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Securities Exchange Act Section 4E(A): Toothless "Internal-Timing Directive" or Statute of Limitation?

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SECURITIES EXCHANGE ACT SECTION 4E(A): TOOTHLESS "INTERNAL-TIMING DIRECTIVE" OR STATUTE OF LIMITATION?

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ABSTRACT

The Securities and Exchange Commission has a problem, and everyone knows it: its investigative process suffers from excessive delay, which harms both individuals and entity it investigates and its own enforcement program. This problem has long been recognized and complained about, but never remedied.

In 2010, Congress passed a law specifically designed to solve the problem of excessive delay but, the way the SEC has read the law—which has been acquiesced in by the courts and ignored by subsequent Congresses—has rendered it toothless and essentially meaningless. This has been accomplished, first, by the Commission's cabined interpretation of the purpose of the law and its flawed review of supposed Supreme Court precedent, and then by the lower courts' overly strong deference to this administrative agency's reading of a law designed to curb its penchant for excessive delay.

Even though the problem of excessive delay remains unsolved and unchanged, there has been no serious published analysis of the 2010 law or of the courts' (or of the SEC's) reading of that law. The purposes of this Article are first, to attempt to quantify the problem of excessive delay; and second, to explore, in more depth than it appears has ever been assayed, both the 2010 law and the court decisions that have considered it, to the end of determining whether new life can properly be breathed into this

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law. I conclude that the 2010 law, while hardly a model of ideal statutory craftsmanship, should be viewed as an actual deadline, akin to a statute of limitations. Or, Congress should revisit the issue of unnecessary delay and enact a clearer and more meaningful legislative solution.

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INTRODUCTION

Few would question that "an effective enforcement program" on the part of the Securities and Exchange Commission "is necessary to maintain investor confidence in the integrity, fairness, and efficiency of our securities markets."[1] There is, though, a valid question whether a fair and effective enforcement program[2] can coexist with excessive delay in the process. And there is no question that SEC enforcement is and has long been dogged by excessive delay.[3]

I talk of "*excessive* delay," not delay *per se*. Obviously, it takes time for the SEC Staff to conclude an investigation and decide whether to drop the matter or recommend that the Commission authorize an enforcement action, and for the Commission to consider and act on that recommendation. Indeed, given the SEC's status and the enormous power it wields,[4] it would be highly inappropriate for the Commission to proceed on the premise that investigative speed is the sole or even the only important measure

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[1] *Securities Litigation Reform: Hearing Before the Subcomm. on Telecomm. & Fin. of the Comm. on Energy & Commerce*, 173rd Cong. 237 (1994) (statement of Mark J. Griffin, Dir., Div. of Sec., Utah Dep't of Commerce) [hereinafter *Hearing*].

[2] There are many books, treatises, law review articles, study materials and web sites exploring all aspects of SEC enforcement. Readers of this Article must look elsewhere for a comprehensive understanding of that process. One very valuable—though somewhat outdated, because of intervening changes in the law—source among many is William R. McLucas et al., *A Practitioner's Guide to the SEC's Investigative and Enforcement Process*, 70 TEMP. L. REV. 53 (1997). Another useful source is the SEC & EX. COMM'N DIV. OF ENFORCEMENT, OFF. OF GEN. COUNS., ENFORCEMENT MANUAL 4–5 (2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf [https://perma.cc/J95Z-258G]. For purposes of this Article, the reader merely needs to know that: SEC investigations are commenced and conducted by staff members of the Division of Enforcement, whether resident in the Home Office or in one or more of the Commission's eleven regional offices; when they finish investigations, the SEC Staff may, but need not, give prospective targets of an enforcement action notice of the likely charges (called, for reasons discussed in this Article, a "Wells notice"); and no enforcement action alleging a violation of the federal securities laws may be filed without authorization by the Commission, consisting of a maximum of 5 members appointed by the President and confirmed by the Senate.

[3] *See generally Hearing*, *supra* note 1, at 199–200 (statement of Michael J. Cook).

[4] As the SEC puts it in its Canon of Ethics, "[t]he power to investigate carries with it the power to defame and destroy." 17 C.F.R. § 200.66 (1963).

of the quality of its enforcement efforts: investigative due care and effective supervision are equally or more important in order to distinguish between those who are properly named in an SEC enforcement action and those who are not. The issue is finding the proper balance between unduly dragging things out and rushing to a premature enforcement action.

This not a new problem. Excessive delay has long been identified as a problem at the SEC but, until 2010, had never been seriously addressed by Congress or the courts other than through a generally applicable statute of limitations on certain types of relief (fines, penalties, and forfeitures).[5] Finally, in 2010, Congress, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[6] enacted a provision explicitly aimed at speeding up the enforcement process by adding Section 4E ("Deadline for Completing Examinations, Inspections and Enforcement Actions") to the Securities Exchange Act of 1934, as amended.[7] Section 4E(a)(1) states:

> Not later than 180 days after the date on which [Securities and Exchange] Commission staff provide a written Wells notification to any person, the Commission staff shall either file an action against such person or provide notice to the Director of the Division of Enforcement of its intent to not file an action.[8]

Section 4E(a)(2) allows for extensions of the 180-day deadline.[9] It is obvious from even a cursory reading of section 4E(a) that

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[5] *See, e.g.*, SEC, Office of Inspector Gen., Failure to Timely Investigate Allegations of Financial Fraud 1, 4 (2010); Marcy Gordon, *SEC Official Pressed on 12-Year Delay to Ponzi Case*, NEWSDAY (Sept. 22, 2010), http://www.newsday.com/business/sec-official-pressed-on-12-year-delay-to-ponzi-case.

[6] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 4E, 124 Stat. 1867 (2010) (codified in scattered sections of various of the acts constituting the federal securities laws).

[7] *Id.* § 4E(a)(1).

[8] 15 U.S.C. § 78d-5(a)(1) (2013); *see also* 15 U.S.C. § 78d-5(b); § 4E(a)(1) (containing parallel provisions for SEC compliance examinations and inspections of regulated entities such as broker-dealers). Section 4E(b) is outside the scope of this Article.

[9] Section 4E(a)(2) provides:

> Notwithstanding paragraph (1), if the Director of the Division of Enforcement of the Commission or the Director's designee determines that a particular enforcement investigation is sufficiently complex such that a determination regarding the filing of an action against a person cannot be completed within the deadline specified in paragraph (1), the Director of the Division

it is a somewhat oddly worded statute. For one thing, it appears to apply only when the Staff provides a written Wells notification, and says nothing about any deadlines applicable to situations where the Staff chooses not to provide a Wells notice or where a Wells notice occurs after an intolerably long investigation.[10] Second, it speaks about the *Staff's* filing an action, when, in fact, the SEC as an agency files an action and only after a majority of the Commissioners authorize a case.[11] Third, it contains no requirement that the Staff actually close an investigation for which they do not intend to file an action.[12] None of these apparent oddities has been mentioned by the SEC or the courts in interpreting section 4E.[13]

The deadline established in section 4E(a)(1) has demonstrated no practical effect.[14] The SEC has done its best to ignore or enfeeble the deadline contained in section 4E(a)(1) by interpreting it as an "internal-timing directive, designed to compel [the SEC] staff to complete investigations, examinations, and inspections in a timely manner and not ... a statute of limitations."[15] In other words, according to the SEC the deadline is a mere guideline

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> of Enforcement of the Commission or the Director's designee may, after providing notice to the Chairman of the Commission, extend *such deadline* as needed for one additional 180-day period. If after the additional 180-day period the Director of the Division of Enforcement of the Commission or the Director's designee determines that a particular enforcement investigation is sufficiently complex such that a determination regarding the filing of an action against a person cannot be completed within the additional 180-day period, the Director of the Division of Enforcement of the Commission or the Director's designee may, after providing notice to and receiving approval of the Commission, extend *such deadline* as needed for one or more additional successive 180-day periods.

§ 4E(a)(2) (emphases added).

[10] In fact, it is well known that, almost universally, Wells notices are provided, so this oddity has less significance than meets the eye. *E.g.*, McLucas et al., *supra* note 2, at 113–14.

[11] *See id.* at 56, 58.

[12] *See id.* at 57, 111.

[13] *See generally* § 4E, 124 Stat. at 1867.

[14] *See id.*

[15] *In re* Montford & Co., Inv. Advisors Act Release No. 3829, 108 SEC Docket 3763 (May 2, 2014) (*affirming In re* Montford & Company, Inc., Admin. Proc. No. 3-14536, 2012 WL 1377372 (ALJ Apr. 20, 2012) (initial decision).

of sorts, while providing no rights to those negatively affected by its violation.[16] And, in the only appellate decision interpreting section 4E, the SEC's interpretation was upheld by the D.C. Circuit in *Montford & Co., Inc. v. SEC*,[17] in which, purporting to follow *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,*[18] the court overtly deferred to the SEC for its reading of this provision.[19] A few district courts, all preceding the D.C. Circuit's *Montford* decision, have also ruled that section 4E is not a statute of limitations.[20]

Neither the statute itself nor any of the judicial opinions interpreting it has been the subject of any academic analysis, and the D.C. Circuit's analysis of the meaning and effect of section 4E has never been discussed in any published opinion, officially or unofficially reported. Perhaps this reflects fewer attempts to point to section 4E in defending SEC enforcement actions. Or perhaps defense lawyers have viewed the pursuit of this issue a waste of time. For whatever reason that this issue is off the radar, there is a definite need to conduct a fresh review of the meaning and effect of section 4E. This is because this provision was obviously aimed at solving the problem of excessive delay but, years after the enactment of section 4E, that problem still infects the SEC enforcement process and has so far defied resolution.

In Part I of this Article, I discuss the problem of excessive delay in SEC enforcement and trace previous efforts to identify the problem and propose remedies.[21] In Part II, I discuss the various cases that have interpreted section 4E, principally the *Montford/SEC* and *Montford* decisions, and explore in depths

[16] *See id.*

[17] 793 F.3d 76, 76 (D.C. Cir. 2015) (deferring to SEC's "reasonable" interpretation of section 4E). In this Article, the SEC ALJ's Initial Decision is referred to as "*Montford/ALJ*," the SEC's Opinion in *Montford & Co., Inc.* as "*Montford/SEC,*" and the D.C. Circuit's opinion in Montford and Co., Inc. v. SEC as "*Montford.*"

[18] 467 U.S. 837, 837 (1984).

[19] *Montford,* 793 F.3d at 81.

[20] *See* SEC v. NIR Grp., LLC, No. CV 11-4723, 2013 WL 5288962, at *1, *3 (E.D.N.Y. Mar. 24, 2013); SEC v. Levin, No. 12-21917-CIV, 2013 WL 594736 (S.D. Fla. Feb. 14, 2013); Memorandum, SEC v. Scammell, No. CV 11-6597 (C.D. Cal. Nov. 15, 2011), ECF No. 13. None of these cases plowed new ground and therefore I do not separately analyze them.

[21] *See infra* Part I.

the cases on which the SEC's Opinion and that of the D.C. Circuit relied.[22] In Part III, I consider whether *Montford* appears to have been decided correctly.[23] I conclude that there is substantial reason to believe that it was not. In Part IV, I describe why there should be life in section 4E, at least until the SEC itself changes its view of the meaning and effect of this statutory provision, Congress enacts a more explicit statute, or courts see the issue differently than they have so far.[24]

I. THE CONTINUING AND WORSENING PROBLEM OF EXCESSIVE DELAY IN THE SEC ENFORCEMENT PROCESS

A. The Scope of the Problem

The problem of excessive delay in SEC enforcement and the negative effects it causes investigatees and the public interest (as embodied in a fair and effective SEC enforcement program) are well established.[25] In fact, years after Dodd-Frank, the limited data made public by the Commission make it clear that the situation is getting much worse.[26]

According to the latest annual data published by the SEC,[27] the average length of those investigations that led to an enforcement action—measured from commencement of the investigation to bringing an enforcement action—is now 25 months, a 19 percent increase since 2013,[28] while the number of enforcement

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[22] *See infra* Part II.

