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In the  
United States Court of Appeals  
For the Second Circuit

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August Term 2021

(Argued: February 15, 2022      Decided: July 21, 2022)

Docket No. 21-529

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VICTOR HONG,

*Petitioner,*

-v.-

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,  
UNITED STATES OF AMERICA,

*Respondents.\**

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B e f o r e :

PARKER, CARNEY, and ROBINSON, *Circuit Judges.*

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This case presents the question whether a person who submits information about potential securities laws violations to the Securities and Exchange Commission is entitled under Section 21F of the Securities Exchange Act to receive a whistleblower award from the SEC when other federal agencies use that information to help secure a

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\* The Clerk of Court is directed to amend the official case caption as set forth above.

1 financial settlement with the alleged wrongdoer. On review, we agree with the SEC that  
2 neither the settlements secured by the other agencies nor any investigative or  
3 information-sharing activities undertaken by the SEC with respect to Hong’s tip  
4 qualifies as a “judicial or administrative action brought by the [SEC]” under Section  
5 21F. 15 U.S.C. § 78u-6. We further decide that the settlements are not “related actions” to  
6 any action brought by the SEC. Having so construed the statute, we reject Hong’s  
7 arguments that he was entitled to an award and that the SEC was obligated to provide  
8 him with additional records regarding its investigation into the wrongdoer.  
9

10 The petition for review is DENIED. The motion to dismiss is DENIED as moot.  
11

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12  
13 PAUL K. BROWN (Richard S. Corenthal, John H. Byington III,  
14 *on the brief*), Archer, Byington, Glennon & Levine LLP,  
15 Melville, NY, *for Petitioner*.  
16

17 MATTHEW S. FERGUSON (Michael A. Conley, Thomas J. Karr,  
18 *on the brief*), Office of the General Counsel, Securities  
19 and Exchange Commission, Washington, DC, *for*  
20 *Respondent Securities and Exchange Commission*.  
21

22 Casen B. Ross, United States Department of Justice,  
23 Washington, DC, *for Respondent United States of*  
24 *America*.  
25

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26 CARNEY, *Circuit Judge*:

27 On this petition for review, we consider whether an individual who submits  
28 information about potentially unlawful conduct to the Securities and Exchange  
29 Commission is entitled to an award under the Commission’s whistleblower program  
30 when the Commission does not itself bring an enforcement action but other federal  
31 agencies secure financial settlements in partial reliance on that information. *See* 15  
32 U.S.C. § 78u-6.

33 Victor Hong worked at a subsidiary of the Royal Bank of Scotland Group PLC  
34 (“RBS” or “the Bank”) for six weeks in the fall of 2007 before resigning, prompted by

1 what he believed to be unlawful practices engaged in by the Bank in connection with its  
2 portfolio of residential mortgage-backed securities (“RMBS”). Seven years later, in 2014,  
3 he formally submitted information to the SEC about the Bank’s misconduct. The SEC  
4 itself took no action against the Bank, but gave the information to the Department of  
5 Justice (“DOJ”) and the Federal Housing Finance Agency (“FHFA”), each of which had  
6 already begun RMBS-related investigations into the Bank. FHFA and DOJ obtained  
7 additional related information and documents from Hong by subpoena, and, in 2017  
8 and 2018, respectively, those agencies entered into settlements with the Bank related to  
9 its underwriting, marketing, and sale of RMBS. Combined, the settlements required the  
10 Bank to make payments to those agencies totaling over \$10 billion.

11 Hong then applied to the SEC for an award under its whistleblower program  
12 (the “Program”), established in 2010 by Section 21F of the Securities Exchange Act. *See*  
13 15 U.S.C. § 78u-6.<sup>1</sup> He asserted that the DOJ and FHFA settlements constituted “covered  
14 judicial or administrative action[s]” or “related action[s]” resulting in sanctions of over  
15 \$1 million and that he was therefore entitled under the Program to receive between 10%  
16 and 30% of the total amounts collected. *See id.* § 78u-6(a)(1), (b)(1). The SEC denied his  
17 claim. It concluded that Hong had identified no action “brought by the Commission  
18 under the securities laws” based on his information, as required to qualify as a “covered  
19 judicial or administrative action” on which an award might be due; it further found that  
20 there was in fact no such action “brought by the Commission.” *Sp. App’x* at 5–6  
21 (quoting 15 U.S.C. § 7u-6(b)(1)). It also rejected his alternative theory of recovery that  
22 the DOJ and FHFA settlements qualified as “related actions” under the Program and

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<sup>1</sup> We note that Section 21F of the Exchange Act is codified in its entirety at 15 U.S.C. § 78u-6. The lettered subsections of Section 21F each correspond directly to the codified subsections of 15 U.S.C. § 78u-6(a)-(j). For ease of reading, we refer in the text to Section 21F and its subsections, providing the statutory citations as needed.

1 made him eligible for an award. The Commission reasoned that an “action” that was  
2 “brought by the SEC” was still a necessary predicate for an action brought by *another*  
3 agency to qualify as a “related action.” *Id.* at 7. Hong then petitioned for judicial review.  
4 *See* 15 U.S.C. § 78u-6(f).

5 On review, we locate no error in the SEC’s construction of Section 21F to require  
6 an action “brought by the Commission” to support a whistleblower award. We further  
7 decide that, contrary to Hong’s arguments, investigative and information-sharing  
8 activities engaged in by the SEC are not “covered judicial or administrative action[s]  
9 brought by the Commission under the securities laws” or “actions” as to which the DOJ  
10 and FHFA settlements can be considered “related.” Hong’s argument that this reading  
11 is impermissibly inconsistent with the congressional intent in establishing the  
12 whistleblower program cannot overcome the plain language of Section 21F and does  
13 not give us license to disregard the agency’s reasonable application of the statutory  
14 provisions.

15 Finally, having so concluded, we adopt the Commission’s determination that  
16 Hong was not entitled to an award under the Program because the Commission did not  
17 bring a covered action. We also reject Hong’s contention that the SEC was obligated to  
18 provide him with additional records regarding its investigation in connection with its  
19 denial of the claimed award. He has identified no regulatory or statutory basis for his  
20 request and, in any event, in light of our construction of the statute, any such records  
21 would not entitle Hong to an award.

22 We therefore **DENY** the petition for review. We further **DENY** as moot the  
23 motion to dismiss filed by the United States as respondent.

1 **BACKGROUND**

2 **I. Statutory Background**

3 Through the Dodd-Frank Wall Street Reform and Consumer Protection Act (“the  
4 Dodd-Frank Act”), Pub. L. No. 111-203, 124 Stat. 1376 (2010), Congress adopted a range  
5 of new whistleblower incentives and protections as well as many other measures aimed  
6 at stemming abuses in the financial arena. The whistleblower provisions in particular  
7 were designed to motivate those with inside knowledge of securities law violations to  
8 share information with the government despite the risks that speaking out could pose  
9 to the whistleblower’s professional reputation and career. *See* S. Rep. No. 111-176, at  
10 110–11 (2010). As relevant here, the Dodd-Frank Act amended the Securities Exchange  
11 Act of 1934 (the “Exchange Act”) to establish a new statutory whistleblower program  
12 within the Commission. *See* Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841–49 (2010); *see*  
13 *generally Kilgour v. U.S. Sec. & Exch. Comm’n*, 942 F.3d 113, 120–21 (2d Cir. 2019).

