

Securities and Exchange Commission Historical Society
Interview with Giovanni Prezioso
Conducted on May 6, 2015 by Will Thomas

WT: This is an interview with Giovanni Prezioso for the SEC Historical Society's virtual museum and archive of the history of financial regulation. I am Will Thomas, and the date is May 6, 2015 and we're in Washington, D.C. Thanks very much for agreeing to speak with us. We usually begin with a little bit of biographical background, where you're from and how you ended up in law, and in securities and corporate law in particular.

GP: I grew up in the Baltimore area, having been born in Boston during a period where my parents were living there briefly, and spending a little time in Italy before moving to Baltimore. I was a history and literature major in college. I was very interested in cities and thought about doing city planning. Some of my work with Baltimore County Planning and Zoning Office folks suggested that it would be useful, if you wanted to be a city planner, to have a professional degree of some type, like engineering or economics or law or architecture, and law seemed to be the only plausible one.

Once I got to law school, I discovered that that was something I liked, and I stopped studying city planning and became a lawyer. My first job was at Cleary Gottlieb. Other than my four years at the SEC, that's where I've practiced law since.

WT: I see that you did both of your degrees at Harvard: the AB, as they call it there, in 1979, and the JD in 1982. Did you concentrate on securities while you were at Harvard Law?

GP: No, not at all. I did take securities law my third year, with Professor Louis Loss, who was still teaching at the time. My interest during law school had started to focus mostly on tax issues, and I gave a lot of thought to doing tax work. But I ultimately felt that I wanted to have a broader remit than being just involved in tax. When I came to Cleary, I didn't have any particular focus that I was trying to prioritize. In those days it was still possible, particularly at Cleary, to practice in almost any area.

WT: So I guess you had twenty years of experience here, at Cleary Gottlieb. Was that always in Washington, D.C.?

GP: Yes, I have always worked in this office.

WT: Maybe you can give us a little bit of background on your experiences there, since that's obviously been very influential in how you would eventually have gotten to the SEC.

GP: I had a great deal of good fortune when I came to the firm in working in a lot of areas, many of them non-securities: everything from government contracts litigation, to trade disputes, to matters that were really bank mergers and acquisitions. Early on, though, one of the first projects I was involved in was working with a trade association in relation to amendments to the bankruptcy code to protect the closeout of repurchase agreements, which essentially were transactions involving government securities and money market instruments, treasuries. That work led to continuing work for that group and for people

in that community. In the '80s I became involved in the standard agreements for repurchase agreements that were developed for the first time.

And then, in the mid to late-'80s, there were a series of crises in the government securities market, the failure of an organization called E.S.M. Securities, and another one called Bevill Bresler, which led to collateral effects including the collapse of the Ohio State insurance savings and loans, the Maryland State insurance savings and loans, from each of these failures, respectively. I became more involved in the regulatory side as that government securities act came into effect.

I became more broadly interested in securities work, focusing first on the fixed income markets. But then in the '90s, the markets were evolving, and by the way, in that period that included a lot of structured finance in the fixed income side as well. The markets started to move, also to expand to cover derivatives, first from the fixed income side and then also the equities side. As that happened my practice was shifted, or became broader to encompass a lot of the issues around that.

By the late-'90s, the work was really spanning all sort of securities regulatory work, and some of it, I would say the heaviest proportion, was oriented towards intermediaries like broker-dealers, but it also included work on the investment advisor side, mutual fund side. I had some no action letters, actually, about mutual fund assets overseas. A lot of the work was international, because Cleary Gottlieb has always been an international firm, and so a lot of the work involved cross-border activities of broker-dealers.

But also, by the end of the '90s, electronic trading was becoming increasingly important part of the marketplace, not the way we know it today, but really the creation of electronic communication that works: the increased ability to post bids and asks, or bids and offers in an electronic order book, and the overall elimination of trading floors as the only place where you could trade. By around 2000 the New York Stock Exchange was really the last place that had that. As we were doing that, a lot of issues were coming up in terms of what ultimately became the Order-Handling Rules for ECNs, and then Regulation ATS by the early 2000s.

WT: Had you had any service, say, with the American Bar Association as well?

GP: I was active in the American Bar Association for many years, and still am active in it in varying degrees and different times. Probably the first significant responsibilities I had within the ABA were probably, I'd say '93, when I was asked to be chair of the—there's a Securities Law Committee in the Business Law section, and there was a Subcommittee on Municipal and Governmental Obligations, and I was asked to take the chairmanship of that at that time. And in part that was because I had had a great deal of experience on the Treasury, the federal government securities side, as distinct from the municipal side, and there weren't so many people doing that and they asked me to come into that role.

That was when I first met Sy Lorne, who came to the first meeting I chaired, a subcommittee. He had recently become General Counsel of the SEC, and Chairman

Levitt was interested in municipal securities issues, so Sy came to the meeting. And of course municipal securities became very important right at the time when they asked someone whose real experience was on the federal side to take over the committee, but I learned a bit about municipal securities as a result.

WT: This is something that the Historical Society has been looking at. We're putting together a gallery right now on municipal securities. I'd be interested if you had a few more words about your experience, and in particular what the focus was, from the ABA side of things.

GP: Well, I mean from the ABA side, we were being asked to look at the same kinds of questions you would expect today, a lot about disclosure, but also pay-to-play type issues. As you'll recall, in the mid-'90s, the Commission made an effort to increase the disclosure around municipal securities, as well as to put some restrictions via the MSRB on pay-to-play type activities. Indeed, some of those were challenged in court in the Blount case, and the Commission—and the MSRB as well—prevailed in that.

So that was the focus at the time. The ABA's role, I would say, was consultative in bringing together parts of the bar that might not ordinarily think about municipal securities issues, because it had a window into that. Because in the municipal area, there's another bar group, NABL, National Association of Bond Lawyers, which is very expert in matters of the issuance of municipal bonds and how that process works. But the ABA group has folks with a more wide ranging set of experiences with securities law, so

I'd say that was the best way to describe that.

WT: And there's also that division between the issuers, who are lightly regulated, except under the fraud provisions, and then the regulation on the broker-dealer side.

GP: Exactly. One of the issues that continues to be there is the Commission's authority over municipal issuers is highly circumscribed, and so regulation in that area has had to proceed principally through the regulation of intermediaries, or the application of the anti-fraud provisions to the issuers.

WT: Let's talk a little bit about how you got into the General Counsel's office at the SEC. How did that come about?

GP: It came about in that I got a telephone message one day—and I was actually out to lunch, literally, and I came back to the office and was told that I'd got a call from the Chairman of the SEC, could I please call back? And I said, "Sure. Who in the Chairman's office called?" because I worked from time to time with people in the Chairman's office, and my secretary said, "The Chairman. Call the Chairman."

So I called back and I spoke to the Chairman, and after some preliminaries he said that he was considering—his then-GC was leaving, could I please keep that confidential—and he was considering whether or not a partner at my law firm might be a potential replacement to consider, and he wanted to get my views. I said, okay.

WT: This is Harvey Pitt, now?

GP: Yes, this was Chairman Pitt. I said, okay. He said, “Do you know who the partner is that I’m thinking of?” I said I didn’t, because Alan Beller, who would’ve been a natural person, had recently agreed to go work for the SEC. He said, “You.” So I said immediately that I’d be very interested. For a securities lawyer doing what I was doing, the opportunity to be General Counsel was just one of those really rare, interesting things. I think if you don’t want the job and you’re a securities lawyer, you might want to reconsider what you do for a living.

