

**Wayne Carlin Oral History  
with Kenneth Durr  
September 10, 2021**

Ken Durr:

This is an interview with Wayne Carlin for the SEC Historical Society virtual museum and archive of the history of financial regulation. Today is September 10, 2021, and I'm Kenneth Durr. Wayne, it's good to talk to you today.

Wayne Carlin:

Good to talk to you as well, Ken.

Ken Durr:

I want to start by stepping back and looking at your education and talking about when you first got interested in law and securities law in particular.

Wayne Carlin:

Sure. It was pretty early for me. I was not one of those people who couldn't figure out what they wanted to do in life. Certainly, by the time I was in high school, I was pretty sure that what I wanted to do was be a lawyer. I had a couple of uncles who were lawyers, one of whom was a merger and acquisition practitioner in a big firm in New York city, so I heard a lot of stories over the years and just got interested.

Wayne Carlin:

The one other thing is, for a while I thought seriously about being a historian, that would have been what I was if I wasn't a lawyer. But shortly before I went off to college, I came to the conclusion that life in an ivory tower was probably not what I wanted. So by the time I was in college, I was pretty sure I wanted to be a lawyer.

Ken Durr:

And you went to Harvard, right?

Wayne Carlin:

I did.

Ken Durr:

How about securities law, where did you come across that particular branch?

Wayne Carlin:

Yes. I think largely the origin for that is what I heard over the years from my uncle who practiced in that area.

Ken Durr:

Yes. And he was involved in M&A back in the '80s, I guess?

Wayne Carlin:

That's correct. As a transactional lawyer not as a litigator, which is what I turned out to be.

Ken Durr:

That was a pretty exciting time though, I would imagine, for him?

Wayne Carlin:

It was. It was indeed.

Ken Durr:

So did you study securities law then at Harvard? Any notable professors or courses?

Wayne Carlin:

I took the basic courses. I took Securities Regulation from Louis Loss and I can't claim that was a formative experience because I already had a pretty well-developed interest at that point. I took Corporations from Robert Clark who was later the dean of the law school, who was a really terrific teacher. So I think that experience did reinforce my interest.

Ken Durr:

Okay. Louis Loss, he was pretty well along in his career at that point, right?

Wayne Carlin:

He was in the late stage of his career at that point. And my main memory with respect to him was not so much from the class. I had some dealings with him in connection with my work on the law review. We were publishing, I think it was a review of a book of his, and the review included a quote. And there was some typographical error in the book, so we put the correction, put the sic, within brackets after the correction. And Louis Loss called me to his office and talked about something else for about 10 minutes, and then worked his way around to saying that in his day people would just put in a correction and not put in the sic. So I took that as a request and went back and made the change.

Ken Durr:

He handled that very delicately, I guess.

Wayne Carlin:

Yes.

Ken Durr:

So did you go right into practice after Harvard?

Wayne Carlin:

I did. I was a summer associate at Wachtell Lipton the summer between second and third year of law school, and then went there as an associate after graduating.

Ken Durr:

Okay. And then you moved on to another firm briefly as well, right?

Wayne Carlin:

Yes. I decided at one point to—I'm originally from the Boston area, and decided to move back to Boston for a while and was at the firm that doesn't exist anymore called Testa, Hurwitz & Thibault.

Ken Durr:

Okay. Could you talk about the genesis of the idea of coming into the SEC? Where did you get the idea?

Wayne Carlin:

Well, I had always wanted to spend some of my career either at the SEC or in the US Attorneys Office. I'd always wanted to have that kind of experience. It hadn't played out that way for me. And at the point that I was moving back to New York from Boston, at that point I was nine years out of law school and realized that if I didn't pursue that interest in government service, that was probably my last chance. And so that led me to pursue getting a position in the New York office of the SEC.

Ken Durr:

Is that where you wanted to go or did you apply to the SEC generally, how did that work?

Wayne Carlin:

Well, I was moving to New York for family reasons, moving back to New York city. So I wasn't really considering any positions anywhere other than New York city.

Ken Durr:

Okay. What was your impression of the, was it the Northeast Regional Office at this point? You came in at this inflection point.

Wayne Carlin:

Yes. I think if my memory is correct, when I joined it was still the New York Regional Office and then the reorganization happened a fairly short time after I got there and New York became the Northeast Regional Office, and then had Philadelphia and Boston as district offices reporting up.

Ken Durr:

Right. I guess it wouldn't have been a huge change for you since you were only there a little while, but did other people register their feelings about this change, which was a pretty significant one I guess?

Wayne Carlin:

Yes. I don't remember there being a lot of discussion about it within the ranks and for probably the same reason it didn't affect most people, probably had more of an effect on people who were in the Boston and Philadelphia offices. And certainly made a big difference for Dick Walker as the regional director, formerly regional administrator.

Ken Durr:

Did you ever get sent up to, say Boston or down to Philadelphia?

Wayne Carlin:

The main thing that I recall from that stretch of my service at the SEC which was a sort of notable experience, was, and this was probably a couple of years later when I was an assistant director, there was an investigation that the Boston office that had been conducting and was still in the investigation stage of that involved a prominent financial services firm. It had spilled into the local press in Boston and there had been some problematic press coverage and a lot of issues with the handling of the investigation.

Wayne Carlin:

And so a decision had been made at very senior levels to bring somebody else in to oversee and bring the investigation to a conclusion. And almost everyone up the line in the New York office had to be recused so it fell to me as an assistant director to get that assignment. I was reporting to Bill McLucas because everybody else was recused. Bill McLucas of course, was the director of Enforcement at the time. And so, that involved spending a fair amount of time in Boston and getting immersed in the investigation, and figuring out what needed to be done and working it to a conclusion.

Ken Durr:

Why was everyone else recused?

Wayne Carlin:

I don't know for a fact, but my pretty confident assumption is the financial services firm that was at the center of the investigation was one where a huge number of people have accounts. So my assumption was always that people had accounts there.

Ken Durr:

Got you. So you worked with Bill McLucas, tell me about that experience?

Wayne Carlin:

It was a really terrific experience, and it was a great opportunity at a relatively early stage of my SEC career. Certainly, I'd seen Bill in action at Commission meetings before getting this Boston assignment that I just described. And to me, Bill as the enforcement director was just a terrific embodiment of the core idea that SEC enforcement is supposed to be tough but fair with equal emphasis. Very tough when that's warranted but also always fair. And that was something that Bill exemplified and that he very effectively communicated down through the ranks. When I was working with him on the Boston investigation that I described, what I also found was that he was an incredibly quick study. It was an investigation with a lot of issues, a lot of complicated issues, and he was very quick to grasp and get to the heart of the matter.

Wayne Carlin:

The other thing I'll say from that experience, which again was very much emblematic of the tone that Bill set from the top of the Division of Enforcement was, even though this is a problematic investigation, even though it was in the public eye in Boston, even though there were all sorts of issues around it, my marching orders from Bill McLucas were: "Figure this out, figure what we should be doing and let's do it." And I didn't get any pushing to, we've got to bring a case here or we've got to close this and get it over with. The instructions were, "Figure out what the right thing is to do, and then we'll do it."

Ken Durr:

What did that turn out to be?

Wayne Carlin:

That turned out to be closing the investigation. We did a bunch more work but we ended up closing it without taking any enforcement action.

Ken Durr:

Okay. And your immediate boss, I guess, was Dick Walker at this point, right?

Wayne Carlin:

Yes. That's right. And coming to the SEC was a different kind of activity for me than what I had done professionally before. I had been a litigator in two different law firms. And so when I got to the SEC, I had a lot of experience as a litigator, and I had role models and people who I learned from as litigators. But I really hadn't had much if any exposure to management of a large organization. And so, working with Dick was my first experience being part of that kind of a large organization and seeing somebody acting as a manager and a leader. And Dick was just terrific in that role, you couldn't ask for a better role model as a still relatively young lawyer trying to learn how to lead a big organization.