14 The Program provides that the SEC “shall pay” monetary awards to individuals  
15 who provide the SEC with “original information” pertaining to securities laws  
16 violations and resulting in sanctions payments if certain conditions are met. 15 U.S.C.  
17 § 78u-6(b)(1). Thus, the statute directs in relevant part:

18 In any *covered judicial or administrative action, or related action*, the  
19 Commission, under regulations prescribed by the Commission . . . , shall  
20 pay an award or awards to 1 or more whistleblowers who voluntarily  
21 provided original information to the Commission that led to the  
22 successful enforcement of *the covered judicial or administrative action, or*  
23 *related action*, in an aggregate amount equal to . . . not less than 10  
24 percent . . . [and] not more than 30 percent, in total, of what has been  
25 collected of the monetary sanction imposed in the action or related  
26 actions.  
27

1 *Id.* (emphasis added).<sup>2</sup> A whistleblower’s eligibility for an award under the program  
2 accordingly depends in part on whether the information provided led to the successful  
3 enforcement of a “covered judicial or administrative action” or “related action.”

4 Section 21F(a)(1) defines “covered judicial or administrative action” as “any  
5 judicial or administrative action brought by the Commission under the securities laws  
6 that results in monetary sanctions exceeding \$1,000,000.” *Id.* § 78u-6(a)(1). It defines a  
7 “related action,” as, “when used with respect to any judicial or administrative action  
8 brought by the Commission under the securities laws, . . . any judicial or administrative  
9 action brought by [certain other entities]” that “is based upon the original information  
10 provided by a whistleblower . . . that led to the successful enforcement of the  
11 Commission action.”<sup>3</sup> *Id.* § 78u-6(a)(5). The Department of Justice is among the entities

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<sup>2</sup> The determination of the amount of such an award is committed to the Commission’s discretion. 15 U.S.C. § 78u-6(c)(1)(A). Awards are paid from a special fund created by Congress for this purpose. *Id.* § 78u-6(b)(2); *see id.* § 78u-6(a)(2) (defining “Fund” as “Securities and Exchange Commission Investor Protection Fund”); *see id.* § 78u-6(g) (establishing Fund).

<sup>3</sup> For easier reference, we set out the relevant text of Section 21F(a)(1) and (5) here in full:

**(1) Covered judicial or administrative action**

The term “covered judicial or administrative action” means any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding \$1,000,000. . . .

**(5) Related action**

The term “related action”, when used with respect to any judicial or administrative action brought by the Commission under the securities laws, means any judicial or administrative action brought by an entity described in subclauses (I) through (IV) of subsection (h)(2)(D)(i) that is based upon the original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action.

15 U.S.C. § 78u-6(a)(1), (5).

1 whose judicial or administrative actions may qualify as “related” for purposes of the  
2 Program. *Id.* § 78u-6(a)(5), (h)(2)(D)(i)(I). The Program also confers substantial  
3 discretion on the Commission in administering the Program, instructing that “[a]ny  
4 determination made under [Section 21F], including whether, to whom, or in what  
5 amount to make awards, shall be in the discretion of the Commission.” *Id.* § 78u-6(f).

## 6 II. Factual Background<sup>4</sup>

### 7 A. Hong’s employment at RBS Greenwich

8 In September 2007, Hong began work as a managing director and head of fixed-  
9 income independent price verification and risk management at RBS Greenwich Capital  
10 Markets, Inc., a subsidiary of RBS. In this position, he was responsible for conducting  
11 independent price verifications for all of the Bank’s securitized credit products,  
12 including prime RMBS.<sup>5</sup> Shortly after beginning work, Hong asserts, he became aware  
13 of “persistent discrepancies between trader marks or otherwise over-marked  
14 valuations” and the “analytical fair market value” of these securitized products. *Jt.*  
15 *App’x* at 153. According to Hong, his supervisors and RBS senior management  
16 repeatedly refused to correct these discrepancies, leading him to resign from RBS  
17 Greenwich in November 2007, less than two months after he began.

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<sup>4</sup> The facts as set forth here are largely undisputed by the parties and are drawn from the administrative record.

<sup>5</sup> As we have explained elsewhere, “RMBS are asset-backed financial instruments supported by residential mortgage loans.” *Fed. Hous. Fin. Agency for Fed. Nat’l Mortg. Ass’n v. Nomura Holding Am., Inc.*, 873 F.3d 85, 100 (2d Cir. 2017). “Typically, an entity (such as a bank) will buy up a large number of mortgages from other banks, assemble those mortgages into pools, securitize the pools (i.e., split them into shares that can be sold off), and then sell them, usually as bonds, to banks or other investors.” *United States v. Litvak*, 808 F.3d 160, 166 n.3 (2d Cir. 2015) (internal quotation marks omitted).

1           B.     Hong’s tips to the SEC and the investigations into RBS

2           In July 2014, seven years after his departure from RBS, Hong completed and filed  
3 with the Commission a Tip, Complaint or Referral (“TCR”) form providing information  
4 about the possible securities law violations of which he became aware while working at  
5 the Bank. He reported, for example, that “RBS Greenwich Capital top officers asked  
6 [him] to help falsify the pricing of several billion dollars of RMBS . . . and other  
7 mortgage-related trading portfolios,” and stated that he had “resigned rather than  
8 cooperate.” Jt. App’x at 6.<sup>6</sup>

9           The information provided on his July 2014 TCR form was apparently of interest  
10 to members of a working group (the “RMBS Group”) drawn from the government’s  
11 Financial Fraud Enforcement Task Force, an entity established by President Obama in  
12 2009 to investigate RMBS-related misconduct and comprising representatives of the  
13 SEC, FHFA, DOJ, and other agencies.<sup>7</sup> In 2011, FHFA had sued the Bank on the basis of  
14 allegedly false and misleading statements related to its sale of RMBS to Fannie Mae and  
15 Freddie Mac. *See Fed. Hous. Fin. Agency v. Royal Bank of Scotland Grp. PLC*, No. 11-cv-  
16 1383 (D. Conn. filed Sept. 2, 2011). In the same timeframe, DOJ initiated an investigation  
17 into the Bank’s “marketing, structuring, sponsorship, arrangement, underwriting,  
18 issuance, and sale” of RMBS. Jt. App’x at 762; *see id.* at 95. The information provided by

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<sup>6</sup> Hong filed several TCR Forms. In his July 2014 submission, Hong wrote that he had spoken about his concerns in 2007 with representatives of DOJ, the SEC, and the Federal Bureau of Investigation. In the form, he did not explain how he came into contact with these agencies or state whether he had made any formal submission to them at that time.

