) (quoting *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25, 33 S.Ct. 410, 57 L.Ed. 716 (1913))).

It does not follow, as the Government suggests, *see* Dkt. No. 24 at 15 ("Because extraterritoriality is a merits question, it is not a basis for dismissing an Indictment."), that the Court's review of an indictment must be limited

to whether it states the elements of an offense and that no examination of facts implicating the extraterritorial reach of a statute is ever appropriate on a pretrial motion to dismiss. There exist other doctrines that constrain the Government's ability to try defendants for conduct entirely remote from the United States and United States interests and there may be circumstances where the connection between the Defendant's conduct and the United States is so remote that the issue can be addressed pretrial. First, a defendant can challenge whether the indictment alleges sufficient facts to demonstrate that the case is properly tried in the district where it is brought—that is, whether venue is adequately alleged. Because, under the Vicinage Clause of the Constitution, the defendant has the right to be tried in "the State and district wherein the crime shall have been committed," U.S. Const. amend. VI, and under Article III, the trial of crimes must be held "in the State wherein the crime shall have been committed," U.S. Const. Art. III, § 2, cl. 3,[2] venue may be challenged on a pretrial motion to dismiss. *See United States v. Peterson*, 357 F. Supp. 2d 748, 751 (S.D.N.Y. 2005) (Chin, J.); *see also United States v. Motz*, 652 F. Supp. 2d 284, 290 (E.D.N.Y. 2009) ("[T]he Government need only show that the . . . indictment alleges facts sufficient to support venue."); Fed. R. Crim. P. 12(b)(3)(A)(i) (noting that "improper venue" "must be raised by pretrial motion"). Although a challenge to venue admittedly is different from a territorial challenge to the application of a statute, the two speak to the extent to which the defendant's conduct is connected to the United States or United States interests.

2. In addition, Federal Rule of Criminal Procedure 18 requires that defendant be tried in the district where their crime was "committed." Fed. R. Crim. P. 18.

A defendant can also challenge whether the court has personal jurisdiction over him on a pretrial motion to dismiss, though such challenges are narrow in scope. *See United States v. McLaughlin*, 949 F.3d 780, 781 (2d Cir. 2019) ("When a District Court has subject matter jurisdiction over the criminal offenses charged, it has personal jurisdiction over the individuals charged in the indictment and present before the court to answer those charges."); *United States v. Turkiye Halk Bankasi A.S.*, 426 F. Supp. 3d 23, 33 (S.D.N.Y. 2019) ("In a criminal prosecution, it is well settled that a district court has personal jurisdiction over any party who appears before it, regardless of how his appearance was obtained." (cleaned up)). A country which is offended by the application of a United States law to conduct of one of its nationals located outside the United States and subject to the laws of that foreign country may refuse to extradite the individual and thereby deprive the United States court of the ability to adjudicate the case against that individual. *See United States v. Salinas Doria*, 2008 WL 4684229, at *6 (S.D.N.Y. Oct. 21, 2008) (Lynch, J.) ("American courts take personal jurisdiction of extradited defendants subject to . . . the extradition orders of the surrendering state.").

Finally, there is case law to suggest that the Indictment must contain sufficient allegations to establish that the charged offense, when applied to extraterritorial conduct, does not violate the Due Process Clause of the Fifth Amendment. "[A]s a general proposition, Congress has the authority to 'enforce its laws beyond the territorial boundaries of the United States.'" *United States v. Al Kassar*, 660 F.3d 108, 117–18 (2d Cir. 2011) (alteration in

original) (quoting *United States v. Yousef*, 327 F.3d 56, 86 (2d Cir. 2003)). However, there are important limitations on this general proposition. First, as discussed above, there is a presumption against extraterritoriality that can be overcome by a clear expression from Congress that the statute should apply to foreign conduct. *See supra* p. 280. Second, even if Congress provides such an instruction, the extraterritorial application of the statute must still comply with the Due Process Clause. *See United States v. Kalichenko*, 2019 WL 1559422, at *6 (E.D.N.Y. Apr. 10, 2019) (Bianco, J.) ("[E]ven if Congress writes a law to apply beyond the territorial boundaries of the United States," it must be consistent with due process.). "Generally, '[i]n order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair.'" *United States v. Antonius*, 73 F.4th 82, 87 (2d Cir. 2023) (alteration in original) (quoting *United States v. Epskamp*, 832 F.3d 154, 168 (2d Cir. 2016)). "When individuals who are not United States citizens act on foreign soil, nexus is present where 'the aim of [the] activity is to cause harm inside the United States or to U.S. citizens or interests.'" *Id.* (alteration in original) (quoting *Al Kassar*, 660 F.3d at 118); *see also Strassheim v. Daily*, 221 U.S. 280, 285, 31 S.Ct. 558, 55 L.Ed. 735 (1911) (Holmes, J.) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power."). The Second Circuit has suggested that whether