Wayne Carlin:

Dick was very hands-on, he was always extremely approachable, he was always very inclusive. If there were meetings on a big case, everybody on the team including the most junior person would be part of it. Dick also really effectively combined those kinds of management skills with

the skills of a good litigator, which is what Dick was before he came to the Commission. He really knew the cases and he brought a litigator's mindset, wanting to get down into the detail. He wanted to keep up to speed on the developments in the important investigations and he was really deeply engaged.

Wayne Carlin:

Another thing that I learned a lot from Dick about which I had really no experience with before I got to the Commission was dealing with the press. Dick was very skilled at that and put a lot of thought and effort into it. And I don't mean in the sense of being attention seeking, but Dick was very thoughtful and effective about getting the Commission's message out. And so, when we would bring a case that had any significance, I remember many times sitting in Dick's office on the day that we announced a case as he called up reporters to make sure they saw the case, make sure they understood what was important about it, make sure that they understood the facts. And that I think was an important part of the job of being the regional director and not one that necessarily would have occurred to me before I got to the Commission. The Commission brings a lot of cases and issues press releases, but there's not a substitute for that direct communication and making sure that the message is understood and as communicated.

Ken Durr:

Now, you started out the enforcement side, you were always on the enforcement side in this early period, right?

Wayne Carlin:

Yes, that's right.

Ken Durr:

How did the career trajectory go? Where did you start, where did you end up?

Wayne Carlin:

Yes. Sure. So when I joined the staff, I joined as a staff attorney. I had become a partner at the firm in Boston, but this was something new and so I came in and started at the bottom rung as a staff attorney. But then it advanced pretty rapidly because it was nine years of experience as a litigator before I got to the Commission, I had some skills. I knew how to take testimony, and I knew how to write a regular legal memo and put a case together, and how to weigh evidence and so forth.

Wayne Carlin:

And the people I was reporting to saw that I had those skills and the first branch chief opening that occurred once I was there, I applied for it and got the promotion. And that was, I can't remember now, it was very quick, it was something like seven months after I got there. And then fairly quickly after that, an assistant director slot opened up which I moved up to as well. And it was very much a meritocracy in the sense that as I said, I came in with certain skills and experience and people recognized that and gave me the opportunity to advance.

Ken Durr:

When you're assistant director, is that for all of enforcement?

Wayne Carlin:

No. At the time in the New York office there were probably six assistant directors. And I had three—enforcement doesn't have branch chiefs anymore, which is unfortunate, but in those days we did. So I had three branch chiefs reporting to me as an assistant director.

Ken Durr:

Okay. Well, let's jump into some of the work you did. One of the notable early cases involved a hedge fund, and this is early days for hedge funds. Can we talk about that one a little bit?

Wayne Carlin:

Sure. That's the Askin Capital case, which was in the early days of the world in general being aware of hedge funds. And it was also, I think, my first real experience handling a high-profile investigation, a high-profile case. Askin Capital invested in various mortgage-backed securities. And it was also in the early days of mortgage-backed securities being kind of rocket science, not like the rocket science that came about 15 years later that contributed to the financial crisis in 2007, this is the first generation, the timeframe of the events is back in 1994.

Wayne Carlin:

And so Askin Capital ran what they described as a market neutral investment program. And the theory of it was they were so clever at mixing and matching the mortgage-backed securities that they invested in that once they put the portfolio together, whatever would happen to the market, if it went up, if it went down, they believed their strategy was going to be profitable and they weren't going to be adversely affected by market movements in any particular direction. That was the theory. What then happened in February 1994, was there was a small increase in interest rates, and in reaction to that a relatively small drop in the bond market. And Askin Capital reported to its investors a small decline in one of their funds and a small gain in another fund. Basically, reported themselves as not being adversely affected in a significant way by this drop in the bond market.

Wayne Carlin:

Within another month or two things started to get more difficult, and eventually they disclosed to their investors that they had had a very sharp drop in the value of their portfolio. Askin Capital was pretty well known in the investment world, and when you have a dramatic decline it gets press attention, so there was a lot of press attention, and a lot of speculation about what really went on there. And people were speculating about this market neutral strategy and whether they really, truly were trying to be market neutral or had they actually made a bet in one direction and was that why their portfolio turned out to have dropped as much as they did?

Wayne Carlin:

So we started an investigation, and it was the kind of thing that we could have spent two or three years investigating. We could have spent two or three years trying to figure out the rocket

science and trying to figure out whether or not we thought the investment strategy that had been pursued was truly market neutral or not. But that really would have been a morass as an investigation. What we ended up doing was conducting a much more targeted investigation. And the investigation took us less than a year, and we brought the case just a little bit more than a year after the events.

Wayne Carlin:

What we zeroed in on was, what Askin Capital had told its investors was that these mortgage-backed securities that they invested in traded in dealer markets. They didn't have a market price like a share of stock in General Motors would have. And what they had told their investors was that they valued their positions based on dealer quotes. What we learned in our investigation was that in this month when the bond market dropped, Askin Capital decided that they had a better idea than the dealers did of what the securities they held were really truly worth. And so, in the critical month rather than pricing their positions, valuing their positions based on the dealer quotes, they decided to use their own marks because they knew much better than the dealers what the real value of the securities was.

Wayne Carlin:

Now, the securities law problem there is that that, what they did and their basis for reporting results to their investors was contrary to what they had represented they were going to do in saying that they would use the dealer quotes. And once we got onto that issue, we decided that's our focus, we're not going to even attempt to figure out the rocket science. We have a much simpler and cleaner case, and that was the case that we brought as a settled case, as I said, just a little more than a year after the events. And there was a lot of value in acting quickly and putting the commission in a position to be able to speak on the case and take steps. The litigation involving investors which the Commission was not a party to, went on for years and years after that. But we felt very good about being able to address the matter as quickly and directly as we did.

Ken Durr:

Did this set any precedent for how Commission dealt with hedge funds in the years afterwards?

Wayne Carlin:

I don't know that I would say that it did, every investigation is unique and dependent on the facts that you're dealing with. And so, I can't claim that it set a blueprint necessarily for others.

Ken Durr:

Okay. Another sort of sui generis case, something totally individual, I guess, would have to do with the city of Syracuse. Could you take me through that case and particularly what you decided to do at the end of it?

Wayne Carlin:

Sure. Municipal finance investigations can be pretty interesting. And municipal finance is an area that is replete with the potential for serious problems because you have municipal

governments or state governments that are the issuers of the securities, which means oftentimes politicians or political appointees are in roles that if you were dealing with a public company would be a CFO with an accounting background. Instead you're dealing with an elected official or a political appointee who doesn't bring the same background and frame of reference, shall we say, to the role as people who come from, say, an accounting background. And frankly, the municipal securities bar is not a bar that is schooled deeply in the federal securities laws. So it can be an unfortunate combination of people. From issuers, who don't necessarily have the best instincts and lawyers who don't necessarily have the most refined understanding of disclosure concepts under the federal securities laws.

Wayne Carlin:

And so, the city of Syracuse case involved bonds issued by the city of Syracuse using disclosure documents, which contained financial statements that had various errors in them, various inaccuracies, various things being misrepresented. The problems with the disclosure, and particularly the financial disclosure, were quite extensive. Which tends also to be a problem area in the municipal world because everybody's idea is, well, bonds are being issued by a public entity that has taxing power. And the only thing that bond investors really care about is credit worthiness so no need to get hung up on financial details because all they need to do is raise taxes and the bonds will be credit worthy. It tends to be a shortsighted view of the world.

Wayne Carlin:

But anyway, there were extensive problems with the financial reporting which we investigated. And there are unusual factors that also come into play when you're dealing with a municipality or other state government. You need to address the problems, you need to shine a light on the problems, you need to take steps to try to do your best to prevent similar problems from happening in the future. But when we brought that case as a settled case against the city of Syracuse and a couple of officials of the city, the settlement did not include a financial penalty against the city, certainly if we brought the same case against a public company, there'd be a significant financial penalty. But there was a recognition that certainly doesn't do anything to help the people of the city of Syracuse and would only add further burden to the problems that the city already had. And so the case was resolved in that way.