<sup>7</sup> *See* Exec. Order No. 13519, 74 Fed. Reg. 60,123 (Nov. 17, 2009). The Task Force membership consisted of senior officials from over 20 governmental entities. It was dissolved in 2018. *See* Exec. Order No. 13844, 83 Fed. Reg. 33,115 (July 11, 2018).



1 Hong on the July 2014 TCR form signaled that he had information potentially relevant  
2 to these agencies' investigations.

3 SEC officials did not contact Hong about the information provided on his July  
4 2014 TCR form. Instead, in November 2014, a special agent with the FHFA Office of  
5 Inspector General contacted him and explained that FHFA planned to follow up in  
6 coordination with the U.S. Attorney's Office for the District of Massachusetts. In  
7 December, after consulting with Hong's attorney, an assistant U.S. attorney from that  
8 district scheduled a meeting with Hong for later that month and issued a subpoena  
9 seeking documents from him related to, among other things, the Bank and its RMBS  
10 business, including documents he had earlier produced to the SEC and DOJ in  
11 connection with ongoing investigations into RBS Greenwich Capital.

12 The December meeting with Hong was attended by several assistant U.S.  
13 attorneys and the FHFA special agent. There and after the meeting, in response to the  
14 "consensual" subpoena, Petitioner's Br. at 6, Hong provided what he describes as  
15 "troves of documents and further information" related to his allegations of misconduct,  
16 Jt. App'x at 159. Soon after, acting on the advice of an assistant U.S. attorney, Hong filed  
17 an amended TCR form with the SEC, making note of his extensive document  
18 production to DOJ.

19 C. The DOJ and FHFA settlements

20 In 2017, FHFA settled its lawsuit against the Bank for \$5.5 billion. *See* Stipulation  
21 of Dismissal, *Fed. Hous. Fin. Agency*, No. 11-cv-1383 (D. Conn. Aug. 3, 2017), ECF No.  
22 741; FHFA-RBS Settlement Agreement (July 12, 2017),  
23 [https://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/FHFA-RBS-](https://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/FHFA-RBS-Settlement-Agreement.pdf)  
24 [Settlement-Agreement.pdf](https://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/FHFA-RBS-Settlement-Agreement.pdf). The following year, in 2018, DOJ announced its own \$4.9  
25 billion settlement agreement with the Bank. *See* Jt. App'x at 763. As explained in that

1 agreement, the DOJ settlement arose out of the Bank’s conduct in which it “underwrote  
2 RMBS backed by home mortgages with a high risk of default, and then made false and  
3 misleading representations to sell those RMBS to investors.” DOJ-RBS Settlement  
4 Agreement, Annex 1 (Aug. 14, 2018), [https://www.justice.gov/opa/press-](https://www.justice.gov/opa/press-release/file/1087151/download)  
5 [release/file/1087151/download](https://www.justice.gov/opa/press-release/file/1087151/download). Hong asserts that, through his two TCR forms and the  
6 subpoenaed documents that he produced, he “produced significant evidence” to DOJ  
7 and FHFA relating to the Bank’s misconduct, helping lead to settlement. Jt. App’x at  
8 159. The evidence he provided included documents and information regarding certain  
9 specific loans and RMBS securitizations that were identified in the DOJ agreement as  
10 among the predicates for that settlement.<sup>8</sup> See Petitioner’s Br. at 7.

### 11 III. Procedural History

12 In 2015 and 2016, before those two settlements, Hong applied to the SEC for a  
13 whistleblower award. See 17 C.F.R. §§ 240.21F-10(b), 240.21F-11(b) (describing  
14 application process). The agency’s blank claim form, WB-APP, requests details  
15 regarding the applicant’s tip or complaint; an explanation of the basis for the applicant’s  
16 claim of entitlement to an award; and identification of the relevant “Notice of Covered  
17 Action” — a notice that the SEC is required to publish on its website when “a  
18 Commission action results in monetary sanctions totaling more than \$1,000,000.” *Id.*  
19 § 240.21F-10(a). The Commission’s Office of the Whistleblower (the “Office”) found  
20 Hong’s two applications deficient for their failure to identify a covered action brought  
21 by the Commission, and it advised Hong that the applications “could not be processed

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<sup>8</sup> For example, Hong explains that he provided documents to DOJ regarding the underlying loans and securitizations constituting various “Soundview” RMBS products during the relevant period. Petitioner’s Br. at 7–8. The DOJ settlement covers the Bank’s underwriting and other activities related to 77 of these Soundview RMBS products. See Jt. App’x at 763 (defining “Covered Conduct”); *id.* at 782 (listing Soundview RMBS).

1 further.” Jt. App’x at 46.

2 In 2019, Hong submitted a third application for an award, and, in the section of  
3 the form that called for information regarding the “Notice of Covered Action,” Hong  
4 listed the “Royal Bank of Scotland/DoJ Settlement” dated August 14, 2018. *Id.* at 48. The  
5 SEC did not publish a notice of covered action related to the DOJ or FHFA settlements,  
6 and Hong left the notice number and case number fields of the application form blank.  
7 *Id.* In his written explanation on the form regarding the basis for his entitlement to an  
8 award, Hong referred to the subpoena under which he provided documents to DOJ in  
9 the District of Massachusetts, the FHFA settlement, and the DOJ settlement, the latter  
10 two of which he appears to have meant to describe as qualifying “related action[s].” *Id.*  
11 at 49. Once again, in response, the Office wrote to Hong that his application “was  
12 deficient and could not be processed further because it did not identify a Covered  
13 Action brought by the Commission.” *Id.* at 46.

14 Hong then petitioned this Court for review, challenging the adequacy of the  
15 response and complaining that the Office had not issued a preliminary determination  
16 allowing or denying his claim—a necessary prerequisite to a final agency ruling that he  
17 could then challenge in court. *See* 17 C.F.R. §§ 240.21F-10(d), 240.21F-11(d); Pet. for  
18 Review, *Hong v. U.S. Sec. and Exch. Comm’n*, No. 19-3886 (2d Cir. Nov. 15, 2019), ECF  
19 No. 1.<sup>9</sup> In a motion to supplement the administrative record and for “supplemental  
20 discovery,” he also sought to force the SEC to provide documents and information  
21 regarding its processing of his TCR forms, its referral of the TCR information to FHFA

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<sup>9</sup> Section 21F of the Exchange Act expressly incorporates into its procedures the provisions of Section 706 of the Administrative Procedure Act—under which a federal court “review[s]” the agency action challenged in the petitioner’s filing. 5 U.S.C. § 706. The relevant subsection of Section 21F is entitled “Appeals,” however. *See* 15 U.S.C. § 78u-6(f). In accordance with the parties’ usage here and with standard practice, we refer to Hong’s present challenge as his “petition for review” and to Hong as “petitioner,” rather than “appellant.”