an application of a statute is "arbitrary or fundamentally unfair" is appropriately raised on a pretrial motion to dismiss. *See United States v. Yousef*, 750 F.3d 254, 262 (2d Cir. 2014), *abrogated on other grounds by Class v. United States*, 583 U.S. 174, 138 S. Ct. 798, 200 L.Ed.2d 37 (2018) ("The absence of the required nexus . . . may have been grounds for dismissing the indictment before the district court.").

Defendant, however, does not challenge venue or assert that the application of the CEA to him would violate the Constitution for lack of the required territorial nexus.[3] And any such arguments would fail. The Indictment contains sufficient allegations to properly allege venue, and to defeat any extraterritorial due process concerns. The Indictment alleges that Bank-2, a bank headquartered in Manhattan, New York, acted as the Hedge Fund's prime broker in connection with the One Touch Option. Dkt. No. 2 ¶ 13. The Hedge Fund also entered a letter agreement with the same bank delineating the Hedge Fund's duties as Calculation Agent. *Id.* ¶ 24. It further alleges, with respect to Count One—conspiracy to commit the crime of commodities fraud—that the agreement to commit commodities fraud occurred "in the Southern District of New York and elsewhere," *id.* ¶ 30, and that overt acts in furtherance of the conspiracy "were committed in the Southern District of New York and elsewhere." *id.* ¶ 32. In particular, it alleges that in connection with the

3. Defendant also does not challenge that the Court has personal jurisdiction over him. Nor could he. Defendant appeared in-person for his arraignment in this District on January 5, 2023. *See* Minute Entry (Jan. 5, 2023).

scheme, Defendant sent messages which passed through the Southern District of New York, *id.* ¶ 32(c), and caused wires to be sent which passed through the Southern District of New York, *id.* ¶¶ 32(e), (f). All of Defendant's relevant foreign currency trades were in United States dollars, *see, e.g.*, *id.* ¶ 21, the value of which is indisputably an area of American interest, and the funds to settle the transactions necessarily "flowed in and out of bank accounts held at the Federal Reserve Bank of New York," *id.* ¶ 32(i); *see also id.* ¶ 26. The payouts to both the Hedge Fund and Client Fund-1 were wired by Bank-2, denominated in U.S. dollars, and also passed through New York. *Id.* ¶ 25. Similarly, the Indictment alleges with respect to Count Two—commodities fraud—that Defendant's actions occurred "in the Southern District of New York and elsewhere." *Id.* ¶ 34. These allegations are sufficient to establish venue in this District. *See United States v. Lange*, 834 F.3d 58, 70 (2d Cir. 2016) ("[W]here a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done." (alteration in original) (citation omitted)). And they are sufficient to establish that the territorial application of the statute comports with due process of the law because "the aim of [the] activity [was] to cause harm inside the United States or to U.S. citizens or interests," *Antonius*, 73 F.4th at 87 (first alteration in original) (citation omitted)—Defendant's actions implicate substantial sums of U.S. dollar, U.S. financial institutions, and U.S. commerce. It thus cannot be said, based on the Indictment alone, that the application of the CEA to Defendant's conduct is "arbitrary or fundamentally unfair." *Id.*

Whether the Government will be able to establish that there was sufficient conduct in the United States or that the conduct had "a direct and significant connection with activities in, or effect on, commerce in the United States" such that that the crimes charged in Counts One and Two properly fall within the territorial reach of Section 6(c)(1) of the CEA is not an easy issue, but it is one that the Court need not, and does not, address at this point. The Government is entitled to put on its evidence, which may include facts beyond those alleged in the Indictment, and Defendant is entitled to challenge that evidence as insufficient, both on a Rule 29 motion and before the jury. What the Court is not entitled to do on a motion to dismiss is to weigh the evidence that the Government has presented.