Ken Durr:

There were penalties for individuals in that case?

Wayne Carlin:

I think there were, if memory serves, not large ones but, yes.

Ken Durr:

How did that case come to the attention of the Northeast Regional Office?

Wayne Carlin:

That one I just don't remember. There were others where I could tell you, but that one I just don't remember. My guess is that there probably was some kind of local press coverage, but I don't really remember.

Ken Durr:

In general, how did you pick up your work?

Wayne Carlin:

There were a number of ways. In the New York office, we had a terrific broker-dealer exam staff and a really terrific '40 Act exam staff. So some of our investigations came out of examinations that they conducted. Some came from tips, anonymous reports that come in. This was of course long before the SEC's Whistleblower Program and Whistleblower Office, and long before the bounty program, but we did get some whistleblower reports. We'll probably talk about the Credit Suisse case, that's where that one came from.

Wayne Carlin:

I also, and this was more my second time around at the Commission when I was the regional director, I was an extremely early riser in those days. And I would typically get to the office before most people were there and before most people had arrived at the home office in Washington. And this was also at a time when people still got their news printed on paper in the morning. And so I spotted a lot of things in the *Wall Street Journal* on my way to the office and had a competitive advantage in getting on the system and opening something up before anybody else got to the office in Washington. So I nabbed a lot of cases that way.

Ken Durr:

Speaking of Washington, somewhere during this period, I take it that there's a sort of combined effort between headquarters and some of the regions to deal with soft dollars. Particularly with New York. Were you involved in that?

Wayne Carlin:

I was, we did a lot of those cases in New York, and I mentioned the '40 Act exam staff and there was a focus on soft dollar practices at the time. Certainly, in all of the exams of investment advisors that our exam staff conducted, they were scrutinizing soft dollar practices. So we got a number of investigations out of things that were found in those exams. We also, at the time in New York, back to my first stint, had two enforcement branches that were focused on investment management-related investigations. This was sort of a forerunner to the later concept of having groups that were dedicated to particular types of enforcement. We had pretty good expertise in all sorts of investment advisor issues, including in soft dollar practices. We handled a number of those investigations, including what was the first criminal soft dollar case. We brought an SEC case but also referred it over to the Southern District of New York for criminal prosecution.

Ken Durr:

Did you provide some of that expertise to the other regions as well?

Wayne Carlin:

Not so much that I recall. I think in the other regions, they probably would have gotten that from the home office. I'm sure there were times where somebody would call up and say, "did you have this issue in the case you brought last year?" And we had those conversations, but it was not a big factor.

Ken Durr:

Yes, I guess I'm wondering if there was a sense of a conveyor belt of expertise going from New York, which was immersed in this stuff to the home office and then maybe out again.

Wayne Carlin:

Yes, I mean certainly we had a lot of interaction with the staff and Investment Management in the home office. They were always up to speed on our investigations in the area. So they had the benefit of that knowledge as they were dealing with other regions.

Ken Durr:

Okay. Well, let's wrap up that first stint with a quick discussion of working with Arthur Levitt and his Commission. Did you get to deal closely with him at any point?

Wayne Carlin:

I was in meetings. Chairman Levitt had a practice of having a briefing before a closed Commission meeting to go over the enforcement cases that were on the agenda for that Commission meeting. I attended a number of those meetings, which were interesting. He was very interested in the enforcement cases and very engaged, but when it came time to talk about your case, you had to be to the point, concise, and clear. He wanted to hear about it, but he wanted to get very quickly to the point. It was a very rewarding aspect of my first stint at the Commission to serve under Chairman Levitt, he was a really effective chairman. People talk about the concept of regulatory capture of regulatory agencies, being under the thumb of people from the industry they're supposed to regulate when those people come inside to the agency. If you wanted Exhibit A to disprove that theory, then you couldn't ask for a better Exhibit A than Arthur Levitt. He identified with and believed in supporting the mission of the Commission.

Wayne Carlin:

The best counterpoint to the regulatory capture concept—Arthur Levitt illustrates it. What you get when someone with industry experience comes into a regulatory agency is the benefit of all that experience. Chairman Levitt, from his years in the industry, was aware of areas that needed attention and was aware of areas where abuse was taking place. He's probably most famous for shining a spotlight on earnings management practices. Municipal finance, another area he started, he moved on to his emphasis on earnings management. The reason why we were conducting a lot of investigations in the '93, '94 timeframe that had to do with municipal finance, was that Arthur Levitt identified that as a priority area that he believed needed attention. He was right, and so it was a really terrific experience to work under him.

Ken Durr:

So what took you back to Lazard Freres after that first stint?

Wayne Carlin:

I was approached with an offer of a position that sounded really interesting. So it was not a situation where I was out looking for another job, but had this opportunity presented which was very appealing to me at the time. Sounded like an interesting thing to do, to go in-house at an investment banking firm and be in charge of regulatory affairs. So that was what I did at that point.

Ken Durr:

Did that give you a substantially different perspective than you had gained earlier from working in the law firms?

Wayne Carlin:

It did, and a substantially different perspective than I had gotten working in enforcement at the Commission. You come out of enforcement, and you think you know all about the federal securities laws. But if you go in house, as an investment bank and a broker dealer, you discover that you know a lot about the anti-fraud provisions and you know a lot about a few other things. But you have really very little concept of the vast array of rules and regulations that these firms have to comply with in everything they do every minute of every day. It was a real learning experience. More so than I probably expected.

Ken Durr:

So a good offer took you there and I assume that a couple of years later there must have been another good offer from Commission.

Wayne Carlin:

A couple of years later—this was probably related to the fact that I hadn't been looking to leave the Commission when I left. What happened a couple years later was that my former superior Henry Clem, who was the associate director, who I reported to when I was an assistant director, Henry left the Commission a couple of years later, so that spot was open. I thought about it, and I really felt like I hadn't done or experienced everything that I wanted to do and experience in the time that I had been at the Commission. So I applied for the position and was successful in that and went back as an associate director and one of the two co-heads of enforcement in the New York office.

Ken Durr:

Okay, and this is 1999?

Wayne Carlin:

This is 1999, yes.

Ken Durr:

And Carmen Lawrence would have been running the region at that point?

Wayne Carlin:

Yes, that's right.

Ken Durr:

Give me a compare and contrast, what did you do? You left under Dick Walker in the Northeast Regional Office. What did you see that had changed either because of the new leadership or for other reasons?

Wayne Carlin:

Frankly, not a lot had changed. I sort of felt almost like I'd never left and walked in there the first day back and just jumped right back in. Carmen had her own approach to running the office. She was a terrific regional director and a very effective leader of the office. I mentioned Dick had come to the position after a career as a litigator in private practice. Carmen had a very long career at the SEC before she became the regional director. She brought a really immense storehouse of knowledge and experience on the enforcement staff over a long period of years. There's just no substitute for that. We'd come up with some issue that we thought was a novel issue that we were puzzling through, and we'd go and talk to Carmen. She would remember two other cases where that had come up eight years ago and 12 years ago. She had tremendous knowledge and experience. She was also very tough in her approach and aggressive in pursuing cases, but still with the appropriate balance. She was a tough investigator and tough advocate for our cases.

Wayne Carlin:

Another thing that distinguished Carmen was she was really supportive of her staff. I remember there was one investigation where the staff handling the investigation, including me, there was a lawyer involved in the conduct of the case and we thought that the lawyer's advice was terrible and was clearly wrong. Things have changed somewhat since that time, but at the time, the Commission's approach to charging lawyers was pretty limited. In those days, in general, in order for a lawyer engaged in the practice of law to be charged in an enforcement action, the Commission's approach generally was the lawyer needed to be a knowing participant in a fraud or knowing participants in a serious violation. The Commission didn't think it was appropriate to go after lawyers in an enforcement action for giving bad advice in good faith. The Commission was also very conscious of not supplanting the role of bar authorities and the state level.

