

13-4404-ag  
Stryker v. Securities and Exchange Commission,

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2014

(Argued: September 29, 2014 Decided: March 11, 2015)

Docket No. 13-4404-ag

LARRY STRYKER,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

B e f o r e: WINTER and CHIN, Circuit Judges, and OETKEN,  
District Judge.\*

Petition for review of the Securities and Exchange Commission's denial of a claim for a whistleblower award. We hold that the SEC's interpretation of Section 21F of the Securities Exchange Act was reasonable and therefore entitled to deference under Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). We deny the petition.

---

\* The Honorable J. Paul Oetken, of the United States District Court for the Southern District of New York, sitting by designation.

1 STEPHEN M. KOHN (Karim H. Kamal, New  
2 York, NY, Michael D. Kohn & David K.  
3 Colapinto, Kohn, Kohn & Colapinto, LLP,  
4 Washington, DC, on the brief), Kohn,  
5 Kohn & Colapinto, LLP, Washington, DC,  
6 for Petitioner.

7  
8 WILLIAM K. SHIRLEY (Anne K. Small,  
9 Michael A. Conley, John W. Avery,  
10 Stephen G. Yoder, on the brief),  
11 Securities and Exchange Commission,  
12 Washington, DC, for Respondent.

13  
14 Dean A. Zerbe, Zerbe, Fingeret, Frank &  
15 Jadav PC, Houston, TX, for Amicus  
16 Curiae.

17  
18 WINTER, Circuit Judge:

19  
20 Larry Stryker petitions for review of an order of the  
21 Securities and Exchange Commission ("SEC") denying his claim for  
22 a whistleblower award. He sought the award under Section 21F of  
23 the Dodd-Frank Act ("Dodd-Frank"), 15 U.S.C. § 78u-6, based on  
24 information he supplied to the SEC that it relied upon in a  
25 successful enforcement action. The SEC held that, because the  
26 information was submitted before enactment of Dodd-Frank,  
27 petitioner did not qualify for an award under Section 21F(b)(1)  
28 of the Securities Exchange Act of 1934 and Rules 21F-(3)(a) and  
29 21F-4(c). Concluding that the SEC's interpretation of Section  
30 21F was within its authority and consistent with the legislation,  
31 we deny the petition.





1 is necessary. Only if we determine that  
2 Congress has not directly addressed the  
3 precise question at issue will we turn to  
4 canons of construction and, if that is  
5 unsuccessful, to legislative history to see  
6 if those interpretive clues permit us to  
7 identify Congress's clear intent.  
8

9 If, despite these efforts, we still cannot  
10 conclude that Congress has directly addressed  
11 the precise question at issue, we will  
12 proceed to Chevron step two, which instructs  
13 us to defer to an agency's interpretation of  
14 the statute it administers, so long as it is  
15 reasonable.  
16

17 N.Y. ex rel. N.Y. State Office of Children & Family Servs. v.  
18 U.S. Dep't of Health & Human Servs. Admin. for Children &  
19 Families, 556 F.3d 90, 97 (2d Cir. 2009) (citations and internal  
20 quotation marks omitted); see also United States v. Connolly, 552  
21 F.3d 86, 89 (2d Cir. 2008) (applying the two-step inquiry as  
22 required by Chevron).

23 We therefore turn to Step 1 and the pertinent statutory  
24 language. Section 21F provides that, where the monetary  
25 sanctions imposed in an SEC enforcement action exceed \$1 million,  
26 the SEC must make a whistleblower award to individuals who  
27 voluntarily provided the SEC with "original information" about  
28 the underlying violation of securities laws. See 15 U.S.C.  
29 § 78u-6(a), (b). Section 21F defines "original information" as  
30 information that:

31 (A) is derived from the independent knowledge  
32 or analysis of a whistleblower;

1 (B) is not known to the Commission from any  
2 other source, unless the whistleblower is the  
3 original source of the information; and  
4 (C) is not exclusively derived from an  
5 allegation made in a judicial or  
6 administrative hearing, in a governmental  
7 report, hearing, audit, or investigation, or  
8 from the news media, unless the whistleblower  
9 is a source of the information.

10  
11 Id. § 78u-6(a)(3). Recognizing that this definition leaves a  
12 number of loose ends, Congress also provided that a putative  
13 whistleblower must provide the requisite information in the form  
14 and manner required by SEC's rules and regulations. See id.  
15 § 78u-6(a)(6); see also id. § 78u-7(a) (providing the SEC with  
16 rulemaking authority to "issue final regulations implementing the  
17 provisions of section 78u-6").

18 Such rules and regulations would be of necessity promulgated  
19 sometime after Dodd-Frank was passed, and Congress also  
20 recognized that information from putative whistleblowers might be  
21 volunteered to the SEC before such promulgation. To allow for  
22 such submissions to qualify for a whistleblower award, Congress  
23 created an express safe harbor for "[i]nformation provided to the  
24 Commission in writing . . . prior to the effective date of the  
25 regulations, if the information is provided by the whistleblower  
26 after July 21, 2010." Id. § 78u-7(b). To give effect to the  
27 safe harbor, the SEC adopted Rule 21F-9(d), which states:

28 If you submitted original information in  
29 writing to the Commission after July 21, 2010  
30 (the date of enactment of . . . Dodd-Frank  
31 but before the effective date of these rules,

1           your submission will be deemed to satisfy the  
2           requirements set forth in paragraphs (a) and  
3           (b) of this section.