[23] *See infra* Part III.

[24] *See infra* Part IV.

[25] *See* Sec. & Exch. Comm'n, Off. of Inspector Gen. at 16, 17, 34.

[26] *See In re Montford & Co.* at 3768, 3771; *see also* SEC, *Fiscal Year 2020 Congressional Budget Justification Annual Performance Plan* 123, 124 (2019), https://www.sec.gov/files/secfy20congbudgjust_0.pdf [https://perma.cc/N583-JDAB].

[27] One commentator, based on a review of fifteen years of SEC enforcement actions, has characterized the SEC's published enforcement "metrics [as] deeply flawed," finding "that the widely-circulated statistics are invalid because they do not measure what they purport to measure, and unreliable because they are inconsistent and can be manipulated all too easily." Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901, 901 (2016). Nevertheless, in her article Professor Velikonja does not mention the statistics discussed below in n. 28.

[28] Every year, the SEC reports to the Congress both "the average number of months between the opening of an investigation and the filing of the first

actions that are brought within 2 years of the opening of an investigation has dropped 22 percent since 2014.[29] Every year, the Commission admits that this length of time is too long: "Target:

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enforcement action arising out of that investigation" and "the rate at which the first enforcement action arising out of an investigation was filed within two years of the opening of the investigation." The data show that, for whatever reason—complexity of cases, loss of manpower, or simple inadequacy of performance—the length of SEC investigations has grown from twenty-one or twenty-two months to twenty-five months in this decade:

Fiscal Year	Average Number Months	Percent Within 2 Years
2007	N/A	54
2008	N/A	62
2009	N/A	70
2010	N/A	67
2011	22	61
2012	21	63
2013	21	58
2014	21	64
2015	24	58
2016	24	53
2017	24	52
2018	25	49

SEC, Fiscal Year 2020 Congressional Budget Justification Annual Performance Plan 123, 124 (2019), https://www.sec.gov/files/secfy20congbudgjust_0.pdf [https://perma.cc/N583-JDAB]; SEC, Fiscal Year 2019 Congressional Budget Justification & Annual Performance Plan 109, 110 (2018), https://www.sec.gov/reports-and-publications/budget-reports/secfy19congbudgjust [https://perma.cc/42Q2-WB5M]; SEC, Fiscal Year 2018 Congressional Budget Justification Annual Performance Plan 35–36 (2017), https://www.sec.gov/reports-and-publications/budget-reports/secfy18congbudgjust [https://perma.cc/DQY2-KY3A]; SEC, Fiscal Year 2017 Congressional Budget Justification & Annual Performance Plan 37–38 (2016), https://www.sec.gov/about/reports/secfy17congbudgjust.pdf [https://perma.cc/ARB3-296Z] [hereinafter SEC, 2017 APR]; SEC, Fiscal Year 2014 Congressional Budget Justification & Annual Performance Plan 33 (2013), https://www.sec.gov/about/reports/secfy14congbudgjust.pdf [https://perma.cc/PDW2-WJJC].

For further comparison, the data for the first metric (percentage of investigations yielding enforcement proceedings within 2 years) from FY 2003 and FY 2004 were 63 percent and 69 percent, respectively, markedly higher than the recent trend. SEC, 2004 Performance and Accountability Report 57, 59 (2005), https://www.sec.gov/about/secpar/secpar04.pdf#sec2 [https://perma.cc/MWK6-HJMP]. Data for the second metric, elapsed time to commencement of enforcement action, were not published in the 2004 report.

[29] *See id.*

Not Met," according to the Commission's Annual Performance Reviews covering 2012 through 2018.[30]

What is more, the published data do not cover the time it takes for the Commission's Staff to commence and close an investigation and notify an investigatee that no enforcement action will be taken.[31] This kind of delay has great importance to those investigatees that stay under an enforcement cloud long after it is apparent to the relevant staff and parties that no enforcement case is in the offing.[32] In response to an FOIA request by the author for "the most recently available data showing, or sufficient to derive, the average time it takes from the commencement of an investigation to the actual closing of an investigation," the Commission's Office of FOIA Services has stated:

> According to the Division of Enforcement, the average time it takes from the commencement of an investigation to the actual closing of an investigation is 863 days. Please be advised that if the enforcement matter originated as a matter under inquiry (MUI) before it was administratively converted into an investigation, this duration of time was included in the calculation.[33]

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[30] *See* Fiscal Year 2020 Congressional Budget Justification Annual Performance Plan 123–24; Fiscal Year 2019 Congressional Budget Justification Annual Performance Plan 109–10; Fiscal Year 2018 Congressional Budget Justification Annual Performance Plan 35–36; Fiscal Year 2017 Congressional Budget Justification & Annual Performance Plan 37–38; Fiscal Year 2014 Congressional Budget Justification & Annual Performance Plan 31, 33; *see also* SEC, Fiscal Year 2016 Congressional Budget Justification & Annual Performance Plan 39–40 (2015); SEC, 2015 Fiscal Year Congressional Budget Justification & Annual Performance Plan 147, 149 (2014).

[31] Since 1972, the SEC has left to the Staff's discretion whether to notify investigatees that the investigation has been closed. *See* 17 C.F.R. § 202.5(c) (2008). According to the SEC Enforcement Division's Manual, it is the Staff's "policy" to send termination letters to anyone that was named in the caption of a formal order of investigation, made a Wells submission, asks for a letter, or that reasonably believes the Staff was considering an enforcement recommendation against them. Nevertheless, the Staff, upon approval by a senior Enforcement Division official, need not send a termination letter, and no standards for such a decision are provided. SEC, Enforcement Manual 27–28 (2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf [https://perma.cc/27GH-LQLQ].

[32] *See infra* text accompanying notes 63–71.

[33] Letter, SEC Office of FOIA Services to author, June 4, 2019 (in possession of author).

In other words, the average investigation that does not result in enforcement action lasts over two years and four months.

B. Recognition of the Problem over the Years

SEC investigations are non-public, and because the SEC, generally, has had no interest in airing its dirty laundry,[34] the details of most instances of excessive delay are known only to the SEC, investigatees and their counsel.[35] Nevertheless, it has been possible to locate through an intensive search on the Internet enough information to develop a reasonably reliable grasp on the extent to which the issue has long been recognized, criticized, and analyzed, particularly from the vantage point of those outside of the agency.[36]

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[34] "Although the SEC has previously conducted internal reviews of its enforcement activities, results have not always been made available to the public." Stavros Gadinis, *The SEC and the Financial Industry: Evidence from Enforcement Against Broker-Dealers*, 67 BUS. LAW. 679, 681 n.7 (2012) (citing Judith Burns, *SEC's Enforcement Division Receives High Marks for Speedup in Past Year*, WALL ST. J., July 23, 1999, at B9). For example, the SEC conducted an internal review of its enforcement division in 1998, led by then-Commissioner Laura Unger, but the results were not made public. *Id.* It was reported, however, that the review identified delays in bringing new cases and completing existing ones. *Id.* And, several years later, in an interview, Ms. Unger said that the study focused heavily on the time it took to complete investigations. *See infra* text accompanying notes 51–53.

[35] Occasionally, however, examples of excessive delay are documented in reports of the SEC's Office of Inspector General. *See*, *e.g.*, Off. of Inspector Gen., Failure to Timely Investigate Allegations of Financial Fraud at 16–17, 33–34 (detailing SEC Staff's failure to investigate twenty complaints, over thirty-three months, received from one registered representative (stockbroker) concerning alleged fraud in sale of a public company's assets, followed by Staff decision not to investigate because the complaint was stale), https://www.sec.gov/files/oig-505.pdf [http://perma.cc/FX3J-AEPZ]; *see also* SEC, Report of Investigation, Failure to Vigorously Enforce Action Against W. Holding and Bear Stearns at the Miami Regional Office, Case No. OIG-483, 5, 24, 26 (2008) (detailing separate seven and eight-month delays where nothing occurred in investigation of Bear Stearns' alleged fraudulent conduct, followed by decision to close investigation even after settlement offer of $500,000), http://pogoarchives.org/m/fo/sec-oig-report-20080930-2.pdf [https://perma.cc/Z9XA-9BSM].

[36] *See generally id.*

A 1956 memorandum from the Commission's Division of Corporation Finance highlighted the issue:

> Don't let cases drag. Keep close control over your cases and let your superior know when a case is not proceeding properly, either because of the conduct of the registrant or its representatives or because of internal problems here. *Non-action on a case or problem is the cause of most of the criticism we hear of the Division and Commission with respect to matters within our jurisdiction.*[37]

In January 1972, Chairman William J. Casey, with the concurrence of the other members of the SEC, appointed The Advisory Committee on Enforcement Policies and Practices (better known by the last name of its Chairman, New York attorney John A. Wells) "to review and evaluate the Commission's enforcement policies and practices," and to make appropriate recommendations.[38] The Committee issued a report in June 1972, with 43

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[37] Memorandum from Byron D. Whiteside on Division Operations and Operating Procedure to All Supervisory Personnel 2 (Sept. 4, 1956), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1950/1956_0904_WoodsideOperationsT.pdf [https://perma.cc/2QMR-JP69] (emphasis added). This memorandum, although from the Division of Corporation Finance, which has responsibility for processing and commenting on SEC filings, such as registration statements, proxy statements, and periodic reports, is pertinent because through August 1972 the Commission's enforcement responsibilities were carried out within each operating division, such as "Corp Fin," rather than being centralized in an Enforcement Division. *See generally* SEC, ABOUT THE DIVISION OF ENFORCEMENT, https://www.sec.gov/enforce/Article/enforce-about.html [https://perma.cc/YL57-W4VB].

The Whiteside memorandum is one of thousands of documents preserved on the website, http://www.sechistorical.org, of the SEC Historical Society, a private, not-for-profit entity. I express my profound appreciation to its founders and supporters, who have had the foresight to collect and publish on its website thousands of SEC documents—like the Whiteside memorandum—that otherwise would be unavailable on the Internet.

[38] John A. Wells et al., Report of the Advisory Committee on Enforcement Policies and Practices 1 (1972), http://www.sechistorical.org/museum/papers/1970/page-3.php (published in 3 parts in pdf format). The Report is referred to in this Article as the "Wells Report." Messrs. Cohen and Demmler were former SEC Chairmen and private practitioners and Mr. Wells was a prominent corporate lawyer. On a point of personal privilege, I had the occasion to face "Manny" Cohen across the table when he was in private practice and I

recommendations.[39] In September the Commission accepted the most famous recommendation, no. 16 (calling for regularizing practice of permitting potential respondents or defendants to make a written submission)[40] in substantial part.[41] This led to the so-called "Wells Process," which is specifically referred to in Exchange Act section 4E(a)(1).[42] For the purposes of this Article, however, another recommendation, no. 11, is of more moment.

Aimed at various problems discussed in the Committee's Report, including investigations that were "*too protracted*",[43] this recommendation was that:

> [a] procedure should be established for auditing the investigative practices and techniques of enforcement personnel on a continuing basis; to that end the Commission should designate an official, who would perform a "staff" as distinguished from a "line" function and be responsible directly to the Commission, whose function would be, on a post-audit basis, to determine whether the Commission's policy of fairness, *promptness*, and efficiency in investigative procedures is being observed.[44]

Significantly, among the "work assignments" suggested by the Committee for this proposed official were "inquiries into the reasons for protracted investigations."[45] Nothing came of this particular recommendation—presumably, much to the relief of the

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was with the SEC Enforcement Division in the 1970s. Manny was not only the consummate gentleman, but he had a profound ability to find the "sweet spot" to resolve an investigation—the point at which both the Staff and he could justifiably conclude that a fair resolution had been achieved.

[39] *Id.*, *passim*. Each recommendation was stated in the introduction to the Wells Report and was repeated—not necessarily word-for-word—and discussed in the body of the report. Quoted recommendations herein are as stated in the introduction to the Report.

[40] *Id.*, at iv, ¶ 16.