B. "In Connection With" a Swap

Section 6(c)(1) makes it "unlawful for any person, directly or indirectly, to use or employ, or attempt to use or employ, in connection with any swap . . . any manipulative or deceptive device or contrivance," in violation of rules promulgated by the CFTC. 7 U.S.C. § 9(1). In turn, Rule 180.1 promulgated by the CFTC prohibits, "in connection with any swap," using "any manipulative device, scheme or artifice to defraud," making any "untrue or misleading statement" of fact or omission, or engaging in "any act, practice or course of business, which operates or would operate as a fraud or deceit upon any person." 17 C.F.R. § 180.1(a). Defendant argues that the CEA claims must be dismissed because the Indictment does not allege that his actions were taken "in connection with" a swap as required

both by the CEA and the rules promulgated thereunder. Specifically, Defendant argues that the CEA does not apply to foreign-exchange spot trades and therefore Defendant's trades fall outside of the reach of the statute and cannot form the basis of the CEA charges. *See* Dkt. No. 22 at 7 (citing 7 U.S.C. § 2(c)(1)(A)); *see also id.* at 9–10. Defendant further argues that the CEA requires that the manipulative conduct be "in connection with" the formation of the swap, *id.* at 10–12, and must be material to that decision, Dkt. No. 26 at 4–5, neither of which is alleged in the Indictment.[4] For the purposes of this motion, the Government does not dispute that the CEA does not reach foreign-currency spot transactions in isolation. *See* Dkt. No. 24 at 10. But the Government counters that the Indictment does not allege a manipulative scheme in the foreign-currency spot transaction market; rather, it alleges a scheme related to the triggering of a swap that relied in part on manipulation of the foreign-exchange spot market. *Id.* at 10–11. The Government further argues that Defendant reads the "in connection with" requirement too narrowly and that the statute reaches actions taken in connection with the triggering of the One Touch Option. *Id.* at 12.

The CEA defines a "swap" as "any agreement, contract, or transaction . . . that provides for any purchase,

4. Defendant also argues that Section 6(c)(1) "covers only fraud-based manipulations" and that the "Indictment does not allege any misrepresentations, half-truths, fraudulent omissions, or deceptive conduct." Dkt. No. 22 at 10. The Court addresses this argument when it addresses Defendant's argument that the Indictment does not allege a scheme to defraud below. *See infra* Section I.C.

sale, payment, or delivery (other than a dividend on an equity security) that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence." 7 U.S.C. § 1a(47)(A)(ii). The Indictment alleges that the One Touch Option was a "contract," *see* Dkt. No. 2 ¶ 11 ("the One Touch Option contract"), that provided for a "payment," *see id.* (the Hedge Fund's counterparty was "obligated to pay $20 million in the event" the One Touch Option was triggered), based on the "occurrence of an event," namely the USD/ZAR exchange rate falling below 12.50 at any point prior to on or about January 2, 2018, *id.* ¶ 10. Thus, the One Touch Option itself falls squarely within the CEA.

The fact that the manipulative conduct occurred in an unregulated market does prohibit the application of the CEA. "Courts have allowed . . . CEA manipulation claims based on actions taking place in one market where the allegedly manipulated market was influenced by actions taken in another market." *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 2016 WL 5108131, at *18 (S.D.N.Y. Sept. 20, 2016) (collecting cases) (concluding that the plaintiffs could rely on trades in the unregulated foreign exchange spot market for their manipulation claims "where Defendants' activity . . . was the 'means of manipulating' prices on" a regulated market); *cf. In re Nat. Gas Commodity Litig.*, 337 F. Supp. 2d 498, 511 (S.D.N.Y. 2004) (holding that wash trading in the natural gas market—which may not have been independently actionable—could form the basis of a manipulation claim under the CEA when the wash trading was "one means

of manipulating the natural gas futures market"). This reading of the statute is consistent with the statute's text and purpose. Section 6(c)(1) prohibits "any person, directly or indirectly, to use or employ, or attempt to use or employ, in connection with any swap . . ., any manipulative or deceptive device or contrivance." 7 U.S.C. § 9(1); *see also* 17 C.F.R. § 180.1(a)(1) ("It shall be unlawful for any person, directly or indirectly, in connection with any swap . . . to intentionally or recklessly . . . [u]se or employ, or attempt to use or employ, any manipulative device, scheme, or artifice to defraud."). Nowhere does the text of the statute, or the Rule implementing the statutory text, limit such "manipulative or deceptive device or contrivance" to devices or contrivances related to markets directly regulated under the CEA.[5] The definition of a "swap" in the CEA is broad. *See* 7 U.S.C. § 1a(47)(A). It applies to "contract[s] . . . that provides for