Wayne Carlin:

We were really worked up about this one particular lawyer's conduct and Carmen was somewhat skeptical. I think she was largely skeptical because of her knowledge of the Commission's approach in lots of cases over the years. So we ended up having a meeting in the office with staff in the office of general counsel in the home office to discuss the question of whether to recommend charges against this lawyer. The team went down, and also Carmen, and it was a remarkable instance of advocacy that really impressed me, because in our internal discussions

back in New York, Carmen really pressed us and sort of took this the skeptical side of the argument. But once we were down there as the team from New York, setting out the reasons in favor of considering charging this lawyer. Carmen was our most effective advocate in talking to the office of general counsel and that really impressed me.

Ken Durr:

So she'd been listening to what you were telling her.

Wayne Carlin:

Yes.

Ken Durr:

Well, let's talk about some of the cases that you get involved in at this point. One of the ones that comes up about a year later involved 120 defendants, and this was a nationwide sweep of some sort. Tell me about that experience.

Wayne Carlin:

Yes, that was a pretty remarkable experience. This was an investigation where we worked with the U.S. Attorney's office in the Southern District and the FBI. This was at a time when boiler room frauds and pump and dump schemes were really rampant. It was before that kind of fraudulent activity migrated over to the internet. This was still the old-fashioned way with people on phones and manipulative trading going on bulletin board stocks that were very thinly traded.

Wayne Carlin:

The U.S. Attorney's office and the FBI were running an undercover investigation and we had a parallel investigation. They were able to share certain information with us, but given the grand jury secrecy, there were things that they weren't able to share with us as the investigation went along. There was one individual who was an undercover cooperator, who was a career stock manipulator, and was also in business with people who were either members of, or affiliates of, organized crime. He operated in that way, undercover, for about a year and he was involved in a lot of these schemes and the investigation expanded to pick up other people and other schemes. When it came time to bring it all down, that's when the 120 people you mentioned were charged by the SEC. And most of them were also arrested by the FBI.

Wayne Carlin:

We brought parallel cases in; the biggest ever blow struck against boiler room activity and pump and dump schemes. One aspect of it that was kind of nerve wracking for me was pretty early on, when I got back to the Commission, I was brought into the loop with this investigation. It was an ongoing undercover operation that involved actual manipulation of various stocks. Obviously, there's a sensitivity there in an arm of the United States government, knowing that a particular stock is in the process of being manipulated and letting that happen. Well, obviously it was for a larger and very worthy purpose. There's a little bit of potential discomfort with that idea. So I ended up with the job of every once in a while, I would get a call from somebody in the U.S.

Attorney's office or the FBI giving me some details on a trade that was going to happen with some parameters. I had the job on behalf of the SEC of saying "yes, it's okay, go ahead."

Wayne Carlin:

So again, it's not something you learn in law school, or you really learn in any other job than the SEC. As far as I know, nothing really horrific resulted from any trade that I didn't object to on behalf of the Commission. The other thing that was very memorable from that investigation was, when we were working towards bringing this all to closure via the Commission bringing its cases, and all of these arrests being made in order for us to have the factual basis to bring our charges and to recommend the appropriate charges to the Commission, we needed a sufficient factual basis.

Wayne Carlin:

A big part of the way we got that basis was a couple of us, Bob Knuts, who was either an assistant director or trial counsel in New York at the time, and I were invited and spent, I think, about three days at an FBI safe house in the Poconos where we met with the cooperator who had been undercover for a year. Along with the FBI and a couple of prosecutors we spent three days with him going through scheme after scheme after scheme and him recounting the conversations that he had and various other factual aspects that were part of the evidence supporting the case. That's another thing I didn't necessarily foresee that I would be doing, but it was a pretty interesting three days.

Ken Durr:

A little bit of cloak and dagger there.

Wayne Carlin:

Yes.

Ken Durr:

Around the same time the Regional Office was involved in the Rick Lazio revelation.

Wayne Carlin:

Yes. So Rick Lazio was a Republican congressman, and he was running for the U.S. Senate. What probably elevated Mr. Lazio's profile a little more was that his opponent was Hillary Clinton. This was Hillary Clinton's first run for the Senate seat from New York. While that campaign was ongoing, allegations became public, allegations of insider trading against Rick Lazio were made public. So we of course opened an investigation. There was a lot of press attention, there was a lot of effort to make hay from these allegations by other Democratic politicians. Our perspective on it was of course we're going to investigate given the nature of the allegations, but we were very alert to not doing anything to cause our investigation to become a factor in any way in the election campaign. A recognition that the best thing that we could do in our role, was to complete the investigation and have a conclusion and be able to do that before the election.

Wayne Carlin:

So that would be the best way to not have what was going on be influenced by anything else we were doing in our investigation, or by allegations that whether they had a basis or didn't have a basis. So we were very intently focused on getting that investigation done and reaching a conclusion. I got personally involved in the investigation; it was basically two of us. Dorothy Heyl, who was a very experienced enforcement lawyer in the New York office, and I were the team on this. We moved in a very expedited fashion, and it appeared to us pretty early on from the information that we got—and at this point, I can't recall for you exactly what the details were—but it was pretty clear to us that it seemed pretty unlikely that Rick Lazio had in fact engaged in insider trading.

Wayne Carlin:

I can't remember at this point, if it was a matter of the dates on which he traded or other surrounding facts. But once we dug into it; got the account records and saw the actual activity, we were pretty skeptical. But we still had to; weren't going to jump to conclusions. We still had to do the work, and we interviewed a number of witnesses and pursued documents.

Wayne Carlin:

Then the final step was we knew we needed to interview Rick Lazio. We didn't feel that it would be appropriate to reach a conclusion without sitting down face-to-face and questioning him and hearing what he had to say and being able to evaluate his credibility. His lawyer in this investigation was none other than Bill McLucas, who at that point had left the Commission and was a partner in the WilmerHale Firm. Bill asked us as an accommodation to interview Congressman Lazio not in the New York office of the SEC but at some other location. He was concerned that reporters and photographers might have the office staked out, he wanted to not have this spectacle.

Wayne Carlin:

We thought that was a reasonable request, so we ended up meeting up in a suite at the Regency Hotel on Park Avenue in Midtown Manhattan. That was where Dorothy and I interviewed Rick Lazio and then pretty expeditiously after doing that—there were no photographers outside the Regency Hotel and there was no spectacle—we pulled it all together. Our conclusion was that the evidence did not support a charge that he engaged in insider trading, and we closed the investigation and we informed Mr. Lazio that we had done so.

Wayne Carlin:

That also was the occasion for us revising the standard form letter that the staff sends when an investigation is closed. I think the revision that Dorothy Heyl and I put together is still the standard form that the SEC uses now. The prior version was very abbreviated, and we revised it so that within the text of the letter, the key points were clearly stated, namely: we're closing the investigation and not recommending any enforcement action, but also be aware this is not a gold seal of approval. There are some appropriate caveats so that someone receiving a closing letter, can't wave it around and say the SEC determined that I'm innocent, which is not really what you do when you close an investigation.

Ken Durr:

This is interesting because there wasn't a lot of money involved, right? Lazio didn't make whole lot of money on these trades. Did the SEC kind of have an obligation to look into this because he was a public figure and there were all the implications of that?

Wayne Carlin:

Yes, I think under the circumstances it was an investigation that we had to conduct. I think it would not be beneficial to the public trust in the Commission in general to not decide to even look into something involving a prominent figure. Frankly the Commission pursues insider trading investigations all the time where relatively small amounts of money are involved.

Ken Durr:

So shortly after that, you took over the regional director's office.

Wayne Carlin:

Yes.