[41] SEC, Procedures Relating to the Commencement of Enforcement Proceedings & Termination of Staff Investigations 1 (1972), https://www.sec.gov/divisions/enforce/wells-release.pdf [https://perma.cc/GFG7-98AV] (codified at 17 C.F.R. § 202.5(c), part of the SEC's Rules on Informal and Other Procedures). None of the other recommendations was discussed in Release No. 5310.

[42] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 4E(a)(1), 124 Stat. 1867 (2010).

[43] Wells et al., *supra* note 38, at v, ¶¶ 22–23.

[44] *Id.*, at iii ¶ 11 (emphasis added).

[45] *Id.* at 25.

SEC Staff[46]—but the problem of *too protracted* investigations did not disappear, and has remained unsolved to this day.[47]

In 1985, an American Bar Association task force recommended revisions to the SEC enforcement process, including limiting SEC Orders of Investigation (the document authorizing the conduct of a specific investigation and endowing the Staff with subpoena power) to one year.[48] This was an obvious reference to the troubling length of investigations. Nothing came of this recommendation.[49]

In 1998, the SEC conducted an internal review of its enforcement division, led by then-Commissioner Laura Unger.[50] Although the results were not made public, it was contemporaneously reported that the review identified delays in bringing new cases and completing existing ones.[51] According to an interview Ms. Unger gave years later, the review focused on Enforcement operations and, in particular, "why investigations take too long; people not knowing when an investigation's over, and other resource issues."[52]

At the beginning of the 21st Century, new Chairman Harvey L. Pitt[53] pressed for a policy of "real-time enforcement" to improve

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[46] It is apparent that the Staff opposed many of the Wells Committee recommendations. *See* Paul S. Atkins, Bradley J. Bondi, *Evaluating the Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program*, 13 FORDHAM J. CORP. & FIN. L. 367, 381 (2008) (citing Harvey L. Pitt et al., *SEC Enforcement Process, Internationalization of the Securities Markets—Business Trends and Regulatory Policy*, C489 ALI-ABA, 63 (1989)). While recommendation no. 11 was ignored by the Commission, the later creation of the Office of Inspector General has resulted in the airing of Staff missteps by an at least nominally neutral observer.

[47] *Id. See also* Daniel Hawke, *5 Common Misconceptions About SEC Investigations*, Law360 (Nov. 13, 2018), https://www.arnoldporter.com/-/media/files/perspectives/publications/2018/11/5-common-misconceptions-about-sec-investigations.pdf [http://perma.cc/79D8-MZHA].

[48] *See* Marc I. Steinberg, *Emerging Capital Markets: Proposals and Recommendations for Implementation*, 30 INT'L LAW. 715, 718, 720 (1996).

[49] *See generally id.*

[50] *See* Interview by Kenneth Durr with Laura Unger, SEC Historical Society, in Washington, D.C. (Nov. 7, 2005), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/oral-histories/unger110705Transcript.pdf [https://perma.cc/3LCU-KZA5] [hereinafter Unger Interview].

[51] *See* Burns, *supra* note 34.

[52] Unger Interview, *supra* note 50.

[53] Few, if any, Chairmen, before or since, have brought to his or her tenure the breadth of experience and detailed knowledge of the intricacies of this

on a situation where "enforcement action often resulted many years after actual wrongdoing had occurred, and often after the fruits of such frauds had long been squandered."[54] A few high-visibility cases were brought very quickly, but, for the most part, the Enforcement process continued to grind away, slowly.[55]

In 2007, the U.S. Governmental Accountability Office took note that "Enforcement may leave open for years many investigations that are not being actively pursued with potentially negative consequences for individuals and companies no longer under review."[56] The GAO reported: "Enforcement officials cited several reasons for division attorneys not always closing investigations promptly. In particular, the officials said that Enforcement attorneys may view pursing potential securities violations as the division's highest priority and lack sufficient time, administrative support, and incentives to comply with established administrative procedures for closing investigations."[57] The GAO also took note of a new SEC Enforcement effort (as of June 2007) to speed up case closings.[58] There has been no discernible long-term improvement.[59]

Unreasonable delays even had a role in the SEC Staff's inability to discover, despite numerous examinations and enforcement inquiries, the Madoff fraud.[60] In one such instance,

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agency that Harvey Pitt brought. He had had an extremely successful career in private practice, before which he had been SEC General Counsel, among other leadership posts he held at the Commission. Since he left the SEC in 2003 he has continued his outstanding career in the private sector. Harvey L. Pitt, SEC Historical Society, SEC Chairmen's Roundtable Submission 4 (2004), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/2000/2004_0602_SECHS_RT_Ch_Pitt.pdf [https://perma.cc/2E4B-M2HK].

[54] *Id.*

[55] *Id.*

[56] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-830, SEC: ADDITIONAL ACTIONS NEEDED TO ENSURE PLANNED IMPROVEMENTS ADDRESS LIMITATIONS IN ENFORCEMENT DIVISION OPERATIONS 21 (2007), http://www.gao.gov/assets/270/265419.pdf [https://perma.cc/HAN6-6J3Z].

[57] *Id.*

[58] *Id.* at 22.

[59] *See id.*

[60] *See* SEC OFFICE OF INVESTIGATIONS, OIG-509, INVESTIGATION OF FAILURE OF THE SEC TO UNCOVER BERNARD MADOFF'S PONZI SCHEME 23, 29, 32 (2009), http://www.sec.gov/news/studies/2009/oig-509.pdf [https://perma.cc/W8AQ-GCVB].

someone waited two weeks to open a MUI (matter under inquiry) for the latest Madoff enforcement inquiry, as a result of which a tip from a suspicious former Madoff investor was not followed up because the recipients of the tip did not know that there was an active inquiry under way.[61]

C. The Causes and Effects of Excessive Delay

If it appears to be a commonly held opinion among attorneys things are too slow in the world of SEC enforcement, what are the causes of excessive delay? Based on my forty-four years of experience on both sides of the Enforcement table, it is too easy an answer to say that SEC investigations are highly complex, manpower is limited, etc. The fact is that, based on my experience, the bulk of SEC investigations are not exceptionally complex and do not involve huge numbers of documents and witnesses, but, even if it were so, complexity is not likely the prime or even a significant cause of excessive delay.

In any one investigation, the active conduct of the investigation (subpoenaing and reviewing documents and taking sworn testimony of witnesses) often takes substantially less time than the processing of the Staff's recommendations to either take enforcement action or close the investigation without action. Substantial amounts of time typically pass after the Staff has finished the active investigation, after which time is taken up, typically, by the Staff's providing Wells notifications and receiving Wells submissions; by the drafting of an "action memorandum" recommending an enforcement action (or, in the alternative, a closing memorandum); by the review of such memoranda at various levels of the Division of Enforcement; and by the Staff's sending an action memorandum to other interested divisions or offices within the SEC for their review and comment. (Of course, for the purposes of section 4E, the only time period that counts is measured from the date of a written Wells notification or the period of any extension.) These reviews are important and vital processes,[62]

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[61] *Id. at* 262–68.

[62] The review process is a vital part of a fair and effective SEC enforcement program, but, for cases that are actually litigated, it is not at all uncommon for the SEC to be unable to prove at trial what it alleged in its complaint despite its ability to obtain sworn pre-filing testimony from all possible witnesses.

which, if performed with dispatch and care, certainly do not *excessively* delay the enforcement process, and are designed to lead to fair results. While precise measurements are not possible on the basis of publicly available data, experience suggests that there are other significant pockets of delay, including investigatees' "slow-walking" production of documents and Staff disinterestedness.

For his part, Professor Vollmer suggests that "[t]he main reason for prolonged investigations, especially since the Madoff affair, is the staff's reluctance to close an investigation because

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See, *e.g.*, SEC v. Schvacho, 991 F. Supp. 2d 1284, 1301 (N.D. Ga. 2014), in which, after a bench trial, the court entered judgment for the defendant, noting "the overreaching, self-serving interpretation that the SEC imposed on the evidence presented at trial."

A reasonable inference from a failure to prove what is alleged is that what was alleged was not actually supported by the investigative record. Unfortunately, such a situation is far from unheard of at the SEC. *See* Andrew N. Vollmer, *Four Ways to Improve SEC Enforcement*, 43 SEC. REG. L.J. 1 (2015) ("[One of t]he three fundamental problems with SEC enforcement [is] that the Commission and the Division of Enforcement misunderstand or mischaracterize the factual record"). This stems from either the lack of, or inadequate, supervisory review of the actual basis for factual assertions in a Staff action memorandum. Professor Vollmer is a former SEC Deputy General Counsel and an experienced SEC practitioner in private practice, and his article is a valuable and insightful overview of what is wrong with SEC enforcement. Notably, his article also focuses on the need to shorten SEC investigations:

> Extended investigations disserve the enforcement process and the persons being investigated. The delays increase the costs of defense and the burdens on private parties. Lengthy investigations create uncertainty for both companies and individuals, and uncertainty about the SEC's plans can harm reputations, stall careers, and postpone financings and investments, research, and product development.

Id. In the author's experience, it is not at all rare for the Staff members conducting the investigation to misstate the evidence (not necessarily in bad faith—sometimes, instead, through inattention) in advancing a case towards Commission consideration. The solution is simple: careful review of underlying evidence by supervisory staff members. It is unclear, however, how intensive such review is, if it occurs at all. *See* Richard E. Brodsky, *Commentary: Report inadvertently opens window into SEC's operations*, MIAMI DAILY BUS. REV. (2008) ("Staff investigators' reports on the results of investigations are often not reviewed carefully to make sure that the facts are as they are portrayed or supported by sufficient evidence, with the result that critical decisions affecting people's lives can be made on the basis of mistaken, or even false, assumptions or inadequate evidence").

of a fear of overlooking a serious issue or of being criticized for failing to enforce the securities laws vigorously."[63] That may be the case since the Madoff fraud exploded in December 2008, but the problem of excessive delay plagued the Commission for decades before then, so unless fear of missing things has been the main problem all along, it is not realistic to view it as the "main" cause today.[64] Ultimately, excessive delay is a management problem.[65] Until career success at the management level is no longer defined by the simple metric of the number of cases a staff attorney's work has resulted in an enforcement action being brought, it will continue to defy solution.[66]

Whatever its causes, the adverse effects of excessive delay are real.[67] Excessive delay harms investigatees when the SEC Staff leaves an investigation open long after it should be obvious that an enforcement action is not a realistic outcome.[68] As observed by the 1972 Wells Committee, "investigations are often protracted and their existence frequently becomes a matter of public knowledge. During the pendency of an investigation uncertainties are likely to be created in the minds of the investigatees and those with whom they have business or other dealings."[69] One court, although ruling that section 4E did not act as a limitations provision, nevertheless recognized that, "[i]n enacting the deadline, Congress obviously recognized the seriousness of a long-pending unresolved SEC investigation, a concern that would be exacerbated where the targets might include a public company

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63 Vollmer, *supra* note 62.

64 *Id.* at 7.

65 *Id.* at 5.

66 *Id.* at 6.

67 Professor Vollmer regards the need to shorten investigations as one of the four basic problems with SEC enforcement:

> Extended investigations disserve the enforcement process and the persons being investigated. The delays increase the costs of defense and the burdens on private parties. Lengthy investigations create uncertainty for both companies and individuals, and uncertainty about the SEC's plans can harm reputations, stall careers, and postpone financings and investments, research, and product development.

Vollmer, *supra* note 62, at 7.

68 *Id.* at 7.

69 Wells et al., *supra* note 38, at 20.

or its officers and directors subject to disclosure requirements."[70] Thus, many public companies will disclose receipt of a Wells notification,[71] and, depending on the specific information requested, broker-dealers and investment and municipal advisors may be required to disclose pending investigations in response to a request for proposal (RFP) from a municipal entity or other potential issuer.[72] Finally, if a case sits long enough on SEC desks, virtual or real, there can develop intense pressure on the part of a party under investigation to agree to settle the case just to be free of its overhang.[73] In sum, the longer a case destined for closure remains open, the greater the damage done to those investigatees that, in the end, will not be named in an enforcement action.