5. The phrase "manipulative or deceptive device or contrivance" was borrowed from the antimanipulation provision of the Securities Exchange Act of 1934 (the "Exchange Act"). *See* 15 U.S.C. § 78j(b). The Supreme Court has interpreted that provision broadly "as a catch-all clause to prevent fraudulent practices." *Chiarella v. United States*, 445 U.S. 222, 226, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980). "And when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.'" *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85, 126 S.Ct. 1503, 164 L.Ed.2d 179 (2006) (citation omitted). The interpretation of the same phrase in the context of the Exchange Act thus lends support to the conclusion that Section 6(c)(1) was intended to apply broadly and to reach activity in markets not regulated by the CEA, when such activity affects markets that are.

any . . . payment . . . that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency." *Id.* § 1a(47)(A)(ii). It also applies to a yet unknown "agreement, contract, or transaction that is, or in the future becomes, commonly known to the trade as a swap." *Id.* § 1a(47)(A)(iv). There is no requirement that a swap be written on a commodity or other underlying item that trades in a market regulated by the CEA. *But see* § 1a(47)(B) (Exclusions). And Dodd-Frank intended the regulatory framework for swaps to be robust. *See In re Interest Rate Swaps Antitrust Litig.*, 261 F. Supp. 3d at 445 ("Title VII of Dodd–Frank amended the [CEA] to 'establish a comprehensive new regulatory framework for swaps,' and vested the [CFTC] with exclusive jurisdiction to implement that framework." (citation and footnote omitted)). If the term "in connection with" were read to only include manipulation in markets directly regulated by the CEA, it would place large swaths of the swaps market, and manipulative conduct related to the swaps market, beyond the reaches of the CEA. And there is nothing in the statute or the statutory purpose that indicates that such a limitation was intended. In fact, the CFTC explicitly contemplated that Rule 180.1 would apply to "cross-market manipulation," including to markets unregulated by the CFTC, because Rule 180.1 was drafted to apply "to the fullest extent allowed by law when determining whether conduct in one market is 'in connection with' an activity or product subject to the jurisdiction of the Commission." *Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation*, 76 Fed. Reg. 41,398, 41,406 (July 14, 2011) (to be codified at 17

C.F.R. pt. 180). Thus, the CFTC "decline[d] to modify the proposed Rule in response to comments requesting that only statements and acts pertaining to 'transactions' in futures, swaps, or commodities markets underlying futures or swaps may give rise to liability under proposed Rule 180.1." *Id.* at 41,403; *see also Commodity Futures Trading Comm'n v. Parnon Energy Inc.*, 875 F. Supp. 2d 233, 243 (S.D.N.Y. 2012) ("Defendants' interpretation excludes from the CEA any course of conduct that happens to involve transactions covered by [a different statutory exemption]. But such a broad reading frustrates the CEA's primary purpose of preventing and deterring price manipulations.").

The single CEA case that Defendant cites in support of its contention that his conduct falls outside of the CEA's jurisdiction is inapposite. In *United States v. Radley*, 632 F.3d 177 (5th Cir. 2011), the Fifth Circuit upheld a district court's dismissal of the indictment's price manipulation count because the conduct underlying the count fell within the statutory exemption for off-exchange commodities transactions. *See id.* at 181–84. There, the court found that all of the conduct constituted "transactions" and thus fell outside of the reaches of the CEA. *Id.* Here, in contrast, the Indictment does not allege that that Defendant violated the CEA through his conduct in the unregulated foreign-exchange spot market; rather, it alleges that Defendant's conduct in the foreign-exchange spot market violated the CEA, because it was part of a scheme to commit fraud in connection with the One Touch Option, a swap that Defendant does not dispute falls within the jurisdiction of the CEA.

Defendant next argues that the Indictment's CEA claims fail because the alleged fraud was not "in connection with" the formation of the One Touch Option. *See* Dkt. No. 22 at 11 ("Even where courts have broadly construed the 'in connection with' requirement under the CEA, they have done so only when the alleged manipulative or fraudulent device 'coincide[d]' sufficiently with or was 'contemporaneous with' the transactions at issue." (citation omitted)). In support of the proposition that the manipulative conduct must have been performed in connection with the formation of the One Touch Option to be actionable, Defendant relies primarily on judicial interpretations of the Securities Exchange Act of 1934 ("Exchange Act"). *See id.* at 10–11. The Exchange Act prohibits the use of a "manipulative or deceptive device or contrivance" "in connection with the purchase or sale of any security." 15 U.S.C. § 78j(b). This language is similar to Section 6(c)(1)'s prohibition on using or employing "any manipulative or deceptive device or contrivance" "in connection with any swap." 7 U.S.C. § 9(1). Thus, it is appropriate to look to judicial interpretations of the identical language in the Exchange Act's antimanipulation provision when giving meaning to the CEA's antimanipulation provision. *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85, 126 S.Ct. 1503, 164 L.Ed.2d 179 (2006) (looking to interpretation of "in connection with the purchase or sale" in Section 10(b) and Rule 10(b)(5) context when examining identical phrase in Securities Litigation Uniform Standards Act because "when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute

indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.'" (citation omitted)); *see also Prohibition on Manipulative and Deceptive Devices*, 76 Fed. Reg. at 41,405 ("The Commission intends to be guided by this and other precedent interpreting the words 'in connection with' in the securities context.").

