

18-1124(L)

Kilgour v. United States Securities and Exchange Commission

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2018

(Argued: January 22, 2019 Decided: November 8, 2019)

Docket Nos. 18-1124, 18-1127

COLIN KILGOUR, DANIEL WILLIAMS, JOHN DOE
Petitioners,

V.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Respondent.

Before: KEARSE, SACK, LIVINGSTON, *Circuit Judges*.

16 These two petitions—one by John Doe, the other by Colin Kilgour and

17 Daniel Williams—are from the denial by the United States Securities and

¹⁸ Exchange Commission of "whistleblower" awards. The petitioners sought the

19 awards following a \$50 million settlement the SEC reached with Deutsche Bank

²⁰ AG that resolved an enforcement action against the bank. The petitioners assert

²⁰ AG that resolved an enforcement action against the bank. The petitioners assert

21 that the SEC erred in basing the denials of their claims on its determination that

22 the petitioners did not provide "original information that led to a successful

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1 enforcement action," a prerequisite for obtaining a whistleblower award under
2 the Securities Exchange Act and the SEC's regulations implementing the Act; and
3 that the SEC erred procedurally during its decision-making process. We
4 disagree. The petitions are therefore DENIED.

5 COLIN KILGOUR, Toronto, Ontario, Canada,
6 *Pro se Petitioner.*

7 Daniel Williams, Toronto, Ontario, Canada,
8 *Pro se Petitioner.*

9 DAVID E. KOVEL, Kirby McInerney LLP,
10 New York, NY, for John Doe, *Petitioner.*

11 WILLIAM K SHIREY (Robert B. Stebbins,
12 Stephen Yoder, Michael A. Conley, *on the*
13 *brief*), for the United States Securities and
14 Exchange Commission, Washington, D.C.,
15 *Respondent.*

16

17 SACK, *Circuit Judge:*

18

19 In 2015, the United States Securities and Exchange Commission (the "SEC")
20 reached a settlement agreement with Deutsche Bank AG ("DB") after the SEC
21 discovered misstatements in DB's financial statements. Previously, between 2010
22 and 2014, while the SEC was investigating DB, petitioners "John Doe,"¹ Colin
23 Kilgour, and Daniel Williams disclosed information to the SEC that they thought

¹ We have adopted the parties' practice of keeping John Doe and two other claimants' identities confidential.

1 would be helpful to that investigation. After the settlement, the petitioners filed
2 applications with the SEC for "whistleblower" awards. Their applications were
3 denied.

4 The petitioners ask that we set aside the SEC's denial of their award
5 applications and instruct the SEC to issue whistleblower awards to them based
6 on the value of the information provided to the SEC. For the reasons that
7 follow, we deny the petitions.

8 **BACKGROUND**

9 **I. The Deutsche Bank Case and Settlement**

10 During 2005 and 2006, DB purchased \$98 billion of leveraged super senior
11 tranches in more than thirty collateralized debt obligations (the "LSS") as credit
12 protection. The LSS were leveraged eleven times, i.e., the sellers of the protection
13 posted only 9% of the total value of the LSS as collateral. In late 2008 and early
14 2009, DB began overvaluing the LSS by misstating in their financial records the
15 associated "gap risk"—the risk that the market value of its credit protection could
16 exceed the available collateral posted by the sellers. This overvaluation was
17 reflected in misstatements in DB's financial statements. On May 26, 2015, the
18 SEC both instituted agency cease-and-desist proceedings against DB with respect

- 1 to these statements and accepted a settlement offer from DB in which DB agreed
- 2 to pay a penalty of \$55 million.

3 **II. The Investigation**

4 Between 2010 and 2014, i.e., before the SEC cease-and-desist proceedings

5 were instituted, the SEC obtained information from several persons (the

6 "Claimants") regarding the potential wrongdoing by DB. Three of the

7 Claimants—John Doe, Colin Kilgour, and Daniel Williams – are the petitioners in

8 this case.²

9 a. John Doe

10 On or about June 7, 2010, the Enforcement Division of the SEC received

11 information from DB's counsel, after Claimant 1, a DB employee, filed an internal

12 complaint, to the effect that DB was overstating the value of certain assets "to

13 improve the appearance of [DB's] financial performance" to its shareholders, the

14 market and the investing public. Declaration of Amy Friedman, Assistant

15 Director of the SEC Enforcement Division, July 27, 2016 ("Friedman

16 Declaration"), at 3-4; Joint Appendix ("JA") 3086-87. Following this disclosure,

17 the SEC opened an investigation of DB, and arranged for an in-person interview

² In this opinion, we refer to Claimants 1, 2, and 3. In doing so, we refer to persons other than John Doe, Colin Kilgour, and Daniel Williams.