Ken Durr:

Did your perspective change, were there things that looked different to you all of a sudden from this new perspective, and what was your agenda? What did you feel like you wanted to accomplish?

Wayne Carlin:

I can't say that I had a substantive agenda in the sense of, well I want to do this kind of case, or I want to do that kind of case. You can't really pick and choose in that way. I certainly had an agenda of wanting to be an effective manager and an effective leader. You have limited tools at your disposal to motivate and reward hardworking staff in a federal agency. You have to make the most of what you have, which includes your own involvement in things and how you interact with people and how you engage with what they're doing. So I was trying to be very much in touch with the staff and involved in what they were doing.

Wayne Carlin:

My own experience up to that point had been all in enforcement, and so part of what I very much had in mind was making a real effort to become more knowledgeable about and more involved in what the exam staff in New York was doing. We had excellent leadership and really excellent staff in those programs. I did make a distinct effort to, I mean, I went out on a couple of exams both see what it's like for the examiners but also kind of show that was my level of interest.

Ken Durr:

How about the structure? You're also responsible for Boston and Philadelphia, for example, this is a pretty big area, a lot of activity. Did you find that structure to be unwieldy in any way?

Wayne Carlin:

I wouldn't say that it was unwieldy. It was not ideal because the investigations being done, say, in Boston, the staff in Boston were the ones who were immersed in them. The supervisors in Boston were the ones who were overseeing it, and it doesn't work that well from out of town to insert yourself into that process. The people running Boston and Philadelphia were fully capable of running Boston and Philadelphia. I had a pretty light touch in supervising what was going on there. The most significant involvement was all of the enforcement recommendations that came out of Boston and Philadelphia came through New York and we reviewed them. That was an important function and I think we did add value.

Wayne Carlin:

I had the benefit in that function of having Jason Geiger on the staff in New York. Jason was a career SEC enforcement lawyer and at that point was in the role of Regional Litigation Counsel, he wasn't actively working on investigations in New York. But Jason had the role as the primary reviewer of the enforcement recommendations that came up from Boston and Philadelphia. It was a really terrific match to his experience because he brought that broad perspective. The way that worked was Jason would periodically meet with me and say, "We've got these two recommendations from Boston. Here's what the case is about, here's what they're recommending. Here's why I think it makes sense."

Wayne Carlin:

Occasionally, Jason would come to me and say there are some issues with this recommendation from one or the other of the district offices. He had very good judgment in spotting when there were issues and good judgment in what he elevated in that way. On the ones that he did elevate, I would then dig much more deeply into. There were some occasions, not a lot, but there were some occasions where cases got killed in New York that came up from Boston and Philadelphia. That was also a challenge, it wasn't just sending a note to Philadelphia saying your case is dead. I tried to in a tactful and diplomatic and sort of "we're all on the same team" kind of way to have a discussion with whichever office it was where there was a recommendation that I had concluded was problematic. I had the ultimate responsibility to sign off and send it up, and I wasn't going to sign off and send it up if I didn't think that was appropriate.

Ken Durr:

One of the things you've got to take into account is resources, I imagine. You're really looking at this probably for the first time, you've got budgets, you've got people, you've only got so much capacity. Was that one of the things that factored into these decisions?

Wayne Carlin:

You're asking about the review of the recommendations from Boston and Philadelphia?

Ken Durr:

Yes.

Wayne Carlin:

Not really. I don't want to overstate how often it happened, but in the cases where I felt a case should not be pursued, it was because I didn't think that the evidence supported it. Or, because I didn't think the legal theory was appropriate. If a case gets to the point that an enforcement recommendation is ready to go up to the Commission, I would be surprised if anybody's making a decision based on resources. If it's being halted, it's because there's a real problem with the recommendation.

Ken Durr:

Okay. Before we leave that administrative discussion, though, I do want to talk about Jim Clarkson. He was the keystone to the Regional Office structure for a long time. Tell me about your relationship with him and how he helped you in your work?

Wayne Carlin:

Jim Clarkson was just a tremendous resource and a really wonderful person. Given his long career at the Commission, he was immensely knowledgeable about the history of cases that have been brought and issues that had come up. But he was also immensely knowledgeable about how to work things administratively and bureaucratically. He was always a wise counselor and a valuable sounding board really committed to the Commission's mission. Also really committed to making things work for the regional offices and upholding the role of the regional offices. He was the right man for the job and just a terrific supporter of everything that we did.

Ken Durr:

Give me a thumbnail description of the region when you come in. It's the SEC's largest by far, how many people? What were some of the big things ongoing at the time?

Wayne Carlin:

As best I can remember, and I certainly could get this wrong, I think we had 400 some staff or so in New York. You're right, it was by far the largest regional office. Of that staff in New York, I think about half were enforcement, maybe a little more, and the others were the exam program. I always felt we had the best of both worlds in New York because as a regional office, we had the autonomy of being out on our own and not being in the home office and able to largely run our affairs with a lot of autonomy.

Wayne Carlin:

But because we were in New York—given the financial services industry, given the New York Stock Exchange, given the public companies that are in New York, accounting firms in New York—our scope in terms of investigations that we could conduct and the kinds of investigations we had the opportunity to conduct was very broad and we were able to investigate and bring a lot of really significant cases by virtue of being in New York.

Ken Durr:

Okay. This is by way of giving some context to what comes next. I think you chaired a really good panel on 9/11 at the SEC. I don't want to detract from that, I benefited by looking into it.

But I think we should run through your experience on September 11th and after. Let's go back to that period, talk about where you were and what your immediate reactions were, and what your long-term actions were following that?

Wayne Carlin:

Sure. On 9/11, I along with all of the other regional directors and Jim Clarkson, we were in San Francisco. We were there because we had attended a conference with the state securities regulators. That was one of the responsibilities of regional directors, was to attend those conferences and be the primary liaison with the state securities regulators. The conference had ended, so on the morning of 9/11 when the first plane hit the World Trade Center a little after 6:00 AM in San Francisco, I was sitting on a plane on the runway just having boarded the plane in San Francisco about to—I thought about to fly home to New York. I was sitting on the plane, the door was still open, and my beeper went off. Beepers were a thing people had in those days.

Wayne Carlin:

My beeper went off, and it was the chairman's office paging me thinking I was in New York because the conferences with the state securities regulators were not topmost in the mind of the chairman's office. I returned the page, called the chairman's office, and spoke to one of his staff. That was how I found out that a plane had hit the World Trade Center, still sitting there in my plane seat. Within moments of that phone call, then an announcement came on the plane, everybody needs to get off the plane and go back into the terminal. Back in the terminal, CNN was on all the TVs with the tape playing. I tried to make a payphone call to New York but couldn't get through.

Wayne Carlin:

Then I quickly realized I was not going to be getting on an airplane that day. So, I went back to the hotel that I had just checked out of, back to the hotel room that I had just checked out of, where the bed hadn't even been made yet. Then spent that day with the TV on in front of me and constantly on the phone. The initial focus was on tracking down all of the staff to make sure that everyone was safe. Because, of course, some people were already in the office when the planes hit, and some people were on route. I watched on TV later in the day as 7 World Trade Center, which is where the New York office was, watched as my office building collapsed on the TV.

Wayne Carlin:

That day was mostly focused on getting in touch with people, which was difficult as there was a lot of interruption of phone service, of course, in Manhattan. By that evening, we had tracked down everyone. Including one broker dealer examiner who was conducting an exam of a broker dealer in one of the towers and was either 74 or 75 stories up, something like that. Not many floors below where the plane hit and had walked down 75 flights of stairs to get out. We finally tracked her down and the main thing that she wanted to talk about was how sorry she was that she had left in such a rush to save her life that she had forgotten to pick up her SEC laptop. The good news was that all of our people were safe.