The adverse effects of excessive delay are also felt by the Commission and the public in the depreciation of the deterrent effect of prompt enforcement action—the SEC publicly states that "[w]hile timeliness in filing actions can be influenced by a number of factors, it is important because it can enhance the action's deterrent impact"[74]—as well as uninformed markets having to trade on misinformation not uncovered by prompt exposure by the SEC.[75] In addition, when excessive delay occurs,

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[70] SEC v. NIR Grp., LLC, No. CV 11-4723 JFB GRB, 2013 WL 5288962, at *5 (E.D.N.Y. Mar. 24, 2013).

[71] Deborah S. Birnbach, *Do You Have to Disclose a Government Investigation?*, Harvard Law School Forum on Corporate Governance and Financial Regulation (Apr. 9, 2016), https://corpgov.law.harvard.edu/2016/04/09/do-you-have-to-disclose-a-government-investigation/ [https://perma.cc/VNN4-YB9W].

[72] *E.g.*, Chicago, Ill. Park District, *Request for Proposal (RFP) for Independent Registered Municipal Advisor (IRMA) Services* 13 (Apr. 30, 2018), https://assets.chicagoparkdistrict.com/s3fs-public/documents/page/Request%20For%20Prposal%20-RFP-%20for%20Independent%20Registered%20Municipal%20Advisor%20-IRMA-%20Services%20%204.30.18.pdf [https://perma.cc/EMW3-MG5Q] ("List any pending investigation of the firm or enforcement or disciplinary action, administrative proceeding, malpractice claim or other like proceeding by the SEC, MSRB or other federal, state or local regulatory body against your firm or any of its personnel relating to your firm's services as financial advisor current, pending, or occurring in the past three (3) years.").

[73] Vollmer, *supra* note 62, at 3.

[74] *E.g.*, SEC, 2017 APR, *supra* note 28, at 109.

[75] The negative effect on the deterrent value of taking too long to bring an enforcement action was one of the cornerstones of SEC Chairman Pitt's "real-time enforcement" initiative. *See* Pitt, *supra* note 53, at 4.

cases get stale, memories fade, and justice suffers, so both sides in an adjudicated case can suffer from the effects of delay.[76]

II. THE *MONTFORD* DECISIONS

Congress enacted section 4A into law in 2010,[77] but it has been treated both by the Commission and the courts as an essentially meaningless law.[78] The key decision is *Montford*. In this section, I analyze the decision, starting with the Initial Decision of the SEC Administrative Law Judge, proceeding to the Commission's Opinion, and, finally, the decision of the D.C. Circuit. I find substantial issues with which to disagree at all three levels.

A. Proceedings at the SEC

Montford involved a registered investment adviser that allegedly misled its clients into believing that it was wholly independent when, in fact, it received kickbacks from an institution with which it urged its clients to invest.[79] The Commission instituted an administrative enforcement proceeding, under the Investment Advisers Act of 1940,[80] 187 days after the Staff provided a Wells notification to the adviser and its principal.[81] After an evidentiary hearing, the SEC administrative law judge (ALJ) found the adviser and its principal liable for fraud and other violations and imposed penalties and other sanctions, which findings were affirmed by the Commission and the D.C. Circuit.[82] The respondents raised a defense that the proceeding was barred because the Staff missed the deadline under section 4E and the deadline was not properly extended, and separately moved to dismiss on the same grounds.[83] The ALJ rejected these

[76] Vollmer, *supra* note 62, at 8.

[77] SEC, *The Laws That Govern the Securities Industry*, https://www.sec.gov/answers/about-laws.html [https://perma.cc/DJQ8-AU9R].

[78] Vollmer, *supra* note 62, at 7.

[79] *In re* Montford & Co. (*Montford/SEC*), Investment Advisors Act Release No. 3829, 108 SEC Docket 3763, 3779 (May 2, 2014), *affirming In re* Montford & Co. (*Montford/ALJ*), Admin. Proc. No. 3-14536, 2012 WL 1377372 (Apr. 20, 2012).

[80] 15 U.S.C. § 80b-1ff (2005).

[81] Montford & Co. v. SEC, 793 F.3d 76, 80 (D.C. Cir. 2015).

[82] *Id.*

[83] *Id.*

defenses.[84] She found that the Enforcement Director had extended the 180-day deadline, and—according to the Commission's order denying the respondents' request for an interlocutory order—"implicitly found" that, in doing so, the Director had made the requisite "complexity determination."[85]

On appeal from the initial decision, the SEC affirmed.[86] Regarding the alleged violation of section 4E, the SEC affirmed on different grounds than advanced by the ALJ.[87] Obviously eager to rule on the underlying issue of the effect of missing the deadline, the Commission largely ignored that issue[88] and focused almost entirely on its view that section 4E imposed no limitations period. A summary of the SEC's main points is as follows:

> Section 4E was enacted as part of the Dodd-Frank Act, a statute that significantly expanded the Commission's authority to police fraud in the securities industry. This particular provision was included under the section of the Dodd-Frank Act titled "Increasing Regulatory Enforcement and Remedies," which Congress explained at the time "strengthens the SEC's authority to conduct investigations." Nowhere in Section 4E, or elsewhere in the Act, did Congress identify a consequence if Commission staff fails to comply with these deadlines. Section 4E states in pertinent part only that, 180 days after providing a Wells notification, Division "staff shall either file ... or provide notice to the Director of the Division ... of its intent to not file an action." Section 4E says nothing about dismissal or preclusion of action if the deadline is missed; nor does it expressly afford the recipients of a Wells notification any rights.[89]

The Commission expanded its "statutory purpose" argument, stating that "[t]he only statute of limitations applicable to

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[84] *Id.*

[85] *Montford & Co.*, Order Denying Suggestion for Interlocutory Review, Advisers Act Rel. No. 3311, at 2 (Nov. 9, 2011).

[86] *Montford*, 793 F.3d at 80.

[87] *Id.*

[88] The Commission found no error in the ALJ's finding that the Staff properly extended the 180-day deadline, but pointedly emphasized that "the basis for [the extension] is irrelevant to any claim or defense that Respondents can make here." *In re* Montford & Co. (*Montford/SEC*), Investment Advisors Act Release No. 3829, 108 SEC Docket 3763, 3771 (May 2, 2014), *affirming In re* Montford & Co. (*Montford/ALJ*), Admin. Proc. No. 3-14536, 2012 WL 1377372 (Apr. 20, 2012) (footnotes omitted).

[89] *Id.*

our proceedings is set forth in 28 U.S.C. § 2462," and that "[i]n enacting section 4E, Congress said nothing about creating a new abbreviated statute of limitations, either as a replacement for or a supplement to 28 U.S.C. § 2462."[90] It added:

> Moreover, it would be inconsistent with Congress's intent to increase our authority to curb securities fraud under the Dodd-Frank Act section enacting Section 4E to read the provision as limiting our ability to act in a proceeding that otherwise meets the requirements of 28 U.S.C. § 2462. This is particularly true where, as here, dismissal of the action would harm the investing public by foreclosing the Commission from taking appropriate remedial measures.[91]

The SEC also reasoned that, given that the Staff has the discretion, according to the SEC's rules and judicial precedent, whether or not to provide a Wells notification, "[i]t would make little sense to conclude that the remedy for missing the 180-day deadline is dismissal when the Division could avoid this outcome by not issuing a Wells notification in the first place."[92]

The Commission stated that its "interpretation" of section 4E was consistent with pertinent Supreme Court precedent, citing *Brock v. Pierce County*[93] and *United States v. James Daniel Good Real Property*[94] Both of these cases dealt with the meaning of statutes "prescrib[ing] internal time periods for federal agency action without specifying any consequences for noncompliance."[95] The Commission—incorrectly, in my view[96]—read both cases as having "held that congressional enactments that prescribe internal time periods for federal agency action without specifying any consequences for noncompliance do not necessitate dismissal of the action if the agency does not act within the time prescribed."[97]

Finally, the Commission concluded:

> Based on the text and legislative history of Section 4E and Supreme Court precedent interpreting similar statutes, we

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[90] *Id.*
[91] *Id.* (footnotes omitted).
[92] *Id.* at 3772.
[93] 476 U.S. 253 (1986).
[94] 510 U.S. 43 (1993).
[95] *Montford/SEC*, 108 SEC Docket at 3771.
[96] *See infra* text accompanying notes 143–66.
[97] *Montford/SEC*, 108 SEC Docket at 3771–72.

> find that this provision is intended to operate as an internal timing directive, designed to compel our staff to complete investigations, examinations, and inspections in a timely manner and not as a statute of limitations.[98]

B. The D.C. Circuit Opinion

1. Chevron

The respondents appealed to the D.C. Circuit, which, in reliance on *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[99] affirmed.[100] To evaluate the D.C. Circuit's *Montford* decision, however, one must engage in a slight detour: while a full analysis of *Chevron* and its progeny is well beyond the scope of this Article, there must be a review of at least the *Chevron* basics.[101]

Chevron involved a challenge by a public interest group to the validity of the Environmental Protection Agency's rules, enacted under the Clean Air Act Amendments of 1977, covering the regulation of "new or modified major stationary sources" of air pollution by states that had not attained air quality standards previously established by EPA.[102] In its rules, EPA permitted those "non-attaining" states to allow individual plants to use the "bubble" approach—to group all individual new or modified "stationary sources" together, so that any one "source" could be in non-compliance so long as overall plant emissions did not exceed the standard.[103] The D.C. Circuit found that the term "stationary sources" was not "explicitly defined" in the statute and that the legislative history was "contradictory,"[104] so the court turned to "the purposes of the non-attainment program."[105] The court held that EPA's use of the "bubble concept" in this regulation conflicted with earlier decisions of that Circuit holding that this

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[98] *Id.* at 3772.

[99] 467 U.S. 837 (1984).

[100] 793 F.3d 76 (D.C. Cir. 2015).

[101] 467 U.S. at 837.

[102] *Id.*

[103] *Id.* at 839–40.

[104] Nat. Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 723 (D.C. Cir. 1982), *rev'd sub nom.* Chevron, USA., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[105] *Id.* at 723 n.39.

concept was inapplicable to situations in which Congress intended to improve air quality and not just preserve the status quo.[106]

Justice Stevens, writing for the Court, stated that "[t]he basic legal error of the Court of Appeals was to adopt a static judicial definition of the term 'stationary source' when it had decided that Congress itself had not commanded that definition."[107] He then proceeded to explain how the Court of Appeals should have decided the case:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[108]

The Court further explained in a now-famous footnote:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. *If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.*[109]

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[106] *Id.* at 726.

[107] *Chevron*, 467 U.S. at 842.

[108] *Id.* at 842–43 (footnotes omitted). This is what is now called the *Chevron* "two-step analysis." *E.g.*, Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2124 (2016) (applying *Chevron* to Department of Labor regulation establishing scope of exemption from overtime provisions of Fair Labor Standards Act). Or, as some refer to it, the "*Chevron* Two-Step." *See* Catherine M. Sharkey, *Cutting in on the* Chevron *Two-Step*, 86 FORDHAM L. REV. 2359, 2361 (2018); Jacob Crump, *Corpus Linguistics in the* Chevron *Two-Step*, 2018 B.Y.U. L. REV. 399, 418 (2018). Not hailing from Texas and never having learned to dance the two-step, I refer to the *Chevron* Two-Step as "the Two Questions," Step One as "Question 1," and Step Two as "Question 2."

[109] *Chevron*, 467 U.S. at 843 n.9 (citations omitted; emphasis supplied).