4  
5       17 C.F.R. § 240.21F-9(d).

6  
7           Like the statutory definition of "original information," the  
8       safe harbor provision does not expressly state whether  
9       information submitted prior to July 21, 2010 might still qualify  
10      for a whistleblower award. Congress, however, did provide that  
11      "original information" had to be submitted in conformity with the  
12      SEC's rules and regulations. See 15 U.S.C. § 78u-6(a)(6). After  
13      considering comments from the public on proposed rules  
14      implementing the whistleblower provisions of Dodd-Frank, the SEC  
15      adopted Rules 21F-1 through 21F-17. 17 C.F.R. §§ 240.21F-1 to  
16      -17. Rule 21F-4(b)(1)(iv) provides that whistleblower awards may  
17      be made only for information "[p]rovided to the Commission for  
18      the first time after July 21, 2010." This Rule was the basis of  
19      the denial of an award to petitioner who now challenges it as  
20      invalid. We reject that challenge.

21           The sole basis for petitioner's claim is Section 21F, which  
22      was not enacted until after he took the actions that are the  
23      grounds for the award sought. If the purpose of Dodd-Frank was  
24      to encourage whistleblower activity, already completed actions  
25      would arguably not qualify. We need not, however, decide if  
26      Congress clearly intended to bar a whistleblower award to  
27      petitioner at Chevron Step 1 because even if Dodd-Frank is

1     ambiguous, we defer to the SEC's interpretation of Dodd-Frank at  
2     Step 2. Section 78u-7(b)'s safe harbor and Section 78u-  
3     6(c)(2)(D)'s provision that, to qualify as "original  
4     information," information must be submitted pursuant to the SEC's  
5     rules and regulations, support the SEC's position that  
6     information submitted before July 21, 2010 does not qualify as  
7     "original information." Congress delegated to the SEC rulemaking  
8     authority to implement the whistleblower award program and  
9     specific authority to determine the "form and manner" in which  
10    information had to be submitted in order to qualify as "original  
11    information." See 15 U.S.C. § 78u-6(a)(6). Under Dodd-Frank,  
12    the only genre of information exempted from the requirement that  
13    it be submitted pursuant to the SEC's applicable rules and  
14    regulations is that described in the Section 924(b) safe harbor,  
15    *i.e.*, information "provided to the Commission . . . prior to the  
16    effective date of the regulations, if the information is provided  
17    by the whistleblower after July 21, 2010." Id. § 78u-7(b). This  
18    limited exclusion from the otherwise required compliance with  
19    rules and regulations to be promulgated by the SEC supports an  
20    inference that Rule 21F-4(b)(1)(iv) is consistent with  
21    legislative intent. See United States v. Johnson, 529 U.S. 53,  
22    58 (2000) ("When Congress provides exceptions in a statute, . . .  
23    . [t]he proper inference . . . is that Congress considered the  
24    issue of exceptions, and, in the end, limited the statute to the

1 ones set forth."); Gulino v. N.Y. State Educ. Dep't, 460 F.3d  
2 361, 375 (2d Cir. 2006) (similar).

3 Even if Congress's intent is unclear, therefore, under Step  
4 2 of Chevron, the SEC's interpretation, as set forth in Rule  
5 21F-4(b)(1)(iv), was reasonable and entitled to deference. We  
6 "will defer to a reasonable agency interpretation of ambiguous  
7 statutory language when it appears that Congress has delegated  
8 authority to the agency generally to make rules carrying the  
9 force of law, and that the agency interpretation claiming  
10 deference was promulgated in the exercise of that authority."  
11 Cohen v. JP Morgan Chase & Co., 498 F.3d 111, 124 (2d Cir. 2007)  
12 (internal quotation marks omitted). To find an agency's  
13 interpretation is reasonable, we "need not conclude that the  
14 agency construction was the only one it permissibly could have  
15 adopted." Mei Juan Zhang v. Holder, 672 F.3d 178, 183 (2d Cir.  
16 2012) (internal quotation marks omitted). Because the SEC's  
17 interpretation was fully consistent with the legislation's safe  
18 harbor provision, the SEC's final order against petitioner is  
19 valid.

#### 20 CONCLUSION

21 Even if Dodd-Frank is ambiguous in relevant part,  
22 petitioner's submission of information to the SEC did not qualify  
23 as statutorily defined whistleblower information because it: (i)  
24 did not conform to the SEC's Rule 21F-4(b)(1)(iv), which

1 disqualified information submitted prior to July 21, 2010; and  
2 (ii) did not fall within Congress's safe harbor, which excluded  
3 from its protection information submitted prior to that date. We  
4 therefore deny the petition.

5