Where Defendant's argument falters is that he does not take account of the differences between the Exchange Act's and the CEA's antimanipulation provisions. Specifically, the Exchange Act bars certain conduct "in connection with *the purchase or sale of any security*," 15 U.S.C. § 78j(b) (emphasis added), whereas the CEA bars conduct "in connection with *any swap*," 7 U.S.C. § 9(1) (emphasis added). The broader language of the CEA's antimanipulation provision suggests that Congress wanted to reach beyond the formation of a swap to all events critical in the lifecycle of a swap, including those that trigger the swap. *Cf. Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 86, 137 S.Ct. 1718, 198 L.Ed.2d 177 (2017) ("[U]sually at least, when we're engaged in the business of interpreting statutes we presume differences in language like this convey differences in meaning."); *see also Prohibition on Manipulative and Deceptive Devices*, 76 Fed. Reg. at 41,405 ("Section 6(c)(1) and final Rule 180.1 reach all manipulative or deceptive conduct in connection with the purchase, sale, solicitation, execution, pendency, or termination of any swap, or contract of sale of any commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity. Accordingly, final Rule 180.1 covers conduct including, but not limited to, *all of the payment and other obligations*

arising under a swap." (emphasis added)); *see also Prime Int'l Trading, Ltd.*, 937 F.3d at 107 ("There is nothing in Section 6(c)(1)'s text suggesting that it is focused on 'purchases and sales of securities in the United States.'" (internal quotation marks and citation omitted)). And that is precisely what the Indictment alleges: It alleges that in order to drive the USD/ZAR exchange rate below 12.50 and trigger the One Touch Option, Defendant sold $725 million USD for ZAR in the foreign-exchange spot market.

To the degree that Defendant argues that the CEA counts must fail because the Indictment does not allege how the foreign-exchange trading was *material* to any decision made by Bank-1, *see* Dkt. No. 22 at 11; Dkt. No. 26 at 4–5—a notion that the Government does not dispute on this motion, *see* Dkt. No. 24 at 13 ("So long as the scheme is 'material to' the parties to the swap—whether it be their decision to purchase, sell, exercise, or terminate—the scheme is in connection with the swap.")—that argument requires the Court to analyze the sufficiency of the Government's evidence, which the Court is not permitted to do on a motion to dismiss. *See United States v. Perez*, 575 F.3d 164, 166–67 (2d Cir. 2009) ("[T]he sufficiency of the evidence is not appropriately addressed on a pretrial motion to dismiss an indictment.").

C. Scheme to Defraud: Artificial Price

Defendant next argues that the Government is required to allege "the four necessary elements of a non-fraud-based manipulation," including that "the defendant specifically intended to and did cause an artificial price

to exist." Dkt. No. 22 at 15. Defendant argues that the indictment does not charge trades that are "manipulative" because the trades took place in the open market without any deceptive conduct. *Id.* at 17–19. The Government, drawing on the case law surrounding Section 10(b) of the Exchange Act and Rule 10(b)(5), counters that manipulative intent is sufficient to transform legitimate activity into manipulative activity, Dkt. No. 24 at 32, and that Defendant's argument to the contrary relies on impermissibly importing elements from Section 9(a)(2) into Section 6(c)(1), *id.* at 28–30.

Defendant's argument is without merit. The Indictment "informs the defendant of the charges he must meet," contains sufficient information to permit the defendant to plead double jeopardy, and adequately meets the requirement that it "track the track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." *Alfonso*, 143 F.3d at 776. Stated otherwise, the Indictment alleges that Defendant caused an artificial price using deceptive conduct. The Indictment alleges that Defendant "engaged in a scheme to intentionally and artificially manipulate the USD/ZAR exchange rate to drive the rate below 12.50 and trigger payment under the $20 million One Touch Option" and, when the Hedge Fund communicated that the One Touch Option was triggered, it "omitted the fact that the triggering event . . . had occurred as a result of the manipulation of the USD/ZAR exchange rate by [Defendant]." Dkt. No. 2 ¶¶ 17, 23. He did so by selling $725 million of USD for ZAR—which constitutes "a large volume of USD"—"in a short period of time,"

thus creating "artificial demand for ZAR, which had the impact of strengthening the ZAR against the USD." *Id.* The Indictment further alleges that this scheme occurred "[b]etween shortly before midnight London time on December 25, 2017 (Christmas day) and approximately 12:45 a.m. London time on December 26, 2017 (Boxing Day)." *Id.* ¶ 18.