Despite the seeming clarity and simplicity of the *Chevron* opinion, the development of the law in the years since has led to extraordinary confusion and uncertainty concerning its meaning and application, with many Supreme Court opinions seemingly in conflict with one another.[110] There is reasonable doubt even as to whether the standard of review that seems to have been mandated by *Chevron* differs in any material respect from that applied in traditional judicial review of agency decisions.[111] Thus, under the Administrative Procedures Act, a reviewing court is to set aside agency action, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law".[112] This is the same standard that the Court has said is to be applied to *Chevron* Question 2,[113] leading Justice Kagan to state that the analysis under *Chevron* Question 2 and the APA "would be the same."[114]

Rather than join the fray about what *Chevron* "really" means or requires, I return to the Court's opinion for the bedrock of its analysis. *Chevron* lays out certain "well-settled principles," the avoidance of which it says caused "the Court of Appeals [to have] misconceived the nature of its role in reviewing the regulations at issue."[115] One can only wonder why so many serious

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[110] There is a plethora of scholarly articles discussing the problem of making intelligible sense of *Chevron* and its progeny. Professor Michael Kagan has noted:

> Since the early days of the doctrine, the trouble with *Chevron* has been in understanding why the Court does one thing in one case but another thing in another case. The problem is not just that the Court has sometimes explicitly indicated that there are exceptions to this doctrine—the so-called 'Step Zero,' for example. Instead, the problem is that the Court far more frequently fails to follow *Chevron*'s normal two-step analysis in cases to which it seems to apply and then does not explain why.

Michael Kagan, *Loud and Soft Anti-*Chevron *Decisions*, 53 WAKE FOREST L. REV. 37, 39 (2018).

[111] Vollmer, *supra* note 62, at 3.

[112] 5 U.S.C. § 706(2) (2012).

[113] *See*, *e.g.*, Astrue v. Capato *ex rel*. B.N.C., 566 U.S. 541, 558 (2012) (deferring under Question 2 because agency regulations were "neither arbitrary or capricious in substance, [n]or manifestly contrary to the statute") (alteration in original) (internal quotation marks omitted) (citation omitted).

[114] *See* Judulang v. Holder, 565 U.S. 42, 52 n.7 (2011) ("analysis" under section 706(2) and Chevron Question 2 "would be the same").

[115] *Chevron*, 467 U.S. at 845.

analyses of *Chevron* do not start with, or even review, these "principles."[116] Only one Supreme Court decision, *INS v. Cardoza-Fonseca*, does so.[117]

The *Chevron* "principles," in full, are as follows:

> The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.' If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.
>
> We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations
>
>> "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations."
>>
>> ....
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>> "If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[118]

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[116] *Id.*

[117] INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987) (*Chevron* is not applicable where a case involves a "pure question of statutory construction for the courts to decide."). For a discussion of *Cardoza-Fonseca,* see Andrew N. Vollmer, *SEC Revanchism and the Expansion of Primary Liability Under Section 17(a) and Rule 10b-5*, 10 VA. L. & BUS. REV. 273, 327–28 (2016).

[118] *Chevron*, 467 U.S. at 843–45 (citations and footnotes omitted).

The Court concluded:

> In light of these well-settled principles it is clear that the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether in its view the concept is 'inappropriate' in the general context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one.[119]

In summary, based on the Court's recitation of these "well-settled principles," and assuming that it makes a difference whether *Chevron* is found to apply to a particular statutory provision, *Chevron* applies when Congress (i) enacts a statute addressing or establishing a policy arising under the statutory regime entrusted to its administration by an agency possessed of the expertise to establish that policy, but (ii) does not set precise standards for determination of the policy. Under such circumstances, a court could reasonably conclude that Congress impliedly intended to delegate that policy decision to the agency.[120]

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[119] *Id.* at 845.

[120] At the time of this Article, it is unclear whether the law concerning judicial deference to administrative interpretations of statutes is headed for a major change. *See generally* Kisor v. Wilkie, 139 S. Ct. 2400 (2019), in which Justice Gorsuch, in a concurring opinion in a case on judicial deference to an administrative agency's interpretation of its own regulation, in a passage in which he was joined by Justice Thomas:

> To be sure, under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984), we sometimes defer to an agency's construction of a *statute*. But there are serious questions, too, about whether *that* doctrine comports with the APA and the Constitution. *See, e.g.*, Pereira v. Sessions, 138 S. Ct. 2105, 2120–2121 (2018) (KENNEDY, J., concurring); Michigan v. EPA, 135 S. Ct. 2699, 2713–2714 (2015) (THOMAS, J., concurring); Perez v. Mortgage Bankers Ass'n, 135 S. Ct, 1199, 1211–1213 (SCALIA, J., concurring in judgment)

(citations omitted). *Id.* at 2446 n.114. Given the uncertainty of the future of *Chevron*, even absent the undeniable uncertainty about what it means and how it is to be applied, I assume in this Article that *Chevron* will not be reversed or materially limited or expanded.

2. *The D.C. Circuit's* Montford *Opinion*

The D.C. Circuit held that "Section 4E is ambiguous"[121] and that "the Commission's interpretation of Section 4E, as not imposing a jurisdictional bar, is reasonable and entitled to deference."[122] "We thus do not need to address the Commission's alternative argument that it had properly extended the deadline."[123]

The court's rationale for finding ambiguity was that Congress, by not specifying any consequence for the Commission's failure to bring an enforcement action within 180 days after issuing a Wells notification, had not "directly spoken to the precise question at issue."[124] The court rejected the respondents' arguments "that Section 4E's 'language, structure, purpose, and legislative history all establish that the deadline is mandatory and jurisdictional,'"[125] finding instead that "[w]hile these arguments demonstrate that it might be reasonable to interpret Section 4E as having a jurisdictional consequence, these arguments do not show that the statute *forecloses* other interpretations."[126]

Since it concluded the "statute is silent ... with respect to the specific issue," the court turned to "whether the agency's answer is based on a permissible construction of the statute."[127] In answering this question, the court made no mention of any issue discussed in the Commission's Opinion other than its interpretation of two Supreme Court opinions concerning agency deadlines, *Brock* and *James Daniel Good*[128] [hereinafter *Good*].[129] The court found that both cases held that statutory deadlines failing to prescribe a consequence for an agency's missing them did not foreclose subsequent action, which the court found to be the case here.[130] The court concluded: "Nothing in the text or

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[121] Montford & Co. v. SEC, 793 F.3d 76, 82 (D.C. Cir. 2015).

[122] *Id.* at 81.

[123] *Id.*

[124] *Id.* at 82.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] United States v. James Daniel Good Real Prop., 510 U.S. 43, 63 (1993)

[129] *Id.* at 82–83.

[130] *Id.* at 83. The court also cited a case decided after the Commission's Opinion, United States v. Kwai Fun Wong, 575 U.S. 402, 411–14 (2015), which the *Montford* court said "reminded us ... [that] time limitations for filings in statutes are presumptively non-jurisdictional." *Id. Kwai* involved claims by

structure of Section 4E overcomes the strong presumption that, where Congress has not stated that an internal deadline shall act as a statute of limitations, courts will not infer such a result."[131]

III. A CRITICAL ASSESSMENT OF *MONTFORD*

My overall evaluation of the D.C. Circuit's opinion in *Montford* is that it appeared to address the issue before it in an overly mechanistic manner and failed to grasp the key underlying issue of whether summarily deferring to the Commission's interpretation of section 4E was a commonsensical approach.

First, the court paid no apparent mind to the question of whether *Chevron* even applied.[132] If, as it appears, *Chevron* applies where Congress has enacted a statute that addresses, but does not set precise standards on, a question of policy arising under a statutory regime entrusted to an agency possessed of the expertise to establish that policy, then the *Montford* court erred by applying *Chevron*. The answer to this question can be found in looking closely at the nature of the issue before the court.

The issue in *Chevron*—whether non-attainment states should be permitted to regulate new stationary sources by grouping these individual sources on a plant-wide basis—is the quintessential policy question.[133] And agency personnel, who make such decisions on a day-to-day basis, are obviously more qualified than a federal judge, by reason of experience, training, and role, to make that decision.[134] It is thus very reasonable to believe that Congress, while not saying so, intended that the EPA, not the federal court, be the primary maker of that choice (subject to the constraints that the agency's policy decision is not inconsistent with the statute and is "reasonable.")[135]

By contrast to *Chevron* and the Clean Air Act, what Congress meant when it enacted section 4E of the Exchange Act

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private parties against the Government under the Federal Tort Claims Act, which established two deadlines to enable a plaintiff to sue. Finding that the deadlines were not "jurisdictional," i.e., they did not act to "deprive[ ] a court of all authority to hear a case," 575 U.S. at 408–09, the Court held that they were subject to equitable tolling. *Id.* at 419–20.

[131] *Montford*, 793 F.3d at 83.

[132] *Id.* 81–82.

[133] Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 840 (1984).

[134] *Id.* at 865–66.

[135] *Id.*

does not invite a "policy" choice at all; it is a matter of seeking its meaning by employing "traditional tools of statutory construction."[136] It would be different, for example, if the case concerned the SEC's enactment of a rule defining a particular sort of securities transaction as a "manipulative or deceptive device or contrivance" under the Exchange Act.[137] In such a case, the Commission can be assumed to have the expertise and experience, based on its overseeing the securities markets, to decide whether that sort of transaction is inherently manipulative or deceptive and merits being outlawed by one of its rules.[138]

But it requires no citation to establish that the SEC, no more than any other administrative agency, possesses no special expertise to determine the meaning of a statute, such as section 4E, that does not require any special substantive experience to supply the answer. It is true that the agency might have views on the subject, but so would an industry group or the citizenry at large. Additionally, it is important that the agency's views, by definition, are subject to being influenced by the agency's self-interest in expanding its authority or contracting the limits on its discretion.[139] This very real possibility makes the agency's views less compelling.[140] Moreover, from the beginning of the republic, courts

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[136] *Id.* at 843 n.9.

[137] *See*, *e.g.*, 15 U.S.C. § 78j(b) (2012).

[138] *See* Vernazza v. SEC, 327 F.3d 851, 869 (9th Cir. 2003) (deferring to SEC under *Chevron*, citing the SEC's expertise).

[139] Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 233 (2006).

[140] "[W]hen an agency's self-interest is so conspicuously at stake, Congress should not be taken to have implicitly delegated law-interpreting power to the agency." *Id.* at 209–10. A corollary to the concern about deferring to an agency when its own authority is at stake is a concern about deferring to an agency position when, as in *Montford*, the position was first announced in a litigation context. *See* Bradley George Hubbard, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The* Chevron *Two-Step and the* Skidmore *Shuffle*, 80 U. CHI. L. REV. 447, 452–58 (2013) (discussing different circuits' decisions on whether agency interpretations announced in litigation merit deference under *Skidmore*); Sarah Zeleznikow, *"Leaving the Fox in Charge of the Hen House": Of Agencies, Jurisdictional Determinations and the Separation of Powers*, 71 N.Y.U. ANN. SURV. AM. L. 275, 304–11 (2016) (discussing agency bias and self-interest within an agency and the questionable nature of the Chevron Doctrine); *see also* E.I. Du Pont De Nemours & Co. v. Smiley, 138 S. Ct. 2563, 2563 (2018) (Gorsuch, J., dissenting from denial of certiorari) (citing Hubbard, *supra*, arguing for granting of certiorari to resolve circuit split on whether "an agency [can] advance an interpretation of a statute for the first time in litigation and then demand deference for its view").

have been vested with the authority to say what the law is.[141] Thus, it is more than reasonable to assert that following the "well-settled principles" underlying *Chevron*, the *Montford* court should have concluded that *Chevron* did not apply, and the court would owe the SEC's reading of section 4E such deference as it deemed appropriate, which would not appear to be particularly great.

Second, let's assume that I am wrong that *Chevron* does not apply. Did the *Montford* court appear to have answered question one correctly? The question, according to *Chevron*, is "whether Congress has directly spoken to the precise question at issue," or whether section 4E is, in another *Chevron* formulation of question one, "ambiguous."[142]

The *Montford* court's analysis was limited to the simple holding that "[b]y not specifying any consequence for the Commission's failure to bring an enforcement action within 180 days after issuing a Wells notification, Congress has not 'directly spoken to the precise question at issue.'"[143] Curiously, the court cited no authority in support of this answer to Question one.[144] Therefore, if this holding—that the only question is whether Congress explicitly spelled out the consequences of the agency's missing a statutory deadline—is wrong as a matter of law, then the justifiability of the D.C. Circuit's and the SEC's reliance on *Brock* (and on this supposed rule) disappears.