1 with Claimant 1. According to the SEC, it was Claimant 1's "early identification
2 of the Gap Risk issue that led the enforcement staff to focus on [that] issue in its
3 investigation, and it was [that] issue that formed the cornerstone of the charges
4 ultimately brought by the [SEC] against [DB] in the enforcement action." *Id.* at 3;
5 JA 3087.

6 On September 30, 2010, petitioner John Doe met with enforcement staff
7 from the SEC's Complex Financial Instruments Unit ("CFIU"), a group that was
8 part of the SEC's Enforcement Division but whose membership did not overlap
9 with the team working on the DB matter ("DB team"). The SEC and Doe offer
10 different characterizations of this meeting. According to a declaration provided
11 by the Deputy Chief of the CFIU, Reed Muoio: "[Doe] appeared to be very
12 disjointed and had difficulty articulating credible and coherent information
13 concerning any potential violation of the federal securities laws [He]
14 brought with [him] to the meeting a wet brown bag containing what [he] claimed
15 to be evidence." Declaration of Reid Muoio, Deputy Chief of CFIU, July 11, 2017
16 ("Muoio Declaration"), at 1; JA 4059.

17 Doe, for his part, contends that he provided credible, helpful information.
18 For example, he asserts that during his meeting with the CFIU he gave a

1 presentation that explained how certain restructuring efforts by DB would
2 reshape the gap risk of the LSS. Doe sent several follow-up emails to the CFIU
3 staff in October 2010, but Deputy Chief Muoio and his staff had concluded that
4 Doe was "not a credible source of information." *Id.* Having so concluded, Muoio
5 and his staff declined to forward emails they received from Doe to other staff in
6 the Division of Enforcement. *Id.* Meanwhile, the SEC assigned two TCR³
7 numbers (numbers used to track whistleblower tips in its database) to Doe.

8 In March 2011, Claimant 2 began providing the DB team with information
9 concerning DB's gap risk calculations and made multiple submissions to the
10 team in June and July 2011. The DB team found Claimant 2 to be a highly
11 credible source of information, and the information that Claimant 2 provided
12 proved, according to SEC enforcement officials, to be invaluable to their
13 investigation of DB.

14 On July 29, 2011, Doe sent another email to the CFIU staff, which they
15 forwarded to the DB team on August 3, 2011. This was the first time the DB team
16 had seen any information provided by Doe. However, Doe's email contained "no

³ "TCR" stands for "Tip, Complaint or Referral." See United States Securities and Exchange Commission, Form TCR (Aug. 2011), <https://www.sec.gov/files/formtcr.pdf>.

1 new information and did not help advance the [DB] [i]nvestigation." Friedman
2 Declaration, at 8; JA 3092.

3 In November 2011 and December 2012, Claimant 2 made two additional
4 submissions which were both considered by SEC enforcement personnel to be
5 helpful to the DB team. The submissions provided information about how the
6 gap risk calculation affected DB's results on their late 2008 and early 2009
7 financial statements, and how something called the "Montreal Accord" affected
8 the gap risk calculation. At that point, the DB team had received no such
9 information from Doe.

10 On March 11, 2013, Doe made additional submissions to the DB team,
11 including the email message that he had sent to the CFIU staff back in October
12 2010. But the DB team considered those submissions, like Doe's prior
13 submissions, to be unhelpful. At that point, "the investigation had already been
14 ongoing for over two and a half years," and the information contained in Doe's
15 submission was "largely duplicative of other information that [the DB team] had
16 already received or had learned." Friedman Declaration at 8; JA 3092. Doe's re-
17 sent October 2010 email, while referencing the Montreal Accord, "provided very
18 little detail" and attached only "publicly-available documents." Additional

1 Declaration of Amy Friedman, July 11, 2017 ("Add'l Friedman Declaration"), at 7;

2 JA 3827.

3 On April 26, 2013, Doe's counsel contacted the DB team to inform them

4 that Doe "had [additional] information that might aid" the investigation. Add'l

5 Friedman Declaration, at 13; JA 3833. The DB team met with Doe but found the

6 information to be redundant. The DB team, like the CFIU in September 2010,

7 thought Doe's presentation was "very difficult to follow, as [he] jumped from

8 topic to topic." *Id.* at 7.