WT: And of course it’s a particularly, shall we say, interesting time at the SEC. So, I don’t know where you’d like to begin.

GP: Well, let me begin when I got there. I arrived in May, I think it was May 6, 2002, and at that time the situation in the markets was very challenged. There was a lot of concern that had risen out of Enron and Arthur Andersen, and there were some real questions about the oversight of the accounting profession and of the reliability of financial statements of U.S. public companies. It was generating much more media and political interest than some of the activities of the SEC traditionally would have, so the SEC was becoming very much front page news. At the time I arrived, I think the view was that Congress probably wasn’t going to act, and the Commission was probably going to have to take the lead in identifying regulatory steps that could be taken to address these issues.

Indeed, in the very early weeks of when I was there, the Commission began to consider a regulatory proposal that might look something like what ultimately was the Public Company Accounting Oversight Board, began to raise issues about having CEOs certify financial statements, and a number of other things that ultimately we saw in the Sarbanes-Oxley Act. But it was still perceived that this was probably going to have to be done by regulation, and, I have to say, the chief generator of the ideas, which were quite creative and very constructive, was in fact Chairman Pitt.

And what then happened was—and I won't remember the dates exactly but it was very soon after I got there—if you figure I arrived May 6th, in mid or early June, WorldCom happened. In addition to some of these other accounting problems that have been identified, I think that it really changed the dynamic. The magnitude of the misstatements there, the lack of almost creativity in the nature of the misstatements—because you may recall there were sort of top of the line adjustments that were made after the numbers had rolled up—led to just a very high degree of concern and a sense that, if these financials are this bad, do we have a problem more generally in the marketplace?

Chairman Pitt took a number of very prompt steps to deal with that. One included bringing action against WorldCom, I believe the next day. I'm not sure it was the exact next day. But also, that was when, because there hadn't been a rulemaking yet on certification, the idea that the Commission had was to have the CEOs and the CFOs of what were roughly the thousand largest public companies in the United States certify

when they made their next filings, under the penalty of perjury, essentially, that their financials were accurate in all material respects.

Now at one level those officers were doing that already, under the prior law. But the view was that by having people certify, put their names on it—and the way the certification had to be structured, which you may know, was it said you have a choice. You either certify that you believe they're accurate in all material respects, with the wording very carefully done, or you have to submit a statement explaining why not.

WT: That was the existing legal structure?

GP: No, that was what was done on a one-time basis. It was done by an order under 21(a) of the Exchange Act. That order came out—probably it was two days before that came out, because it was somewhat novel and had to be worked through, what the process was going to be, because it wasn't rule making. We couldn't just require people to certify something, the way you would a rule. We had to come up with a structure that said, "Either say they're accurate or explain to us why they're not," because we had to focus on the existing authority.

So we got that out very quickly, but what also happened, and was actually more important, is at that point the view of legislation changed in a matter of really days, I would say. The assessment became that it was going to be necessary and useful to have legislation, on the Hill and the administration. I'm not talking about at the Commission.

At this point, this was outside the Commission's control.

I believe Sarbanes-Oxley was passed and signed by July 30th, if I'm remembering the dates, the dates may be a little off, and so many of the things that we had been thinking about doing in a rulemaking context, in terms of oversight certification, became part of that, as well as a number of other things. Some of that legislation had been very thought through, because Senator Sarbanes had been doing work for some time on oversight of the auditing profession, and I'd say those provisions were the ones that had the most time to have hearings, to be reflected upon.

There were other provisions that were pretty plainly immediate kinds of reactions to things that had happened at Enron and WorldCom. For example, there's a targeted provision in there, sort of a 48-hour blackout pension period provision that reflected something that happened in the Enron case that's not likely ever to repeat itself again, but is actually in the legislation.

But the legislation did take—I think in part because of all the thoughtful work that had been done by some members of Congress before, and the work done at the agency before—an approach of not prescribing so much specific rigid limits (though there are a few of those things there, no loans to officers and so forth), but rather enhanced oversight of the accounting profession through the PCAOB, enhanced information to senior officers. Because a lot of times in cases where people identify fraud the senior officers were essentially taking a position that they didn't know about the underlying information.

So part of the effort was to get that up to the senior officers, getting that information to of course the directors as well, and enhancing their ability to act on that in various ways, through audit the committees, and obviously through the enhancement of independence of different committees; and also, other focus on people like lawyers, where the up-the-ladder reporting rules were required under the statute and as a particular provision focused on lawyers.

So you see this effort to try to enhance the quality of financial statements reporting, and associated governance of course, through making the various, what some people would call gatekeepers but others might just call agents, senior fiduciaries, whatever you want to call them, involved having better information, better tools, and being more accountable.

WT: I know a lot of—well, let's say under Chairman Levitt's time at the Commission, they had been working along certain channels to do reforms in the accounting area, how many of those were carried over and how much of that had to come de novo in this period?

GP: A great deal of what was in Sarbanes-Oxley relating to the provision of non-audit services by auditing firms really did grow out of the debate that had occurred when Chairman Levitt was there. Of course, there had been a resolution of some of those things by rule during the time when Chairman Levitt was there. Sarbanes-Oxley took a much more restrictive approach to that. It also created a framework where there was going to be, on an ongoing basis now, an oversight body, the Public Company Accounting Oversight Board, that would have both leadership that was independent of

the profession for the most part, not entirely, but also funding that was independent of the profession, which had been perceived to be a weakness in the prior oversight structures that had existed.

Some of Sarbanes-Oxley was self-effectuating, in terms of the limits it imposed. But a great deal of it required rulemaking, and it required action further by the PCAOB once it was created. So, when I mentioned that on July 30th, which I believe is the correct date, Sarbanes-Oxley was signed by the President, there was a rulemaking timetable and a set of assignments given to the SEC to help get the PCAOB up and running, for example, and do some other things, some studies, and it was quite a tight leash that was imposed on the agency.

Almost all of what had to be done had to be done within six months. There were a few things that went out a year, but most of what had to be done had to happen within six months. A number of things had the lines of only thirty or ninety days to be hit, so the day after the statute was enacted, we had already prepared and had ready to go a kind of time and responsibilities schedule, for want of a better term, that had all the deadlines one column, and had all of the responsible divisions listed, action steps, and the names of the individuals. We started a series of weekly—bi-weekly at the beginning—meetings to make sure we were going to hit all those deadlines that were established by Congress. In fact we were able to meet every one of those deadlines.

WT: Now, right out of the gate you hit this fiasco with the appointment of the chairman. What

perspective are you able to offer on what went on there with that situation?

GP: There was a GAO report written on this subject, and probably one can turn to that to give the perspective. What I would say is it was a very new task that was given to the SEC, the idea of appointing these members of the PCAOB. The very limited precedent that existed was the original MSRB appointments for which there had actually been no formal process adopted, as far as I can tell.

While I think that there was a good faith and responsible effort by the Commission, the Chairman and the other Commissioners to try to make that process work, the absence of a precedent and pre-existing set of approaches to this, combined with the political environment that we were dealing in, which was one of intense scrutiny. As you'll recall, it was an election year, these issues were part of the election campaign. I think that as a result, the process did not produce a consensus among the Commissioners, and there are probably some individual decisions that people made along the way that affected that.

The curious thing is that if you ask people what the problem was, in the end, the person who was appointed—the initial chair of the PCAOB was William Webster, a man known for his integrity, not only before but after this, and indeed, who's been the recipient of many lifetime integrity awards since that time, near ten years ago now I guess, or over ten years ago when this all happened. So, I think that's probably the most I can offer, in terms of context.