1 and DOJ, and communications among the agencies and other entities regarding the RBS  
2 investigations. Motion to Suppl. Record at 12–15, *Hong*, No. 19-3886 (2d Cir. Feb. 10,  
3 2020), ECF No. 50. The Commission then sought, and we granted, a remand to permit  
4 the Office to issue a preliminary determination on Hong’s claim and the Commission  
5 then to issue a final determination. Motion to Remand at 2, *Hong*, No. 19-3886 (2d Cir.  
6 Feb. 20, 2020), ECF No. 62 (citing Fed. R. App. P. 27).<sup>10</sup>

7 On remand, the Office issued a preliminary determination recommending denial  
8 of an award on the ground, stated earlier, that Hong failed to identify a covered action  
9 or a “related action.” Jt. App’x at 83. After requesting and receiving the materials that,  
10 according to the Office’s staff, formed the basis of its recommendation, Hong contested  
11 the recommendation and sought a favorable final determination from the Commission.  
12 In an eight-page written decision, the Commission denied Hong’s claim. It agreed with  
13 the Office’s preliminary conclusions that the actions identified by Hong—the FHFA and  
14 DOJ settlements—were not actions “brought by the Commission under the securities  
15 laws” as required to qualify as “covered judicial or administrative action[s]” under  
16 Section 21F. Sp. App’x at 5–6. It further ruled that “[a] Related Action cannot be a basis  
17 for an award absent a Covered Action”: that is, absent a qualifying “action” that was  
18 “brought by the Commission,” there could be no “Related Action.” *Id.* at 7. The  
19 Commission also rejected Hong’s argument that the agency should have produced to  
20 him all documents and information in its possession regarding its referral of the  
21 information in his TCR form to DOJ and FHFA. The record was clear, it wrote, that

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<sup>10</sup> Our order was “based on the SEC’s representation that it will, in good faith, proceed to issuance of preliminary and final determinations on Petitioner’s application and address his arguments regarding the record and its rejection of his application.” Motion Order, *Hong*, No. 19-3886 (2d Cir. May 12, 2020), ECF No. 92. As discussed below, in connection with his continuing quest for agency documents, Hong now contests the agency’s assertion that it complied with that directive and understanding. *See infra* at 26.

1 Hong had not identified any action “brought by the Commission within the statutory  
2 definition of a Covered Action,” *id.* at 10–11, and so no further factual development  
3 would affect its treatment of Hong’s claim.

4 Hong again petitioned for review,<sup>11</sup> and we now consider his challenges to the  
5 Commission’s decision.

## 6 DISCUSSION

7 As provided in Section 21F(f) of the Exchange Act, we review a Commission  
8 determination denying a whistleblower award under the standards set forth in Section  
9 706 of the Administrative Procedure Act (“APA”). 15 U.S.C. § 78u-6(f). Section 706  
10 provides in relevant part that the court shall “set aside agency action, findings, and  
11 conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise  
12 not in accordance with law.” 5 U.S.C. § 706(2)(A); *see Kilgour*, 942 F.3d at 120. As  
13 mentioned above, Section 21F(f) further provides that “[a]ny determination made under  
14 this section, including whether, to whom, or in what amount to make awards, shall be  
15 in the discretion of the Commission,” reenforcing an apparent congressional desire to  
16 afford latitude to the Commission in its determinations under the statutory program. 15  
17 U.S.C. § 78u-6(f).

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<sup>11</sup> In addition to the SEC, Hong named the United States and DOJ as respondents to this petition. *See* Pet. for Review (Mar. 3, 2021), ECF No. 1. Both of the latter moved to dismiss the petition insofar as it named them. *See* Motion to Dismiss (May 12, 2021), ECF No. 44. A motions panel of this Court dismissed the petition as to DOJ, a result that Hong had not opposed. It referred the contested motion to dismiss the United States to this panel for resolution. *See* Order (Dec. 6, 2021), ECF No. 97. Because we deny Hong’s petition for review on the merits, we deny the United States’ motion to dismiss as moot.

1           When evaluating an APA challenge to “an agency’s interpretation of a statute  
2 that it administers,” we apply the two-step *Chevron* framework.<sup>12</sup> *Catskill Mountains*  
3 *Chapter of Trout Unlimited, Inc. v. Env’t Prot. Agency*, 846 F.3d 492, 507 (2d Cir. 2017). “At  
4 *Chevron* Step One, we ask ‘whether Congress has directly spoken to the precise question  
5 at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as  
6 well as the agency, must give effect to the unambiguously expressed intent of  
7 Congress.’” *Id.* (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837,  
8 842–43 (1984)). If the statute is ambiguous, we proceed to *Chevron* step two and  
9 determine whether the agency’s interpretation is based on a permissible construction of  
10 the statute. *See Nat. Res. Def. Council, Inc. v. U.S. Env’t Prot. Agency*, 961 F.3d 160, 169 (2d  
11 Cir. 2020). We must accord deference to the agency’s interpretation of the statute so  
12 long as that interpretation is reasonable, even if it is “not necessarily the only possible  
13 interpretation, nor even the interpretation deemed *most* reasonable by the courts.”  
14 *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009) (emphasis in original); *see*  
15 *Catskill*, 846 F.3d at 520.

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<sup>12</sup> In his brief, Hong urges that *Chevron* analysis does not apply unless the agency acted pursuant to rulemaking authority delegated by Congress. He does not argue, however, that the SEC was *not* acting under its rulemaking authority when interpreting the statute, and in fact Section 21F expressly delegates authority to the SEC to promulgate rules and regulations to implement the Program. *See* 15 U.S.C. § 78u-6(j). We therefore use the *Chevron* framework to address the statutory interpretation questions presented here. Additionally, although Hong frames his challenge in terms of the “arbitrary” or “capricious” standard, we understand him to be arguing that the SEC misinterpreted the statute, not that either the SEC’s determination or regulations are “procedurally defective as a result of flaws in the agency’s decisionmaking process” under the standards set forth in *Motor Vehicle Manufacturers Association of the U.S., Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). *Catskill*, 846 F.3d at 521–23. We therefore proceed to consider the statutory language and, to the extent that language may be considered ambiguous, the reasonableness of the Commission’s interpretation of it in its development of the Program. We then consider whether the agency’s *application* of the statute and regulations to Hong’s request was arbitrary or capricious.

1           Hong’s eligibility for a whistleblower award turns on whether the information he  
2 provided to the SEC led to the successful enforcement of a “covered judicial or  
3 administrative action” —that is, an “action” of some kind that was “brought by the  
4 Commission under the securities laws” —or a “related action.” 15 U.S.C. § 78u-6(a)(1),  
5 (b)(1). The agency does not dispute Hong’s assertion that the information he provided  
6 to the Commission in his TCR form contributed in some way to the settlements that  
7 DOJ and FHFA reached with RBS; indeed, we observe that the DOJ settlement refers  
8 expressly to a set of the Bank’s RMBS products as to which Hong provided details.  
9 Hong, for his part, does not meaningfully dispute that, to establish award eligibility, he  
10 needs to demonstrate that the Commission “brought” some qualifying action.  
11 Meanwhile, the record is plain that the Commission did not sue the Bank, formally  
12 initiate an enforcement proceeding against it, or enter into a settlement with it, and  
13 Hong cannot contend otherwise.