Wayne Carlin:

Then the succeeding few days in San Francisco—every day I made a plane reservation for the next day to fly back, and then the next day all the flights were canceled. So I was in San Francisco for several more days. Our focus, once we had accounted for everyone, shifted to finding new office space because our building had been destroyed. Several of the senior New York staff in my absence started to work on tracking down availability of potentially suitable office space. Then eventually when we got to the Thursday of that week and the flights were still getting canceled every day, that's when I decided to drive home prompted by the fact that the Jewish holidays were about to be happening.

Wayne Carlin:

I think Monday was going to be Rosh Hashanah, and I realized if I didn't leave and start driving on Thursday, I wouldn't get home in time for the holidays. Dave Nelson, who was my counterpart in Miami, the regional director in Miami and I rented a car and hit the road. We left, I think, in the afternoon and got as far as Salt Lake City that first day. Then the next day we drove 1,020 miles and got to Manhattan, Kansas. Dave took pictures of me, I spent large amounts of that car ride on the phone with my staff back in New York working on trying to get our office up and running again. Dave and I then, the next day, split up in St. Louis and he headed south, and I kept heading east. I got to Columbus, Ohio, that night, and then the next day drove from Columbus, Ohio, to my home in New Jersey.

Wayne Carlin:

The other thing I should say is while all this was going on, my staff on their own was meeting and figuring out how to keep doing their work. We had people meeting in people's apartments, we had a group of examiners who lived on Long Island who met in a public library. It was really an extraordinary commitment to their jobs, and it wasn't that somebody told them go do this. They thought they should be doing their jobs, and so they did.

Ken Durr:

You left Friday and got back there Monday, or you left Thursday and got back on Monday?

Wayne Carlin:

I left Thursday and I think I got back on ... maybe it was Sunday.

Ken Durr:

The big question is people are doing their work. I assume that some folks did have their work ... did have their laptops. How did you recreate the document base, the records, the nuts and bolts of all of these cases?

Wayne Carlin:

It was a huge task. We were lucky in the amount of the material that was stored electronically. So, for a lot of investigations, we did not have to go back to people and say, "Re-produce to us the documents that you've produced already." In a lot of cases, document productions had been uploaded and were preserved electronically. It was a big task of pulling together what was

electronically stored. We really only had one investigation where somebody tried to turn these events to their advantage. One investigation where we had to go back ... I think we had to go back and get some documents re-produced. The party involved was very uncooperative, but we persisted and completed the investigation and brought an enforcement action. I can assure you, in resolving it we didn't forget that was the one party that had tried to get an advantage out of these events.

Ken Durr:

Did you work closely with Chairman Pitt through this?

Wayne Carlin:

Chairman Pitt was hugely supportive, and it was really remarkable what a federal agency was able to accomplish in the circumstances. One thing that chairman Pitt did was empower Jane Seidman to come to New York and lease office space. He was responsible, really, for cutting through what would've been all of the normal red tape and bureaucracy and Jane was fully empowered to do whatever needed to be done to get us situated in new office space. That then enabled us to be the first federal agency in lower Manhattan to reopen after 9/11.

Ken Durr:

About how long did it take until you felt like things were up and running and you were comfortable in the new office?

Wayne Carlin:

Well, we were up and running right away, and we really never stopped being up and running. The comfort in the new office was much more of a challenge because—and we didn't have a lot of choices. We ended up taking space in the Woolworth building, which architecturally is a classic building in lower Manhattan. The space that we moved into had been previously occupied by a dot-com company. This happened to be right after the collapse of the dotcoms. The space was configured for dotcom, so it was open work areas and cubicles. I went to look at the space when I got back to New York, this was at a time when the only way you could get into lower Manhattan was with a police escort.

Wayne Carlin:

Went into the Woolworth building, and it was like a dot-com version of going to Pompeii. Because it looked like these people had gone home from work one night and then they got a call don't come in in the morning. People had their pictures on the desk, the foosball table was still there. It was an abandoned dot-com space, and so it was really not ideal for enforcement lawyers to be in cubicles and open work areas. We had a limited number of private offices. People plugged through it, but it was not an ideal setting. It was not until my successor, Mark Schoenfeld, moved the office to the location where it is now, what used to be called the World Financial Center, that the office was back to a configuration that was really more suitable for the functions being performed.

Ken Durr:

Well, let's talk about some of the work that you did from your dot-com space in those last couple of years. You mentioned earlier Credit Suisse, maybe we should jump into that one?

Wayne Carlin:

Credit Suisse is, to me, a terrific story because it shows the Commission staff at its best. As I mentioned earlier, this started from a whistleblower letter. I can still remember being in the hallway at the office and Bob Sollazzo—who was the head of the broker dealer exam staff, only recently retired in the last year or so—Bob stopped me in the hall and showed me this anonymous letter that had come in describing practices at Credit Suisse. This was in an area where there were a lot of hot IPOs, hot initial public offerings, particularly involving technology companies, where on the day of the IPO, there was a pattern of the stock market prices going up dramatically from the IPO price in the first day.

Wayne Carlin:

So, for investors, being able to get the IPO stock was a great boon because if it was one of these frequent offerings where the stock price rocketed the first day, you'd have very large instant profits. The allegation was that there was a practice at Credit Suisse of allocating hot IPO stock to customers who would then "pay back" for that opportunity by doing large trades in—have widely traded equity securities in which they paid outlandish commissions. The commissions not being related to the equity trade, but that was the payback for being given the hot IPO stock of some other company that had just gone public.

Wayne Carlin:

I've seen a lot of whistleblower letters over the years, and you can make a pretty good judgment on the face of a lot of them. They're illogical, they don't make sense. A lot of them you look at and your reaction is, well, this ... I'm skeptical about putting any weight on this. This one was written in grammatical English, it made sense, it was logical, it had specific details, it was cogent, and it sounded like a really bad practice. My reaction looking at the letter was, "Well, if this is true then this is a huge enforcement case."

Wayne Carlin:

Another advantage that we had as a regional office as a function of having an exam staff was that we didn't have to start everything we were interested in as an enforcement investigation if it involved a regulated firm. And so, we didn't open an enforcement investigation, we sent in our broker dealer examiners. They went in with a purpose and they were able in the exam to find evidence to corroborate the allegations in this whistleblower letter. We then expanded it and moved on to the enforcement investigation stage and it turned out that the allegations in the whistleblower letter were accurate. This was a very significant practice that was going on involving very large amounts of money.

Wayne Carlin:

That investigation then also sparked an industry-wide investigation because the same practices were going on at other firms. There were other firms that weren't nearly as big participants as underwriters of these hot tech stocks. It was most prominent at Credit Suisse because they had the largest position as an underwriter in that market segment, but there was an industry-wide investigation. One twist that we had to deal with was that the facts of these transactions didn't necessarily fit completely neatly into all the elements of Rule 10b-5. And so, the case that we ultimately brought was somewhat unusual, it was an injunctive against Credit Suisse charging them with violating an NASD rule. I think it was still the NASD in those days before FINRA.

Wayne Carlin:

There was an NASD rule that prohibited a broker dealer from sharing in the profits of a customer account. That was our theory of the violation, that this practice enabled the firm to share in the profits of customer accounts and that was what the violation was. The Commission had authority to enforce SRO rules, but it was not something that the Commission did very often. Typically, an SRO would enforce its own rules. It certainly was within the Commission's power, but it was an unusual approach.

Ken Durr:

Did you consider going to FINRA or to the NASD and saying, "Hey, you've got this problem. Take care of it?"

Wayne Carlin:

I think we felt we had the problem well in hand.

Ken Durr:

Okay. You handled one of the first Reg FD cases, or I think there were a couple of them, right?

Wayne Carlin:

Yes. The two that we had in the New York office were the first two. There were two others, and when the cases were brought, all four were brought together. Some people took the view that we slowed down a little bit so that the other two cases could join us, but they were all four brought on the same day. Reg FD was a new regulatory provision obviously designed for the purposes of preventing selective disclosure. Designed so that if a company's going to communicate material non-public information, then it goes to the market as a whole and not selectively to securities analysts or big investors. It was new, and I think what happened is not all public companies got the message initially. Not all public companies completely understood the new rules of the road.