As you know, after election night in November, Chairman Pitt announced his resignation, and not long thereafter Mr. Webster decided to withdraw from being in that chairman slot. Chairman Pitt remained until we finished the main batch of Sarbanes-Oxley rulemakings in the end of January, thereabouts, early February. It's sort of a real tribute to him and the other Commissioners that I believe all of the Sarbanes-Oxley rulemakings—not all of the rulemakings we did in that time, but all of the Sarbanes-Oxley rulemakings—were approved unanimously by the Commission in that period.

WT: In terms of the internal communication, and the fact that not everybody was privy to William Webster's service on this one audit committee, would you attribute that to the novelty of the task and the fact that the Commission wasn't really set up to make these kinds of appointments?

GP: If you read the GAO report, I think that's the source of the recommendation that they have there, that there should've been a better process for this. In the absence of a process, the appointment of individuals is a complicated task. And indeed, the novelty of this assignment, in a way, is confirmed by the constitutional challenge that ultimately was made to the way the PCAOB members are appointed that was successful, in fact, in which it was held that the double for-cause removal was not allowed. I think the fact that there was a successful constitutional decision didn't go to the specifics of this, but it just shows you how novel the task was for a multi-member agency like the SEC to take on a function that ordinarily would be handled by a kind of unitary executive.

WT: So in terms of the actual rulemaking surrounding Sarbanes-Oxley, could you tell me a little bit more about that and if there were particular areas—404(b) is the famous one, but I don't want to restrict your comments to that particular area.

GP: No, it's a very interesting thing to go back and look at the rulemaking files, because 404(b) ultimately became the most controversial part of Sarbanes-Oxley, I think it's safe to say, in the aftermath of its adoption and in the years that followed. But, if you look at the rulemaking files and the ones that generated the most controversy, 404(b) generated a very limited number of comments. I'm pretty confident that it was a mere fraction of the comment letters that the Commission got on the expert members of the board of directors, because a lot of people were worried that being designated as experts—financial experts was really kind of a form of accounting expert—on the board would be putting a target on their backs, and so we got a lot of comments on that particular rulemaking, many fewer on 404(b).

I think most people believed, and still believe, that the notion of 404 itself, of internal controls, is a good idea. What people maybe didn't fully envision at the time—they didn't fully envision, they had some inkling of it but nothing like the magnitude—was that by requiring the auditing firm under 404(b) to attest, that that was going to put the auditors in a position where they were at risk for missing something. The costs were borne by the company, and the impact of that was going to be larger than people perhaps perceived when they thought about the notion of what it meant to have good internal controls.

I think one of the notable things is that the real issues around 404(b) that you start to see, in terms of criticism of it, mostly don't happen until people begin to implement it and start to see this dynamic and start to see the challenges that it presents from an implementation perspective.

WT: So against the background of all this, you also have the enforcement actions against Enron, WorldCom, other people who are entangled in these scandals. Could you tell me about if there was debate surrounding the strategies of how to do these cases?

GP: I would say that there was a lot of focus and this little echo theme that you probably would hear across any era. There was a lot of focus on making sure the Commission moved swiftly to bring its actions, because there was a sense that public confidence depended on seeing the enforcers act quickly to do what needed to be done, and there was still a set of confidence issues in the marketplace.

I think there was a focus on trying to identify where there were individuals who could be held accountable and make sure they were held accountable. I think there was an emphasis on, where appropriate, trying to identify penalties that could be imposed. As you know, the use of penalties was still very much evolving. Other than a limited way in the '80s for insider trading, the Commission didn't have any real penalties authority until the Remedies Act in the early-mid-'90s. In fact before, roughly at the beginning of this cycle, there was a lot of attention paid to what was then the largest penalty, I believe, ever

imposed against Xerox, which was \$10 million, which, compared to today's types of penalties, seems like a very small penalty. But that was considered quite large at the time.

So, those were the kinds of things that people were focusing on. I don't want to get too far ahead of where we are in terms of the timeline, but what you're also seeing at this time is a highly active New York attorney general, probably beginning in late '01 or early '02, but continuing after that and inspiring further actions by not only New York state AGs, but other state AGs in the years thereafter, and that surely had some impact on the degree to which the enforcement staff at the SEC and the Commission perceived it necessary to act quickly and progressively where there were problems.

WT: To what degree is there an attempt to establish a Commission policy surrounding enforcement and how far to extend cases? I know it's divisive among the Commission members themselves, so I'm curious to what extent you can act coherently from a legal standpoint.

GP: There ultimately was a policy adopted on penalties by the Commission in the context of entities that was done in early 2006. I think it might have been finalized after I left, so it's at the tail-end of my experience. But what was going on then was a very active and engaged Commission, from essentially summer of 2002 when there was a full slate of Commissioners—because when I first arrived we actually had a limited slate of Commissioners; we had five, certainly by late August, I think it was—once we had those

Commissioners, they were all very engaged Commissioners.

From my perspective—I wasn't there for other periods, but I think was a good period in terms of engaged, active Commission debate on enforcement matters. Chairman Pitt had wanted to make sure that the Commission was active from the beginning to the end, including on formal orders. That was not to slow them down. That was to make sure the process was moving quickly, so the Commission knew when formal orders were authorized, could keep track of how long it was taking to get cases done.

And these topics all were actively discussed at the table, in terms of the extent of the potential defendants' respondents that should be named in cases, issues around where penalties were imposed what those penalties should be. I would say, while there were cycles and periods when this ebbed and flowed, that much of the time the Commission was—various Commissioners at different times and different cases—was very active in engaging the staff about whether they were being sufficiently aggressive, whether they were thinking about these issues in the right way.

Over that four year period that I was there, roughly four year period, there was an ebb and flow to that. I think some policy was emerging from the, what I'll call common law style of development of these cases, but there were regular, almost weekly Commission meetings on closed meeting basis where there were very full agendas and there was a lot of discussion and debate of all the significant cases.

WT: You mentioned Eliot Spitzer. And there's of course the broker-analysts cases, and in this case there's the much more specific case of Dick Grasso's pay, which I don't believe was any sort of rules violation or anything like that, but there was a letter from Chairman Donaldson. I'm wondering what kinds of discussions came up surrounding the pressures that were coming from the state authorities that you mentioned earlier.

GP: I don't think that the Grasso situation grew out of so much of was going on with the states. There was definitely an awareness of what was happening at the states. But I think that's an interesting example when you come at this from the lawyer's perspective, the General Counsel's perspective, obviously: what's the Commission's legal authority, and there's a tendency often to think of coercive authority, examination, investigation authority.

There are a lot of things that the Commission can do that have mostly to do with getting information. I gave you the example of the one-time certification that was required right after WorldCom. In the Grasso situation, you mentioned the letter that Chairman Donaldson sent, I think the letter in a way reflects what was happening, which is that there was news about this, there was a great deal of concern about what it would mean, and there was a limited amount of information in terms of facts. Chairman Donaldson's letter really just asked for the facts. It asked for them quickly. Back to this theme of moving quickly, I can't remember how long, but it was probably about a week, if I'm recollecting it.