14           Accordingly, our task is to determine whether the Commission’s interpretation  
15 of the statutory language “covered judicial or administrative action brought by the  
16 Commission” and “related action” was inconsistent with congressional intent. We  
17 determine it was not. We then consider whether the Commission acted in a manner that  
18 was arbitrary, capricious, or otherwise not in accordance with law by determining that  
19 FHFA or DOJ settlements were neither covered nor related actions. After due  
20 consideration, we conclude that the Commission did not and that Hong was therefore  
21 not entitled to the award from the Commission that he claimed.

#### 22           **I.       Meaning of “Covered Judicial or Administrative Action”**

23           Hong contends that the SEC’s interpretation of the phrase “covered judicial or  
24 administrative action,” which is defined in Section 21F(a)(1), is incorrect and that the  
25 phrase should encompass the Commission’s conduct in sharing the TCR form with DOJ

1 and FHFA to aid their preexisting investigations. The Commission’s interpretation, he  
2 says, runs counter to its acknowledgment in a 2018 proposed rulemaking that an  
3 “action” need not take the form of a filed lawsuit and should be understood to  
4 encompass deferred-prosecution and non-prosecution agreements before which no  
5 formal legal or administrative proceeding was initiated. *See Whistleblower Program*  
6 *Rules*, 83 Fed. Reg. 34,702, 34,705 (July 20, 2018). Hong contends that Congress’s intent  
7 to strongly encourage whistleblower awards supports his expansive reading and  
8 renders the agency’s parsimonious denial of his application unreasonable and not in  
9 accordance with law. Hong’s arguments fall short of the mark.

10 To examine them, we conduct a *Chevron* analysis as to two interrelated elements  
11 of the statutory definition of a “covered . . . action”: first, the phrase “judicial or  
12 administrative action,” and second, the phrase “brought by the Commission.”

13 A. “Judicial or administrative action”

14 As previewed, Hong suggests that the term “action” must be interpreted to  
15 encompass the investigative activities undertaken by the SEC in response to the tips it  
16 receives. These would include, Hong argues, its “referrals, coordination, and evidence-  
17 sharing” with other agencies. Petitioner’s Br. at 28–29. He reasons that to conclude  
18 otherwise would be inconsistent with the incentivizing purpose of the Dodd-Frank  
19 Act’s whistleblower provisions and would fail to acknowledge the SEC’s effective  
20 concession, in its 2018 regulation applying Section 21F, that a successful “action” need  
21 not be a formal proceeding to be covered by the Program. The SEC counters that mere  
22 investigative activities undertaken by the SEC are “far removed from a judicial or  
23 administrative action,” and that in any event its broadening of “action” to include  
24 settlement agreements entered into by the SEC outside of a formal proceeding does not  
25 compel it to adopt the far more expansive interpretation urged on us by Hong.  
26 Respondent’s Br. at 35–36.



1                   1. *Whether the statutory language is ambiguous*

2                   We first conclude, at *Chevron* step one, that Congress did not unambiguously  
3 express an intent that the phrase “judicial or administrative action” in Section 21F  
4 encompass all manner of investigative “actions” engaged in by the SEC and somehow  
5 connected to a financial settlement achieved by a government agency. Nor, by using the  
6 term “action,” did it unambiguously require that the Commission have initiated a  
7 formal judicial or administrative proceeding before it could pay an award.

8                   “Every exercise in statutory construction must begin with the words of the text.”  
9 *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003). Hong may well be correct that  
10 “action” has an expansive meaning in many contexts. The word is often used as a  
11 synonym for “act” or “conduct.” *See Action*, Black’s Law Dictionary (11th ed. 2019);  
12 *Action*, Merriam-Webster Dictionary, [https://www.merriam-](https://www.merriam-webster.com/dictionary/action)  
13 [webster.com/dictionary/action](https://www.merriam-webster.com/dictionary/action). But “[t]he plain meaning [of a statute] does not turn  
14 solely on dictionary definitions of the statute’s component words”; it also depends on  
15 “the specific context in which that language is used, and the broader context of the  
16 statute as a whole.” *United States v. Rowland*, 826 F.3d 100, 108 (2d Cir. 2016) (internal  
17 quotation marks and brackets omitted).

18                   We agree with the SEC that Hong’s proposed reading of the term “action” is  
19 incompatible with the rest of the statutory definition, and at the very least is not  
20 mandated by the statute’s plain language. Activities like evidence-sharing and  
21 interagency coordination are “actions” in a generic sense, to be sure, but it would be  
22 unusual and inappropriate in the Program’s statutory setting to refer to them as  
23 “judicial or administrative actions brought . . . under the securities laws.” In the phrase  
24 “to bring an action,” the verb “to bring” is more commonly paired with a limited  
25 definition of “action” —one that refers to some form of legal process initiated to seek a  
26 remedy. *See Action*, Black’s Law Dictionary (listing numerous uses of the word “action”

1 as a synonym for a legal proceeding); *Action*, Oxford English Dictionary,  
2 <https://www.oed.com/view/Entry/1938> (defining “action” as “[t]he taking of legal steps  
3 to establish a claim or obtain judicial remedy”). For instance, courts commonly refer to a  
4 party as having “brought an action,” meaning that the party filed a lawsuit or formally  
5 initiated an administrative proceeding. See *Gabelli v. Sec. and Exch. Comm’n*, 568 U.S. 442,  
6 446 (2013) (stating that “the SEC brought a civil enforcement action” in district court);  
7 *Grandon v. Merrill Lynch & Co.*, 147 F.3d 184, 192 (2d Cir. 1998) (explaining that “the SEC  
8 has brought administrative actions for fraud,” and alternatively referring to such  
9 actions as “administrative proceedings”).

10 That this more focused reading of “action” fits better within the relevant text of  
11 Section 21F is bolstered by the text’s qualification that, to trigger a possible  
12 whistleblower award, the action must be “judicial or administrative” in nature and  
13 brought “under the securities laws.” 15 U.S.C. § 78u-6(a)(1). Further, the text leaves no  
14 doubt that the covered “action” itself must “result[] in monetary sanctions” and be  
15 amenable to “enforcement.” *Id.* § 78u-6(a)(1), (b)(1). Although the SEC’s involvement in  
16 an investigation and its referrals to other agencies may facilitate judgments or  
17 settlements achieved by those agencies, any such actions by the SEC are not amenable  
18 to “enforcement” to obtain a monetary sanction, unlike the judgments or settlements  
19 themselves. We thus decline to conclude that the phrase “judicial or administrative  
20 action” can be construed *only* to have the sweeping meaning that Hong ascribes to it.