Defendant claims that the Indictment's allegations are insufficient because the Indictment does not allege that Defendant intended to and did cause an "artificial price." Dkt. No. 22 at 15 (citing *U.S. Commodity Futures Trading Comm'n v. Wilson*, 2018 WL 6322024, at *12 (S.D.N.Y. Nov. 30, 2018) (Sullivan, J.)). Defendant further claims that an "artificial price" is one that must be set by forces other than the forces of supply and demand and that "legitimate transactions, conducted transparently in the open market, with willing market participants on the oppose side of each trade" cannot be manipulative. Dkt. No. 22 at 16–17.

The Second Circuit, however, has rejected the notion that open-market trades that are conducted with willing counterparties cannot be manipulative. *See Set Cap. LLC v. Credit Suisse Grp. AG*, 996 F.3d 64, 76–77 (2d Cir. 2021) ("[A] defendant may manipulate the market through open-market transactions."); *see also Commodity Futures Trading Comm'n v. Gorman*, 587 F. Supp. 3d 24, 41 (S.D.N.Y. 2022) (noting that "this Circuit [has] found [that] open-market activity" can be "manipulative" and that "this line of cases" has been "extended . . . to the CEA"). In *Set Capital LLC v. Credit Suisse Grp. AG*, 996 F.3d 64, for example, the Circuit concluded that the complaint

stated a claim under Section 10(b) because it alleged an actionable manipulative act, even though such act was accomplished through open-market transactions: The defendant "flooded the market with millions of additional XIV Notes for the very purpose of enhancing the impact of its hedging trades," resulting in considerable profit to the defendant. *Id.* at 77–78. Similarly, in *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87 (2d Cir. 2007), the Circuit indicated that "trading engineered to stimulate demand," like the Indictment alleges Defendant's trading did here, "can mislead investors into believing that the market has discovered some positive news and seeks to exploit it" and can be manipulative. *Id.* at 101. Thus, the fact that the trades were made in the open market with willing participants does not alone defeat the Government's claim of manipulation.

Further, the Indictment alleges that to accomplish his goal of breaching the 12.50 USD/ZAR exchange rate, Defendant engaged in what could be characterized as deceptive conduct: He traded during a relatively short period of time when the market was illiquid. The Indictment alleges that, beginning shortly before 12:00 a.m., London time, on Christmas Day and continuing for approximately 45 minutes, Defendant sold $725 million of USD for ZAR. Dkt. No. 2 ¶ 17–18. According to the Indictment, it was no accident that Defendant picked this timing: His goal was to move the exchange rate below 12.50 and he was informed that the market was relatively thin, making the task easier. *Id.* ¶ 20(c) (informing Defendant that he was "the only seller[ ] in the market" and there was relatively little "depth" in buyers until "the bid" got

closer to 12.50). This is similar to conduct that the Second Circuit has found to be manipulative. *See Set Cap. LLC*, 996 F.3d at 77 (noting that part of the defendant's scheme was to "exacerbate[ ] the risk of illiquidity in the VIX futures market"); *cf. United States v. Royer*, 549 F.3d 886, 887, 900 (2d Cir. 2008) (holding that seeking to "artificially affect the prices of various securities by directing [others] to trade and to disclose the negative information [related to thinly traded securities] at times and in manners orchestrated by the defendants . . . squarely meets the ordinary meaning of 'manipulation'"); *U.S. Commodity Futures Trading Comm'n v. Amaranth Advisors, L.L.C.*, 554 F. Supp. 2d 523, 534 (S.D.N.Y. 2008) (Chin, J.) (noting that "marking the close"—or "the execution of purchase or sale orders at or near the close of the market [when it is easier to affect prices in order] to affect the closing price of a security"—can "constitute manipulation in contravention of the CEA" (citation omitted)).