And that information, which the Commission made clear in the letter I believe was going to be made public when it was received by the Commission, ultimately led to a series of events that were precipitated by other people acting. There was, ultimately, the New York attorney general's action. I think that reflected both a different perspective that a state AG will bring in any event, but also a different authority, because, essentially, that grew out of the fact that that the New York Stock Exchange was not a for-profit corporation. As you know, the state AGs have a certain amount of authority when you're looking at not-for-profit corporations to protect sort of the public from officers, directors, employees from taking assets of those entities for their own benefit, which is not SEC authority, obviously.

So I would say, in that case, I feel that the Commission really was active and had a real leadership role and that Chairman Donaldson acting, I believe, with full consensus from the Commission was able, using essentially a letter to get information out, and sunlight has its consequences.

WT: A I mentioned the broker-analyst conflicts. That ultimately concluded, to my knowledge, with the global settlement. How did that come about?

GP: That particular matter is one that, for reasons I won't give you the specifics of, I was not able to participate in. So I don't have anything to say about that other than what you might glean from the public, other than it naturally did shape the public perception of the Commission and the state authorities.

WT: Extending onto the theme of the SROs, of course we've mentioned Grasso, the New York Stock Exchange, but of course they're in a period of substantial reorganization at this time, and NASD itself is a few years removed from the 21(a) report. While you're there, NYSE Regulation comes about. Could you tell me a little bit about the issues involved with those developments?

GP: There was a lot of focus on governance at the SROs, and there were significant changes that the Commission pushed to have happen. You could say some of those were related to the topic we were just talking about, because the New York Stock Exchange was in fact working on governance issues at around the time that these announcements came out about the compensation. I think that also was consistent with the theme of the way the Commission and others were thinking about regulation. In retrospect, I believe it was pretty thoughtful, which was very governance-oriented.

You know what I said about Sarbanes-Oxley, that people were not trying to necessarily write a bunch of prescriptive rules, not "this is how we're going to fix this," but "let's get the governance mechanisms right, let's get the senior people informed and empowered." I see this as building on that similar set of themes. Let's make sure that we've got governance structures that reflect the right interests and right level of independence at the appropriate levels for these things to work, because that's going to work more effectively over time than the Commission trying to micromanage every detail of it, which is not a viable approach anyway, certainly at that time it wasn't.

WT: I'm really glad that you brought this up on your own accord, because it's a theme that I've noticed. And of course with the accountants and broker-analysts, but also with the investment company rules that were put into effect later on, this was a strategy of focusing on governance. It was actively discussed beyond the individual issues. Did it come up as a theme at the time?

GP: I would say it didn't come up in the abstract sense. I think it came up in the context of particular problems. When people looked at ways to address them, I think they were trying to take a sophisticated and far-reaching approach. You mentioned what happened in the mutual funds space; as you know, that was an outgrowth of a set of concerns mostly that came out of market timing activities that people identified. At that time, the Chairman and the Commissioners wanted to take an active—and by then that was Chairman Donaldson—wanted to take an active approach, really had a multi-part policy of how they were going to come at this problem. It was not limited to just one step, it was multiple steps. Many of them were governance-oriented, not 100 percent of them. I can't give you the whole checklist at this removed time.

But there was a kind of blueprint established, obviously with the staff from IM and the Commissioners all working together, to restore confidence and to do that on a basis that was sound, in terms of the underlying changes to the regulatory structure. Some of that proved to be more controversial than other parts of it. But I must say, one of the important things for the Commission is to have the public feel comfortable that people

are taking steps to address problems when they see them.

WT: I wonder if you can talk a little bit about—and this is probably tangentially related thematically, but the need to move into the regulation of banks, or these consolidated supervised entities. And everything that comes in the wake of Gramm-Leach-Bliley, of course before your time, but still rolling through that period.

GP: This is one of the, I believe, most misunderstood rulemakings and events of the time period that I was at the Commission. At that time, one of the geneses of the Consolidated Supervised Entities rulemaking, the CSE rulemaking, was that European regulators were looking at the question of how to regulate on a cross-border basis, and believed that if U.S. broker-dealers were not regulated on a holding company basis—and remember, not like today, where so many are in commercial banks, there were many U.S. large broker-dealers that were not part of bank holding companies. As a result, they did not have holding company capital regulations, and Europeans were suggesting that without such regulation they would have to establish a regulatory structure to deal with that, or some kind of intermediate holding company. I'm not sure exactly what they would have done.

At the same time, what you're seeing at that time period—again, a different world than today—there were activities being done in broker-dealers, and of course everything done in a broker-dealer was subject to the net capital rule, which I don't think to this day anyone views as not rigorous in all respects. But activities that were not done in the broker-dealer were not subject to any capital regulation, because they involved

transactions of a type that were, by definition, exempt from being done in a broker-dealer, so that would have included at that time swaps, all kinds of related derivatives, certain types of currency, et cetera.

So the CSE rules, in a sense, used the opportunity of the European regulators focusing on holding company-type capital to say, “Wouldn’t it be a good idea, if we’re going to go in the direction here of this, of figuring out how to get under the tent, to some extent, these activities in the unregulated entities and make them part of this capital universe, and also to update the net capital rule to reflect that?”

Ultimately, that expansion to pick up the entities that wouldn’t have otherwise been covered—because the SEC didn’t have that authority—which was also accompanied by certain types of modeling-type tests that you see in capital rule then, that some people would argue were liberalizations, but in fact the approach is still taken today by bank and other regulators, became viewed as somehow a liberalization that led to the downfall of these entities, I think is just a complete misreading of what happened.

I think this actually was an effort to modernize, and to some extent actually expand the scope of, the SEC’s authority through this mechanism. Because any of these entities, if they had not been subject to any capital rules at all in their unregulated entities, obviously could’ve taken a huge amount of risk there, and that could’ve brought down the broker-dealer as well, not to mention have all the collateral consequences for the system.

I think that was the approach that was taken, and I think, unfortunately, after the financial crisis, there was a certain amount of misunderstanding because this is a somewhat more complicated story than sometimes makes it through the maw of the general public, which I understand.

WT: I was still trying to work it out a little bit myself. I was talking to Erik Sirri last week or the week before, so of course we got into some of these issues. So, the adoption is on the Basel standards, correct, within the Consolidated Supervised Entities?

GP: I don't think it's exactly the Basel standards.

WT: An analog, perhaps?

GP: Yes, there were some similarities. And now you're getting to a level of granularity where, a) I wasn't the head of then-Market Regulation, and b), it's a decade ago.

WT: Well, it's always nice when I can push up as the outsider against those boundaries. It means I'm getting somewhere, at least.

GP: The specific way that the capital was calculated at the time I can no longer recall.

WT: So, you mentioned much earlier Reg NMS. Can you talk a little bit about that and what some of the issues there were?

GP: Absolutely. We were talking a little bit earlier about the experience I had in the '90s, as people were beginning to develop more and more of these mechanisms to enable electronic trading, and there were real changes in the way markets were functioning. And these were driven by forces that were affecting all of our economy, not just securities firms. The way any kind of commercial business was run in 1995 was probably radically different than 2005. The Internet barely existed in '95, right? It did exist, but it was not part of everyday life in every business in America.

And there was with that, also, increasing awareness that the traditional model for exchanges—with a trading floor, with the kind of specialists, or market makers I should say—that existed previously, was posing challenges, and indeed that some of the markets couldn't continue on that basis without slowing down, essentially, the rest of the markets.

So there was a need to bridge this gap between the traditional model of doing business and the evolving model. Which, by the way, if you think about trading floors, by 2000, 2001, in developed markets, developed securities markets, I think the only physical trading floors that remained were the New York Stock Exchange, Madrid and Bombay. The European markets had all essentially become totally done at screens.