21 Hong asserts more generally that Congress’s purposes in adopting the  
22 whistleblower award provisions leave no doubt that the SEC’s investigatory activities  
23 qualify as “judicial or administrative actions” that were “brought by” it. In his view,  
24 Congress’s intent to ensure predictability in the whistleblower program to incentivize  
25 individuals in possession of valuable information to come forward to the SEC, often at  
26 significant risk to their own careers, would be undermined by adopting the agency’s

1 position that its referral of information to other agencies was not an “action” that it  
2 “brought.” That this was Congress’s general purpose in enacting the statute, however,  
3 does not mean that the Commission must give the phrase “judicial or administrative  
4 action” its broadest possible construction. As the Supreme Court has explained, “no law  
5 pursues its purpose at all costs.” *Rapanos v. United States*, 547 U.S. 715, 752 (2006).  
6 Congress itself built in specific conditions to a whistleblower’s eligibility for an award  
7 under the Program, including the requirements that a “judicial or administrative  
8 action” be brought by the SEC “under the securities laws” and that the minimum  
9 recovery be \$1 million. It carried these over, too, as a prerequisite for an award based on  
10 a “related action.” The statute thus expressly contemplates that the SEC’s obligation to  
11 pay an award is limited to situations in which the SEC *itself* takes certain enforcement  
12 steps. We therefore conclude that the broad goals underlying the Dodd-Frank Act’s  
13 whistleblower provisions do not compel the agency to conclude that the term “judicial  
14 or administrative action” extends to the full range of investigative or information-  
15 sharing activities that it may undertake with respect to a tip.

16 In our view, while the term is not entirely free of ambiguity, the contextual clues  
17 described above strongly support the SEC’s position that Congress intended the term  
18 “judicial or administrative action” to refer to judicial or administrative proceedings or  
19 an enforcement action that leads to a settlement, whether pre- or post-litigation, by the  
20 Commission.

21 *2. Whether the SEC’s interpretation is reasonable*

22 We need not conclusively determine whether the statutory definition  
23 unambiguously refers only to judicial or administrative proceedings, however, because  
24 the Commission has reasonably interpreted the provision in its regulations and its  
25 interpretation is entitled to deference under *Chevron* step two, as well as under the  
26 deference directed by Section 21F(f). *See* 15 U.S.C. § 78u-6(f). The regulation initially

1 promulgated by the Commission to apply Section 21F(a)(1), interpreting “covered  
2 judicial or administrative action,” provided that “[a]n action generally means a single  
3 captioned judicial or administrative proceeding brought by the Commission,” as well  
4 as, in certain circumstances, multiple proceedings brought by the SEC “aris[ing] out of  
5 the same nucleus of operative facts.” 17 C.F.R. § 240.21F-4(d)(1)–(2) (2011).<sup>13</sup> As  
6 explained above, interpreting the term “action” to mean “proceeding” is a permissible  
7 construction of the statutory definition that comports with the most natural reading of  
8 the text. *See Catskill*, 846 F.3d at 507.

9         That the SEC subsequently amended its regulation to extend the definition of  
10 “administrative action” to cover certain non-prosecution, deferred-prosecution, and  
11 settlement agreements, *see* 17 C.F.R. § 240.21F-4(d)(3) (2020), does not require us to alter  
12 our conclusion, contrary to what Hong urges. The SEC’s expansion of this definition to  
13 reach beyond formal judicial or administrative proceedings does not compel further  
14 expansion to include an investigative referral. In support of his different view, Hong  
15 seizes on the SEC’s comment during the rulemaking process that “Congress did not  
16 intend for meritorious whistleblowers to be denied awards simply because of the  
17 procedural vehicle that the Commission (or the other authority) has selected to pursue  
18 an enforcement matter.” 83 Fed. Reg. at 34,705. For present purposes, we may assume  
19 without deciding that settlement agreements secured by the Commission outside of the  
20 context of pending judicial or administrative proceedings may reasonably be viewed as  
21 constituting “judicial or administrative action[s]” because, like settlements and

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<sup>13</sup> We rely on the version of the regulation in effect when Hong applied for a whistleblower award and the SEC rendered its preliminary determination. As Hong points out and as we discuss in the text, it has since been amended and now speaks directly to settlements achieved through non-prosecution agreements, among other pre-litigation devices. *See* 17 C.F.R. § 240.21F-4(d) (2020).

1 judgments procured through a proceeding, they enable the agency to enforce the  
2 securities laws and obtain a judicially enforceable monetary penalty.

3 Even so, Hong is incorrect that, having adopted this broader view of the term  
4 “action,” the Commission then had to include under the umbrella of “action” those  
5 investigative activities that contributed to a settlement agreement ultimately achieved  
6 by an agency other than the SEC. A settlement agreement achieved by an agency is a  
7 “resolution to a law-enforcement investigation” brought by it, entailing “significant  
8 remedial and compliance commitments” and directly resulting in “monetary remedies  
9 for past violations.” *Id.* at 34,705–06. Such an agreement reflects a significantly deeper  
10 commitment than do the myriad other acts undertaken incidentally by an agency in its  
11 investigative capacity, which share few of the characteristics exhibited by a resolved  
12 judicial or administrative proceeding. As the SEC suggests, interpreting “action” to  
13 extend even further than settlement agreements would risk blurring the line between  
14 actions brought by the SEC and those brought by another agency, disrupting the  
15 statute’s distinction between “covered” and “related” actions and its focus on the SEC’s  
16 enforcement activities “under the securities laws.” It was therefore reasonable for the  
17 SEC to interpret “judicial or administrative action” to refer in general to judicial or  
18 administrative proceedings and to limited other categories of actions that share  
19 substantial similarities with those proceedings.

20 Hong insists, still, that the agency’s interpretation is impermissible in light of  
21 Congress’s intent in creating the whistleblower program to provide robust incentives  
22 for individuals to come forward with information about financial wrongdoing that  
23 affects markets and the stability of our financial system. But even if we were to agree  
24 that Hong’s broader interpretation offers a better fit with the overall remedial purpose  
25 of the statute, his arguments do not make the SEC’s interpretation unreasonable. *Cf.*  
26 *Catskill*, 846 F.3d at 520 (concluding that “[a]lthough the Rule may or may not be the

1 best or most faithful interpretation of the Act in light of its paramount goal of restoring  
2 and protecting the quality of U.S. waters, it is supported by several valid arguments”  
3 and is thus reasonable). The SEC’s interpretation reasonably seeks to accommodate the  
4 varying procedural routes that agencies may follow to impose a monetary sanction on a  
5 scofflaw while complying with Congress’s explicit requirement that a “covered judicial  
6 or administrative action” brought by the Commission exist before an award may be  
7 paid. Hong’s arguments thus fail to persuade us.

8 B. “Brought by the Commission”

9 Having found reasonable the SEC’s interpretation of the phrase “judicial or  
10 administrative action,” we briefly address the interlocking statutory requirement that,  
11 to support a whistleblower award under the Program, such an action have been  
12 “brought by the Commission under the securities laws.” 15 U.S.C. § 78u-6(a)(1). SEC  
13 regulations do not further interpret this requirement, and Hong offers little analysis of  
14 the language, although it was pivotal to the Commission’s ruling: he seems to accept  
15 that the sanction on which an award is based must have been “brought by the  
16 Commission.” We have little doubt, however, that in most circumstances the agency  
17 that “brought” the action is best understood to be the entity that filed or prosecuted the  
18 lawsuit, initiated the administrative proceeding, or entered into the settlement or other  
19 agreement that generated the recovery. *See Bring*, Merriam-Webster Dictionary,  
20 <https://www.merriam-webster.com/dictionary/bring> (“to cause to exist or occur,” such  
21 as to “institute” a “legal action”). The phrase “brought by the Commission” thus  
22 contemplates a leading enforcement role by the SEC and a sanction payment to the  
23 Commission.

