> **Commission has furthered that goal both through our implementation of the statute and through our own initiatives. Lasting reform—not just "checking the box" for a list of rules—is the only way we can safeguard against another financial crisis. With increased transparency, better investor protections, and new regulatory tools, the Commission continues to work towards a stronger marketplace and financial future for all Americans.**

Also not surprisingly, President Barack Obama praised the Dodd-Frank Act for helping America battle back from the 2008 recession. "In America, we should reward drive, innovation, and fair play. That's what Wall Street reform does. It makes sure everybody plays by the same set of rules."

> **If we keep moving forward, not backward—if we keep building an economy that rewards responsibility instead of recklessness—then we won't just keep coming back, we'll come back stronger than ever. Wall Street Reform now allows us to crack down on some of the worst types of recklessness that brought our economy to its knees, from big banks making huge, risky bets using borrowed money, to paying executives in a way that rewarded irresponsible behavior.**

So, where does Dodd-Frank at Five leave us, and more importantly, where is it taking us?

One interesting place to look may be the US Court of Appeals for the D.C. Circuit. The court recently ruled that a small Texas bank does indeed have the legal standing to argue the very existence of the CFPB is unconstitutional.

The original lawsuit was filed by State National Bank of Big Spring, Texas, which argued that it was being unconstitutionally harmed by the CFPB. Two conservative groups and 11 State attorneys general signed on to the case. The suit was previously dismissed by a federal judge who said the bank lacked standing and could not prove it had been harmed.

But the DC Circuit Court said that because the bank is regulated by the CFPB, it is not a "mere outsider" making a legal challenge. "It would make little sense to force a regulated entity to violate a law (and thereby trigger an enforcement action against it) simply so that the regulated entity can challenge the constitutionality of the regulating agency," the court stated in its ruling.

There was some good news for Dodd-Frank in the DC Circuit's ruling, however. The court agreed with the lower court's dismissal of the bank's legal challenge to the Financial Stability Oversight Council and regulators' ability to intervene when sizable financial institutions get in trouble and could harm the overall US economy. The court underscored that the Texas bank did not have standing to challenge those parts of Dodd-Frank.

Deadlines & SEC Enforcement: When 180 Days Is Not 180 Days

BY THOMAS O. GORMAN

Thomas O. Gorman is a partner in the Washington, D.C. office of Dorsey and Whitney LLP. He also publishes a blog, "SEC Actions" (www.secactions.com) that focuses on the Securities and Exchange Commission (SEC) and other securities industry regulators. This article is taken from blog post that ran July 12. Contact: Gorman.tom@Dorsey.com.

When does a 180-day deadline not mean that in 180 days your time is up? *Answer*: When the Securities and Exchange Commission (SEC) says so, and the US Court of Appeals for the D.C. Circuit gives the conclusion *Chevron* deference.[1] That is the holding of *Montford and Company, Inc. v. SEC*,[2] which was decided July 10.

The *Montford* decision centers on the meaning of Exchange Act Section 4E which provides that not "later than 180 days after the date on which Commission staff provides 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." The Section was added to the Exchange Act as part of the Dodd-Frank Act. Petitioners Montford and Co., a registered investment adviser, and Ernest Montford, its founder, claimed this provision was violated when an enforcement action was brought against them. They learned that 180 days in not 180 days if the SEC says so.

The underlying action is straight forward. Montford and Co. advises institutional investors. The firm claims in advertisements that is independent and conflict free. The adviser represents in its Form ADV that it is independent, avoids material misrepresentations in any investment recommendations and would disclose any matter that could reasonably impair its recommendations or make them unbiased.

In 2003 the firm began recommending Stanley Kowalewski, an investment manager specializing in hedge funds. When Mr. Kowalewski told the adviser in 2009 that he was leaving his current employment to launch his own firm, SJK Investment Management LLC, Mr. Montford stated he would try and convince clients to follow. Over a period of months Mr. Montford and his staff provided substantial assistance in transferring clients to the new enterprise. Nine clients transferred their accounts.

In view of the work involved with the transition, Mr. Kowalewski agreed to pay the adviser $130,000. None of the clients were told about the payment. Later, when the clients learned about the payment many terminated their relationship.

In March 2011, the Commission issued the firm and Mr. Montford a Wells notice. Then, 187 days later, the SEC instituted an administrative proceeding alleging violations of the anti-fraud and reporting sections of the Advisers Act. A motion to dismiss based on Section 4E was denied by the Administrative Law Judge (ALJ) who concluded that an extension had been granted by the SEC's Director of the Division of Enforcement because it was a complex matter. Eventually, the adviser and its principal were found liable and sanctioned. Disgorgement, a penalty and an industry bar were ordered. On appeal the SEC affirmed, concluding that even absent the extension of time from the Director, Section 4E does not require dismissal because it is essentially an internal deadline and not jurisdictional.