I use the example: I happened to be in Milan once and I was going to see someone at the Milan, now Italian Stock Exchange, and I was waiting to go in. And there's this big glass wall, and it was dark inside, and I asked the guard, I said, "what's in there?" He says,

“That’s the trading floor. We use it for weddings now.” So we were somewhat antiquated, in fact, by having those floors.

A big part of NMS was taking some of the regulatory pieces that had been done on an ad hoc basis—ad hoc’s too strong, it makes it sound disorganized—had been done incrementally in the ‘90s, like ECNs being regulated, there were handling rules, and developing an approach (also because Reg ATS had happened right before I got there as well), and organizing that into a way that the whole system could try to be integrated, and also to allow a transition from this old world to the new world.

I think when you look back at that set of rules, it required a lot of work and I give a lot of credit to the people running the division, but also to the Chairman and the Commissioners. Particularly the Chairman because he had a vision about markets and he had good instincts, I would say, about how to structure some of these things, that set of changes worked pretty well in transitioning from the old system to the new.

Now remember, once we created this system, there was a lot that was unleashed that people really didn’t totally anticipate, because once you have fully electronic markets, not limited to Reg NMSs around the world now, that’s when it enables computers to now plug in and make decisions. You couldn’t have algorithmic trading in a meaningful sense when you still had human beings involved in every transaction.

And so, I think Reg NMS is a key bridge from the old universe, and it happened in

stages, order handling, Reg ATS, Reg NMS, but really important. I think, while there were a lot of fights and disputes because there's a competitive angle to a lot of the aspects of these rules, everyone has a business model that they're trying to protect at any given moment when you're doing market structure discussions, I think it was broadly perceived as fair. I think, as one might expect, once the rules were clear, people adapted pretty quickly in the marketplace.

WT: You've mentioned a couple of times in specific contexts the question of international markets. I'm wondering how much of a theme, how much that occupied your attention, being the general counsel during your time in the office. You mentioned you had some experience with it here at Cleary Gottlieb, ahead of time.

GP: It came up in different ways. A lot of international questions arose in the context of Sarbanes-Oxley. In the period of implementing Sarbanes-Oxley, because it was an enhancement of regulation in a number of areas, there was a pretty active set of lines of communications open between both the U.S. regulators and non-U.S. regulators, and various trade groups and associations outside the U.S. communicating ideas back into the United States. Some of those related to, for example, some really straightforward governance questions that were quite technical.

We had audit committee independence requirements. For example, in the list of requirements adopted under Sarbanes-Oxley, in some countries—Germany and Italy are examples of this—there were already certain statutory schemes that required the

appointment of auditors through an independent mechanism or through a supervisory board that achieved essentially the same function, and so there was a need to accommodate that.

To give you a very specific example, I worked on the attorney conduct rules that were required by Sarbanes-Oxley, under Section 307, the up-the-ladder reporting and related issues, and a lot of non-U.S. lawyers had questions about how that was going to apply to them and whether we were regulating non-U.S. lawyers, so we heard a lot from that.

The other side of that, though, is I think a growing view within the SEC that it was important to engage with non-U.S. regulators on a basis that didn't always presume superiority of the U.S. system. One of the areas where a fair number of steps were taken was on accounting standards. There was an effort to see what the U.S. could do to move towards international accounting standards. Ultimately, before I left, there was actually a timeframe established, but there were specific changes made to the rules to eliminate some other reconciliation requirements that existed before.

Another related point on this is that we got a lot of feedback from the non-U.S. community, and this is a broader theme for the U.S. markets, that the changes in regulation here simply were making it not viable to raise capital in the United States anymore, and that they couldn't leave the United States once they were registered, because of some complexity in the process of how you count shareholders and so forth for purposes of de-registering your securities. This became a bit of an ongoing theme at

the various international bodies, but also in the marketplaces in the U.S. The Europeans tend to call it the “Hotel California” problem, you can check out but you can never leave, and ultimately, some rules were adopted to help alleviate that concern.

So drawing that balance of, you know, make sure you’re protecting U.S. investors, making the markets attractive, but doing it in a way that says, “Look, we’ll welcome your capital here, we think we have a great system, but we’re not going to keep you here by force,” because in part that will have collateral negative impact, because nobody’s going to come into a capital market—they’re going to be less inclined to come in if they think they can never leave. So there was an ongoing theme there, and it was a pretty active area and a pretty active dialogue through the whole time I was there.

WT: There are a couple of things that I wanted to ask about that feature I think on your present bio that I haven’t heard about anywhere else. One of them is the question of professional standards for attorneys representing public companies, I guess that was something that you would have done while you were there.

GP: Yes, that was the Sarbanes-Oxley, Section 307 rules, which ultimately became the Part 205 rules of the Commission. Under Sarbanes-Oxley, Section 307 required that the Commission, within a certain time period, adopt rules that would require attorneys appearing and practicing before the Commission on behalf of public companies to report up the ladder within the organization evidence of material violation of securities laws or breach of fiduciary duty. The Commission was tasked with writing those rules,

proposing and ultimately adopting within 180 days.

So we went to work on that, and that rulemaking was interesting in a number of ways.

First, there had been long a debate at the Commission about what the Commission should be doing in terms of oversight of attorneys, and it's a debate that went back decades. To some extent, the Commission was overseeing the conduct of attorneys by virtue of its Rule 102(e), before that, Rule 2(e), rules of practice that allowed the Commission to suspend or prevent lawyers from appearing before it when they engage in certain kinds of misconduct.

But then it became controversial. It became controversial because there's always a concern that in an agency that's an enforcement agency, among other things, that there might be some element of retaliation, which is why from the early '80s, in fact, the Commission had this policy about taking those cases to district court so a federal judge would oversee the issues. There was some controversy about some different cases.

In any event, we were told we had to write this rule on up-the-ladder reporting. In doing so, we put out a proposal that went—because it said you have to do this and establish other professional conduct standards—we proposed a rule that would also require, in certain instances, what was known as mandatory noisy withdrawal: an outside lawyer would have to, if they became aware of certain evidence and there wasn't an appropriate response by management and the board, that that lawyer would have to end the assignment, withdraw from the assignment, and do so noisily, meaning notify the

Commission or the public of this potential ongoing harm from the legal violation.

Now, that has some resemblance to the traditional crime-fraud exception under most state bar rules, which says a lawyer can disclose where necessary to prevent a crime or fraud.

What was distinct about it, of course, was it was mandatory, which had been done in very few states, and certainly not to the same extent. That generated an immense amount of controversy. We got a lot of adverse comments from the bar, but we also got some support from different people.

Ultimately, when we adopted the rules at the end of January 2003, the Commission determined only to adopt the up-the-ladder reporting part that was required under the statute to be done within that 180 days, and said, "We don't have to decide within 180 days whether to do this mandatory notice of withdrawal," so we proposed that for further comment, also with some alternative approaches to achieving a similar objective. It continued to be controversial. Ultimately, the Commission did not take further action after that.

But I would say that, as you look at the Commission historically, the Commission's authority to oversee lawyer conduct had not been completely clear until Sarbanes-Oxley. But the combination of 307 and another provision that made it clear that the Commission could have Rule 102(e) made it very clear that the Commission both could and should regulate lawyers. You can agree or disagree whether that's a good idea, but the authority question was really very clearly resolved about some oversight of lawyers. How much,

that you can debate, right?