Wayne Carlin:

There was also a fair amount of concern around the adoption of Reg FD about whether the Commission would go overboard in enforcing it, whether the Commission would be unreasonable in where it would draw the lines on what was material information. We had two cases in New York, one was an enforcement action against a public company where the conduct they engage in was clearly prohibited by Reg FD. There were individual phone calls to securities

analysts to get them to adjust their earnings estimates, so there was not any angst over whether this was too close to a borderline or not.

Wayne Carlin:

The other case that we brought was, I think, more interesting, and I think we recommended, and the Commission took, a thoughtful approach to. In the other case the conduct, in our view was, was clearly in violation of this new regulation. The company involved had publicly told analysts and investors to expect a significant decline in its sales. What they then selectively communicated to individual analysts was when they said significant, what they meant was at least 25 percent. They gave specific quantification to the more general statement on a selective basis, they gave specific quantification to a statement they had made more generally publicly. Our view was that that quantification was material information, this was clearly contrary to Reg FD.

Wayne Carlin:

The complication there was before the folks of this company made those selective disclosures, they went to their legal department, and they said, "Here's what we plan to do, is that okay under Reg FD?" The legal advice that they received was, "yes, it's okay." The internal lawyers had some theories about why they thought that it was okay. Our view was that legal advice was mistaken and we thought was pretty clearly mistaken under Reg FD. However, we thought that it was appropriate to have some sensitivity to the fact that in this instance, businesspeople didn't just run out and do something that was wrong. They did what we pretty much would want them to do.

Wayne Carlin:

They went to their legal department and asked for advice, the advice they got was bad advice, but they asked for it and they followed it in good faith. So what we recommended, and the Commission decided to do was, rather than bring in enforcement action to publish a 21(a) report and that was what was done. The 21(a) report laid out, all of these facts made clear, the Commission's view that the judgment that had been made that this information was not material was an erroneous judgment. It made clear that the Commission's in favor of people getting legal advice, but also emphasized that for the future, legal advice is not necessarily universally a get out of jail free card; that the lawyers need to be appraised of all the necessary facts.

Wayne Carlin:

Legal advice has to be followed faithfully but I think we did a good job and I think the Commission was right to walk that line with that new regulation, where there was a lot of apprehension about how the Commission would approach it. To very clearly send the message of how to interpret the regulation, but at the same time recognize and give some weight to a good faith attempt to act appropriately.

Ken Durr:

Okay. The point being that Reg FD is new, and you want to give people time to get used to these new provisions rather than hit them all at once, I guess.

Wayne Carlin:

Pretty much so. In the first case that I described that conduct should have been understood to be in violation of Reg FD and we brought it as an enforcement action, the people in that company had not taken the step of asking for legal advice. So they didn't have the benefit of that.

Ken Durr:

Right.

Ken Durr:

Well, on one hand, you've got people getting legal advice. Another thing that's going on at this point is they're not going to their lawyers. They're going to their auditors; they're going to the accountants. This point is when you're getting a lot of earnings management and ultimately restatements. Give me a little context for that, from your point of view, from the New York point of view.

Wayne Carlin:

Sure. This was the beginning of what's now a very widely understood issue that the Commission and its staff has spoken a lot about, and I think public companies from my experience are very alert to, and what, what we now call non-GAAP performance measures. Many companies when they report their earnings, report metrics that are not GAAP measures, but that investors consider to be meaningful. The concept is that they try to isolate metrics that reflect the results of the ongoing operations of the business and factor out various things that are non-recurring one-time events, things that are for one reason or another don't go to the ongoing operations of the business. So back in the days we're talking about this was a fairly new in being recognized as a possible problem area. This was something that Chairman Pitt had spoken about and had called attention to.

Wayne Carlin:

The concern was companies reporting financial measures without making clear what had gone into those financial measures and what had not. Which meant that investors lacked the information that they needed to really be able to evaluate the information that they were receiving. There was a case that we brought, an investigation we conducted and a case we brought that really made the point and it involved a company called Trump Hotels international. I will say it, it did not in any way involve Donald Trump, but it did involve his company. And this is 20 years ago. And this is one of these investigations that came from something I spotted. I was looking at some, I think, fairly obscure industry publication. And there was a little article about this company having announced its quarterly results and touting that they beat analyst expectations but then a few days later, it emerged that, they had failed to disclose that the earnings number that they reported and touted as beating analyst expectations had been affected by a very significant one-time transaction.

Wayne Carlin:

So, their financial reporting was not inaccurate. The numbers they reported were the correct numbers, but what they had failed to disclose initially was that there was an unusual non-

recurring event that made the difference between beating analyst expectations as they had touted and, falling short. That essential scenario was described in this little article that I saw. And this is another one of these moments of, well, if that's true, that's an enforcement action. So we opened the investigation and those were the facts. And so we ended up ultimately bringing a settled enforcement action.

Wayne Carlin:

This was, I think, before the terminology of non-GAAP financial measures and this actually wasn't even really a non-GAAP measure. But in those days, I think that the terminology people were using was pro forma financial reporting. So it was the first case that dealt with that area and made the point that, if there's something unusual in your numbers, you can't conceal that. And you can't tout yourself as having beaten expectations if you're failing to disclose that it was not your regularly ongoing operations that enabled you to beat expectations.

Ken Durr:

Okay. Another case where I think you had that even to a greater degree was the Rite Aid case.

Wayne Carlin:

Rite Aid was an accounting fraud investigation and, it was a fascinating investigation. Rite Aid at the time had gone through what was up to that time, the largest restatement of income in history. I think was something like \$1.4 billion restatement of income. It was very quickly thereafter eclipsed by WorldCom. So that's why you don't today think of Rite Aid as the biggest ever, but up to the point it was. And so Rite Aid also illustrates something that is not at all uncommon in investigations, which is you start investigating something and you end up finding something else.

Wayne Carlin:

The Rite Aid investigation started as an investigation of related party transactions between Rite Aid, the public company, and the family that was, I think, still the majority owner of the equity of the company. It started out focused on related party transactions, but in the course of pursuing that investigation, we became aware of various accounting issues, which ended up being the real story at Rite Aid.

Wayne Carlin:

It was a really rampant accounting fraud involving a wide variety of fraudulent techniques, including a number of really blatant techniques. I'll just give you one example to illustrate, which is, the company was entitled to get credits from its vendors to the extent that if products that were in an inventory that they had purchased from a vendor were damaged, or otherwise unusable, they were entitled to claim credits that would offset future bills from those vendors. And this company had developed a practice of what are called upcharges, which were just an automatic additional percentage amount that was added on to the legitimate credit claims based on damaged products. No business justification caused the accounting to be inaccurate and it added up to very substantial amounts of money.

Wayne Carlin:

So it was a case of a variety of quite blatant forms of conduct. And so there was a very extensive investigation. There was a parallel criminal investigation conducted by the US Attorney's office in Harrisburg, Pennsylvania. It was an investigation that—I had done accounting investigations over the years, I had some experience in the area, but I worked personally pretty extensively on the investigation.

Wayne Carlin:

I worked very closely with, with an enforcement accountant in the New York office named Scott York, who had been on the staff for a long time and had really vast experience in accounting investigations. And I learned a huge amount from Scott York. Working with him on Rite Aid I particularly learned a lot about how accountants think and learned a lot about how to identify issues that had a chance of an evidentiary basis being traced up the corporate ladder. It was a case where there were probably 20 issues that could have been pursued, but Scott spent a lot of time and figured out the one or two issues that, for good reason, he thought had the potential of being able to be traced further up in the corporate hierarchy. And he was right. And we brought those cases.

Ken Durr:

And did you build up your accounting expertise to during this point?

Wayne Carlin:

We did. While I was the regional director, we did get the ability to add to the accounting expertise. I mean, it was only on the order of being able to hire one or two or three additional people, but we only had one or two or three to start with, so that was certainly a help.

Ken Durr:

Right, okay. And the AIG, Brightpoint case, I want to hit that too, before we close.

Wayne Carlin:

Sure. That was a case that I considered to be a really important case in a couple of ways, both in terms of the underlying issues and then also issues relating to the conduct of our investigation. The underlying issue there was, Brightpoint was a company that had some kind of an accounting problem. And AIG had what they called an insurance product that was able to be used by this other company, Brightpoint, to kind of smooth out their own financial reporting. In any event, the basic concept was the company pays a huge amount as an insurance premium, and then receives a similar amount as a payment under its insurance coverage. And the Commission—our conclusion, our recommendation to the Commission in the case, the Commission found that use of that device enabled Brightpoint to misrepresent their financial reporting.

Wayne Carlin:

The part of the case that ultimately, to me, was more important and of broader significance though, had to do with the integrity of the staff's investigative process. We determined by the end of the investigation, that there were very significant documents that were called for by our

investigative subpoenas that were not produced. And stated reasons for not producing them, we felt, were not legitimate. All of that was further compounded by the fact that in the course of Wells meetings that we held, defense counsel made arguments to us in the Wells meetings, that when we subsequently learned that certain documents hadn't been produced and we obtained production, what we saw was that defense counsel had been making arguments to us that were contradicted by the documents that had been inappropriately withheld.

Wayne Carlin:

So we were very concerned from the standpoint of the integrity of the staff investigative process. And so when it came time to settle that case with AIG, in addition to the charges, based on the underlying conduct that the charging instrument described in great detail, what I just described to you, the withholding of documents that should have been produced and the conduct and the Wells meetings and so forth, we thought it was important to shine a light on that conduct make clear the Commission's view of the seriousness of that conduct, make clear that we are capable of detecting when that kind of conduct occurs so as to deter it on the part of others.

Wayne Carlin:

The settlement also included—and this is a commentary on how things change—included a penalty, which at the time we felt it was important to impose a significant penalty given the conduct in the investigation. And I forget exactly. Now, I think this was maybe 2003, we brought this case. So at the time, the number that we arrived at that we thought would be big enough to really be eye catching and really send this message was \$10 million. It wasn't because we were timid back in 2003, it was just that we had no idea that within a short amount of time, \$10 million was going to be kind of pocket change in the frame of reference for SEC penalties in big cases. But it was with that purpose at the time.

Ken Durr:

So maybe the number didn't remain, but do you think that this message that you sent, do you think that it took, do you think defense counsels paid attention?

Wayne Carlin:

I think people certainly paid attention at the time. They understood the message at the time. Look, as in any field of endeavor, there are always going to be some people who are going to press the boundaries or step over the boundaries. I think the message was heard, but it was maybe, I don't know, five or so years later, for instance, that Rob Khuzami, when he was the Director of Enforcement, gave a very widely noticed speech in which he described a variety of tactics that he believed defense counsel engaged in in SEC investigations. And he did that for the purpose of sending this same message of, "we know you do these kinds of things, some of you, and they're not appropriate, and there are going to be serious consequences if you do this in the future." And I think it was effective when Rob gave that speech, but does that mean that nobody ever did it again after that? I don't think so.

Ken Durr:

Yes. Got to keep sending messages, I guess. We've talked about a lot of high-profile cases, and you're going to be involved in those being in New York clearly, but what certainly must have

been the biggest was the ImClone insider trading case. And I'd like to have you lead us through that one, what some of the implications were for the Commission.

Wayne Carlin:

Sure. That case got a huge amount of attention. As we were conducting the investigation, the initial focus was the CEO of ImClone. ImClone was a company that produced drugs regulated by the FDA. They had some major product that was going through the FDA and shortly before the news became public there were some negative results or negative developments with respect to that product at the FDA, a relatively short time before that, the CEO of the company sold a large quantity of his holdings of ImClone stock. And so a pretty dramatic and blatant case just based on those facts in terms of warranting an investigation. And the investigation as we pursued it certainly supported the conclusion that had been unlawful insider trading.

Ken Durr:

Well, when the FDA gave it the thumbs down, did you turn around and look back for people dumping stock? Or did you notice it back when the sales were initially made?

Wayne Carlin:

On this one? I can't remember how the investigation began. I just don't remember what the origin was, but then of course, what eventually drew much greater notoriety in this investigation is that another person who had sold some ImClone stock at a suspicious time was Martha Stewart, obviously very prominent and well-known public figure. And as with any insider trading investigation, our initial focus was as I described on the CEO, but, whenever you do an investigation, an insider trading investigation, you look at who else traded in various ways. So there wasn't anything unusual about pursuing trades by others. And there was an unusually intense focus as the investigation was proceeding because it became publicly known that that Martha Stewart had traded in the stock.

Wayne Carlin:

And I have to say in complete honesty—and the same thing is true in every other investigation I've been involved in, including Rick Lazio in the middle of an election campaign—we conducted the investigation in the right way. We did all the things that we would've done if the people involved were people nobody ever heard of. And there weren't any preordained conclusions either way just as I learned from my earliest days on the staff, as I had described to you, your job is to figure out what the right thing is and do that thing and so we proceeded with the investigation and ultimately concluded that the evidence supported an insider trading charge against Martha Stewart. There was a parallel criminal investigation, which did not charge her with insider trading, but charged her with false statements in an interview by federal officers. And there was intense focus throughout, including leaks of when the Commission was going to be meeting to consider the recommendation. But we just kept our heads down and brought the Commission the recommendation that we thought was the appropriate one.

Ken Durr:

You talked earlier in the interview about Dick Walker and his ability to manage the press and get the message out beyond just sending out press releases. Is this something that you had to do at

this point was kind of think through how you were going to talk about the case in public to the reporters and such?

Wayne Carlin:

Yes. I'll say it was something that I did in every case that we brought. I mean, I took the same approach that I had that I had seen, Dick take when we brought cases in New York. I had a list of reporters who I got in touch with to make sure they knew about the case and understood why it would be interesting for people to read about.

Wayne Carlin:

So, yes, when we were going to be bringing the ImClone case, I gave some thought to how best to explain it. And the dealing with the press was somewhat more extensive and intense than in most of our cases. I ended up on Good Morning America explaining what the case was about. I think we also had an invitation to The Today Show and in one of my exercises of my management prerogatives, I decided that that Barry Rashkover, who was the associate director who had overseen the investigation—look, if I was going to go on Good Morning America, Barry should go on The Today show. So we split that up.

Ken Durr:

Well, this's been great. Is there anything else we should talk about from your time as regional director?

Wayne Carlin:

I think that we've covered the high points. It was the best job I ever had. I mean, I really enjoy what I do now a lot, have a lot of enthusiasm for it, but, when you're—it risks sounding a little corny, but, when job is to figure out what the right, fair, and just outcome is, and you're doing it in public service for the benefit of the markets and investors around the country there's an intangible element that you get from filling that role that you don't really get from any other kind of activity.

Wayne Carlin:

The job kind of changed after 9/11. It still had all those good elements, but I spent a big chunk of my time after 9/11 as a crisis manager and an aftermath of crisis manager, which was certainly experience that I feel like I benefited from, even though it was not the job I thought I was signing up for.

Ken Durr:

Yes. So you decided to take off in 2004, is that right?

Wayne Carlin:

Yes.

Ken Durr:

Okay and went back into practice

Wayne Carlin:

That's correct. Since then, my practice has been representing companies involved in SEC investigations, conducting internal investigations. I'm often in a role of conducting an internal investigation and cooperating with the enforcement staff, which is one that's a natural fit for me.

Ken Durr:

Yes. It makes sense. Well, this has been a great talk. Thanks for two hours of your time. I really appreciate it.

Wayne Carlin:

It was my pleasure. Thank you.