9 On June 7, 2013, Doe made his final submission, attaching various internal

10 DB documents. Again, these documents were considered by the DB team to be

11 largely duplicative of documents the DB team had received from Claimant 2 or

12 from DB itself when it responded to SEC document requests, and therefore

13 unhelpful.

14 b. Colin Kilgour and Daniel Williams

15 On June 21, 2013, Claimant 2 submitted an expert report to the DB team,

16 which had been prepared by the Kilgour Williams Group ("KWG"), a consulting

17 firm owned by petitioners Colin Kilgour and Daniel Williams. According to the

18 DB team, this expert report was "detailed and comprehensive," "absolutely

1 critical to [the] investigation," and used "in connection with [the] proffer session
2 with [DB] and ensuing settlement negotiations with the company." *Id.* at 9-10.
3 After submitting the report, and until July 2014, KWG continued to provide
4 information to the SEC and to respond to questions from the DB team that
5 "allowed the [team] to strengthen the SEC's position vis-à-vis [DB]." *Id.*

6 In May 2014, Claimant 2 and his wife divorced. The state court overseeing
7 the divorce proceedings awarded half the proceeds of any whistleblower payout
8 Claimant 2 might receive to his wife. The court also ordered that Claimant 2 pay
9 "all costs and expenses he had incurred or will incur with . . . [KGW]." State
10 Court Divorce Judgment August 10, 2015, at 10; JA 411.

11 On August 11, 2014, Claimant 2 authorized Kilgour and Williams to make
12 an independent whistleblower submission so that they too could claim an award
13 from the SEC. The next day, they jointly submitted an SEC Form TCR in an
14 attempt to attain whistleblower status. This Form TCR did not provide any new
15 information; it reiterated the information that KWG had been commissioned to
16 provide on behalf of Claimant 2 between June 2013 and July 2014 and which had
17 previously been supplied to the SEC.

18

1 **III. SEC Whistleblower Proceedings and the Award Order**

2 After DB agreed to pay the \$55 million civil fine to the SEC, nine
3 whistleblower claimants (including the three petitioners in the case at bar) came
4 forward to claim awards. On July 27, 2016, the SEC's Claims Review Staff
5 ("CRS") issued a Preliminary Determination ("PD"), as is required by Rule 21F-
6 10(d), recommending awards for Claimants 1 and 2 and rejecting all other
7 claimants' applications.

8 Pursuant to SEC regulations, any claimant may submit "a written response
9 to the Office of the Whistleblower setting forth the grounds for [an] objection to
10 either the denial of an award or the proposed amount of an award." Rule 21F-
11 10(e). To facilitate such objections, the SEC also permits claimants to request to
12 review the materials "that formed the basis of the . . . [PD]." Rule 21F-10(e)(1)(i).

13 After the issuance of the PD, Doe requested that the CRS produce all
14 materials upon which it based its PD. The CRS produced a record consisting of
15 Doe's own submissions to the SEC and the Friedman Declaration, dated July 27,
16 2016. The declaration set forth the timing of the CFIU intake and subsequent
17 forwarding of Doe's information to the DB team, asserting that by the time the
18 DB investigators received Doe's information, it was duplicative of information

1 that was publicly available or that they had already received from other sources
2 (primarily Claimant 2).

3 Doe objected to the PD on several grounds, arguing that the CFIU staff
4 should have forwarded his information to the DB investigators and that it was
5 unfair for the SEC to penalize him for their failure to do so; that the CRS should
6 have provided Doe with the other Claimants' materials on which Friedman had
7 relied in preparing her declaration; and that Doe had, in any event, submitted
8 important, original information, and therefore deserved credit as a source of that
9 information. The SEC responded with the Muoio Declaration and a second
10 declaration from Friedman.

11 On November 30, 2017, the SEC issued an "Order Determining
12 Whistleblower Award Claims" for the DB matter. SPA 1. Under the order,
13 Claimant 1 and Claimant 2 were each to receive an award of about \$8 million.
14 Each of the other claimants — including these petitioners — would not receive
15 an award.