I think what that probably required—because remember, before then there was reluctance of the Commission to go too far in this space because it might lack the mandate and authority, but also because of an expertise issue. I think Sarbanes-Oxley made clear that not only did the Commission have the authority, but also had the responsibility, within certain limits, and that made, I think, it necessary for the Commission to develop more expertise in that area.

The Office of the General Counsel became a national repository for that, and there's a group within the Office of the General Counsel that's headed by one of the associate general counsels that has become quite knowledgeable in this area and has been involved in cases since that time period. It was an important part of the way the Commission's mission evolved a little bit as a result of Sarbanes-Oxley from where it had been traditionally. I think the approach the Commission has taken on lawyers since then has been actually much more aggressive, mostly on the side of bringing enforcement actions against them.

WT: Is the situation with hedge fund registration analogous insofar as the authority of the Commission is concerned, or was that more clear-cut and just a question of whether or not it should be done?

GP: I don't think it was clear cut as an authority question, and I don't think it was agreed

upon as a policy question, either. The attorney up-the-ladder thing really came from Senator Edwards's office, and Senator Edwards proposed that particular language, is my understanding, and it wasn't nearly as broadly debated as the questions around hedge funds and their regulation.

WT: The other thing on your bio is the revitalization of the Commission's amicus program. That I found very interesting, because I know that's a traditional role of the General Counsel's Office, and I'm wondering what the situation was when you got there, and specifically what you were doing in that area.

GP: I think the effort there we had was driven by a bunch of things. First, when I arrived, Chairman Pitt, having been General Counsel before in the '70s, was very aware of the way in which the amicus program can contribute to the overall mission and mandate of the Commission in achieving its policy objectives, so I think he was both enthusiastic and active in getting people thinking about that.

I also think that—and this influenced my thinking about it—is that as we were being asked to submit amicus briefs on an ad hoc basis from time to time, either parties would come to us or courts would ask us for our views, I started to hear from people, “Well, we don't know anything about this. We don't know how do you get an amicus, what happens?” My own view was that it wasn't necessarily as well understood by the community as a whole what the program could do, and I thought it was very important, because—

WT: I'm sorry, when you refer to the community –

GP: I mean the financial community as a whole, the bar, but also affected firms, public companies, plaintiffs. A lot of the Commission's briefs are on the side of the plaintiffs in civil actions, class actions, et cetera, and I wanted to make sure that people understood what the program was about, first priority because I think, on policy issues, I'm a big believer in getting out to the world how you're coming at a problem. You may have particular cases to maintain closed meetings and all that, but getting the policy out I think is pretty important, and it became pretty clear to me that the bar, for example, didn't completely understand what the Commission was doing there.

Second, the thing about amicus briefs, there are a couple of elements to them that I think are important. I actually gave a speech about this when I was at the Commission. One, you're used to hearing SEC staff and Commissioners go out and speak, and they always start off by saying these are my views, they're not necessarily those of my fellow Commissioners or of those on the staff.

An amicus brief, that's the view of the Commission. The Commission votes on those briefs. Those briefs only get submitted after being approved by the Commission. There is no qualifier, there is no caveat. They're real policy statements of the Commission. And surprisingly few policy statements outside the rulemaking context actually come from the Commission. Moreover, they allow the Commission to speak to certain types of

issues where the Commission might not ordinarily be a litigant.

Obviously, that includes class actions, but it also includes, for example, a lot of 16(b) issues, short swing profit type considerations, a lot of briefs have been filed in that area over time. It's a way of getting out policy statements that have full Commission approval.

The other thing about that program—program is too strong a word—about the filing of amicus briefs I really believe—and I found that this was generally the case when I was there—I certainly tried not to bring issues to the Commission unless I thought there would be a consensus around the right position. It didn't necessarily have to be unanimous 5-0, but certainly I didn't want to bring to the Commission on a voluntary basis issues that were going to be split 3-2. And sometimes the courts ask you for views and you don't really have the same dynamic.

But the reason for that is not because I'm against controversy or voting. It's because case law, almost by definition, operates in its impact on a timeline that's much longer than any one particular cycle of political interest or the markets. The cases that were decided thirty years ago still have a lot of impact today. My own view has always been that one of the contributions of amicus, for instance, you can get Commissioners to step back, get the Commission to step back, and think about policy from that longer perspective, so that the views not only represent the views of the Commission, but they represent, you hope, views that will not be just of the moment but will reflect kind of a longer-term

perspective on the law and policy.

We spent a lot of time trying to get that message out to people, to try to identify the cases that were of interest to us and what we would want to have people talk to us about. I don't know where the raw numbers ended up, and when you compare them to today versus then, in part because not everything got posted on the website back in those days and so forth, but I think we did get increased interest. I think we were able to have a real role in informing the courts, in a number of cases, about aspects of the law that they might not have otherwise focused on.

From a GC's perspective, I will tell you it was one of the very interesting parts of the job. I still can remember one of the early times we were working on an amicus matter and our practice, generally—not always, but generally—was to try to have the parties from both sides come in and brief us. If we could, we'd even try to do it the same day so we would be as engaged as possible.

So you'd have the parties come in from one side and they'd speak to you and you asked a lot of questions, and then parties from the other side would speak to you. Then they would leave, and you'd sit there with the team that was working on it, and the question really before you was, what's the right answer? As a lawyer, to be in a situation where you've just been briefed by the best lawyers on the issue, heard all of the precedent, and to be thinking about it from just the perspective of what's the best, right, long-term answer, it's I think a uniquely satisfying element of practicing law at the Commission.

WT: Are there one or two examples of an amicus brief that you can use as an illustration as to how this can be an effective tool?

GP: I'm trying to think what might be some of the better examples here, and nothing is immediately jumping to mind. I'm sure that the minute we stop talking I'll think of three, but right now nothing's popping into my head.

WT: Okay, on this question of representing the views of the Commission, I know there was a little bit of a hubbub around, late in your tenure, of Commissioner Atkins criticizing you specifically for representing the views of the Commission in one way or another on issues that had been 3-2 votes. I'm wondering if you can comment on that at all.

GP: Sure, I'll say this: the General Counsel works for the Commission, the General Counsel doesn't work for one Commissioner. Like everyone on the staff, the General Counsel reports to the Chairman in an operational sense, on a day-to-day basis, because that's the way—you'd be familiar with Reorganization Plan 10 of 1950. I don't know if you've ever looked at that, but it tells you what the Commission's responsibilities are versus the Chairman's, and the Chairman is responsible for the executive functions of the Commission, the Commission is responsible for the policy functions.

There's a mechanism by which the Commission expresses its views on policy matters, and that mechanism is by meeting and voting. When the Commission votes, whether it's

five to none, four to one, three to two, the Commission has spoken, and the job of the staff is not to try to do three-fifths of the policy and not do the other two-fifths because two Commissioners voted against it, particularly when, as you can imagine, there's very little that you do as a General Counsel that's a secret to the Chairman. You might think that's not an element of being a good member of the Commission staff.

So while, obviously, individual Commissioners can and do view particular actions in ways where they don't agree with them, I don't really know what alternative any member of the staff has, General Counsel or otherwise, but to implement the will of the Commission as expressed by vote at a formal meeting taken in accordance with its rules.

WT: There's no King Solomon, split-the-child-in-two option, right?

GP: You can't go into court and say, "I'm going to devote the first twenty pages of my brief to this, and the next ten to that."

WT: Right. I wanted to ask about some of the novel challenges to the Commission's authority. The specific one, the first instance I think came up in your time there of insufficiency of cost-benefit analyses. This was with the *Chamber of Commerce* case with the mutual fund governance rules.