The D.C. Circuit also affirmed. The Court concluded that the SEC's interpretation was reasonable and entitled to the *Chevron* deference. When a court reviews an agency construction of its statute there are two questions, according to the Court. The first is whether Congress has directly spoken to the issue. If it has and the answer is clear, the matter ends. If the statute is silent or ambiguous on the point, the question for the reviewing court is if the agency conclusion is a permissible construction of the statute.

In this case the Court held that it did "not owe the Commission's interpretation any less deference because the Commission interprets the scope of its own jurisdiction... . Nor is it relevant that the Commission's interpretation is the result of adjudication, rather than notice-and-comment rulemaking." This is because for "traditional agencies" such as the SEC, adjudication is an appropriate forum in which to exercise lawmaking by interpretation.

Section 4E is ambiguous within the meaning of *Chevron*, the Circuit Court concluded. By not stating a consequence for exceeding the 180-day deadline, Congress has not addressed the issue. Viewed in this context, the SEC's interpretation of the provision as not being jurisdictional or requiring dismissal even absent an extension is reasonable. That conclusion is based on a finding that such deadlines are for internal purposes only.

In *U.S. v. James Daniel Good Real Property*,[3] the Supreme 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.'" Likewise, there is nothing in the text or structure of Section 4E that "overcomes the strong presumption that, when Congress has not stated that an internal deadline shall act as a statute of limitations, courts will not infer such a result," the Court concluded.

While Petitioners are correct that the statute is written in mandatory terms, and argue that its purpose and legislative history all establish that the deadline is to be mandatory, this simply dem-

onstrates that the Section is ambiguous. Petitioners have failed to demonstrate that the SEC's interpretation is unreasonable.

NOTES

1. The "Chevron deference" comes from the US Supreme Court's ruling *in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694, 21 Env't. Rep. Cas. (BNA) 1049, 14 Envtl. L. Rep. 20507 (1984), that held that when a law is ambiguous, the court shall defer to a permissible interpretation of the Executive Branch or government agencies.
2. *Montford and Company, Inc. v. SEC*, No. 14-1126 (Decided July 10, 2015).
3. *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993).

2015 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)

F. JOSEPH WARIN, MICHAEL DIAMANT & MELISSA FARRAR

F. Joseph Warin is a Partner and Chair of Gibson, Dunn & Crutcher's Washington, D.C. Office's Litigation Department. Mr. Warin also serves as co-chair of the firm's White Collar Defense and Investigations Practice Group. Michael S. Diamant is a Partner in the Washington, D.C. office, and his practice focuses on white collar criminal defense, internal investigations, and corporate compliance. Melissa Farrar is an Associate in the firm's Washington, D.C. office, and she currently practices in the Litigation Department. Contact: fwarin@gibsondunn.com or mdiamant@gibsondunn.com.

2015 came in like a lion, bringing with it remarkable policy changes regarding corporate non-prosecution agreements (NPA) and deferred prosecution agreements (DPA). The Department of Justice's (DOJ's) leadership has articulated new bright-line approaches to post-resolution conduct, including the unprecedented step of revoking an NPA. The judiciary has edged further toward a more interventionist role in DPA oversight. Finally, as we previously predicted, the first of dozens of anticipated NPA resolutions have emerged from the DOJ Tax Division's August 2013 "Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks" (the "DOJ Tax Swiss Bank Program").

This article summarizes highlights from the NPAs and DPAs of the first half of 2015, and addresses shifts in the treatment of NPAs and DPAs by all three branches of government. <H1>NPAs and DPAs in 2015

In the first six months of 2015, the DOJ entered into five DPAs and 23 NPAs. In addition to DOJ's 28 agreements, the Securities and Exchange Commission (SEC) entered into one DPA in the first part of 2015, bringing its total overall NPA and DPA count to eight. This year's 29 year-to-date overall agreements vastly exceeds agreement counts from recent years, with 2014 seeing 13, and 2013 seeing 12 by this time of the year. Indeed, 2015's NPA and DPA count has already exceeded the overall number of NPAs and DPAs in 2013, when there were only 28, and it is closely approaching last year's overall count of 30. This is in large part due to the rollout of NPA resolutions under the DOJ Tax Swiss Bank Program, which account for 15 of the 29.

As demonstrated by the Chart below, NPAs and DPAs have played an increasingly important and consistent role in resolving allegations of corporate wrongdoing since 2000. There have typically been at least 20 agreements per year since 2006, with highs reached in 2007 and 2010 at 39 and 40 agreements, respectively. This year, with 29 agreements already on the books and the promise of dozens more through the DOJ Tax Swiss Bank Program, it is highly likely that 2015 will substantially exceed historical highs. Indeed, in 2007, at this point in the year, only 17 agreements had been publicized; in 2010, there had been only 11.