We are not left in the dark as to where *Montford* was looking when it proclaimed this simple test to be the law, for, in answering Question two, *Montford*, it found "[t]he Commission's analysis of Supreme Court precedent, and its application of that precedent to Section 4E, is sound."[145] Specifically, the court noted

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[141] *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is"). The issue of whether *Chevron* conflicts with *Marbury* and the vesting of judicial authority in Article III courts has been raised in numerous cases and commentaries. *See* Aditya Bamzai, Marbury v. Madison *and the Concept of Judicial Deference*, 81 MO. L. REV. 1057, 1057–58 (2016) (analyzing "seeming tension" between *Chevron* and *Marbury*).

[142] Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–43 (1984).

[143] Montford and Co. v. SEC, 793 F.3d 76, 82 (D.C. Cir. 2015).

[144] *Id.*

[145] *Montford*, 793 F.3d at 83.

that the Commission had "discussed" *Brock* and *Good*.[146] The court characterized the holdings in those two cases in the same manner as the SEC had in its Opinion:

> In *Brock,* the Court held that the Secretary of Labor's failure to act by a 120-day deadline did not foreclose subsequent action, where the statute did not identify a consequence for missing the deadline. ... In *Good,* the Court held that when "a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction."[147]

However, the unavoidable truth is that the *Montford* court and the SEC plainly misstated the holding in *Brock*, as did the Supreme Court itself in *Good*. In *Brock*, a statute required the Secretary of Labor to issue a "final determination" of whether a grant recipient had misused job-training funds within 120 days of receiving a complaint.[148] The Secretary missed the deadline but proceeded to seek to recover misused funds.[149] The question was whether the Secretary's failure to act within that period caused him to lose the power to recover misused funds.[150]

While the exact holding in *Brock* is muddled,[151] one thing is absolutely clear: The *Brock* Court expressly stated that "[w]e

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[146] *Id.* at 82–83.
[147] *Id.* at 83 (citations omitted).
[148] Brock v. Pierce Cty., 476 U.S. 253, 254–55 (1986).
[149] *Id.* at 256–57.
[150] *Id.* at 253.
[151] Three possible holdings are suggested in *Brock*:
(1) "We hold that CETA's requirement that the Secretary 'shall' take action within 120 days does not, standing alone, divest the Secretary of jurisdiction to act after that time. There is simply no indication in the statute or its legislative history that Congress intended to remove the Secretary's enforcement powers if he fails to issue a final determination on a complaint or audit within 120 days." *Id.* at 266.
(2) "We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act." *Id.* at 260 (footnote omitted).

need not, *and do not*, hold that a statutory deadline for agency action can never bar later action unless that consequence is stated explicitly in the statute."[152] How much more clearly could a court state what its holding was *not*? Since both the *Montford* court and the Commission—not to mention the Supreme Court in *Good*[153]—got *Brock* wrong, it becomes necessary to see if section 4E of the Exchange Act can be meaningfully distinguished from the statute analyzed in *Brock*. There are in fact, many distinctions between the two statutes.[154]

In *Brock*, the Court found that the "complainant" whose complaint was not acted on within the 120-day statutory period would have standing to bring an action in federal court to compel agency action.[155] Also,

> [i]f respondent is correct in arguing that Congress, in enacting [the applicable statute] intended to protect grant recipients from lengthy delays in audits, grant recipients such as respondent would be within the zone of interests protected by [the statute], and would therefore have standing to bring an action under the APA to the same extent as a complainant.[156]

> (3) "[Even under respondent's theory, § 106(b) cannot be jurisdictional, because it would then permit the Secretary's inaction to prejudice individual complainants seeking to enforce their rights under CETA. We hold, therefore, that the mere use of the word 'shall' in § 106(b), standing alone, is not enough to remove the Secretary's power to act after 120 days." *Id.* at 262.

To avoid getting caught in the thicket of deciding exactly what the holding of *Brock* is, I consider both statements discussed in the text to be its holdings. *See* United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924) (where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other) (citation and internal quotation marks omitted). For an extensive discussion of how to identify the holding in a case, see Stephen E. Ryan, *Guns and Dictum: Is the Fifth Circuit's Finding of an Individual Right under the Second Amendment Dictum or Holding*, 81 N.C. L. REV. 853, 856, 858 (2003) (describing "prescriptive" and "descriptive" techniques of deriving *ratio* decidendi, or holding, of case; citing *Title Ins.* as using "prescriptive" technique).

[152] *Brock*, 476 U.S. at 262 n.9 (emphasis added).

[153] United States v. James Daniel Good Real Prop., 510 U.S. 43, 63 (1993).

[154] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 4E(a)(1), 124 Stat. 1867 (2010).

[155] *Brock*, 476 U.S at 260 n.7.

[156] *Id.*

No such comparable provision is contained in the Exchange Act, nor has it ever been suggested that any such procedures can be inferred to be available, in part because the typical SEC investigation does not contain the neat categories of complainant and grant recipients. Even if an investigatee could sue to compel the Commission to decide whether to sue or drop the case it would seem unrealistic, if not utterly foolhardy, for an investigatee to do so since the likely reaction of the SEC would be to jump off the fence and institute an enforcement action.

Another distinction is that, in *Brock*, the statute did more than require the Secretary to file an action; it required the Secretary to resolve the entire dispute within the 120-day period.[157] "This is a more substantial task than filing a complaint, and the Secretary's ability to complete it within 120 days is subject to factors beyond his control."[158] There is less reason, therefore, to believe that Congress intended such drastic consequences to follow from the Secretary's failure to meet the 120-day deadline.[159] By contrast, in the case of section 4E, all that is required is that the Commission file an action or decide to close the case within 180 days of the Staff's providing a written Wells notification which by definition is not done until nearly the end of the investigative process; moreover, the deadline can be extended.[160]

The *Brock* Court found direct support for its holding in the statute's legislative history.[161] Specifically in *Brock*, there was a floor colloquy in which the sponsor of an amendment containing the deadline expressly agreed that a failure to meet the deadline would "not affect the Secretary's jurisdiction in the matter."[162] The Court found the colloquy was not "controlling" but, because it was consistent with the statutory language and other legislative history, they found it to "provide evidence of Congress' intent."[163] The Court also found that the statute of which the 120-day period was a part was aimed at "the growing incidence of fraud and misuse of CETA funds by state and local

[157] *Id.* at 266.
[158] *Id.* at 261.
[159] *Id.*
[160] 15 U.S.C. § 78d-5(a)(2) (2012).
[161] *Brock*, 476 U.S. at 264–65.
[162] *Id.* at 263.
[163] *Id.*

governments," and that "[a] primary purpose of the [statute] was to strengthen the Secretary's hand in dealing with illegal practices."[164] By contrast, there is nothing in the legislative history of Dodd-Frank, as it directly pertains to section 4E, that supports the *Montford* holding.[165] In fact, a fair reading of the legislative history stands in stark contrast with the reading given the legislative history by both the SEC and the *Montford* court.[166]

Good held that the Government violated due process in a civil forfeiture case by seizing real property without giving the owner notice and an opportunity to be heard.[167] To the point here, *Good* also held that a court could not dismiss a forfeiture action filed within the statute of limitations when government officials failed to comply with "a series of internal notification and reporting requirements," including two "reporting up" requirements and a mandate that a forfeiture action must be "immediately" and "forthwith" brought if the Attorney General believes one is warranted.[168]

The Court based that conclusion on its reading of two previous Supreme Court decisions, *Brock* and *United States v. Montalvo-Murillo,*[169] which the *Good* Court characterized has having "held that if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction."[170] As we have already noted, that was not the holding in *Brock* and it is a stretch to say that *Montalvo-Murillo* conforms to this categorization.[171]

The Bail Reform Act of 1984 stated that a "judicial officer shall hold a hearing" to determine whether to grant bail to an arrested person and that "hearing shall be held *immediately*

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[164] *Id.*

[165] *See generally Dodd-Frank Wall Street Reform and Consumer Financial Protection Act: A Brief Legislative History with Links, Reports, and Summaries*, LAW LIBRARIANS SOC'Y OF WASH., D.C., http://www.llsdc.org/dodd-frank-legislative-history [https://perma.cc/M9Y7-BVQU].

[166] *See infra* text accompanying notes 174–211.

[167] United States v. James Daniel Good Real Prop., 510 U.S. 43, 62 (1993).

[168] *Id.* at 48 (internal quotation marks and citation omitted).

[169] 495 U.S. 711 (1990).

[170] *Good*, 510 U.S. at 63.

[171] *Montalvo-Murillo*, 495 U.S. at 717–21.

upon the person's first appearance before the judicial officer."[172] *Montalvo-Murillo* held that failure to hold an immediate hearing did not require release of the accused, rejecting the notion that there exists a "presumption or general rule that for every duty imposed upon the court or the Government and its prosecutors there must exist some corollary punitive sanction for departures or omissions, even if negligent."[173]

While the Court noted "the Act is silent on the issue of a remedy for violations of its time limits," this was not the end of the Court's discussion, just the beginning.[174] The Court found it necessary to read the provision in context, "seek[ing] only a practical remedy, not one that strips the Government of all authority to act."[175] This led to an analysis of the statute's purpose and legislative history, which the Court found to be consistent with its conclusion.[176]

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[172] 18 U.S.C. § 3142(f) (2012) (emphasis added).

[173] *Montalvo-Murillo*, 495 U.S. at 717.

[174] *Id.* at 716.

[175] *Id.* at 719.

[176] *Id.* at 718–19. Thus, the Court found that "[a]utomatic release contravenes the object of the statute: to provide fair bail procedures while protecting the safety of the public and assuring the appearance at trial of defendants found likely to flee." *Id.* at 720. It also found:

> Assessing the situation in realistic and practical terms, it is inevitable that, despite the most diligent efforts of the Government and the courts, some errors in the application of the time requirements of § 3142(f) will occur. Detention proceedings take place during the disordered period following arrest. As this case well illustrates, circumstances such as the involvement of more than one district, doubts about whether the defendant was subject to temporary detention under § 3142(d), and ambiguity in requests for continuances may contribute to a missed deadline for which no real blame can be fixed. In these situations, there is no reason to bestow upon the defendant a windfall and to visit upon the Government and the citizens a severe penalty by mandating release of possibly dangerous defendants every time some deviation from the strictures of § 3142(f) occurs.

Id. By contrast, there is nothing "disordered" about the period starting with a written Wells notification. Everything is under the Staff's control. *See* Montford & Co., Investment Advisors Act Release Nos. IA-3829; AP-3-14536, 108 SEC Docket 3763, 3770 n.60 (May 2, 2014) (citation omitted). The Staff can ensure that all its ducks are in a row before it provides the Wells notification, and, if

Having established the shaky basis for *Montford*'s reliance placed on *Brock*, I turn to the key issue of the purpose of section 4E as indicated on its face, illuminated by a reference to its context and legislative history. Notably, the D.C. Circuit did not discuss the purpose of section 4E, Dodd-Frank as a whole, or any portion of this vast Act.[177] Reference, therefore, must be made to the Commission's Opinion where it obliquely dealt with statutory purpose as part of an overall analysis that the D.C. Court found to be permissible.[178]

A. The Purpose of Section 4E: Painting with a Proper-Sized Brush

In discussing the purpose of section 4E, the Commission painted with a very broad brush, indeed far too broad.[179] It never searched for evidence of Congressional intent concerning section 4E.[180] Its comments on statutory purpose started off with a reference to the Act as a whole and its subtitle XII(B) ("Increasing Regulatory Enforcement and Remedies"),[181] within which section 4E was placed:

> Section 4E was enacted as part of the Dodd-Frank Act, a statute that significantly expanded the Commission's authority to police fraud in the securities industry. This particular provision

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there is a bona fide basis for one or more extensions, it can obtain an extension and postpone the deadline.

[177] Montford & Co. v. SEC, 793 F.3d 76, 83 (D.C. Cir. 2015).

[178] *In re* Montford & Co. (*Montford/SEC*), Investment Advisors Act Release No. 3829, 108 SEC Docket 3763, 3771–73 (May 2, 2014).