GP: There's been a fair amount written about that after the fact in recent years, and there's a lot that's remarkable about that case, in terms of the public statements, the macro issues,

or about whether the Commission had appropriately thought about certain broad economic questions.

But in reality the actual court decision there decided to send the rule back, because it concluded that the Commission hadn't adequately attempted to calculate an expense for certain staffing needs that people might have if they went in a certain direction, because the Commission had concluded that they couldn't predict which way they would go on the staff, whether they would increase it or decrease it, and that in any event it would be minimal.

The court held that the Commission had to do more to estimate those costs, a rule that was I would say a very massive rule. I think that the subsequent commentary has shown how novel that was, particularly because, keep in mind, the Commission at that time did not have—I'm not sure it does even today—a strict rule requiring cost-benefit analysis. It had a requirement to consider the impact of its rules on capital formation, et cetera, et cetera. So it was a very unusual holding, and indeed that argument, and I'm not going to remember the specifics, but I believe was at about page fifty-six in a paragraph of a sixty-page brief, most of which was devoted to issues on which the Commission prevailed.

WT: I'm wondering about the D.C. Circuit Court of Appeals in general. I forget if it was you or somebody else—I mentioned before we started recording that the gathering of General Counsels was held at the Commission about ten years ago, and somebody referred to it as a permanent home field or home court disadvantage.

GP: Well, I don't know exactly who said that or whether even I said it, but I would say this, D.C. Circuit, like every circuit that I've had the privilege of having cases before, consists of immensely talented judges who are incomparable in terms of the degree of preparedness they bring to cases. They're not exceeded is what I will say, they are always thoroughly familiar with the case, the law, and I think they're always trying to do the right thing. I think that they are an unusual court, because they have an ongoing relationship, in a sense, with the administrative agencies, since every litigant knows that they can, by and large, bring their appeals to the D.C. Circuit or challenge rules to the D.C. Circuit.

You can go to other circuits, sometimes people do, but the D.C. Circuit is there to be available to provide this forum, and so a lot of what one has to think about is that the D.C. Circuit, when it's considering cases—and this is true of courts like the Supreme Court to an even greater extent—they're thinking about the way a decision is going to affect not just that particular rule, but they have to think about the context of the laws, the administrative laws that they are responsible for overseeing generally.

How that plays out over time, it's been challenging for the Commission over this last ten-plus—really longer than ten years, actually, this goes back into the late-'90s. And so how long it continues, everyone needs to be accountable to someone.

WT: Are there any other particular tactics that you saw, that were prevalent, used to challenge

the Commission, aside from the cost-benefit analysis, like state versus federal authority?

GP: I don't think there's any one answer to that. I think that litigants are smart about looking at the case they have, and so in some cases they're going to focus on these cost-benefit type issues, in other cases they're going to look at questions like the statute and whether the statute was crafted in a form that was designed to pick up what's being discussed. I think the bar that tends to bring these cases is sufficiently sophisticated, they focus on what they think are the best arguments in the case, they have no problem. Those change from case to case.

WT: The one specific issue that I wanted to get back to—that we haven't mentioned it at all, and there were no rules on it while you were there—was the shareholder access issue, which was another one of these controversial things. I'm wondering if you have any insight into the discussions that were had on that.

GP: That issue, in the form that we think about it today, was being thought about a little bit differently at the time and hadn't probably been to the same extent. I think there was an ongoing sensitivity to making sure that the Commission looked at the perspective of shareholders, as the investors' advocate. I think we had an awful lot on our plate most of the time I was there, just like the current Commission has a lot on its plate, and I don't think those sets of issues achieved quite the same prominence then as they've achieved afterwards.

WT: Right. So, I wanted to ask you just in general, maybe in a stylistic respect: you served under three Chairmen, William Donaldson for the most part, but I'm wondering if you can comment on if there are different styles or different foci, if you will, that they had.

GP: First, one of the things I certainly continue to see is that being Chairman of the SEC is a very difficult job in times of great public focus on the agency and what it does. You're tasked with bringing together a group of five people to reach conclusions on controversial topics in a fishbowl, where you often have very limited resources compared to the people you're overseeing.

The budget of the SEC when I was there—I haven't done the comparisons lately, but it was probably roughly the equivalent of the revenues of pick any one of the top twenty law firms in the United States, to give you sort of the sense of comparability. The entire agency's budget was around \$500 million when I was there. There were probably at least ten, maybe twenty law firms in the United States, individually, that had revenues at that level at the time. You can look at any American lawyer I think today, the big law firms, the biggest ones have a couple billion dollars in revenue in excess of the SEC's budget.

So I think the jobs are very challenging. I want to start with that, because I think then when you look at the individuals that I worked with, I will tell you I was very fortunate to work with each of them. And what I mostly would say, and this is a very vanilla observation, which is, people come to the job with the experiences they have. Chairman Pitt had been a lawyer at the Commission, had been a lawyer in private practice, and he

continued to be an immensely creative lawyer, in addition to other things, and had a particular style of thinking and focus and skills that went with that.

Chairman Donaldson had spent his career on the business side, but began as an analyst and was someone who was able, because of that, to be particularly able to pull together the information he wanted, be a good listener, try to absorb, in an active way, the information before taking a decision, and it was thoughtful and that he would be able to live with over time.

Chairman Cox had spent a very substantial part of his career on Capitol Hill, and was thus particularly skilled at trying to maintain relations among Commissioners and the outside world. That's why he tried to have that policy that came into effect on penalties, where there had been a lot of ongoing disagreement within the Commission. I'm not sure that ended the disagreement, but I think he brought the perspective of someone who had that particular background.

I don't think that you can ever do something for twenty, thirty, forty years and not have that affect the way you come at that job or any other job, so that would be the very straightforward observation I would have about, as I say, three very immensely talented and dedicated people who, to this day, I feel a real debt of gratitude to each of them.

WT: It's of course, a very politically divisive time. Would you say that each was pretty effective in insulating the Commission from the various pressures that come from the

different interest groups, or was that something that filtered through?

GP: I think that the Commission always should be politically accountable at one level, and always has been. But I also believe it's really important to maintain a certain independence, and I think each of those three, during my time there, did a good job with that. I think there's a strength that you need to have as an agency that has been challenged a bit by what happened in the financial crisis, by the way Dodd-Frank played out, that may be making it harder today than it was when we were there.

But I can tell you, because part of my job was to help protect that independence, that there were many times when people on Capitol Hill or in the administration—and I think a lot of people will be surprised about this—about how independent the agency was, were essentially told, “Look, we’re an independent agency. We want to be transparent. We want a certain public interest. We understand the various oversight rules that people have, but there are some things that we need to do ourselves, and that we need to be accountable to the mechanism that we have in place, and the oversight, whether that’s the courts or Congress, we deal with the administration’s appointments.” But there is a professional function that the agency had, and I think that all of the Chairmen were supportive of that. I actually think, while there are occasionally lines that emerged that appeared to be partisan, I don’t think they were actually really partisan, by and large. I mean, it’s a democracy and it should be.

I think there were some really principled divisions on matters of policy, and occasionally

that spilled over into the human dimension, which is inevitable. But no, I thought all three Chairmen during my time very much tried to maintain the agency's independence, consistent with the statute and consistent with appropriate accountability.

WT: Do you have any general notions that you'd like to share about the role of the General Counsel's Office, or how it may have changed or how it should, anything to that effect?