24 As we touched on above, that a separate statutory provision speaks to awards  
25 that are based on “related actions” further suggests that Congress did not intend the  
26 phrase “judicial or administrative action brought by the Commission” to encompass

1 actions instituted by agencies to which the SEC merely provided assistance. 15 U.S.C.  
2 § 78u-6(a)(5); *see* 17 C.F.R. § 240.21F-3(b)(1) (related action can be “based upon  
3 information that either the whistleblower provided directly to [another agency] *or the*  
4 *Commission itself passed along . . . pursuant to the Commission’s procedures for sharing*  
5 *information”* (emphasis added)). We therefore have no trouble concluding that for an  
6 action to be “brought by the Commission,” the SEC must have led that action in some  
7 respect, as the Commission ruled. The Commission’s decision to that effect was not  
8 arbitrary, capricious, or otherwise not in accordance with law.

## 9 II. Meaning of “Related Action”

10 Hong does not meaningfully challenge the SEC’s position that the existence of a  
11 “covered judicial or administrative action” is a prerequisite to finding a “related action”  
12 that would qualify for an SEC whistleblower award. We conclude that, to the extent  
13 that the statutory definition of “related action” is ambiguous, the SEC regulations  
14 reasonably interpret the provision to require a predicate action brought by the SEC.

15 As set forth above, Section 21F provides:

16 The term ‘related action’, when used with respect to any judicial or  
17 administrative action brought by the Commission under the  
18 securities laws, means any judicial or administrative action brought  
19 by [certain entities, including agencies] that is based upon the  
20 original information provided by a whistleblower . . . that led to the  
21 successful enforcement of the Commission action.

22 15 U.S.C. § 78u-6(a)(5). Although the definition does not state in so many words that an  
23 SEC action is a prerequisite to the existence of a “related action,” an SEC action logically  
24 must exist for the non-SEC action to be “based upon the original information” that the  
25 “successful” Commission action relies on, as required by the definition’s final clause. A  
26 “related action” depends on “successful enforcement of the Commission action”; this  
27 presupposes that there is a Commission action that could be “enforce[d].”

1 In line with this reading, the SEC’s regulations reasonably interpret “related  
2 action” to include the prerequisite. One Commission regulation issued under Section  
3 21F provides for award eligibility based on a “related action” if the claimant is “eligible  
4 to receive an award following a Commission action that results in monetary sanctions  
5 totaling more than \$1,000,000.” 17 C.F.R. § 240.21F-11(a). Another similarly requires that  
6 the original information underlying any related action have “led the Commission to  
7 obtain monetary sanctions totaling more than \$1,000,000.” *Id.* § 240.21F-3(b)(1). These  
8 regulations reasonably instruct that an award based on recovery in a related action is  
9 not available absent an action brought by the SEC. Hong provides no basis for  
10 concluding that these regulations reflect an unreasonable interpretation of the statutory  
11 definition of “related action.”

12 Thus, we decide that an award-eligible “related action” must rest on a “covered  
13 judicial or administrative action.”

14 **III. Neither the DOJ nor FHFA Settlement Is a “Covered Judicial or**  
15 **Administrative Action” or “Related Action”**

16 Applying the above framework to Hong’s case, we conclude that none of the  
17 purported agency “actions” that he identifies qualifies as a “judicial or administrative  
18 action” that was “brought by” the SEC and therefore that the SEC did not act arbitrarily  
19 or capriciously in denying Hong’s claim.

20 First, we reject Hong’s argument that the DOJ or FHFA settlements are  
21 themselves judicial or administrative “actions” that were “brought by” the SEC. Here,  
22 the SEC gave to DOJ and FHFA the two TCR forms that Hong submitted to it. When it  
23 did so, DOJ and FHFA were already well into investigating the Bank’s practices  
24 regarding RMBS. Although, like DOJ and FHFA, the SEC was a member of the RMBS  
25 Group, the requirement that a covered action be “brought by” the SEC calls for some  
26 form of leadership by the SEC in the action itself. The settlement agreements reached



1 here make no mention of any involvement by the SEC; more consequentially, they do  
2 not purport to and do not in fact settle the claims of the SEC and other agencies against  
3 the Bank. *See* Stipulation of Dismissal, *Fed. Hous. Fin. Agency*, No. 11-cv-1383 (D. Conn.  
4 Aug. 3, 2017), ECF No. 741 (agreement defined as between FHFA and the Bank); FHFA-  
5 RBS Settlement Agreement at 4 (released claims do not include “any claims of any  
6 governmental entity or agency other than FHFA”); Jt. App’x at 762, 765–66 (DOJ-RBS  
7 agreement defined as between the Bank and United States acting through DOJ, and  
8 disclaiming authority to release claims of the SEC). Hong cites no authority for his bald  
9 assertion that “each member-agency does not act individually and lacks a functional  
10 separate identity when enforcing securities laws within the RMBS Group’s mandate,”  
11 Petitioner’s Br. at 35, and the executive order convening the Financial Fraud  
12 Enforcement Task Force offers no basis to decide otherwise.

13 We need not decide whether in other circumstances an action might be  
14 considered jointly “brought by” multiple agencies, because Hong points to no basis for  
15 a claim that the SEC secured the DOJ and FHFA settlements. The settlement agreements  
16 are therefore not appropriately considered actions “brought by” the SEC and cannot  
17 support an award.

18 Second, because none of the activities undertaken by the SEC with respect to  
19 Hong’s tip qualifies as a “covered judicial or administrative action,” the other agencies’  
20 settlements cannot be award-eligible “related action[s]” to an SEC action. As described  
21 above, Hong describes the relevant SEC “actions” as “referrals, coordination, and  
22 evidence-sharing” with the other agencies of the RMBS Group.<sup>14</sup> Petitioner’s Br. at 29.

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<sup>14</sup> Hong also contends that he is unable to discern the exact activities undertaken by the SEC with respect to his tips and the investigations of RBS because the SEC has not provided him with the documents he requires. As explained below, Hong is not entitled to additional

1 But the SEC reasonably interpreted the term “judicial or administrative action” to refer  
2 only to “judicial or administrative proceeding[s]” or certain settlement agreements  
3 entered into by the SEC outside of a proceeding to address securities law violations. *See*  
4 17 C.F.R. § 240.21F-4(d). The activities identified by Hong fall into neither category.  
5 Thus, they are not covered judicial or administrative actions.

#### 6 **IV. The SEC Complied with This Court’s Remand Order**

7 Finally, Hong contends that the SEC failed to comply with our 2019 remand  
8 order and urges us to conclude that the agency did not address his arguments in good  
9 faith and did not “produce any records concerning [his] whistleblower information and  
10 the Commission’s coordination with the FHFA and DOJ culminating in the DOJ  
11 Settlement or the FHFA Settlement,” as he claims was required. Petitioner’s Br. at 47.  
12 We are unpersuaded.

13 The final determination issued by the SEC shows that the agency indeed  
14 complied with the remand order. As noted above, we based our remand order “on the  
15 SEC’s representation that it will, in good faith, proceed to issuance of preliminary and  
16 final determinations on Petitioner’s application and address his arguments regarding  
17 the record and its rejection of his application.” Motion Order, *Hong*, No. 19-3886 (2d Cir.  
18 May 12, 2020), ECF No. 92. In its final determination, the SEC considered Hong’s  
19 arguments regarding the record but rejected them based on its application of the  
20 relevant law and regulations. The Commission concluded that the Office complied with  
21 agency regulations by (a) identifying the materials that formed the basis for an award  
22 determination and (b) providing such materials to Hong upon his request. It reasonably  
23 found that Hong was not entitled to more general discovery, explaining that the

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discovery under the relevant regulations, and the information he seeks would be irrelevant to whether the SEC brought an “action” as defined by regulation.

1 materials Hong sought to have the agency consider “may be relevant to the underlying  
2 investigations, referrals, and settlements by” FHFA and DOJ, but “are not relevant to  
3 the basis for the determination with respect to [Hong’s] award application.” Sp. App’x  
4 at 10. Hong may disagree with the SEC’s conclusion, but its decision leaves no room for  
5 reasonable dispute as to whether the agency fully considered Hong’s arguments  
6 regarding the record that underlay its denial of his award claim.

7         We see no error in the SEC’s decision. SEC regulations do not entitle Hong to “all  
8 records pertaining to the actions [the SEC] took upon receipt of Petitioner’s  
9 whistleblower [tip] in lieu of commencing a judicial or administrative proceeding,”  
10 Petitioner’s Reply Br. at 16, unless such records fall within the categories of documents  
11 the agency relies upon in making its award determination. *See* 17 C.F.R. §§ 240.21F-  
12 10(e)(1)(i) (applicant may request materials that formed the basis of the preliminary  
13 determination), 240.21F-12(a) (listing six categories of materials that the SEC may rely  
14 upon to make an award determination). An applicant is not entitled to “any materials  
15 (including any pre-decisional or internal deliberative process materials that are  
16 prepared exclusively to assist the Commission in deciding the claim) other than those  
17 listed” in the relevant regulations. 17 C.F.R. § 240.21F-12(b); *see also Kilgour*, 942 F.3d at  
18 124 (rejecting petitioner’s argument that the SEC violated his due process rights by  
19 refusing to turn over certain documents, because they were “not included within the  
20 materials that [petitioner] is entitled to review under Rule 21F-12(a)”); *Doe v. Sec. &*  
21 *Exch. Comm’n*, 846 F. App’x 1, 5 (D.C. Cir. 2021) (concluding that whistleblower was not  
22 “entitled to all the information the Commission used in reaching the settlements”  
23 beyond those materials specified in Rule 21F-12(a)). Hong does not dispute that he  
24 received the materials delineated in Rule 21F-12(a), and he identifies no regulatory or  
25 other legal basis for his request for additional documents.

1           Moreover, in light of our construction of the statute and as the SEC correctly  
2 ruled, production of the records that Hong requested would have no effect on his  
3 entitlement to a whistleblower award. As explained above, the SEC has interpreted the  
4 term “judicial or administrative action” to mean “a single captioned judicial or  
5 administrative proceeding” as well as limited types of settlement and non-prosecution  
6 agreements. 17 C.F.R. § 240.21F-4(d). An SEC declarant averred that the SEC took no  
7 such action with respect to Hong’s tip, *see* Jt. App’x at 47, and Hong does not go so far  
8 as to speculate that the SEC is concealing a judicial or administrative proceeding or its  
9 own settlement agreement with the Bank arising from the information in Hong’s tip,  
10 nor does the record provide any basis for doing so. Ultimately, the materials Hong  
11 requests would be relevant only if we accept his arguments in favor of an all-embracing  
12 construction of the term “judicial or administrative action” —one that would include the  
13 most trivial information-sharing activities. For the reasons set out above, we find no  
14 error in the agency’s rejection of that construction.

15           We therefore conclude that the SEC did not fail to comply with the remand order  
16 or wrongfully deny Hong access to additional documents related to its investigation of  
17 the Bank.

## 18           **V. Further Observations**

19           As set forth above, we identify no error in the SEC’s interpretation of Section 21F  
20 nor in its finding that, despite his contributions to recoveries obtained from the Bank by  
21 other components of the United States government, Hong is ineligible for a  
22 whistleblower award from the SEC. The agency’s ruling rests on a reasonable  
23 construction of the statute and its own reasonable regulations issued under the statute.  
24 We are mindful that this decision may strike some as inconsistent with the principal  
25 statutory goal of the Program—namely, Congress’s desire to incentivize and reward  
26 whistleblowers who may risk their reputations and careers to help hold financial

1 institutions responsible for unlawful behavior. But it is not our role to rewrite the  
2 limitations on eligibility set forth in the Exchange Act, nor to override the SEC's  
3 reasonable interpretations of that statute, in order to ensure that this goal is satisfied in  
4 every instance.

5 Other considerations, too, assure us that this outcome is consistent with the  
6 general statutory framework and purpose of the program. First, the Exchange Act  
7 provides that whistleblower awards be paid from the Commission's Investor Protection  
8 Fund, which is generally funded by monetary sanctions or civil penalties obtained *by*  
9 *the SEC*. See 15 U.S.C. § 78u-6(a)(2), (b)(2), (g)(3). Hong points to no basis for believing  
10 that recoveries obtained in settlements by DOJ and FHFA are accessible by the SEC to  
11 pay an award. We are aware of no reason to believe that the mere existence of the  
12 Financial Fraud Enforcement Task Force and its RMBS Group was intended to override  
13 the well-established boundaries between agency finances or that Congress intended  
14 such a result.<sup>15</sup> Finally, despite Hong's bald claims of bad faith by the SEC, the record  
15 provides no basis for believing that individual officials involved denied his claim to  
16 avoid having to pay Hong a whistleblower award. Hong cites to no action of the SEC  
17 that could reasonably be so construed. To the contrary: the agency reasonably decided  
18 that the law did not permit it to pay an award.

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<sup>15</sup> Although the parties do not address the availability of whistleblower awards through other agencies, we note that DOJ has its own provisions designed to reward individuals for sharing helpful information regarding violations of the Financial Institutions Reform, Recovery, and Enforcement Act—which was the basis for DOJ's settlement here—albeit with significant differences to the SEC's whistleblower program. See 12 U.S.C. §§ 4201, 4205 (providing that the Attorney General must pay a percentage-based award to an individual who provided a declaration to DOJ that led to a judgment or settlement pursuant to which the United States acquires funds or assets). Hong may or may not be eligible for this type of award or other non-SEC monetary award programs, but the existence of other such programs makes clear that the SEC's was not contemplated to be a blanket mechanism for rewarding whistleblowers without regard to which agency acts on the information provided.

1 **CONCLUSION**

2 For the reasons set forth above, the petition for review is **DENIED**. The motion of  
3 the United States to dismiss is **DENIED** as moot.