[179] *See id.*

[180] *See id.*

[181] *Id.* at 3771 (quoting H.R. REP. No. 111-517, at 870–71 (2010)). Dodd-Frank was organized into 16 titles. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1, 124 Stat. 1376, 1376−86 (2010). One of these, Title IX ("Investor Protections and Improvements to the Regulation of Securities") was divided into 10 subtitles, numbered as A–J. *Id.* at 1381–83. Section 929U—codified at 15 U.S.C. § 78d-5, but adding to section 4 of the Securities and Exchange Act of 1934, sec. 929U, § 4, 124 Stat. at 1867—was contained in subtitle B ("Increasing Regulatory Enforcement and Remedies"), the "section" to which the Commission referred in its Opinion. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, sec. 929U, § 4, 124 Stat. 1376 (2010) (codified at 15 U.S.C. § 78d-5 (2012)); *Montford/SEC*, 108 SEC Docket at 3771.

> was included under the [subtitle] of the Dodd-Frank Act titled "Increasing Regulatory Enforcement and Remedies," which Congress explained at the time "strengthens the SEC's authority to conduct investigations."[182]

Then, taking note of a general Government-wide statute of limitations, contained in 28 U.S.C. § 2462, the Commission further opined:

> In enacting Section 4E, Congress said nothing about creating a new abbreviated statute of limitations, either as a replacement for or a supplement to 28 U.S.C. § 2462. Moreover, it would be inconsistent with Congress's intent to increase our authority to curb securities fraud under the Dodd-Frank Act section enacting Section 4E to read the provision as limiting our ability to act in a proceeding that otherwise meets the requirements of 28 U.S.C. § 2462. This is particularly true where, as here, dismissal of the action would harm the investing public by foreclosing the Commission from taking appropriate remedial measures.[183]

Had the Commission looked more closely at the legislative history of section 4E, it would have found language that cast serious doubt on the inference that its purpose was subsumed within a larger statutory purpose of "strengthen[ing]" (i.e., enhancing) the Commission's statutory powers.[184] Instead, a fair reading of the purpose of section 4E is that it stands on its own and that it is surrounded by strong expressions of Congressional dissatisfaction with the recent history of SEC enforcement.[185]

First, the context of section 4E(a)(1) makes clear it imposes a deadline.[186] A "deadline" is "a fixed time limit: a date or time before which something must be done and after which the opportunity passes or a penalty follows."[187] This deadline says that the SEC

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[182] *Montford/SEC*, 108 SEC Docket at 3771 (quoting H.R. REP. NO. 111-517, at 870–71 (2010)).

[183] *Id.* (footnotes omitted).

[184] *Compare id.*, *with* H.R. REP. NO. 111-687, pt. 1, at 46–47, 78 (2010).

[185] *See generally* 156 CONG. REC. 9, 12430–34 (2010) (statement of Rep. Kanjorski).

[186] Congress recognized that Section 4E(a)(1) imposes a "deadline"—section 4E is titled "*Deadline* for completing examinations, inspections and enforcement actions," and the very next subsection, (a)(2), expressly, twice, refers to the 180-day period as "*the deadline* specified in paragraph (1)." Sec. 929U, § 4, 124 Stat. at 1867–68 (codified at 15 U.S.C. § 78d-5 (2012)).

[187] *Deadline*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002).

Staff must either file an action or inform their superiors of an intent to drop the case by an easily determinable date, and it was entirely within the Commission's control whether to do so or not.[188] By contrast, *Brock* required a "determination" of misuse of funds to completed by a date certain but did not require filing an action by that date,[189] and *Good* was focused on some internal reporting up deadlines as well as the commencement of a forfeiture action after the Attorney General found such an action warranted.[190] Therefore on its face, the statute in *Brock* was silent on whether an action must be brought, so there is an obvious uncertainty as to the consequence of missing the deadline, and the statute in *Good* was inherently more ambiguous concerning the consequence of missing the reporting-up deadlines or when a determination that follow-up was warranted was made.[191] But not so in the case of section 4E, which required by the specified date certain, "the Commission staff [to] either file an action against such person or provide notice to the Director of the Division of Enforcement of its intent to not file an action."[192] In other words, a consequence of not suing by the deadline is expressly stated: either sue or drop the case.[193]

Moreover, the light cast on section 4E's meaning by pertinent legislative history is far different from what was described by the Commission in its Opinion and cleared by the court.[194] The Conference Report on the enacted version of Dodd-Frank deals directly with what became section 4E: "[Title IX Subtitle B, of Dodd-Frank] requires the SEC to complete investigations and examinations within certain time frames, subject to exceptions for complex cases."[195] Virtually the same language was contained in a House Report on H.R. 3817, an earlier version of section 4E: "This section generally requires the SEC to complete enforcement

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[188] Sec. 929U, § 4, 124 Stat. at 1867–68 (codified at 15 U.S.C. § 78d-5 (2012)).

[189] Brock v. Pierce Cty., 476 U.S. 253, 254 (1986).

[190] United States v. James Daniel Good Real Prop., 510 U.S. 43, 48 (1993).

[191] *Compare Brock*, 476 U.S. at 266, *with Good*, 510 U.S. at 64–65.

[192] Sec. 929U, § 4, 124 Stat. at 1867 (codified at 15 U.S.C. § 78d-5 (2012)).

[193] *See id.*

[194] *Compare* H.R. REP. NO. 111-517, at 871 (2010) *and* H.R. REP. NO. 111-687, pt. 1, at 78 (2010), *with* Montford & Co. (*Montford/SEC*), Investment Advisors Act Release Nos. IA-3829; AP-3-14536, 108 SEC Docket 3763, 3771–73 (May 2, 2014).

[195] H.R. REP. NO. 111-517, at 871.

investigations within 180 days after staff provides a written Wells notice to any person. The section contains exceptions for complex actions."[196] This language does not speak of enhancing Commission enforcement authority; rather, it tends to narrow it.[197] Moreover, it appears to leave no doubt as to Congress's intent if the Commission's staff failed to file an action within the deadline, and, to boot, it provided a safety valve for the Staff, to seek an extension of the deadline.[198]

In addition, the Conference Report on Dodd-Frank, and the rest of Dodd-Frank itself, say far more about Commission enforcement than that the Act "strengthens the SEC's authority to conduct investigations,"[199] (which is how the Commission's Opinion in *Montford/SEC* characterizes the purpose of section 4E).[200] The statute as a whole, and especially Title IX, simply cannot be seen simply as a bouquet thrown the Commission's way.[201] Instead, it is filled with provisions aimed at changes in the Commission's overall operations.[202]

Thus, Subtitle A ("Increasing Investor Protection"),

> establishes mechanisms to assist investors in their dealings with the SEC by creating an Office of Investor Advocate and an Ombudsman. It also creates an Investor Advisory Committee at the SEC, and clarifies the authority of the SEC to engage in investor testing. Subtitle A directs the SEC to study the standards of care applicable to broker-dealers and investment advisers giving investment advice to retail customers, and it authorizes the SEC to promulgate rules imposing a fiduciary duty on broker-dealers and investment advisers to protect retail customers. In addition, the subtitle streamlines filing procedures for self-regulatory organizations. Subtitle A also clarifies the authority of the SEC to require investor disclosures before purchase of investment products and services. Finally, the

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[196] H.R. REP. NO. 111-687, at 78.

[197] *See id.*

[198] *See id.*

[199] H.R. REP. NO. 111-517, at 870.

[200] *Montford/SEC*, 108 SEC Docket 3763, 3771.

[201] *See* 156 CONG. REC. 9,12432 (2010) (statement of Rep. Kanjorski); *see also* H.R. REP. NO. 111-687, at 46–47.

[202] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, sec. 929U, § 4, 124 Stat. 1376, 1867–68 (2010) (codified at 15 U.S.C. § 78d-5 (2012)); H.R. REP. NO. 111-517, at 871; *see also* H.R. REP. NO. 111-687, at 78.

> subtitle requires studies on the enhancement of investment adviser examinations, financial literacy, mutual fund advertising, conflicts of interest, improved investor access to information on investment advisers and broker-dealers, and financial planners and the use of financial designations.[203]

Additionally, Title IX, Subtitle F ("Improvements to the Management of the Securities and Exchange Commission") "requires several reports designed to assess SEC performance and provide recommendations for improvements ... related to internal supervisory controls, personnel management, financial controls, and oversight of national securities associations."[204] Subtitle F also "requires the SEC to hire a consultant to study the SEC's operations and determine whether there is a need for comprehensive reform."[205] It also "creates a suggestion program for SEC employees and requires the Divisions of Trading and Markets and Investment Management to have examiners on their staffs" and "requires the GAO to study issues surrounding employees who leave the SEC to work in the securities industry."[206]

Thus, it is evident by the number of studies that this Title required that Congress not only wanted to provide broader authority to the SEC in certain specified circumstances but also to require the SEC to clean up its act in various areas.[207] Moreover, it is useful to recall the historical context in which Dodd-Frank was enacted. It came on the heels of the worst financial crisis since the Great Depression, and soon after the revelation of the Madoff scandal, a multi-year, multibillion-dollar Ponzi scheme that the SEC enforcement staff was handed on a silver platter, but somehow managed to fail to uncover for years.[208] In addition, at the same

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[203] H.R. REP. NO. 111-517, at 870.

[204] *Id.* at 873.

[205] *Id.*

[206] *Id.*

[207] *See id.* at 870, 873–74.

[208] *See generally* OFFICE OF INVESTIGATIONS, SEC, OIG-509, INVESTIGATION OF FAILURE OF THE SEC TO UNCOVER BERNARD MADOFF'S PONZI SCHEME at 1–2 (2009), http://www.sec.gov/news/studies/2009/oig-509.pdf [https://perma.cc/J3DN-HT54]. Ironically, one SEC Enforcement staffer told the SEC's OIG that one of the causes of the Commission's failure to uncover what Madoff was up to was that a key staffer was spending so much of her time closing old investigations. "That's what [she] spent a lot of her time doing, writing closing memos because she had inherited a branch where everybody had left and left

time another massive securities fraud, Stanford, was allowed by staff inaction to grow exponentially for fourteen years after the SEC examiners had concluded this was likely a Ponzi scheme before the Commission took enforcement action.[209] As a result, many Congressmen and Senators were not happy with the SEC's record.

B. The Views of the Sponsor of Section E

The SEC's record was openly criticized[210] by Rep. Paul E. Kanjorski, Chair of the House Financial Services Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises.[211] On October 1, 2009, he issued a "discussion draft" of a proposed bill, the Investor Protection Act of 2009, containing, among other things, what seemed to amount to a statute of limitation: it would have required the SEC "to complete any examination, investigations, or enforcement action initiated by the Commission not later than 180 days after the date on which such examination, inspection, or enforcement action is commenced."[212] After significant modification, this provision was

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these old cases in shambles, and you had to go back to the court records, pulling all these court files, and recreating files to close them." *Id.* at 366.

[209] *See* OFFICE OF INSPECTOR GENERAL, SEC, OIG-526, INVESTIGATION OF THE SEC'S RESPONSE TO CONCERNS REGARDING ROBERT ALLEN STANFORD'S ALLEGED PONZI SCHEME at 149 (2010), https://www.sec.gov/about/offices/oig/reports/investigations/2010/oig-526.pdf [https://perma.cc/3DES-Y9KW].

[210] *See generally The Stanford Ponzi Scheme: Lessons for Protecting Investors from the Next Securities Fraud: Hearing Before the Subcomm. On Oversight and Investigations of the H. Comm. On Fin. Services*, 112th Cong. 1 (2012). In addition to the SEC's highly visible problems with respect to Madoff and Stanford, the OIG issued a highly critical report on the then–Enforcement Director's communication with her predecessor concerning the Commission's ongoing investigation of an entity not represented by the former Director. *See* OFFICE OF INSPECTOR GENERAL, SEC, OIG-502, ALLEGATIONS OF IMPROPER DISCLOSURES AND ASSURANCES GIVEN at 45–46 (2009), https://www.sec.gov/about/offices/oig/reports/investigations/2009/oig-502.pdf [https://perma.cc/ZWY6-DGVQ].

[211] *See Subcommittee Assignments for the 111th Congress*, HOUSE FIN. SERVS. COMMITTEE, https://web.archive.org/web/20100608223332/http://financialservices.house.gov/subassignments.html [https://perma.cc/J67X-RPY4].

[212] *See* Davis Polk Client Memorandum, Representative Kanjorski Releases Investor Protection, Private Investment Fund Advisers Registration and Federal Insurance Office Proposals, Oct. 6, 2009, https://www.davispolk.com/files/files/Publication/948e554f-2037-4f0e-81eb-001bc52e4762/Preview/PublicationAttachment/43b23898-544a-4344-bfbb-9c30be53402c/100609_Kanjorski.pdf. There is no record on why this draft provision was so substantially modified by the

enacted in Dodd Frank as section 4E.[213] Months before his introduction of H.R. 3817, his subcommittee had held hearings on the Madoff fiasco, "using" in his words, "the largest known instance of securities fraud as a case study to guide the work of the Financial Services Committee in reshaping and reforming our Nation's financial services regulatory system."[214] Chairman Kanjorski (also Chairman of the Subcommittee) expressed the view that the securities regulatory "motor is broken beyond repair. We therefore need to invent a new engine to ensure that the securities regulatory system reflects today's realities and can respond effectively to tomorrow's innovations."[215] When top Commission officials, citing an ongoing investigation, refused to comment on the specifics of the Madoff case, including why the SEC never caught the fraud, Congressman Kanjorski had a strong reaction: "[T]he lack of cooperation shown in the last several weeks, and I think the abuse of authority or the attempt to bring a protective shield over an executive agency or independent agency of this government is not acceptable."[216]

Notably, he also expounded on the issue of excessive delays in SEC enforcement:

> Let me just say that justice delayed very often is justice denied. And if we are going to have cooperation, and we are going to have an effective enforcement tool of the Securities and Exchange Commission, we cannot have the culture or mentality

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time it became law. One problem with the original version was that it required an "SEC enforcement action" (without clarifying whether this referred only to an administrative proceeding or also to a civil action) to be completed within 180 days of its commencement—far too short a period to give respondents or defendants an opportunity to prepare their defense and, in any event, outside the control of the Commission if it were applied to a civil (court) action. *See id.* In any event, neither the SEC nor the *Montford* court commented on the evolution of this provision in their respective opinions. *See* Montford & Co. v. SEC (*Montford/SEC*), 793 F.3d 76, 81–83 (D.C. Cir. 2015); Montford & Co., Investment Advisors Act Release Nos. IA-3829; AP-3-14536, 108 SEC Docket 3763, 3771–73 (May 2, 2014).

[213] H.R. REP. NO. 111-687, pt. 1, at 48 (2010).

[214] *Assessing The Madoff Ponzi Scheme and Regulatory Failures: Hearing Before the S. Comm. on Capital Markets, Insurance, and Government Sponsored Enterprises of the H. Comm. on Financial Services*, 111th Cong. 1 (2009), http://library.clerk.house.gov/reference-files/111_fin_005.pdf [https://perma.cc/XQK5-PD2X].

[215] *Id.* at 2.

[216] *Id.* at 59.

> that I sense over there that in examination and investigation, a process can go on forever. I mean, I have stories that will shrivel your ears with how long enforcement proceedings have just laid around with no action having been taken. I am getting the impression that is the culture now, that there is not an intent to do something.
> So one of the things the committee will be considering in some of this legislation is whether or not we can impose a 180-day rule. You know, if we can get criminal prosecutions within 180 days in this country, it seems to me once we charge some corporate activity as being a violation of the SEC, let us move along; 180 days get to a trial, let us get it decided. Something like this.[217]

Later, during the markup of H.R. 3817, Rep. Kanjorski, after reviewing the Inspector General's Madoff Report, stated, "'it became eminently clear' that the SEC was 'a dysfunctional agency' that could not protect investors if it 'does not implement the laws' Congress enacts."[218] Finally, when he spoke on the House floor at the time the full House considered what had become Dodd-Frank, Rep. Kanjorski made no secret of his belief that the SEC needed more than new legislative authority to cure its problems.[219] In addition to providing the SEC with more manpower, the bill dealt with "the SEC's systemic failures to effectively police the markets in recent years,"[220] which

> required Congress to do even more to shake up the agency's daily operations. As such, the legislation includes my provision mandating an expeditious, independent, comprehensive study of the securities regulatory regime by a high caliber body with expertise in organizational restructuring to identify deficiencies and reforms, and ensure that the SEC and other regulatory entities put in place further improvements designed to provide superior investor protection.[221]

He concluded with a direct reference to what would become section 4E: "The final bill also includes my deadlines generally *forcing* the SEC to complete enforcement, compliance examinations,

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[217] *Id.* at 61.

[218] *See* Pet'r's Br. at 24–25, Montford & Co. v. SEC, 793 F.3d 76 (D.C. Cir. 2015) (quoting Representative Kanjorski, Remarks at the House Financial Services Committee Mark-up (Oct. 27, 2009) (*video recording*), *available at* http://financialserv.edgeboss.net/wmedia/financialserv/markup102709.wvx).

[219] 156 CONG. REC. 9,12432 (2010) (statement of Rep. Kanjorski).

[220] *Id.*

[221] *Id.*

and inspections within 180 days, with some limited exemptions for complex cases."[222] Manifestly, "forcing" a deadline on the agency is far from promulgating a deadline that the SEC can treat as an "internal timing directive."[223]

The spoken and written words of Congressman Kanjorski merit emphasis because of his role in the enactment of section 4E.[224] Not only do they illustrate the depth of his dissatisfaction with the performance of the SEC, but they support the conclusion that the purpose of section 4E was, as his remarks stated, to "forc[e]" the SEC to act within the 180-day deadline or get an extension.[225] The SEC's view, which is supported by the D.C. Circuit, was that such an interpretation conflicted with the purportedly sole purpose of Title IX of Dodd-Frank, i.e., to buttress the Commission's authority.[226] In reality, the remarks of section 4E's sponsor and the other provisions of Dodd-Frank show that the intent was not simply to increase Commission authority, but also to require changes in its operations.[227]

IV. IS SECTION 4E DEAD?

While there is no guarantee that an attempt to convince a court to interpret section 4E differently than it was interpreted in *Montford* would be successful, it would appear that, where the facts allow an argument that an SEC case was tardily filed under section 4E, it would be worth the attempt. This is because the SEC and the courts, in viewing section 4E, misread Supreme

[222] *Id.* (emphasis added).

[223] *Compare id.*, *with* Montford & Co. (*Montford/SEC*), Investment Advisors Act Release Nos. IA-3829; AP-3-14536, 108 SEC Docket 3763, 3771–73 (May 2, 2014) (quoting U.S. v. James Daniel Good Real Prop., 510 U.S. 43, 65 (1993)).

[224] *See* 155 CONG. REC. 18,25035 (2009).

[225] 156 CONG. REC. 9,12432 (statement of Rep. Kanjorski).

[226] *See Montford/SEC*, 108 SEC Docket at 3771–73; *see also* Montford and Co. v. SEC, 793 F.3d 76, 82–83 (D.C. Cir. 2015).

[227] The statements of the sponsor of legislation "are an authoritative guide to the statute's construction." N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 526–27 (1982); *accord* Brock v. Pierce Cty., 476 U.S. 253, 263 (1986) (stating an individual legislator's remarks "should not be given controlling effect, but when they are consistent with the statutory language and other legislative history, they provide evidence of Congress' intent."). Thus, at least to the extent that a particular Supreme Court majority is, today, willing to consider legislative history, the statements of a statutory provision's author merit a level of special attention. *See id.*; *N. Haven Bd. of Educ.*, 456 U.S. at 526–27.

Court precedent and overlooked significant evidence of legislative intent that conflicts with the rather simplistic view that treating section 4E as a statute of limitation conflicted with the purpose of enacting subtitle IX of Dodd-Frank (strengthening the SEC's enforcement arsenal).[228] As I have shown, there is plenty of evidence that Congress had the intention to, in Congressman Kanjorski's words, "forc[e]" the SEC to bring cases within the deadline.[229]

A final judicial resolution to what section 4E means ultimately awaits decision by the Supreme Court of the United States. For the present, however, given the fact that there is no inter-Circuit conflict, there is no immediate prospect that there ever will be an occasion for the Court to determine what section 4E means. Thus, one might conclude that we lawyers can only reach our own private conclusions unless we have a client that can and will test this issue in litigation. But before we conclude that a court case is the only way to solve this problem, let us consider the possible role of the SEC or the Congress.

Is there any hope that a future SEC will decide to reinterpret section 4E and treat it like a limitations statute? The fact is that, given the safety valve enacted into the statute by the addition of the possibility of an extension *ad infinitum*, even were the Commission so to decide, this action would be of dubious significance unless the Staff or the Commission were to take the initiative by deciding to limit the number or length of extensions.[230] Even if no such change were enacted, the Staff or the Commission can turn down meritless extension requests—extensions caused by sheer inefficiency or foot-dragging.[231] If flimsy extension requests were denied, "violations" of the statute would appear almost impossible if someone at the SEC is minding the store.[232] Then, assuming proper planning on the part of the Staff, such violations

[228] *See Brock*, 476 U.S. at 263; *N. Haven Bd. of Educ.*, 456 U.S. at 526–27. *Compare* Montford & Co. (*Montford/SEC*), Investment Advisors Act Release Nos. IA-3829; AP-3-14536, 108 SEC Docket 3763, 3771–73 (May 2, 2014), *affirming Montford/ALJ*, Admin. Proc. No. 3-14536 (Apr. 20, 2012), *with* 156 CONG. REC. 9,12432 (2010) (statement of Rep. Kanjorski).

[229] 156 CONG. REC. 9,12432 (2010) (statement of Rep. Kanjorski); *see* H.R. REP. NO. 111-687, pt. 1, at 78 (2010).

[230] *See Montford & Co.*, 793 F.3d at 83 (holding section 4E's 180-day time limit is not "jurisdictional").

[231] *See id.*

[232] *See id.*

would occur only if a particular request for an extension is so unreasonable that it is, unexpectedly, not granted.[233]

Thus, properly understood, section 4E should not be viewed as much of a shackle as far as the Commission or its staff are concerned.[234] If the statute is not to be rendered a complete nullity, the Commission would be well-advised to adopt a new interpretation of this section and give it the teeth its Staff needs to understand the need to avoid the age-old problem of excessive delay. However, realism intrudes and suggests that there is virtually no chance any of this would happen: if the Commission felt that a particular staff recommendation took too long to reach "the table," as Commission consideration was called in my day, then it can always deny the recommendation.

Finally, the issue can be reconsidered in Congress. Surely Congress could make the statute clearer and, perhaps, even wiser. As far as clarity is concerned, if Congress either believed that the original statute, as enacted, was intended to act as a limitations statute, or concluded that, whatever the intent of Congress in enacting section 4E, making it a limitations statute would be wise policy, it could either instruct the SEC in, say, an appropriations bill to "reinterpret" section 4E, or it could amend it by explicitly stating that it is a limitations statute (or by clarifying in no uncertain term that filing or closing was required within 180 days of a Wells notification, or some other measurement of a deadline). Congress could create a new, shorter limitations period for SEC enforcement proceedings than the general federal limitations statute, which establishes a limitation period of five years from when "the claim first accrued."[235] Or Congress could add more days to the 180-day deadline and permit only one 90-day extension.[236] The alternatives are endless, and all would be an improvement on the *status quo*.

In the meantime, were a defendant or respondent litigating an enforcement case with the SEC to raise a section 4E defense if one were available, there is a strong basis to attempt to persuade a court of appeal that *Montford* was wrongly decided.

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[233] *See id.*
[234] *See id.*
[235] 28 U.S.C. § 2462 (2012).
[236] *See id.*