GP: Everyone says it's the second-best job at the Commission, and it undoubtedly is at least that. Sometimes I think it may be the best job in the Commission. There are different ways that people talk about it. What I guess I would say is it's a role where you try very hard to be a moderating force in every direction. You don't usually succeed as much as you would like, but you do try and you succeed some of the time. There are times when the Commission is too aggressive. There are other times when the Commission maybe isn't aggressive enough. And there are times when the Commissioners or others can need some help in working things out among themselves, or other times when you need to let them have their differences and have a vote and disagree.

Trying to maintain all of that while you're also maintaining this balance with the rest of the government is part of the job and never going to be achieved perfectly, but it's a critical part of what the General Counsel's role is. I think that you have to put it in a perspective of the traditional saw about, we are the investor's advocate. Sometimes, the General Counsel is going to want to have to pull people back and not be crazy.

But in the end you have to remember that—and I really think this is an important part of the Commission’s mission and the GC’s view of how things go has to take this into account is—you want the agency to be credible, but you also want the public to perceive the agency as willing to fight for it. Sometimes that’s going to mean you’re going to take on battles that you won’t prevail on. But I think there are a lot of times when it’s important for the agency to go out and try to do things.

I think it was not a mistake for the agency to adopt the rules it did regarding hedge fund advisors. I think there was a real basis in the statute for what was done. The agency lost, but I think the message to the public was a good one, which is we were willing to try to do this. We thought it was the right thing, we thought we had enough authority to do it. Ultimately the courts said no, but that then enabled Congress to take the steps.

There are other times when there are other ways to come at this. I’ll give you another example where the Commission came at it from the opposite side, which is there was a lot of discussion when I was there about regulating rating agencies. Rating agencies have been recognized under a no action letter process since the ‘70s, more or less. And ultimately, and this was public at the time, it was discussed at open meetings, we reached the conclusion that the Commission’s authority in that space was so limited that to provide for meaningful regulation of credit rating agencies was going to require legislation. Once that became clear, by the way, to the Hill and the public, there was in fact legislation that authorized the Commission to do more.

So that's part of the role of the General Counsel, trying to find that balance of where to push and where to step back, how you balance the credibility of winning versus being an advocate, because the public does need to believe that the Commission is fighting for it. I really think that.

I've known some folks who have been around the agency a long time, well before my time, some who started there before I was born, and I don't think you can ever forget that, and I don't think that's changed. I think people believe the Commission fights for them to this day. I think it's important. I think if the public doesn't believe that, it hurts the agency.

WT: When you left, did you generally think that you would be coming back here to Cleary Gottlieb?

GP: When I first left, I didn't know what I was going to do. I knew that it was very difficult for any senior person at the Commission to think about their next steps until they actually left the agency. The potential conflicts and issues were such that most of the senior people would wait until they left and then, I was pretty confident I would be able to find work somewhere.

And so I left, I took a little break, I spoke at a couple conferences, I talked to a lot of people. I talked to people who were just people that I wanted to talk to because they were knowledgeable, and I talked to people about possible jobs in-house at companies. I

talked to some law firms, because people who I knew called me and asked will you sit down with us. I thought about other kinds of opportunities that might be out there.

After a lot of listening and asking questions, I decided that this firm, which I didn't leave because I didn't like it, I left only because I had this great opportunity, was a really wonderful place for me, that I could count on people here telling me when I was full of it, and I would be able to tell whether they were probably right or not because I'd known them for a long, long time. In a great firm like this, with people I knew, I would be able to do a lot of interesting things, and knew that this was the best opportunity for me. I took the summer off and traveled around the world with my kids and came back to work filled with fire and vinegar.

WT: So you spent twenty years as a lawyer here before going to the Commission. Now it's been about ten years since then. Has your experience or outlook changed based upon your time at the Commission?

GP: Sure it has, but partly that's because the world has changed. That's probably the biggest reason for that. Because at the Commission—and we did talk about this a bit—I spent such a lot of time on enforcement matters, the outside, I don't think people see how much of your focus is on it, but if you think about it, every time the Commission meets, the General Counsel is basically there. If it's important enough for the Chairman and Commissioners to get there, it's usually important enough for the GC to be there.

And a lot of what they do is enforcement, because even during my time it was a very high percentage of my time. When I came back to practice, I found this increasing call for me to help out on enforcement matters, do internal investigations, and spend also more time, because of all the governance issues we had done there on internal governance, that kind of thing; and less on what I would call more just regular counseling. Also less on transactions, because I had been able and fortunate, because of the flexibility of this firm, to do a lot of transactional work as well, before I went to the Commission.

So since I've been back, that's been a much higher percentage of the things I do, and that's been what I'll call heightened by the fact that over the last, particularly since the financial crisis in 2007, 2008, the amount of work in that space has just gone off the wall for everybody, and so there's just more to do. So that has shifted my practice.

In terms of my perspective, I was fortunate to always have worked a lot with folks at the SEC, so I knew a lot of people on the staff, I had some sense of how the agency works, but there's nothing quite like having been in there to understand the dynamic and the decision-making process. So it helps you understand the way people think about their problems.

Sometimes, when you're not in the agency you have some clients, well, why don't they just do X, Y, or Z, because that would be so sensible, but you know that to do X, or Y, or Z in that agency would require various things to happen, that there are legal constraints that people have to work within, there are administrative constraints, and that's not a

viable option. Not because it's maybe not a good answer, but because we work in a due process system and you have to follow the due process system.

I think maybe it's heightened my awareness a little bit of how you have to balance—what I already knew was the case—a world which operates on modern Internet business, financial market time, with an agency, which, rightly, operates on traditional legal due-process time.

WT: You were the chair of the executive council, the Federal Bar Association Securities Law Committee, and I'm wondering if you could just tell me a little bit about what that position is, what activities there were.

GP: That committee really was formed many, many years ago. I don't know the full history, but it was originally apparently designed as part of—the whole Federal Bar Association, as I understand it, grew out of a time when government lawyers couldn't participate in the American Bar Association, and the Federal Bar Association was designed in a way that they could participate, so it goes back quite a bit of time.

I had been asked to participate in this executive council, and not long after I was at the Commission I was asked to take over as the chair. And it's a fantastic group. It does a number of things, but its principal thing it does is meet once a month and have speakers who come and talk to the group about topics of interest. But it's a group of people who largely have worked at the Commission at some point in their career, not 100 percent, but

who have a really broader interest in the Commission and its success, is what I would say.

And it's a chance for people who have that perspective to sit down and think about issues, not just from a "what do my clients want today" perspective, but "what's sort of the public interest?" I have to say that for me, the best part of that is it's enabled me to meet—some people I already met—but to get to know better some senior people who are former SEC Commissioners and staff people who are just wonderful windows into the history of the SEC.

You probably know former Commissioner Pollack, Irv Pollack, Judge Sporkin, these are people who are regular attendees, and being able to hear their commentary on the issues of the day, get their insights, talk to them about these things, is just a fantastic thing for me, and it's one of the few places where I get to feel like I'm very young.

WT: Okay, terrific. Is there anything that we've neglected to bring up that you feel might be pressing?

GP: No, I don't have anything that I think needs to be brought up, other than I would say that the job of the General Counsel probably is as challenging today as it's ever been, and my hat's off to the incumbent and future people in that role.

WT: All right. Well, thank you very much. I feel we've been efficient and substantive, which

is pretty much everything that you can get from these interviews.

GP: Well, thank you.

WT: Very pleased. Thanks.

(End of Interview)