Finally, Defendant contends that so long as an open-market transaction is "supported by a legitimate economic rationale," it "cannot form the basis for liability under the CEA because it does not send a false signal." Dkt. No. 22 at 18. The trades here, Defendant argues, "had a legitimate economic rationale": He "believed that the [r]and would strengthen relative to the dollar," thus motivating his purchase of rand. *Id.* at 19. The problem with Defendant's argument is that the Indictment specifically alleges that the trades were made only for a single purpose: "to drive the USD/ZAR rate below 12.50" and thus to trigger the One Touch Option. *See* Dkt. No. 2 ¶ 20; *see also id.* ¶ 2 (Defendant "engaged in these USD/ZAR spot transactions

for the purpose of intentionally and artificially driving the USD/ZAR exchange rate below the threshold level set by the barrier options contract in order to trigger the $20 million payment" under the One Touch Option). The Court, which must accept the allegations of the Indictment as true, is not permitted to find that any motivation other than the one that appears on the face of the Indictment was the purpose behind the trades. Defendant will have an opportunity to argue at trial that a legitimate economic rationale underpinned the Hedge Fund's sale of $725 million for ZAR and that this rationale legitimizes activity that may otherwise be deemed manipulative under the CEA. However, it is premature for the Court to decide on this motion whether such conduct, if evidence of it was offered and it was proved, would legitimize otherwise manipulative activity.

Accordingly, Defendant's motion to dismiss Counts One and Two for failure to allege an artificial price is denied.

II. Wire Fraud Counts

Defendant argues that the wire fraud counts must be dismissed because the Hedge Fund, in its role as the Calculation Agent, had no duty to disclose that it had purchased ZAR with the intent to move the USD/ZAR exchange rate below 12.50. Dkt. No. 22 at 21–22. Defendant further argues that the alleged omission was neither misleading nor material. *Id.* at 23–24.

"The 'essential elements of' [a wire fraud violation] are '(1) a scheme to defraud, (2) money or property as the

object of the scheme, and (3) use of the mails or wires to further the scheme.'" *United States v. Binday*, 804 F.3d 558, 569 (2d Cir. 2015), *abrogated on other grounds by Ciminelli v. United States*, 598 U.S. 306, 143 S.Ct. 1121, 215 L.Ed.2d 294 (2023) (citation omitted). Count Three alleges that Defendant "and others known and unknown, willfully and knowingly, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, would and did transmit and cause to be transmitted by means of wire and radio communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing such scheme and artifice, in violation of" 18 U.S.C. § 1343. Dkt. No. 2 ¶ 37. And Count Four alleges that Defendant "transmitted and caused to be transmitted" the same.[6] *Id.* ¶ 39. "Because Counts

6. Defendant's argument can be read to suggest that the wire fraud count fails because it does not allege that the omission was made by Defendant. *See* Dkt. No. 22 at 20 ("The Indictment does not allege any misrepresentation or omission made by Phillips himself. Rather, the only omission alleged in the Indictment was in connection with the notification by a Glen Point employee that the Barrier Event had occurred."). However, that fact alone does not lessen Defendant's liability for the wire fraud scheme. *See Williams v. Equitable Acceptance Corp.*, 443 F. Supp. 3d 480, 492 (S.D.N.Y. 2020) ("The mail and wire fraud statutes only require that the scheme, in which [the defendant] allegedly participated with knowledge or intent, contain a material misrepresentation, not that [the defendant] made any misrepresentation by [himself]. As long as [the defendant] had an intent to defraud in participating in the scheme and the scheme contained a material misstatement, [the defendant] may be held liable for mail and wire fraud violations." (citations omitted)).

Three and Four track the relevant statutory . . . language . . ., apprise the defendant of the nature of the accusations against him, and—when read in conjunction with the [paragraphs 1 through 29 and 32] of the indictment, which Counts Three and Four incorporate by reference—provide notice generally of where and when the crime occurred, both counts sufficiently allege" wire fraud. *Bankman-Fried*, 680 F.Supp.3d at 309.

Each of Defendant's arguments go to the sufficiency of the Government's evidence, which is inappropriate on a motion to dismiss an indictment absent a full proffer of the evidence. The Indictment alleges that the Hedge Fund, in its role as Calculation Agent, had a duty to determine whether a barrier event had occurred "in good faith and in a commercially reasonable manner." Dkt. No. 2 ¶ 13. Defendant argues that this obligation "cannot form the basis for a duty to disclose trading activity." Dkt. No 22 at 21; *see also id.* at 22 ("The Indictment invents a duty that did not exist."). The Government, however, is entitled to put on evidence that the Hedge Fund's failure to disclose its trading activity violated its duty to act in good faith and a commercially reasonable manner, and that this violation in turn exposed Defendant to criminal liability. Defendant next argues that the omission was not misleading because the Hedge Fund "had no duty to report *how* the Barrier Event occurred, but rather *whether* it occurred." *Id.* at 23 (emphasis in original). But this argument too goes to the sufficiency of the evidence: The Government may be able to present evidence that the Hedge Fund's obligation to act in good faith and a commercially reasonable manner required it to disclose how the 12.50 barrier was breached