16 With respect to Doe's application, the SEC determined that "the
17 information provided by [Doe] was not of a higher quality than the information
18 provided by Claimant #2 (or Claimant #1)" and that "the [DB team] received

1 information from Claimant 2 (as well as Claimant 1) before receiving any
2 information from [Doe]." SEC Order, November 30, 2017, SPA 16. The SEC
3 therefore concluded that "the record firmly demonstrates that [Doe] did not
4 provide information that led to the success of the [DB action]." *Id.*

5 Regarding Kilgour's and Williams's claim, the SEC found, *inter alia*, that
6 the information the two had included in their August 2014 Form TCR was not
7 "original information" because the SEC already had obtained it from Claimant 2
8 in his submissions. The SEC further decided that neither petitioner qualified as
9 the "original source" of that information because they had both previously
10 interacted with the SEC in their capacity as Claimant 2's experts. The SEC also
11 determined that Kilgour's and Williams's Form TCR submission did not lead to
12 the success of the enforcement action.

13 **DISCUSSION**

14 The petitioners Doe, Kilgour, and Williams now ask us to overturn the
15 SEC's denials of their "whistleblower"⁴ award applications. We must address

⁴ The Securities Exchange Act provides, in relevant part:

The term "whistleblower" means any individual, or 2 or more individuals acting jointly, who provides information relating to a violation of this Act

1 four issues in order to resolve the petitions: First, whether the SEC can, should,
2 or must be equitably estopped from denying Doe his requested whistleblower
3 award. Second, whether the SEC violated Doe's Due Process rights by failing to
4 provide him with materials to which he asserts he was entitled in order to
5 contest the CRS's PD. Third, whether the SEC acted arbitrarily and capriciously
6 in granting an award to Claimant 2, but not Doe. And fourth, whether Kilgour
7 and Williams were entitled to a whistleblower award for the information that
8 they submitted.

9 **I. Standard of Review**

10 We review the Commission's whistleblower award determinations "in
11 accordance with section 706 of [the Administrative Procedure Act]." 15 U.S.C.
12 § 78u-6(f). Accordingly, this Court may set aside an agency action if it is
13 "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
14 the law," or if it is "unsupported by substantial evidence." 5 U.S.C. § 706(2)(A) &
15 (E). Section 702(2)(A) provides for "a deferential standard of review" where "we
16 cannot substitute our judgment for that of the agency." *Nat. Res. Def. Council, Inc.*

to the Commission, in a manner established by rule or regulation by the
Commission.

15 U.S.C. § 78u-6(a)(6).

1 *v. FAA*, 564 F.3d 549, 555 (2d Cir. 2009). In reviewing the SEC's findings of fact
2 for "substantial evidence" we require that they be supported by "more than a
3 scintilla of evidence," which may be "less than a preponderance." *Cellular Tel. Co.*
4 *v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999).

5 **II. Legal Framework**

6 In 2010, as part of the Dodd-Frank Act, Congress amended the Securities
7 Exchange Act of 1934 to establish a whistleblower award program. *See* 15 U.S.C.
8 § 78u-6. Under this program, the SEC "shall pay an award or awards to 1 or
9 more whistleblowers who voluntarily provided original information to the
10 Commission that led to the successful enforcement of [a] covered judicial or
11 administrative action." *Id.* § 78u-6(b)(1). To be eligible for an award, a
12 whistleblower must submit information in accordance with the SEC's rules and
13 regulations. *Id.* § 78u-6(a)(6), (c)(2)(D); *see also id.* § 78u-6(j) (authorizing the SEC
14 to issue rules and regulations to implement the program).

15 In 2011, the SEC adopted rules establishing the procedures and criteria for
16 whistleblower awards. *See* Securities Whistleblower Incentives and Protections,
17 76 Fed. Reg. 34,300 (June 13, 2011) (codified at 17 C.F.R. Parts 240 and 249).
18 These rules limit awards to whistleblowers who "voluntarily provide the

1 Commission with original information that leads to the successful enforcement
2 by the Commission of a Federal court or administrative action." 17 C.F.R. §
3 240.21F-3(a).

4 "Original information" is defined as information "[n]ot already known to
5 the Commission from any other source, unless [the applicant is] the original
6 source of the information." 17 C.F.R. § 240.21F-4(b)(1)(ii). The SEC considers an
7 applicant to be an "original source" of information that the SEC has obtained
8 from another source if "the other source obtained the information from [the
9 applicant or her] representative." *Id.* § 240.21F-4(b)(5). The rules further define
10 information "lead[ing] to successful enforcement" as information that (1) "was
11 sufficiently specific, credible, and timely to cause" the SEC to open, reopen, or
12 expand an examination or investigation, leading to a "successful judicial or
13 administrative action based in whole or in part on conduct that was the subject of
14 [the applicant's] original information," or (2) concerned "conduct that was
15 already under examination or investigation" and its "submission significantly
16 contributed to the success of the action." *Id.* § 240.21F-4(c)(1)-(2). "A
17 whistleblower must be an individual. A company or another entity is not
18 eligible to be a whistleblower." *Id.* § 240.21F-2(a)(1).

1 Rule 21F-9 governs the procedures for submitting information as the basis
2 of a claim for a whistleblower award. 17 C.F.R. § 240.21F-9; *see also id.* § 240.21F-
3 2(a)(2) (eligibility for awards conditioned on compliance with these procedures,
4 among others). It provides that to be considered a whistleblower for these
5 purposes, an individual must submit her or his information to the SEC through
6 the SEC's website or in a "Form TCR (Tip, Complaint or Referral)" mailed or
7 faxed to the SEC. *Id.* § 240.21F-9(a). This submission must be accompanied by a
8 declaration "under penalty of perjury . . . that [the] information [provided] is true
9 and correct to the best of [the claimant's] knowledge and belief." *Id.* § 240.21F-
10 9(b). "[T]he Commission may, in its sole discretion, waive any of these
11 procedures based upon a showing of extraordinary circumstances." *Id.*
12 § 240.21F-8(a).

13 **III. Can the SEC Be Equitably Estopped from Denying Doe's
14 Whistleblower Award?**

15 Doe does not contest the SEC's factual determination that when the DB
16 team received his submissions, the information was duplicative of information
17 the team had already obtained from other sources. Doe argues, though, that "the
18 Commission should be equitably estopped from claiming it did not rely on Doe's
19 September/October 2010 submissions and be directed to issue an award based on
20

1 the contribution that information made to their investigation (when provided by
2 other sources)." Pet'r Doe Br. 33. In other words: Doe argues that
3 notwithstanding the fact that his *submissions* did not contribute to the success of
4 the enforcement action against DB, he should be entitled to a whistleblower
5 award because the *information* in those submissions did. We disagree.

6 In *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), the
7 Supreme Court concluded that "a claimant may not assert a monetary claim of
8 estoppel against the government when the funds used to pay this claim will
9 come from the Federal Treasury, but are not authorized by statute." *Dun &*
10 *Bradstreet Corp. Found. v. U.S. Postal Serv.*, 946 F.2d 189, 195 (2d Cir. 1991) (citing
11 *Office of Personnel Management v. Richmond*, 496 U.S. at 423-25.). "Accordingly, an
12 estoppel claim that will require the payment of government funds in
13 contravention of a statute will fail." *Id.* This is such a claim.

14 First, the funds for the award that Doe requests would come from the
15 Securities and Exchange Commission Investor Protection Fund in the Federal
16 Treasury, as do all SEC whistleblower awards. *See* 15 U.S.C. § 78u-6(g)(1) ("There
17 is established in the Treasury of the United States a fund to be known as the
18 'Securities and Exchange Commission Investor Protection Fund'").

1 Second, if we were to grant Doe's petition on the grounds of equitable
2 estoppel, we would be compelling the SEC, in effect, to issue Doe an award that
3 is not authorized by statute. In his reply brief, Doe argues that awarding him
4 whistleblower funds would not contravene the Securities Exchange Act because
5 the relief sought—granting Doe's award application—is authorized by statute.
6 He contends that "[i]n crediting the provider of the original information the
7 statute . . . requires that the SEC '*shall pay*' for 'original information' that led to a
8 successful conclusion." Pet'r Doe Reply 11. Doe argues that therefore, "so long
9 as a claimant provided original information, and that information aided a
10 successful enforcement action, payment is authorized and non-discretionary." *Id.*
11 Not so.

12 We do not decide whether that the SEC erred in its determination that Doe
13 was not credible. As the SEC notes, the "CFIU staff and the DB team reached
14 generally similar conclusions that Doe did not have helpful information
15 regarding Deutsche Bank." SEC Br. at 30. But even if we assume that some of the
16 information Doe provided was also provided by Claimant 2 and ultimately led to
17 the success of an enforcement action, the statute does not authorize the SEC to
18 give Doe an award under the circumstances.

1 "When Congress has entrusted rulemaking authority under a statute to an
2 administrative agency, we evaluate the agency's implementing regulations under
3 *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)."
4 *Encarnacion ex rel. George v. Astrue*, 568 F.3d 72, 78 (2d Cir. 2009); *see also Stryker v.*
5 *SEC*, 780 F.3d 163, 165 (2d. Cir. 2015) (applying the "familiar two-step framework
6 set forth in *Chevron*" to review the SEC's denial of a whistleblower award where
7 the ruling was based on rules promulgated by the SEC to implement the Dodd-
8 Frank Act). "Chevron requires us to apply a two-step inquiry to an agency's
9 interpretation of a statute. At the first step of the analysis, a reviewing court
10 must ask whether Congress has directly spoken to the precise question at issue."
11 *Cappetta v. Comm'r of Soc. Sec. Admin.*, 904 F.3d 158, 166 (2d Cir. 2018) (internal
12 quotation marks omitted). "If the statute is ambiguous, then at the second step
13 the question for the court is whether the agency's answer is based on a
14 permissible construction of the statute . . . in other words, whether the agency's
15 interpretation is reasonable." *Id.* (internal quotation marks omitted).

16 The Act provides that the Commission "shall pay an award" to a
17 whistleblower "who voluntarily provided original information to the
18 Commission that led to the successful enforcement of the covered judicial or

1 administrative action." 15 U.S.C. § 78u-6(b)(1). The statute thus seems to require
2 that the information *as provided by the whistleblower* must have "led to the
3 successful enforcement action." And, assuming *arguendo* that Dodd-Frank is
4 ambiguous on this question, "we defer to the SEC's interpretation of Dodd-Frank
5 at Step 2." *Stryker*, 780 F.3d at 166. The SEC has enacted Rule 240.21F-4(c), which
6 clarifies what is meant by "information that leads to a successful enforcement."
7 17 C.F.R. § 240.21F-4(c). According to the Rule, a whistleblower satisfies this
8 statutory command if he provides original information in a "submission" which
9 itself "significantly contributed to the success of the action." *Id.* § 240.2F-4(c)(2).
10 The SEC's answer, that it is a whistleblower's *submission* that must contribute to
11 the successful action, is thus "based on a permissible construction of the statute."
12 *Chevron*, 467 U.S. at 843.

13 Applying *Chevron*, we conclude that the interpretation of "information . . .
14 that led to" in 15 U.S.C. § 78u-6(b)(1) by the SEC is reasonable. First, Congress has
15 not "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842.
16 Section 78u-6 says nothing about whether a whistleblower can be given an award
17 if their submission was not used by the SEC to bring a successful enforcement
18 action. Second, the SEC's answer—that it is a whistleblower's submission that

1 must contribute to the successful action—is "based on a permissible construction
2 of the statute." *Id.* at 843.

3 Doe asks us to disregard the SEC's interpretation of "information . . . that
4 led to," and instead declare that a whistleblower need not worry about curating a
5 useful submission. All a whistleblower must do to be entitled to an award, Doe
6 contends, is give some useful information to the SEC first, in any form, no matter
7 how impenetrable. Consider an example: Whistleblower A submits to the SEC
8 one-thousand pages of scrambled documents, informing the SEC only that some
9 incriminating information lies within that might prove useful to an ongoing
10 investigation. Several weeks later, Whistleblower B submits to the SEC a single
11 incriminating document, 10 pages in length, and explains in an attached
12 memorandum why the document is incriminating and useful to an ongoing
13 investigation. The SEC uses Whistleblower B's submission, and the ongoing
14 investigation ultimately concludes in a successful enforcement action. According
15 to Doe's interpretation, it would seem, as long as Whistleblower A's submission
16 contained the information passed along by Whistleblower B, Whistleblower A is
17 entitled to an award. We disagree.

1 The interpretation that Doe asks us to adopt misreads the statute and
2 would lead to consequences not likely intended by Congress. The whistleblower
3 program was enacted "to motivate people who know of securities law violations
4 to tell the SEC." *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777 (2018)
5 (internal quotation marks and emphasis omitted). "By enlisting whistleblowers
6 to assist the Government [in] identify[ing] and prosecut[ing] persons who have
7 violated securities laws, Congress undertook to improve SEC enforcement and
8 facilitate the Commission's recover[y] [of] money for victims of financial fraud."
9 *Id.* (internal quotation marks omitted; brackets in original).

10 As the foregoing example suggests, Doe's interpretation might
11 disincentivize whistleblowers from curating their submissions. The SEC's
12 interpretation, by contrast, strikes a sensible balance between care and
13 timeliness, one that is more consistent with the whistleblower program's
14 purpose: A whistleblower might still be rewarded for being the first to bring
15 incriminating information to the SEC's attention, but only if that information is
16 contained in a credible, and ultimately useful submission.

17 In sum, it was not arbitrary or capricious for the SEC to conclude that
18 Doe's submissions did not provide "original information to the Commission that

1 led to" a successful enforcement action, 15 U.S.C. § 78u-6(b)(1), because Doe's
2 *submissions* were not used by the DB team. The award Doe asks us to compel by
3 equitable estoppel in this case is therefore not authorized by statute, and because
4 that award would come from the Federal Treasury, *Office of Personnel*
5 *Management* forecloses Doe's claim.

6 **IV. Did the SEC Violate Doe's Due Process Rights by Failing to Provide
7 Doe with Certain Materials?**

8
9 Doe next argues that the SEC violated his rights under the Due Process
10 Clause of the Fifth Amendment by failing to provide him with materials that
11 would have enabled him to contest the CRS's PD more effectively. Specifically,
12 Doe argues that the SEC violated Rule 21F-12(a) by relying on materials
13 submitted by Claimants 1 and 2 in determining Doe's whistleblower claim, and
14 then not producing those materials to Doe. Pet'r Doe Br. 35. We disagree. We
15 think Doe's argument is contrary to the plain meaning of the relevant
16 regulations.

17 Rule 240.21F-10(e)(1)(i) requires the SEC to produce material requested by
18 a claimant only if the materials "formed the basis of the Claims Review Staff's
19 Preliminary Determination" on the claimant's application. 17 C.F.R. § 240.21F-
20 10(e)(1)(i). Those "materials" may be (1) "publicly available materials from the

1 covered action or related action," (2) "the whistleblower's Form TCR . . . and
2 other related materials provided by the whistleblower to assist the Commission
3 with the investigation," (3) "the whistleblower's . . . award application [and
4 supporting submissions]," and (4) "[s]worn declarations (including attachments)
5 from the Commission staff regarding any matters relevant to the award
6 determination." *Id.* § 240.21F-12(a). Crucially, claimants are "not entitle[d] . . . to
7 obtain from the Commission any materials . . . other than those listed" in Rule
8 21F-12(a). *Id.* § 21F-12(b).

9 Claimant 1's and 2's submissions are not included within the materials that
10 Doe is entitled to review under Rule 21F-12(a). The SEC therefore did not violate
11 that rule or by extension Doe's Due Process rights in refusing to produce them.

12 **V. Did the SEC Act in an Arbitrary and Capricious Manner by Favoring
13 Claimant 2's Submissions over Doe's?**

14
15 Doe's final argument is that the SEC was "biased against Doe in its
16 treatment of information that he provided versus similar information provided
17 by Claimant 2." Pet'r Doe Br. 38. He therefore challenges the SEC's decision on
18 the basis that its treatment of his submission was arbitrary and capricious.

19 We conclude to the contrary. It was reasonable for the SEC to credit its
20 staff's informed determination that Doe had not provided a credible submission,

1 and that Claimant 2 had provided consistent, critical information that led to the
2 successful enforcement action against DB.

3 The CFIU staff explained that it had concluded, after interviewing Doe in
4 2010, that he "had difficulty articulating credible and coherent information
5 concerning any potential violation of the federal securities laws." Muoio
6 Declaration at 1; JA 4059. Doe "brought with him to the meeting a wet brown
7 paper bag containing what he claimed to be evidence," and his "files were
8 jumbled and disorganized. During the meeting he repeatedly referred to distress
9 over [a] personal situation, and [he] appeared to be under great duress." *Id.* And
10 when Doe was interviewed again in 2013, this time by the DB team, they found
11 that he was "very difficult to follow, as he jumped from topic to topic." Add'l
12 Friedman Declaration, at 13; JA 3833.

13 The SEC personnel decided that Claimant 2, by contrast, provided more
14 critical or helpful information in a far more digestible manner than Doe. The DB
15 team itself characterized Claimant 2's submission as "detailed and
16 comprehensive" and concluded that it "far surpassed the quality of the
17 information provided by [Doe]." Add'l Friedman Declaration, at 9; JA 3829. Doe
18 purports to perceive some pernicious bias, asserting that Claimant 2 also

1 provided "publicly available" information—an aspect of Doe's submission that
2 the SEC faulted him for—but the DB team explained that "Claimant 2's expert
3 report was not based on publicly available information, but contained an inside
4 view of . . . the Montreal Accord." *Id.* at 11. The SEC therefore acted in a manner
5 that was reasonable, not arbitrary or capricious.

6 **VI. Were Kilgour and Williams entitled to a whistleblower award for the
7 information that they submitted in their Form TCR?**

8
9 Kilgour and Williams argue that they are entitled to a whistleblower
10 award on the basis of information they provided to the SEC in their joint Form
11 TCR submitted in August 2014. We disagree.

12 As discussed above, Kilgour and Williams would be entitled to an award
13 in return for that submission only if (1) they provided original information
14 submitted in their Form TCR, and (2) their submission significantly contributed
15 to the success of the action. *See* 17 C.F.R. §§ 240.21F-3(a), 240.21F-4(b)(1)(ii),
16 (b)(5), (c)(2). But by the time they submitted their Form TCR, all the information
17 contained therein was already known to the DB team, having been provided by
18 Kilgour and Williams earlier to support Claimant 2's submissions. Accordingly,
19 their Form TCR submission did not significantly contribute to the success of the
20 DB action; Claimant 2's submissions did.

1 We recognize that Rule 21F-4, contains an "original source exception,"
2 which provides that

3 The Commission will consider you to be an original
4 source of the same information that we obtain from
5 another source if the information satisfies the definition
6 of original information and the other source obtained the
7 information from you or your representative.

8
9 17 C.F.R § 240.21F-4(b)(5). Kilgour and Williams argue a that refusal to grant
10 them that exception renders the original source exception "moot because it
11 would effectively disqualify all whistleblowers, including petitioners Kilgour
12 and Williams, from making [w]histleblower applications using original
13 information attributed to them under this rule, because, by definition, the SEC
14 was already aware of it." Pet'rs K&W Br. 28. We disagree: The SEC's
15 interpretation of "information . . . that led to" in Rule 21F-4(c)(2)—discussed
16 above—would not have the effect of nullifying the original-source definition in
17 Rule 21F-4(b)(5).

18 Rule 21F-4(b)(7) advises a whistleblower that:

19 [i]f you provide information to the Congress, any other
20 authority of the Federal government, a state Attorney
21 General or securities regulatory authority, any self-
22 regulatory organization, or the Public Company
23 Accounting Oversight Board, or to an entity's internal
24 whistleblower, legal, or compliance procedures for

1 reporting allegations of possible violations of law, and
2 you, within 120 days, submit the same information to the
3 Commission pursuant to § 240.21F-9 of this chapter, as
4 you must do in order for you to be eligible to be
5 considered for an award, then, for purposes of
6 evaluating your claim to an award under §§ 240.21F-10
7 and 240.21F-11 of this chapter, the Commission will
8 consider that you provided information as of the date of
9 your original disclosure, report or submission to one of
10 these other authorities or persons.

11
12 17 C.F.R. § 240.21F-4(b)(7). In other words, in circumstances identified in the
13 Rule—such as when a person submits his or her tip to another federal agency—
14 the SEC will treat the information as though it had been submitted to the SEC
15 directly from that person at the same time that it was submitted to the other
16 agency. This rule thus preserves the original source exception, notwithstanding
17 the submission-focused nature of Rule 21F-4(c)(2), for certain specified situations.
18 This case does not present such a situation.

19 **Conclusion**

20 We have considered the petitioners' remaining arguments in support of
21 their petitions and conclude that they are without merit. For the foregoing
22 reasons, we DENY the petitions of Doe, Kilgour, and Williams to compel the SEC
23 to grant their applications for whistleblower awards in connection with the DB
24 matter.