Securities and Exchange Commission Historical Society
Interview with Susan Merrill
Conducted on October 3, 2013 by William Thomas

WT: This is an interview with Susan Merrill for the SEC Historical Society's virtual museum and archive of the history of financial regulation. I'm William Thomas. The date is October 3rd, 2013. Thanks very much for taking the time to talk with us today. We usually start by discussing a little bit of personal background: where you're from, possibly what your parents did, if it's relevant to your own career, and, ultimately, your education, and then we'll move into the bulk of your career.

SM: Well, thank you very much for doing this. I'm honored. I grew up in Baltimore, and my father worked his whole career for Exxon Corporation. He was a manager there in the sales force. My mother was a legal secretary and did a lot of paralegal work for lawyers. I met several lawyers when I was a little older through my mother, but I was not at all planning on having a career in the law. I was extremely interested in the theater, and I did a lot of theater in high school. I had a very inspiring teacher in high school. I always say if she were my chemistry teacher, I probably would've been a doctor, but I became an actress. I studied it in college; it was my major in college.

WT: You went to the University of Maryland?

SM: Yes, and I was a theater major there. Upon graduation, I worked for the summer following graduation from college at the Washington Shakespeare Festival. Then when that play, *Taming of the Shrew*, closed, I moved to New York, and that was in the fall of

1979. I continued to pursue my acting career in New York for several years, had some success, became a member of Actors' Equity and did some shows both in New York and also touring.

After about three or four years of that, which was punctuated by large periods of time that I was waiting on tables instead of acting, I decided that while it was fun to be doing that at 26, it might not be so much fun to be doing it at 36 or 46, so I decided to go to law school. That was a little bit of a whim, in a way. I didn't know precisely what I wanted to do, even if I was going to practice law. But I had a good friend who had gone to law school, but who had never practiced, but who thought it was an excellent education and opened a lot of doors in other ways. So I went to law school without any particular focus in mind in terms of what kind of law I would practice, or even whether I would become a practicing lawyer. But then it turned out that I did.

WT: So could you tell me a little bit, did you have any sense that you would end up in the securities field at all?

SM: Not at first. The first year of law school, I took the standard courses that everyone takes, but by the second year of law school, I had two very influential professors—I went to Brooklyn Law School—Arthur Pinto and Norm Poser. Between the two of them, taking courses in securities regulation, corporate finance, I became very interested in securities law and really was inspired by their teaching and some of the readings that we were doing in those classes.

But I still had not settled on that. I was very focused on working as a judicial law clerk, both as a student—I had the opportunity to work with Judge Sand in the Southern District of New York as a student clerk, and then Judge Korman in the Eastern District as a student clerk. When I graduated, I went to become a clerk in the Third Circuit for Judge Van Dusen. During that time, I still did not have a firm idea of what kind of law I wanted to practice. Of course, working for the circuit, there are a lot of different types of law that are presented in the cases that are going up to the Federal Circuit courts, all different areas that I had never studied, even: copyright law and admiralty law, and all sorts of interesting topics. So it was really a wonderful experience, but I still did not have a particular focus.

WT: So then upon finishing, you went directly from there to Davis Polk?

SM: Correct. I joined Davis Polk, actually, on Black Monday, October 19th, I believe, 1987. It was quite an eventful day. We were in training all day and people kept coming in to give us various bits of news about what was happening in the market. "Boy, I've been last hired, first fired," was running through my mind. But I became part of the litigation department, which, of course, is countercyclical, and we were extremely busy coming out of that.

For the first two years I was at Davis Polk, I did a wide variety of litigation matters, some of which touched on the securities laws, many of which did not. I remember doing a very

interesting internal investigation that involved insider trading by a junior analyst at one of the big broker-dealers, which was subsequently self-reported, and the person went to jail. That was really my first brush with the securities laws as a young associate.

And then, very fortunately for me, Davis Polk hired, as a lateral partner, Gary Lynch, who was coming out of having been the Director of Enforcement at the SEC in the late eighties. He had been the person who had brought the Ivan Boesky and Michael Milken cases. He joined Davis Polk, I believe, in 1989, and he had a one-year bar, of course. He was not able to practice in front of the Commission.

But when his one-year bar was finished, I just happened to be coming back from maternity leave after having my first child, and so I was paired with him since I had no cases on my plate, and he was beginning to have a lot of cases because his one-year bar was finished. That was really the beginning of learning the securities enforcement practice from a master of that area. I worked with Gary all the way through the ‘90s and until he left Davis Polk in 2001.

WT: So what sort of cases were you working on with him?

SM: Really ran the gamut. I remember we originally started working together on the Treasury auction cases back in 1990, possibly '91, where all of the big primary dealers on Wall Street were being investigated after it came to light that there were some false bids that were being submitted in the Treasury auctions by one of those big firms. We had a

number of clients that were being investigated, and that spawned some side investigations, and that was a huge one that we worked on together.

And, thereafter, we continued to do a lot of work for the large financial institutions, Morgan Stanley and J.P. Morgan, et cetera. But we also did a fair number of cases for issuer clients, for public companies who, in one way or the other, were being investigated by the SEC for various issues, many having to do with accounting fraud, having to do with disclosures, financial statement issues.

Some of those we did, we got involved at first through internal investigations that we did for companies, and others started because the SEC issued a subpoena. And both varieties are quite interesting and fun to work on. In some cases, doing the internal investigation first, you have a little bit of a leg up before you self-report and the SEC gets involved. In other situations where the SEC subpoena arrives on the desk of the general counsel of a public company who really didn't know there was a problem, you are very quickly trying to get your arms around the issues. And so we did a lot of those, some very interesting cases. We worked on one for Mattel, for Avon, just a lot of different matters coming out of the Big Four accounting firms, as well as working on cases for some of the big broker-dealers.

WT: Does it end up being a mix between attempting to defend against charges or possible results of an investigation, and in other cases, essentially having to clean up after something that has gone on within a company?

SM: Yes. I mean, there were times where the company realizes, if not before the subpoena arrives, relatively quickly thereafter, that there really was a problem. In those cases it is a matter of trying to ring-fence that and deal with the issues, and trying to reach a resolution with the SEC that's palatable and fair. In other cases, there were certainly many cases where firms believed that their conduct was not problematic. In many of those cases we were able to talk the SEC out of bringing any kind of action, after a year or eighteen months of investigation with many, many witnesses on the record.

Those kinds of victories were very satisfying and substantial and very good for our clients. They're ones that you can't really talk about in public because the investigations themselves are usually private, and having talked the SEC out of bringing any action, the last thing your client wants is for their name to be associated with there having been an investigation. But we did have a lot of success in those areas, and also had some success in limiting the types of charges that were brought, even when there was admittedly a problem within the organization.

WT: So when you were working with Gary Lynch, how big of a group was that that you were working with? So far you've mentioned yourself and him.

SM: Well, Gary was the partner who had a full-time practice in securities enforcement. When I made partner, I became the second partner to have a full-time practice in securities enforcement.

WT: Was that in 1994?

SM: 1994 is when I made partner, yes. So he and I were the only two partners who had a full-time practice in the area. There were other partners at Davis Polk, both before Gary arrived, and also while he was there, and continuing to this day, who have a practice that includes some securities enforcement cases, but who also do civil cases, securities class actions. There are white collar partners who do some securities enforcement-related work as well as doing investigations that are primarily criminal in nature. So it was a relatively small group of us who were focused on it exclusively.

WT: Everything you did was SEC-related, almost.

SM: And NASD and New York Stock Exchange and state AGs, but less so on the criminal side. If and when we had cases that had a criminal element, we always had a criminal, white-collar partner with us to help with those aspects of the case. There were quite a few cases that had some investigation, not necessarily indictment, but some investigation by the U.S. Attorney's Office—typically, the Southern District of New York, but also some of the other U.S. Attorney's Offices throughout the country. So I would say the securities enforcement practice at Davis Polk was a relatively small part of the litigation department, and Gary was definitely the leader of that, but there were other partners who also did securities enforcement work as part of their portfolio.

WT: It also sounds as though you had quite a few responsibilities yourself, if you made partner after five years of working with Gary Lynch, and also probably quite a bit of quick learning also about the law in this area.

SM: Well, I had a very good teacher. But, yes, it was a very interesting time of my life. I made partner about six weeks after I returned from maternity leave from having had my second child, and I think that was very unusual at the time. I think it was a testament, partially, to how busy Gary's practice was, and how important it was to him to have another partner who was full-time in the area. But I did learn a lot in a short period of time. The law itself in this area is manageable, and most of the cases that we were working on involved some type of fraud or allegations, either under 10b-5, or 17(a) of the '33 Act. But the facts of each case vary so dramatically and are so important to being able to represent your client in a way that's going to have the right outcome, that that was often the challenge, was marshalling those facts.

In some cases, we had very large teams who were working on them. I remember we did the Joe Jett investigation, which involved an employee of Kidder Peabody, who, it was determined, had been involved in a false profits, sort of a made-up scam to make it look as though his trading desk, or the book that he was responsible for, was making 300-some million dollars a year, when in fact it was completely manufactured.

That case, which was an internal investigation—we were hired by the parent company of Kidder Peabody, which was GE—that case had probably fifteen or twenty people

working on it at Davis Polk in one capacity or the other, other very senior associates, and, of course, Gary was leading the team. There were a lot of different aspects of that case. So that was an example of how marshalling the facts was a huge challenge, and that really can only happen with a pretty big team of people.

WT: So, as you know, this interview is in association with a gallery that's being put together on women in regulation. Could you speak a little bit about your perceptions of the place of women—now in law school, at Davis Polk—what the proportions were, whether it was a comfortable environment?

SM: Sure. I was by no means a trailblazer. I was one of the fortunate people in sort of the next wave of women going through law school and going into big law, and there were those of the generation before me who really got the arrows, so to speak. I had quite a lot of women in my law school class. I don't think it was 50 percent, but it was certainly over 30, maybe 40 percent.

WT: And this was at the Brooklyn Law School?

SM: At Brooklyn, right, and I was there from '83 through '86. I never had any impression that there was any kind of discrimination with respect to women, either at law school or at Davis Polk. I will say that the partnership was extremely supportive of women lawyers at the firm. Certainly, there was quite a lot of attention paid to training across the board, and I never felt that there was any distinction made between the men and the women.

There were not as many women partners as male partners, for sure, when I became a partner in 1994. There were two women litigation partners, and I know that Karen Wagner is still there. I'm not sure Laureen Bedell is still there; I can't recall. But those two women were already partners in the litigation department when I made partner, so I was the third.

There was some talk about how I was the first woman who made partner in the litigation department without having to be a senior counsel first. And so there was some talk about, well, if you're a woman you might not be on the same seven-year track, but I did not think that was the case. It wasn't the case for me; it wasn't the case for many women who came after me. So I think that was just sort of serendipitous that both Karen and Laureen had been senior counsel for a time. And certainly I felt that the fact that I made partner with my class—in other words, I wasn't held back because I had been out on maternity leave for five months the year I was up for partner—I felt that there was no discrimination whatsoever about being a woman in this profession, certainly not at Davis Polk.

I have not really experienced a lot of that, even with people outside of the law firm that I was at. I never really felt that there were people who were trying to bully me from the other side because I was a female. It hasn't been my experience at all.

WT: That would've been one of my questions later on, is being in enforcement and dealing with the world of Wall Street and the very aggressive personalities that are there, whether that would affect that. And evidently not so much.

SM: I didn't feel that way.

WT: No? Okay. So were there any trends in the sorts of cases that you had in your time at Davis Polk? You were there for seventeen years, from 1987 to 2004. And so, of course, you're dealing with a lot of trends in the broader world, the rise of the Internet, for example, obviously then the dot-com bust, Sarbanes-Oxley and so forth. So do you have any particular perception of things that changed over the time that you were there?

SM: Well, certainly all of those things that you mentioned influenced the type of cases we were seeing and the types of things that were being investigated coming out of the SEC. There was a big focus, as I mentioned, on accounting issues when the dot-com era took off and then exploded. There were many cases that had to do with what those financials looked like and whether those were the subject of either round-trip transactions that were being done with other companies to make revenues look better. We were involved in a number of those kinds of investigations.

I remember, in particular, a company that we represented out in Silicon Valley who was caught up in an investigation where the Justice Department and the SEC were investigating AOL's revenues, because online advertising was very new at the time, and

how one recognized revenue from online advertising was a new area in accounting. And there was a very serious investigation in which several companies and some individuals were charged with making up transactions to make those revenues look better, and how, exactly, and when should revenues be recognized in that very new world of online advertising. So that's kind of an example, I think, of the changes in the world always find their way into the cases that the SEC is investigating.

WT: When you went to the New York Stock Exchange in 2004, of course that was in the wake of a lot of the criticism broker/analyst conflicts of interest. Did you deal with cases like those when you were at Davis Polk?

SM: Yes, I was involved in the research analyst conflict-of-interest cases. I represented one of the large broker-dealers in those investigations. As you may recall, that was a matter that involved several regulators getting together and investigating the conduct across Wall Street. In fact, there was an agreement that certain regulators would take this set of firms and another regulator would take the other set of firms, but that the facts would form the basis for actions by all the regulators.

So the firm that I represented was being investigated by the NASD, but the settlement that arose out of that was not just with the NASD, but was also with the New York Stock Exchange and the SEC. That was somewhat unique at that time, I think, a way that it was approached. When I went to the New York Stock Exchange, one of the matters that I worked on there, a couple of the cases in the first couple of years I was at the New York

Stock Exchange, involved how firms were complying with the global settlement that came out of those research analyst conflict of interest cases, because there were quite a lot of prohibitions on what research analysts could and couldn't do, what investment bankers could and couldn't do with research analysts, disclosures that needed to be made on the research itself. And so that was, from a regulatory perspective, once I became the head of enforcement at New York Stock Exchange, I worked on those matters.

WT: I'm just kind of curious. Of course, both you and Linda Chatman Thomsen were both very prominent in the enforcement community at the same time, and you were both at Davis Polk. Did you know her?

SM: Absolutely, yes. In fact, we worked together on a couple of matters. I remember the first deposition that I took, Linda was sitting next to me. She was senior to me so she was a bit of a mentor to me, having been at the firm longer than I was. Of course, she left to go to the SEC not too long after I made partner. I can't remember exactly the year that she left, but soon after I made partner, she went to the trial unit, and then, of course, over to Enforcement and became the head of Enforcement. She and I had the pleasure of working together on one large set of cases, the auction rate securities cases, when she was the head of Enforcement for the SEC and I was the head of enforcement at FINRA.

WT: Did you have any other mentors, either in law school or at Davis Polk? You mentioned, of course, Gary Lynch, Linda Thomsen just because I asked about it. But I may as well give you the opportunity to add others, if you like.

SM: Sure. One of the people who was very influential in my career at Davis Polk was Bob Fiske. I worked with Bob when I was a relatively junior associate, first and second years that I was at the firm. He was also very influential in my personal life, I will say, because he very much valued his time with his family. When I had come back from maternity leave after having my first child, he made a point of talking to me about how important it was to make time for family and to try to get home to see your kids before they go to sleep. And that was, I thought, really quite impactful for me coming from him, who was such an excellent lawyer and so well respected, but yet here he was giving me advice about how to have that career, but also how important it is to maintain your family.

The other thing that Bob was really instrumental in terms of my career is how much he talked about—and also, of course, led by example—in terms of doing government service, and how that is a service to the government and to our country and the markets, but also can make you a better lawyer. He had done so much of that, and he was one of the people, in addition to Gary Lynch, who also talked to me about it quite a lot, who was instrumental in my deciding to become a regulator.

WT: Had you thought about it for a long time before you ultimately went over to the New York Stock Exchange?

SM: I had been thinking about it for three or four years, yes, at least that. I left in 2004. I remember starting to talk about it with Gary and with Bob in the late ‘90s. Some of it

actually had to do with whether I wanted to move. There were positions that I could have applied for outside of New York, particularly regional offices of the SEC, but, because of my family situation, I decided to hold off and hoped to find something that was local. And so, fortunately, that did come about for me.

WT: So was it unusual, when you did take that position, for somebody who had been purely in private practice to that point to take a position within a regulator?

SM: I don't think so. I think there is a fair amount of people who decide at some point in their career, if they haven't done it when they were first out of law school or quite junior as lawyers, that they are going to do it at some point in their career. That was my path. I had gone right from a clerkship into Davis Polk. I had actually considered, when I was very junior at Davis Polk, after a couple of years, going to the U.S. Attorney's Office, which a lot of people at Davis Polk had done in that sort of second year or third year time frame. But that is when I had first started working with Gary Lynch, and I was enjoying that so much and didn't want to do it. So I don't think it's unusual. There are different ways people do it. Some people do it when they're very junior, some people do it later.

WT: How about at that level of director? You were brought in at a very high level at the New York Stock Exchange. Was that unusual, from private practice?

SM: Well, I don't know that it was unusual for New York Stock Exchange. I think you see, now, at the SEC, people coming in from private practice to become the head of

Enforcement. That just very recently happened. And I think that having had a long experience in securities enforcement, both as an associate and as a partner, helped me in taking over that role at that senior level.

WT: So, just to put me in the world of private practice and working on SEC enforcement issues and other regulator enforcement issues, how many people would there be in various law firms at your level who would've been as prominent as you are? I'm phrasing that question in such a way that I'm asking you to toot your own horn, I guess. But just to give me a sense of the work.

SM: I've been involved in this field now for quite some time. Twenty years, I guess, since I really first started doing it as a young associate. And it's a relatively small world, we all know each other pretty well. Folks, both in Washington and in New York, primarily, who do this kind of work, many, many of them are SEC alum in one way or the other, and some of them have done that and then gone to law firms and become partners at law firms. Others have gone the other way. I couldn't venture a guess of how many people that would be, but it's a relatively small group of lawyers.

WT: So could you tell me the circumstances about your move to the NYSE specifically?

SM: Sure. I knew Rick Ketchum because Gary Lynch and I had done a big project for NASD when they bought the American Stock Exchange. And that's how I became acquainted with him, and also with Mary Schapiro and Elisse Walter. They were all at NASDAQ,

NASD, NASD Regulation at the time, and I met them in that way. As I'm sure you know, Rick went to Citigroup and was the general counsel there at CGMI, and then he had been asked to come in and become the first chief regulatory officer for New York Stock Exchange after the reorganization of that entire institution when Dick Grasso stepped down.

So he knew me. We knew each other from this assignment that we had worked on relatively recently. I think he knew that I had been considering some work in a regulatory capacity, and he asked me to go to breakfast. We discussed over breakfast that he was looking for a new head of enforcement. Dave Doherty, who had been there for, I believe, nearly twenty years in that role, was retiring. I thought it was a very, very intriguing offer. I thought about it over the weekend, and accepted the offer.

WT: And, of course, these are very interesting times at the Stock Exchange. Rick Ketchum is brought in with a whole new team, I guess, with a mandate, if you will, to beef up the regulatory efforts there. Now, of course, I've also seen that David Doherty had originally come in as, I don't know if protégé is the right word, of Stanley Sporkin. So what was your perception of the situation there at the Stock Exchange? What were the priorities, in your mind?

SM: Well, I never worked with Dave Doherty. I had cases in front of him and his enforcement team when I was in private practice, and, of course, I met him during the transition. He was extremely gracious and helpful to me as I was starting in that role, or

getting ready to start in that role. I think there were issues relating to the specialist cases. I actually had worked on specialist cases when I was in private practice.

WT: This was the front-running?

SM: Yes. I had represented one of the large specialist firms. In fact, the settlement had just gone through a few months before Rick reached out to me to offer me this position. So that particular investigation, I think, put a spotlight on regulation at New York Stock Exchange and how could a practice such as this be occurring on the floor of the Stock Exchange allegedly for years without there having been scrutiny of it. So the organization was under a microscope.

And so one of the things that I think Rick wanted to do was to bring in new leadership and start to show the world that this was a very good regulatory organization, and any black eye that it may have suffered from that one investigation –

WT: This is the Dick Grasso investigation?

SM: Well, this was the investigation relating to the specialists.

WT: Oh, the specialists.

SM: It shouldn't be a mark against the whole program. There were a lot of extremely talented and dedicated people working in the regulatory department, many of whom stayed on and worked for me and for the other new leadership in the regulatory program. The Dick Grasso resignation was really a separate issue that had more to do with governance, not so much the regulatory side.

WT: Right, that's what I would think. Yes, we interviewed Robert Marchman at one point, and he was saying that, in his perception, the office prior to the reorganization had not actually felt undue pressure from the higher governance of the Stock Exchange. But, of course, you were operating in a reorganized organization.

SM: Correct. I never worked there under that older regime. But having talked with the people who had worked there, they also felt, people who became my direct reports, that there was not undue influence by the business side on regulation, and that was a misperception maybe that was painted perhaps mostly in the press. But nevertheless, having a very strict segregation of those duties, at a minimum, I believe, helped in terms of appearances, and having a reporting line—Rick's reporting line, was to the board, not to the CEO—I think, underscored the independence of the program, which is important.

WT: Now, of course, this is also in the period when Eliot Spitzer is moving very aggressively against Wall Street on his end. Did you have much in the way of relationship with what his office was doing?

SM: Yes. Well, of course, Spitzer had started out with the research cases, and that was while I was still in private practice. His office was instrumental in the market timing cases, which had begun before I went to the New York Stock Exchange, but continued for quite some time. We did coordinate with his office, his investor protection unit, on many cases. For a time, that unit was run by David Brown, who was a former colleague of mine from Davis Polk. Eric Dinallo was in that position for a while, and he and I came to know each other and worked closely together. We coordinated, shared information, sometimes announced cases together, sometimes did things separately, but we had a good relationship with that office.

WT: And you were part of a group there also that was very cohesive for a fairly long period of time, moving into the FINRA period. We've mentioned Robert Marchman, but also John Malitzis came in at that time. We spoke last month with Grace Vogel, actually. So, was there a sense of it being a gang, so to speak? That might be too facetious.

SM: Well, we did have a very good organization that Rick had put together when he came in. I think Grace Vogel and I started within a couple of days of each other. Robert Marchman, when I came into the enforcement department, then became the head of the market reg program. So the three of us were the heads of the three major areas: the exam program, the market regulation program, and the enforcement program, all reporting into Rick. We were a tightknit group. We had a joint mission, if you will. And so, the transition over to FINRA was a little jarring at first. And, of course, I'm sure you know that Robert Marchman's group didn't come over right away. That happened years later.

So that was another very interesting time in my career, and one of the biggest challenges that I faced was really being part of a merger. It's funny because I brought a number of cases when I was at the New York Stock Exchange that were based on firms having breakdowns in their controls because of mergers that had happened. And during those mergers, things started to slip through the cracks and the way people used to be doing it didn't get transferred, and there were all kinds of operational issues that arose from those mergers. Then I got to experience being part of one of those mergers, and I became a little more sympathetic.

WT: So why don't we talk in a little bit of detail about some of the kinds of cases that you had been dealing with in enforcement. I mentioned that last month I was speaking with Linda Chatman Thomsen, so we were talking about things like small-cap stock, option-backdating, insider trading, of course. Was there an overlap in the kinds of cases that you would've been seeing with the SEC, or was the division of responsibilities, did that create distinctions in the kinds of cases that you saw?

SM: A little of both, I would say. The SEC and FINRA, and also New York Stock Exchange, have concurrent jurisdiction over the brokerage industry. Of course, the SEC's jurisdiction expands to listed companies, public companies and investment advisors, et cetera, but as it relates to the brokerage industry, registered broker-dealers, the jurisdiction is concurrent. However, I thought one of the big services that the SROs

played was to bring the cases that the SEC couldn't, not because they didn't have jurisdiction, but because of the resource issue.

So one of the things that I think we were the most proud of both at the New York Stock Exchange and at FINRA was our dedication to bringing small cases. A great percentage of the cases that we brought in both organizations were one broker/one customer cases. That's not something that you would often see the SEC doing, but they're extremely important, not only to the one customer who's affected by the one broker, but also to send a message to the whole industry that just because you're a smalltime cheat, don't think you're going to get away with it. So that is one difference, I think.

The other thing is that at FINRA and the New York Stock Exchange, we focused a lot on sales practice cases. Some of that came out of the exam program that both New York Stock Exchange and then FINRA had of going into firms every year, in some cases, and looking at the way they were selling products to the public. That resulted in a lot of cases that were unique to those two organizations and that the SEC didn't focus on as much.

So, for example, we brought a lot of mutual fund cases. As I'm sure you know, that is an instrument that most of America is invested in. The cases that were brought by FINRA in those areas such as breakpoints, NAV transfer cases, cases that affected the fees that individual investors were paying to buy mutual funds that were unfair or that were not in accordance with the disclosure documents, when they shouldn't have had to pay a fee to move from one fund to another, or to roll over from one fund to another within the same

fund family. Or they should have been given a breakpoint after they purchase a certain quantity, that they weren't getting, that was a big focus. It's an example of a sales practice issue. Some of the cases that we brought in that area resulted in millions of dollars of not just fines, but restitution to customers who were paying fees that they probably didn't know they weren't supposed to be paying.

We also focused a lot on other products such as variable annuities, that were often sold inappropriately, unsuitable type of products. The rules of the SROs, of both FINRA and the New York Stock Exchange, allow for prosecution of a company or an individual for violation of what they call just and equitable principles of trade. The SEC does not have an equivalent. Most of the SEC cases in this area would have to be brought as a fraud. And so, by the SROs having a just and equitable principles of trade rule, we were able to get at things that were hurting investors, particular vulnerable investors, elderly investors, that sort of thing, that we wouldn't have been able to make out a fraud case on, but still had a dramatic impact on investors.

Structured products was another big focus. Particularly after the financial crisis starting in 2008 and beyond, so many investors saw their 401(k) earnings drop dramatically, and they were vulnerable to brokers who were selling things that really weren't suitable. And, in many cases, we found the brokers themselves didn't understand the products, leveraged ETFs, inverse ETFs, reverse convertibles, something called knock-in puts, that were promising high yield in a very low-yield environment, and where people were trying to make back money that they had lost when the markets collapsed. But, in many cases,

those resulted in even further losses to the customers. So we focused a lot on those kinds of issues. In some cases we did overlap. I think auction rate securities is probably one of the most notable examples.

WT: Yes, I wanted to be sure and ask you about those in particular.

SM: Yes, so the auction rate securities cases, well, of course, the market seized up in February of '09, I believe.

WT: Sounds right.

SM: In February of '09. We started looking into those, as did the SEC and also the New York Attorney General's Office. I think that was a good example of how FINRA can take an area where the SEC is already involved, but still do something that's not just a piggyback, or not just piling on, if you will, by bringing the same action against the same firms.

When those markets seized up and the brokers who had been underwriting those securities to begin with failed to provide liquidity, failed to be the bidders in those auctions, there were millions of people whose money was trapped. They weren't losing their money; they just couldn't get access to it. So the SEC and the AG's Office brought some big cases. I think Citi was the first one. There were a number of others that were really focused on the big broker-dealers who were doing the underwriting of those instruments to start with.

FINRA decided to focus on some of the downstream, smaller broker-dealers who were merely selling the products, who had not been involved in the underwriting. But what happened is, because FINRA got involved in that way, there were twelve more firms that were brought into settlements. There was over, I think, $1.3 billion more of liquidity provided back to customers that wouldn't have been provided that liquidity from the bigger settlements if they had brought from a downstream broker-dealer.

Those cases were brought really using the advertising rules that FINRA has, which are unique to FINRA. There's not an equivalent in the SEC. But we found that the way the product was being marketed, and the materials that the firms were using to market the product, were not fair and balanced, and that's the standard under the advertising rules, whereas under SEC rules, it would have to be materially misleading or something of that order. So I thought that was a good example of our working together.

WT: Yes, my understanding is that they were being sold, essentially, as a cash equivalent, almost.

SM: Correct. Yes. They were being sold as a cash equivalent. I remember at the time saying, "If your broker's trying to tell you that this is a cash equivalent, it's probably not, because there really is no such thing." The reason that it was paying a slightly higher interest rate than a money market, or than you could get by depositing it in your bank account, is because of that risk. But the risks were not being made plain to the investors. We found,

by looking at the advertising and the marketing materials that the firms were using, that they were deficient in terms of pointing out those risks.

That was a matter where Jim Shorris, who was working with me at that time at FINRA—I think his title was executive director of enforcement at FINRA—he led a group that went in and did a very swift investigation of these twelve firms, and we employed some techniques that allowed us to get to the endgame quickly. That was really because of the fact that there were so many investors that were complaining that they didn't have access to their money.

WT: Was that the main thing enforcement-wise in the aftermath of the financial crisis that you could address? Of course, so much of it is economics, and there are, of course, very complex products involved, but that don't necessarily deal with frauds or other things that one could enforce, per se.

SM: Yes, I think that that is primarily what we focused on. A lot of the cases that you still see being brought by the SEC that are coming out of the financial crisis have to do with mortgage-backed securities and other instruments that were primarily being sold to institutional investors, hedge funds, or other very large institutional investors. At FINRA, we were more focused on products that were being sold to retail investors, and that's why we were focusing on things like the structured products that were being sold to retail: variable annuities and other products.

Even, we got into a situation where there were a lot of private placements and Reg D-exempt companies that brokers were selling. We brought a series of cases against broker-dealers where they did not have enough reasonable inquiry by the broker to make sure that this private placement that they were selling was anything other than a shell. So those were the types of things we focused on.

WT: When we spoke to Rick Ketchum, he praised you for the complexity of the cases that you were bringing. Could you talk a little bit about the complexities in this period? Did it have mainly to do with the complexities of some the products that were being sold, or was it other things as well?

SM: Yes, I think the products, for one thing, and we also tried to look broadly at an area and not just the first firm that we found, but to say: well, if this is going on in this firm, could this be going on in other firms throughout the country? So one of the practices that we implemented was bringing a case, and, at the same time, putting out a notice to members, or what was later renamed regulatory notices, explaining what we had found, and then sweeping out to do an investigation of others in the industry.

So that—for example, the private placement in Reg D, the penny stock, and unregistered offering cases that we brought—a big case was brought, a regulatory notice was put out that put everyone on notice, if you didn't already know, this is the type of compliance program you should be having, due diligence. And then started to investigate where that took us with other firms.

That took a lot of coordination. There are seventeen regional offices that FINRA has throughout the country. That was a big difference from the program at New York Stock Exchange, which was on three different floors of one building in lower Manhattan. So when we had these larger task force-type cases, we used the resources in all seventeen of the district offices, and had enforcement people in each of those offices, as well as exam staff, working together to look into what was going on. In some cases, the products themselves were very difficult to understand, and in some cases it was just a matter of really trying to amass the facts from so many different companies at one time.

WT: Did you find that in pursuing things in a systematic way and putting out notices, that it encouraged self-reporting?

SM: We tried to encourage self-reporting. That was one of the things that I did when I was at New York Stock Exchange was put out a memo on credit for cooperation and information. When we became FINRA, within a year or so of joining those two programs together, we put out another notice on cooperation because NASD didn't have one. I wish I could say that it worked in those bigger industry-wide cases. I'm not sure that it did. But it did result in a lot of people arguing to me that they needed to get credit for cooperation because of something that they had done after we had started our investigation.

WT: Right. So in expanding, I guess, when you became FINRA to, well, beyond the stock exchange, what particular difficulties did you find were involved in that?

SM: Well, I mentioned one already. I think one of the big issues was geographic diversity. We had a program that was pretty tightknit at New York Stock Exchange, all of us together on a couple of floors. One of the big challenges was trying to not only integrate an entire program that was sitting in New York with a big program that was sitting in Washington, but then to also bring together all of the enforcement staff that was working in each of these regional offices. And, in some cases, the regional enforcement staff was quite small. In one office, there was one person. I believe that was in Seattle. But other offices were bigger. Chicago, for example, had a pretty large enforcement staff.

Another challenge, I think, was trying to get everyone on the same page programmatically about what we were going to do about certain substantive cases, case issues, procedural issues. Credit for cooperation is an example of that. One of the things that I brought over from the New York Stock Exchange was a practice called the Disciplinary Advisory Committee. That committee, once we went to FINRA, was a group of senior level enforcement people from the various enforcement centers throughout the country, that would get together and discuss some of the big cases that we were about to make a decision on in terms of charging.

I thought it was very important to do that so that we would become one department. I didn't like the idea that a broker-dealer that encountered FINRA in Atlanta would be

treated differently than a broker-dealer that encountered FINRA in Washington, or in New York, or in St. Louis. And there are very subtle differences in the way regulators approach cases. I mean, everyone is an individual and has their own individual philosophy, but I thought if we were going to come together and have one set of policies that would govern us as enforcement departments so that people would know what they were getting when they encountered FINRA enforcement, it was important for us to discuss some of the big cases and hash them out.

It was time consuming, and there were some complaints about that. It involved people taking home large binders of homework to read over the weekend because you know what your case is about, but if you're going to participate in this Disciplinary Advisory Committee, you needed to read other people's cases. The staff generally would write a long memo about the facts and about the law and about the recommendation for the charges and a recommendation for the penalty. In order to have a good discussion of that, the senior people in enforcement needed to become familiar with it. So it was work. It did take time. But I think over the first two years that we were together, it helped us gel into one organization.

WT: I want to ask you in general about the mechanisms of the relationship with market surveillance. But one of the issues that I'm particularly interested in—I was talking with Shelly Bohlin a week or so ago about some of the very complex surveillance that they do on very high volume trades and discovering things within that. I wanted to ask you,

specifically, on the enforcement side, about peculiarities of bringing cases where, you know, the detection of the frauds is a very subtle thing.

SM: Well, first of all, you have to understand that a great deal of the information that the surveillance group at FINRA uncovers is referred to the SEC, and that is primarily because the trading that they're monitoring, particular insider trading, various other surveillances that they have, often is evidence that there is something going on in the markets beyond merely the trading by a registered broker-dealer. An insider trading case is a perfect example of that. There are all sorts of mechanisms that surveillance uses to detect unusual trading patterns, either in advance of bad news, in advance of good news, mergers, et cetera.

But the people who are making those trades, generally speaking, are not regulated by FINRA. And even if there is somebody at a registered entity that's involved in trading on inside information, as soon as that person picks up the phone and calls his or her brother-in-law, you have a person who's outside the jurisdiction of FINRA. So many cases, the great vast majority of those cases, are referred out of FINRA to the SEC, who has jurisdiction to subpoena anyone, not just a registered person who's in the securities business.

The other thing is that there's another group within FINRA that pursues enforcement cases outside of main enforcement, and that's the market regulation group that Robert Marchman heads up. There's a group there, I don't know if it's still called the legal

department or if it has another name now, but I always thought of it as the other enforcement department within FINRA. They follow up and bring enforcement cases that primarily are related to trading and trading surveillance.

WT: So in deciding whether to litigate a case or ultimately settle it, at the SEC, there's a level of policy that the commissioners are involved with. How does that policy work at the level of the New York Stock Exchange or FINRA?

SM: Well, it was a little different in each of those organizations. At the New York Stock Exchange, Rick Ketchum, as the chief regulatory officer, or later CEO of NYSE Regulation, signed every case. In other words, he authorized every case to be brought, whether it was going to be settled or whether it was going to be litigated.

At FINRA, that was not the case. It had not been the case at NASD. And part of that is because far more cases were brought by the NASD than by the New York Stock Exchange. New York Stock Exchange only has jurisdiction over its member firms, and that's about 250, roughly, of the largest firms in the country, but only those. There's about 5,000 firms that FINRA regulates, and that includes one-man shops and mid-level, small broker-dealers, et cetera. So just multiples of cases being brought by NASD and then later FINRA.

So the procedure there was that the case was discussed and authorized within enforcement, and then it went to something called the Office of Disciplinary Affairs,

ODA. ODA had delegated authority from the Board to approve either a settlement or a complaint. So they were an independent body, they were not part of enforcement, they did not report into the head of regulation, and they had a staff. It was not one person; it was a whole staff of people that reviewed either the settlement document or the complaint.

WT: I was speaking with Linda Chatman Thomsen about the Madoff case in particular. Was there any jurisdiction there at FINRA over that, or was that outside of that?

SM: Well, the only jurisdiction that FINRA had was at the broker-dealer, and, of course, the Ponzi scheme was taking place at the advisor.

WT: At the advisor, okay. But he was a registered broker.

SM: He was a registered broker, yes.

WT: Okay, I see.

SM: His legitimate business was the market-making business in the broker-dealer.

WT: Is there anything else that we should, you think, cover from your time at enforcement?

SM: No, I think we've covered it.

WT: We've covered it pretty well. So let me just ask you then about the transition back into private practice, what kind of cases you would deal with in your subsequent career, and just the general difference in culture.

SM: Sure. I liked coming back into private practice a lot, and I still am enjoying it quite a lot after three and a half years. There's something that I find very rewarding about doing the work on the cases themselves that I was missing when I was the head of a 300-person department.

The jobs are very different. And what I liked about being a regulator was being able to set policy and influence the type of conduct that was happening at broker-dealers on a higher level. When I spoke on a panel or I gave a speech and highlighted a practice or a product, I felt that I was having a broader impact than I ever had in private practice. But what I missed, when I was at the regulator, was actually getting to be the lawyer in charge of the case, on either side, because there were plenty of people that worked with me at FINRA enforcement and New York Stock Exchange enforcement that were doing that, but I didn't have any cases that I was the person responsible for bringing the witnesses and ordering the documents.

WT: You were just coordinating the whole setup.

SM: Right. I was in charge of the whole department. I really missed that. So it's great to be back into private practice to get to do that, to be the person that's thinking about the case and figuring out the strategy, learning the documents, helping shape the way it's presented, preparing the witnesses. I love that work.

So it wasn't such a big transition for me, I would say, because I had done it for so many years. I think there are people who come out of government and go into private practice who haven't been in private practice before or certainly haven't been in private practice in fifteen, twenty years, who find it more challenging. Billing my time in six-minute increments is not my favorite thing to do. That is one thing that I didn't miss when I was a regulator. But I do really enjoy the work quite a lot. I feel that it's why I went to law school, it's what I like about being a lawyer. So I've really enjoyed being back in private practice.

WT: On the private practice versus regulatory relationship, what did you feel from your prior career in private practice, was most helpful to you in your job as director of enforcement?

SM: I think because I had worked on so many cases for so many of the big firms, I was familiar with the way big broker-dealers work. I understood a lot about the structure of those organizations, a lot about the role of compliance versus the role of business. I understood how things worked within broker-dealer organizations, how things can go wrong. I think that was probably the biggest advantage. Of course, I also felt that when lawyers from big firms were making arguments to me, I had heard some of it before.

Maybe I had made some of those arguments myself, so I was a little more savvy than I might otherwise have been.

WT: Do you find there to be any difficulties, psychological or otherwise, in moving from one side of the fence to the other?

SM: In the type of practice I have, less so than you might imagine, and that's because a big part of what I do now is represent large broker-dealers, large financial institutions in investigations by the SEC, or by FINRA, CFTC, state regulators. In many of those cases, the client realizes that something has gone wrong and would like to have the case put behind them in a way that they feel is fair and appropriate. And so, while it is adversarial, it's not as adversarial as some areas of the law, or when you're representing, perhaps, other types of clients or individuals. A lot of it has to do with negotiating and getting a fair understanding of the facts by both parties, so I didn't feel the transition was as difficult as you might imagine.

WT: Are you working in more or less the same areas now that you were before you went to the New York Stock Exchange?

SM: Yes, except for I would say that the CFTC has become a bigger part of my practice, perhaps because the CFTC has been newly reenergized in their efforts. David Meister, who I know just announced this week that he was stepping down, was a lawyer that I had worked with back in the specialist cases, and I have great respect for him and I think he

did a tremendous job at the CFTC as head of enforcement. And, as a result, I have quite a few cases with that organization right now.

WT: And just for the record, you have been with Bingham McCutchen and now Sidley Austin, 2010 to 2013, and you've come here this year.

SM: Yes. I was at Bingham from April 2010 to April 2013, and I've been at Sidley since April 2013 to the present.

WT: Okay, if I can return one more time to the question of women in regulation, have you noticed any trends? Would you like to say anything in general about your experience?

SM: Well, I've noticed a trend of there being a lot more women in securities regulation, and I think that's wonderful. I think that women in very high positions, obviously the SEC and Sheila Bair at the FDIC, there are just more women in powerful positions in securities regulation and banking regulation than I can remember in the past. I think that's a wonderful trend.

WT: All right. Well, I think that's all the questions that I have. If you'd like to add anything else, please feel free, but if not, I think we'll wrap it up there.

SM: Thank you.

WT: Well, thank you very much.

[End of Interview]