and thus its omission was misleading; it may not be able to present evidence to that effect. Both sides have presented powerful arguments. But the Government is entitled to make that argument to a jury and Defendant is entitled to raise the arguments it raises here after the full presentation of the Government's evidence on a Rule 29 motion. Finally, Defendant argues that the omission was not material because, *inter alia*, "it would not 'naturally tend to lead or [be] capable of leading a reasonable [person] to change [his] conduct." *Id.* at 25 (alterations in original) (citation omitted). The Government might have to prove beyond a reasonable doubt to a jury that a bank—either in the role of a counterparty to the One Touch Option or a broker of the option—would have acted differently had it known of the omitted information, but it does not need to do so based solely on the facts alleged in the Indictment alone.

Accordingly, Defendant's motion to dismiss Counts Three and Four is denied.

III. Constitutional Challenges

Finally, Defendant argues that the Indictment violates the Due Process Clause because its theory of market manipulation "is a novel construction of both the CEA and the wire fraud statute" and because "[t]he charges against [Defendant] are unconstitutionally vague as applied to his conduct." Dkt. No. 22 at 26–28. Defendant's constitutional challenges to the Indictment are premature and not properly made on a motion to dismiss.

"The Supreme Court has [ ] made clear that principles of due process require 'fair warning . . . in language that the common world will understand' as to what conduct is prohibited by law." *United States v. Benjamin*, 2022 WL 17417038, at *13 (S.D.N.Y. Dec. 5, 2022) (quoting *McBoyle v. United States*, 283 U.S. 25, 27, 51 S.Ct. 340, 75 L.Ed. 816 (1931)). "There are three related manifestations of the fair warning requirement": the vagueness doctrine, the rule of lenity, and a bar on the application of a "novel construction" of a statute. *United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997).

By Defendant's own admission, he is only bringing as-applied challenges to the CEA and wire fraud statutes under both the vagueness and novel construction doctrines. *See id.* This approach is consistent with Second Circuit precedent, which has "repeatedly held that when, as in the case before us, the interpretation of a statute does not implicate First Amendment rights, it is assessed for vagueness only 'as applied,' i.e., 'in light of the specific facts of the case at hand and not with regard to the statute's facial validity.'" *United States v. Rybicki*, 354 F.3d 124, 129 (2d Cir. 2003) (collecting cases) (citation omitted); *see also United States v. Coiro*, 922 F.2d 1008, 1017 (2d Cir. 1991) ("In the absence of first amendment considerations, vagueness challenges must be considered in light of the facts of the particular case."). "An implicit requirement of [the vagueness] test is that it must be clear what the defendant did." *United States v. Raniere*, 384 F. Supp. 3d 282, 320–21 (E.D.N.Y. 2019) (citation omitted). The same can be said for Defendant's "novel constructing" challenge, which bars the application of "a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within

its scope." *United States v. Lanier*, 520 U.S. at 266, 117 S.Ct. 1219. In each case, "the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that *the defendant's conduct* was criminal." *Id.* at 267, 117 S.Ct. 1219 (emphasis added). Thus, the Court requires full factual development at trial before it can determine whether the CEA and wire fraud statutes failed to provide Defendant fair warning that his conduct was prohibited by law, as required by the Due Process Clause. *See United States v. Milani*, 739 F. Supp. 216, 217 (S.D.N.Y. 1990) ("In the absence of a plenary trial record this Court is unable to rule on whether the statute is impermissibly vague as applied to defendant. Surely it is not void on its face."); *see also United States v. Avenatti*, 432 F. Supp. 3d 354, 366 (S.D.N.Y. 2020) (denying as premature an as-applied vagueness challenge to honest services charge on a motion to dismiss).

CONCLUSION

The motion to dismiss the Indictment is denied without prejudice to Defendant making a Rule 29 motion for judgment of acquittal after the close of the Government's evidence and, if the Rule 29 motion is not granted then, after the close of all evidence.

SO ORDERED.

Dated: March 27, 2024
New York, New York

/s/ Lewis J. Liman
Lewis J. Liman
United States District Judge

APPENDIX E — REHEARING ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED DECEMBER 22, 2025

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket No: 24-1908

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of December, two thousand twenty-five.

UNITED STATES OF AMERICA,

Appellee,

v.

NEIL PHILLIPS,

Defendant - Appellant.

Filed December 22, 2025

ORDER

Appellant, Neil Phillips, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*.

The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe