Securities and Exchange Commission Historical Society
Interview with Tamar Frankel
Conducted on August 17, 2017 by Kenneth Durr

KD: This is an interview with Tamar Frankel for the SEC Historical Society's Virtual Museum and Archive of the History of Financial Regulation. I'm Kenneth Durr, and today is August 17, 2017, and we are at Boston University Law School. Thank you very much for taking some time to talk. I'm really looking forward to our discussion today. And I start with everyone with some background. So you're a native of Palestine? It wasn't Israel at the time.

TF: That's correct.

KD: And you would have just been coming of age at the time of the partition, the War of Independence, tell me a little about your experiences then, in a nutshell.

TF: Well, I was a member of the underground movement, the Haganah, very early on. I spoke over the illegal radio, where people wanted to know what was going on, and the British had some limitations, and not everybody had a telephone at that time. But people were very anxious about it. And, of course, like everybody else, I knew how to shoot well. And finally, women in Israel, at that time, were leaders. A second head of the government was a very strong woman, Golda Meir, but they were also in the Supreme Court and so on.

I ended up first in the air force. And in 1949, when we were sent here, that's when I came for the first time. There was a group of us who came to talk about the state and so on. That's when I learned that I was a lieutenant. I didn't know that before, and no one cared what (laughter) – and after, I did not have enough experience in that time. I didn't feel comfortable being the general counsel of the air force, even though the air force was very small.

By the way, one of the pilots ended up being the president of Israel, Weizman. Ezer Weizman was his name. And everybody knew each other. It was a very small community. But we had some legal issues, like foreign pilots who came to help but didn't want us to be – when the state of Israel was declared, I was barely twenty-three. So I didn't get the license to practice law, according to the British. But I got it from the Supreme Court of Israel. I was one of the first that got the license later.

KD: So you had studied some law in Jerusalem?

TF: I studied in the only law school in Palestine, which was called the Jerusalem Law Classes. And the system there was that you sit down for two years, five days a week, in the afternoon – because it also accommodated those who worked – and listen to lectures. Nothing else. Then after two years, you had twelve exams, three hours in the morning, three hours in the afternoon, four days a week. Then, if you passed them, you could continue for two more years of the same thing, but eight exams. And then the fifth year was five exams, and you had to be twenty-three.

However, there were two things that were really interesting. One is that if you failed in the first year, you had to go back and do two years again. And the second was that after the first two years, you could be an external, an (indiscernible 00:05:37) juror, as they said. Yes. So my father was a lawyer. He ended up being State of Israel president of the lawyers' organization, the first one. So I really learned law from him.

KD: Did you work with him in his practice?

TF: Oh, yes, I worked at his office. I also continued to listen to some classes, but the main thing was really what I learned from him.

KD: So tell me about the practice. Was it corporate?

TF: Well, that's another thing. At that time, the practice was also varied. You didn't specialize. There were not enough people to create a specialization. So he went to court, and so did I. And he had at least two, maybe three, banks, a mortgage bank and also international currency bank that provided that. So, early on, I learned, in a very small way, some of the financing parts. Then there was land law, which was also Turkish. It was the Mejelle, Turkish land law, which reflected the sultan, who used to own everything but gave to his friends or whoever. A very long type of – it wasn't a full gift. The ownership remained with the sultan, so after ninety years, you didn't have it. So you had to change the very concept of ownership in order to continue.

What happened to me, and just by chance, is that I met people who started the legal department of State of Israel. Not department, it was really – well, whatever we called it. It consisted of twelve people, including the head. It had Haim Cohn as the general manager. And what was interesting is the questions, the issues that were raised. Do you give a law a name or a number? Who signs the law? Basic fundamentals. Then we didn't have words. Do you take them from the Talmud or the Mishnah, or do you take them from something else? I'll give you one example.

There were many Jews that bought land in Israel. It was kind of, if you were wealthy, you bought a piece of land. The remnants of the Holocaust then came, younger people, but they knew that the uncle or the aunt or someone had a piece of land. Went to the registry, and sure enough, they found it. But then they had to show that they were the heirs. And one of the issues was who died first, the man or the woman, because these were two branches, different families, before even the Talmudic law. The man always died last, and that was the source of the tribal ownership of land. And if the woman went away, still, the tribe retained its ownership. So the question was whether you take this rule, if the man died, or you take the rule of the UN at that time, which assumed that both died at the same time, which meant that each branch of the family, the woman's and the – will get it separately.

The usual desire was to revive the Talmud. But in this particular case, and there were arguments, we went with the UN. There was a recognition that you can't take everything

that was appropriate years ago, but not today. So this was one of the things. And the other story that I find, and you may want to put it in, was Haim Zadok was the head of the legislation department. We were three people. And I belonged to that department. Mainly, they took me because Hebrew was my natural language, and everybody else's was not. So I had a gut about the language.

Anyway, he was called to Ben-Gurion, and he was told to write two laws supporting the family of soldiers who died, and supporting the soldiers who were hurt during the war. Not that the government didn't pay. The government paid, but he wanted a law for them, not depending on the government. And he wanted it in a week. So Haim Zadok said, "We can't have it in a week." So Ben-Gurion said, "Put some more people on it." So Haim Zadok said, "If you want to paint a picture, can you put more people on it so that it will be faster?" So they negotiated after this story, a month. He came back. How do I know about it? I wasn't there. But he came back, and he told us this story. And I started. I was given the model of the Canadian law, and we started with that.

So the other thing also was, should Israel have a death penalty? There were lots of arguments. The answer was, no. It doesn't have it to this very day. There's no such thing. All these people who came to kill other people and so on, they are in jail. And we feed them. There's no end. We have to wait sometimes to exchange a hundred of them with one soldier who was caught, but no death penalty.

KD: What was the role of English common law and that whole tradition? Were you integrating that?

TF: We were and we weren't. We were shopping around. But the first stop was the Talmud. Not only the Talmud, the Mishnah and so on. For example, for words, the words "*el nounah*" – and there were a lot of words we took from old Hebrew – we didn't have those words. And this one thing is interesting. We took a Mishnah word, but we put in – it was a British concept. And that appeared before the Supreme Court, because the meaning of the Talmudic word was different, and we didn't really want it. We wanted the British one. And the Supreme Court said we are going to interpret it according to the British, because the legislature has poured the British ideas into the Hebrew language. So there were these kind of issues.

KD: So this is a big period of setting precedent.

TF: Yes. It was taking a law that was the British mandate law, for example, the Turkish land law, and transferring it into or transforming it into today's reality. My role was very small, but it really was language.

KD: Language. How to talk about concepts and how to talk about –

TF: And not only how to, but the words, the words. I had a gut. And when you were born and raised on Polish, which Haim Zadok was, or in German, which Haim Cohn was,

"How do you say it?" And they would come and say, "Tamar, how do you say it?" And I had a gut and they didn't.

KD: So when did you move out of the Israeli government then and start working in finance?

TF: When they moved to Jerusalem. Then what also happened, which changed my life, is that my father died very suddenly of a heart attack. And he was fifty-four. He was very young. So I continued his office. And I must admit, the clients just stuck with me.

KD: Why?

TF: I think it was trust. They did not have some very unique issues. They wanted to transfer land, they wanted to – some in court, too. But the main thing is they knew me and they knew my father. I opened his files, and he would write it down as if he talked to me. Yes. And he had reports on every penny he got – it was amazing – so that I could continue. And there were three other people who worked for him, and they were just as committed. I couldn't have done it without them. So I continued and did really finance, to some extent; bank and real estate, to some extent. But big; not simply transferring houses.

I want to add something here, and that is that maybe two years ago I started and I wrote. It is not a big book. It is about living in different cultures. And I'm now going, hopefully, to publish it. I think it is done. One of the things was that you learn to live

with other people who come from different countries, different language, different eating, different sleeping. Everything was different. The one thing that brought us together was security. You became responsible for everybody else, and you felt safe. So you could walk in Tel Aviv in the middle of the night, and if you gave one shriek, 10,000 people would come down and ask, "What's the matter?" And that is true, I think, to this very day. So you lived with differences, and you accepted them. And the other thing is you lived also with a tremendous amount of argument and a lot of love. And you're smiling, because you know the culture.

KD: Yes, and there are some contrasts that you can draw between the culture you're describing and culture as it developed, but we'll get to that. This is great, great stuff, but of course, most of your career you've been dealing with corporations.

TF: So let me go back now. Not in corporations, but in finance. I did teach corporations for a very long time, and very large classes, that's true. I was invited to come here as a visiting scholar, to Harvard Law School. Louis Loss invited me. And I came really for six months, and then for private reasons, decided to stay. Became an LL.M. student and then an S.J.D. student. They looked for that. My doctoral thesis was on variable annuities. I didn't know mutual funds, and I didn't know insurance, and that was a perfect, perfect subject because of that. I didn't want to chew cud, to do again and again what I know. I'm looking always for something that I don't.

Here, and unfortunately, the culture is that if you don't know something, you're stupid or you are a loser. I learned that lesson from my students, a loser. So one of the basic differences, I think, for me, was that I didn't feel bad if I didn't know. That's why I took Chinese law. By the way, I took the – Cohen taught it, is a very famous man who I – but I wanted to learn the language. They said, "No, because if you don't use it, you'll lose it." But otherwise, it is – the culture that I came from was the one that, not required, but was very encouraging to look for what you don't know.

KD: Tell me a little bit about working with Louis Loss. He's a legend.

TF: I'll try.

KD: What did you learn from him, if you had to boil it down?

TF: First of all, I learned securities laws. But I also – when I came here and began to listen to what was – I took other courses, too. I had to. I was like a drunk. It was a new world. Wasn't the language, it was the concepts, it was the refinement. It wasn't the Mejelle. And I remember walking on the Charles River, just thinking and rethinking. So what he did was to help me that he opened – he really taught me some things, not by telling me, but by telling me where to go, what to look for. And he and his wife were very kind to me. So this was number one.

Number two, he did something great for me when, after the doctorate, he really caused – and I'm trying to remember now the name of a large publisher that was acquired afterwards by Kluwers – to give me a contract to write on investment companies. It was his doing. They didn't know me from Adam. They would have never talked to me.

He also did something wonderful when I was a student. I wanted to teach. I knew I wanted to teach, but he made arrangement – he convinced people at Ropes & Gray to take me as an assistant for $5 an hour or something like that. But I wanted to know where I would be sending my students, so I was treated like one. I was given the type of research that they would. I sat in the library with them. I saw them crying. So it taught me a great deal about the future teaching.

KD: You did some work at Ropes & Gray a little bit, and that's a real white-shoe kind of a firm, very traditional.

TF: Yes, that's right.

KD: You spent a little time at Arnold & Porter as well, right?

TF: That's right. He was the one who helped me when we moved to Washington. I don't think without him – "Who is she?" Yes? But without him – and I spent time there, at Arnold & Porter.

KD: Did you see a big difference?

TF: I worked for Judge Arnold. And I'll never forget it – I learned so much about America, because he would sit down and he would reminisce about this case and that case and this. He had a very famous case of somebody who was a traitor to America because he was in Italy and, during the Second World War, he talked about Americans. When this guy came back, he was charged with that, and Arnold represented him. I learned so much about America, just because he would do it that way. And he also – it was a wonderful experience. And there were, at that time, 40 people, not 200. At the same time, one of the persons I met then, we became very friendly – and she needed that, I needed that – was Brooksley Landau.

KD: Brooksley Born?

TF: Yes, at that time. But now.

KD: So you went through that corporate experience knowing that you wanted –

TF: One more experience was we moved, also, for two years I think, to Los Angeles, and I worked for the Department of Corporations there. And I learned so much because I knew so little. That's the truth. Also, I learned a very different culture as compared to what we have here.

KD: Yes, in the east.

TF: And that gave me some idea also about students.

KD: I noticed that your first academic work is on the Maloney Act and SROs. Do you remember that?

TF: Funnily enough, I don't. Did I publish it?

KD: Yes, it was under your maiden name. And I was just interested in the fact that it was –

TF: What did I write about?

KD: It was about the NASD and the beginnings of SROs under the SEC.

TF: Oh, that wasn't the first. I think that the first was, first of all, my thesis, variable annuities. May I tell you a story about it?

KD: Sure.

TF: Forty years later, I received an email from someone I never knew, and he wrote that he was a regulator in New York, an insurance regulator. It was published here by *BU Law Review*. He bought this. And from time to time, when he had problems, he would look at

it again for the analysis. And so, forty-plus years later, he thanked me. I walked on air for a month.

KD: So how did you get to a subject like that? That was a pretty new thing at that point.

TF: Well, one reason was – it was, again, Lou. I didn't want to write about what he was doing. And he said, "How about mutual funds?" He did not like it. But he recognized that somebody has to write it. So that's how I started. And in '79, I wrote the first two volumes. All I would say is that I met one lawyer who said to me, "I never met you before, but you've been on my shelf for a long time." It was that kind of thing. There was a need. And mutual funds was tied to variable annuities. But I didn't go with the insurance, although I taught insurance for two years in order to learn. And then afterwards, it really clicked, to write this thesis. I would add one more thing. I couldn't do it without an assistant, who was my former student, Ann Schwing. She's still doing it.

KD: Was this a task that occupied a lot of your time during the 1970s?

TF: I write faster than I talk, and I think that is hereditary. My father and grandfather, I found out some others, they wrote, not talk. So in that respect, sure, it took time. But it could be done by night.

KD: This is a period when mutual funds are changing a lot, in the 1970s.

TF: Right.

KD: You're shooting at a moving target, in a way.

TF: I am. But that's another thing. I'm used, and I'm more interested in moving targets, rather than in collecting, call it. That was the first time, and it was collecting. And one of the criticisms that I got was that it was descriptive and not prescriptive. "Where were her thoughts? Nowhere." Well, this is the reason why to this very day the lawyers have it and the SEC has it. It is because I wasn't me, me, me all over. It was a service. It was needed, period. The difficulty was in organizing it and in presenting the materials fairly, not what I got from God. None of that. To this very day, now I have a former student also, Laby, who is – he, as a matter of fact, suggested that you come.

KD: Yes, we've spoken.

TF: And we had not an argument but a discussion about it. And I told him, "Articles write fire and brimstone or whatever they call it, but not in this treatise. This service is different." And I think Lou understood that, too, and he thought that there was a need. And he told me, "But I'm not interested. So will you do it?" I said, "Yes."

KD: It seemed like a lot of your emphasis on it is on investment advisors, too. Not just the investment companies and the '40 Act, but investment advisors.

TF: In the beginning, the advisor – this is interesting – the mutual funds started, after the disaster in 1929, started from the Boston trustee. Now, the Boston trustee got a lot of requests. People didn't know what to do. The Boston trustee couldn't give personalized advice to everybody. So what they did was to create a pool of lesser and say, "Okay. We are going to deal with it, but with you and everybody else. We are not going to take care of the wife who wanted to go abroad," and all sorts of things that they used to do. "Not to you." Okay. What is interesting is that as a result of it, the design of mutual funds is that you have all the money of the clients in a corporation, then you have a board, and then you have nothing.

This is a corporation without anything, except a contract to the advisor. That's what it was taken from. Now, in corporate law a corporation cannot outsource all its activities. The courts, a long time ago, said, "No." And when I looked at it, I said, "What the hell is that?" Then finally, afterwards, the contractors achieved some supervision by the board, was sitting on all the money. But the supervision is the head, or the Boston trustee is the head there.

So what happened next – and that stopped then, but that was the beginning, and we still have it. Now the question is, who owns the trustee? In some respects, in Fidelity, a family. He owns it. In the other, about six or seven, the public. In Vanguard, went back to the investors. They not only have a contract, they owned whatever they pay.

KD: And this is one of those things that was changing when you were writing your treatise.

TF: Right. Right, but it continued. At that time, Vanguard didn't exist, or at least I didn't know about it. But there were other things and it became clear that – and that is what brought me, really, to fiduciary law. It's other people's money. Face it.

KD: Yes, working your way through the investments –

TF: How some belongs to me, some doesn't belong to me, what words are used. Then I went to history. I have a teaching book on that and I have a book on fiduciary law that was translated into Japanese and into Chinese.

KD: But first you had an article, back in the early eighties.

TF: That article is now – I was so surprised. I'll never forget it. I met someone who is now a judge, and I won't mention his name. And he said to me, "Tamar, you don't understand. Everything is contract. And fiduciary is implied contract." And I said, "That is wrong. It is property issue. It's not a contract issue. It depends." I can be the best – the smartest person on God's earth in connection with securities, but if I gave my money to somebody else, I'm a baby. So where's the contract?

KD: When did this article come out? I think this is your first statement.

TF: It was in '80.

KD: Yes, this first statement that fiduciaries need to be looked at, not from the different areas within which they work –

TF: Correct.

KD: – but together, conceptually, as fiduciaries.

TF: Right.

KD: When did that idea start to germinate? Do you remember?

TF: I taught for a year – I think for a year, maybe two , I don't remember – in Berkeley. And at that time, the rule was – and that was the big, big, big thing, law and economics. You quantified everything, from one to five. Are you a smart person or not? I had some experiences after that. Also, this quantification of something that is conceptual. And the result was to – I began to think about it also because I did have some background in trust. It occurs to me now, simply in my childhood we had to trust each other. And then I began to think about it. I don't remember a particular situation. And by the way, I wasn't a good teacher at that time, I know.

But as far as writing is concerned – I heard so much about quantification – my reaction was negative, and that's how it started. Now, I don't remember where I got the germs of

it, but I think it was because of trust law. There was a law, but if I took the money from somebody else, I was a contractual party with implied – and that was something that didn't jibe.

KD: The SEC, in the seventies, through that period, was starting to go after gatekeepers: lawyers, accountants. Did that factor into this development of these ideas at all?

TF: It could, although I came to the SEC much, much later. But I would say one thing, yes, I read a lot. And what really was the difference was avoiding contract law. It was against contract law and for a transfer of property, other people's money. But it's not only other people's money. That was another thing. I did look at lawyers. I don't know if I wrote it, if I published it, but I looked at the history of lawyering and the duties that lawyers had – why? Why lawyers? Why doctors? And the same thing then applied. It's something that they don't want you to know. Nobody can be expert in everything. So once you need that, and once you need society to depend on others, then you'd better have others being reliable. Otherwise, you lose the value for the society.

KD: But you need a legal structure for that to happen.

TF: To enforce it. To enforce it. Because it did not – that was another thing. It was later, but I wrote a book about trust and honesty, America's business. And that was exactly it, that if we want to be poor, we should stop trusting each other. But if we want to trust, we've got to be trustworthy.

KD: Did that article, the fiduciary law article, make an impression? Did you hear a lot about it?

TF: You know what has happened it to it now? There's a book about writing that made a difference, and I got a request to permit it. It is now – is going out – I think it's Oxford. They even paid me for it. I was so surprised. But they wanted my consent. (Laughter.)

KD: Well, that's terrific. At the time, did you hear much? Did you get much response, at that time, back in the early eighties?

TF: I got pushback, and that was hostile to some extent, by everybody. But that's another thing. Here, people want the result – immediately, yesterday. I was not taught that way. So first of all, I may be wrong. Okay. And then afterwards – what did it for me was a conference in Toronto. And there, there were also people from New Zealand, and there was an argument about that. And some snickered, but there was a woman there who became a Supreme Court judge in Canada. She is now, I think, still, the chief justice. She didn't snicker. And the first cite to this article was by the Supreme Court of Canada that held that a psychiatrist who gives drugs to a client for sex is a fiduciary. Bingo. Now I have – and this, I count. I have three such cites in Canada in Supreme Court, and one in Israel. But at that time, I got a lot of pushback. "You don't know. Besides, you are not an American lawyer." And economics meant a lot.

KD: The law and economics movement was very strong.

TF: Law and economics. And it wasn't a discussion, it was winning. It was, if you don't agree with me, you are my enemy. I'll tell you what – and that was a time when I was already teaching. I wrote a little parable on teachers who gave higher grades to those who paid. And one teacher started it, and the other thought it was a very good idea, so they continued to do it. Everybody then charged for a higher grade. Then the employers began to realize that the higher grade doesn't mean the higher quality, so they began to disregard it. The students really disregarded it and then the teachers, again, began to look at the quality. However, it didn't go back completely, because the bitter taste of the other money situation somehow remained, and the employers are still not quite sure that they're getting it. And that parable I gave to a former dean of mine, and he was furious at me. He was so angry. And so, I decided, I didn't publish it. Now I'm going to publish it. (Laughter.)

KD: So this is really something that you saw in the academy.

TF: Oh, yes. It was terrible. There were some other stories, but I won't –

KD: This is the eighties here?

TF: In eighties. It was terrible.

KD: There was a big cultural change at that point.

TF: Oh, yes. But it still stuck.

KD: Let's move into the nineties a little bit, and this is a period when you moved around and did some really interesting things. One is you went to the Brookings Institute for a little while?

TF: Yes.

KD: Tell me about that.

TF: Well, I was asked – I met someone, we discussed, and then they said, "Why don't you come?" It was that kind of thing. We talked law. And, of course, if I didn't know anything, I wanted to be there. What happened for me in the Brookings is that somebody said "securitization," and I had no idea what it meant. So that was a perfect thing to look at. And I began to write about securitization. And, oh, what's her name? She was at the Fed, and she was there. We became friends.

Anyway, she knew a lot of government. At that time, it was not Fannie Mae, but Ginnie Mae that began to buy from mainly – well, from those banks that held mortgages. And that was a time when they didn't have enough money, because people were taking – it was inflation. People were taking money out. So the government took the mortgages.

And then, when the government added a guarantee, it could be so, and then the money could go to them. That's how they saved small banks or whatever they bought. That was of interest. And because the government was involved, she invited some people from the government, and they explained to me this. And afterwards, I came back, and sure enough, then I wrote a treatise on securitization.

KD: So you first encountered this as a way to get past the liquidity crisis of the seventies, right?

TF: Yes. But then afterward, there were many other questions. And I still teach it in mutual funds, because is it a security, or is it not a security? And the mutual fund is the one that invests in securities and issues securities. So it still has – and besides, they have to know something about it.

KD: And, again, when you're writing about this, it's fairly – this was only happening in the mortgage market at that time, right?

TF: It was happening in the mortgage market, but not exactly – what I have written – by the way, what – this treatise is translated into Chinese. Bowie bonds. You remember that?

KD: Yes.

TF: Bowie didn't have mortgages, he had rights to his songs, and so he securitized them. And then there were some others. So it wasn't mortgages only. As a matter of fact, what happened was that the mutual fund people looked at it and said that's a very good way to get out. So that's when the SEC said, "Hold it. Rule 2a-7. If you want to be out, then you can't do this, you can't do this, you can't do this. And the only thing you can do is loans. IOUs."

KD: When you were writing about securitization, did you foresee some of the issues that would come up later?

TF: Again, this was descriptive and not prescriptive. But afterwards, I did write articles in which I did mention it. But by that time, we had so much trouble. And I did write a number of articles on why the trouble came. Wells Fargo, at that time, did also one of those things.

KD: And then shortly after that, you went to the SEC, I think?

TF: No, I went back. It wasn't so shortly after that, but I think when the SEC began to use my treatise. When did I go there? In the eighties, also.

KD: Yes. I think you did a short stint in '85, and then a longer one in '87, something like that.

TF: I stayed there for a year and a half. First, it was a year, and then they added. And interestingly enough, I went – where did I go, to some country, to talk about securitization because they didn't have anybody? (Laughter.)

KD: You wrote on China securitization, I think.

TF: No, it wasn't China. It was a Muslim country. And as a matter of fact, one of the people there said, "Frankel, Frankel, isn't that a Jewish name?" I said it was a German name, but afterwards I told them, "Don't send Jews there." (Laughter.)

KD: Yes, good idea. Anyway, the SEC period, did you come in to work with the investment management division specifically?

TF: Yes, it was definitely the investment management division. And it was again, I learned. I don't know how much I gave. I don't know what to say about it. Ask me a more specific question.

KD: Well, let's talk about how you got there.

TF: I was simply asked. I didn't have any contact, also. It was kind of out of the blue. But it was something new, and so, sure.

KD: When you came into – the way this usually works is younger folks begin their careers by going to the Commission.

TF: Right.

KD: And then they work for a few years. And you were very well into your career at this time.

TF: Well, I had tenure here. I did not want to practice.

KD: Let's talk about some of the things that you learned there. Investment management had just gone through a big study. It was called the *Red Book*.

TF: Right.

KD: Was that still the basis for what everybody was doing?

TF: Yes it was. It was a guide that one had to look at, and it was a very useful one. So this was number one. And number two, I, for example, was impressed and surprised that when the Labor Department had some interpretation, they asked the SEC, "What is your interpretation?" Turned out that it was different, because of the sources. But what I saw was a corporation, a give-and-take. The same thing applied with even sending me to talk about securitization. It was another department. It was the Treasury that was asked, but

they didn't have anybody there. So what I saw at that time, and I think it remains today, is really corporation on the same subject looking at it differently.

KD: Were you involved in rulemaking at all?

TF: Yes. Well, I was involved because I was there and listened. And I saw exemptions. When it came to mutual funds and insurance variables, I was more involved, because I knew more. People would come and ask.

KD: Money markets are –

TF: Also at that time. A little earlier. And as a matter of fact, it was interesting, because the Economic Department in the SEC was outraged by this, because they thought it was hiding what should have been told and so on.

KD: The money market funds?

TF: Yes. But in the seventies, I also heard the bankers say, "Don't worry. We'll get it back." So it was quite clearly a political, as well as a financial, issue. You do it here, where do you get – and by the way, the people of the large institutions that wanted the money there wanted it because it was cheaper than to go to the bank. Very simple.

KD: But there was the whole issue of you had to get the exemptive relief in order to do that.

TF: That's right. But then they did the rule, a rule that told them this, that, and the other. And that's where they fought. Like now with the DOL. Same thing.

KD: Exchange-traded funds, was that something that you had any involvement in?

TF: Not very much.

KD: So was it your sense that the '40 Act was working? When you came away from this, did you feel like the '40 Act was working and that it was essentially sound, or did you have other ideas about that?

TF: Yes, I had that sense. Not so much because it was working at that particular time. There were all sorts of things that didn't work.

KD: Like what?

TF: Well, for example, pay-to-play. That was when it was introduced. What was working – and that's the key to every such regulation – is sensitivity to what is outside that is changing and that requires attention and maybe action. That is what a regulation should be. No law works. There's always some change. And one of the problems now is the fighting about the change.

KD: So the exemptive authority of the ’40 Act allowed it to change.

TF: That is one thing. But there are three, really. One is the no-action letters. The other one is the exemption. And the third one is a rule. We have buckets of rules. And this is also a very good system, because you start with, first of all, nonpublic – at least in the beginning, you start with learning. For example, the people who wanted no-action letters were invited and they came and explained to us what they wanted to do. So it was a teaching arrangement with the regulators that was terrific. And then the regulators gave also some response. “We don’t feel comfortable with it, but it is so small it’s not important. Go ahead.” And then afterwards, when we see that it is now – only now did I see that they took out one of the no-action letters. They erased it and said, “Whatever is in the past is okay, but not in the future.” Why? Because things change.

So these are the mechanisms for getting the information cheaply. By the way, they also got an awful lot, as far as I remember, notices by phone. So you know what’s going on, you know what people think. And you have no-action letter, which nobody knows except that we took. And then you have an exemption, which everybody knows must be published, three months, and so on. So you have a balance between the request, the information, and the publicity, which I think is important.

KD: Excellent summary of how that worked. I like that. Is there anything else in your SEC period that you found interesting that we should talk about?

TF: I found interesting and important an ongoing relationship with the organization of mutual funds, with brokers. And the other thing is their ability to show and to express different opinions, the value of arguments, and somehow the solution. The process was tremendous. What has happened, I see even now, is more of it, for example, with the CFTC, which was not the case then. And more of it, or at least some of it, with the DOL, with the Department of Labor. So I think it is a creative – and caring. What I saw was also caring agencies.

KD: Did you get to talk to Arthur Levitt much during this period?

TF: Not really, and it is my loss. But what I saw was really, here is a person who knows inside out. He doesn't have to learn from anyone. The other commissioners, with Aguilar, for example, I have contacts to this very day. Not every day, yes, but we meet. And it was also tremendously important that here were people who had conflicting ideas who can work together, which, unfortunately, is not everywhere else.

KD: Let's talk about an instance where it appears that you tried to help people with conflicting ideas work together, which is this bringing together the initiative that created ICANN, that created the Internet registry. It's really interesting. It started out as ISOC. There was a group in the United States.

TF: Okay. It's kind of simple. First of all, I was asked to write a design for a not-for-profit corporation. Well, I taught corporate law, and one of the former students came and asked

for that. Okay. What I didn't know, what this was about. And then when I came, I realized, number one, they had meetings between the techies on the one hand and the business on the other that were continuous, before decision-makers. It was before Congress. It was before the White House. It was before here, there, and everywhere. So one of the things I began to receive is, "I want my fifteen minutes." What fifteen minutes? Well, each had fifteen minutes to just kind of – and that became the forum.

So I was asked to go to Virginia, to a hotel, where about 500 people met. By the way, this would be in my book, but okay. And they met with me before, and there were kind of talks about breaking the meeting. Well, I'm an Israeli. I went to the hotel and I told them to put some people at the doors, and I sent a message through someone that if they tried to break the meeting, the police would be very soon.

KD: People were going to disrupt the meeting?

TF: Yes, they were going to. So that kind of disappeared. Then it became clear, I saw what they were doing with the fifteen minutes and so on. Ira Magaziner had come for a few minutes, said, "I hope that this will be" – Ira Magaziner was the responsible person from the White House. So what I did was different. I told them that the corporation should have five or six kind of a name and this, this, this, and this and this. That's a design. We took the large hall and divide – oh. All the newspaper people, out. That was also. (Laughter.) And then we broke it to the five or six things that will create a corporation, and we had blackboards on each of these places. And I told them, "Go, meet, argue, and

then see if you can come to an agreement. I don't want to hear about disagreement. Come to an agreement, and you can walk from one to the other, argue, shout, whatever you want. Come to an agreement. At the end, I want each of these groups to report their agreement."

And I remember somebody saying, "Who is going to report?" And I said, "You are big boys and girls. You decide who is going to report." I'll never forget that. What happened was, number one, the business people and the techies found that they had a lot in common. They wanted the same thing, for heaven's sake. Second, they all wanted a corporation. That is what they did want. So if I give a little bit here, you'll get a little bit there, and so on. At six o'clock, each of these groups, the subject came, said, "We want this to be the name. We agreed to this name. We agreed to this." And, honestly, there was a hype. There was an achievement. Not winning, but an achievement of another source. After that, I went to Geneva, and it was also interesting. I met there with their people.

KD: Europeans.

TF: And they said, "Well, what will we agree on?" I said, "What do you mean? We haven't yet met." He said, "We usually agree in advance what we're going to decide." I said, "No way." (Laughter.) But that was another culture altogether. Okay. We did the same thing there. They screamed like you wouldn't believe. In one place, I really went in. I said, "Enough is enough. You know, I can scream, too." And that is when Jon Postel

was there with his lawyer. And it was interesting. The lawyer said to me, "It won't work." Jon Postel just kind of – he was smart like you wouldn't believe. He understood a little bit here, a little bit there.

KD: But he had been doing this all along.

TF: All along, but he wanted a lawyer, okay? And the one thing I did, I never, never became a chair of the people who managed the meeting. Never. I roamed around, but never. So, at that time also, I had two people who are now luminaries, really – I'm bad at names and especially now – at Harvard. They helped a lot, because one of them was a young man at that time and he typed everything, and so on. I couldn't do it. Then I went, and we came to an agreement. Then we went to Singapore. We did the same thing there. Very different people. People from Vietnam came, not because they were Vietnamese, but because there were Europeans who worked there, and they wanted it there because it was godforsaken place. Then there was an Australian and so on, so quite a few. Very different.

And as a matter of fact, the guy who was an Australian, I couldn't go to him before I talked to his secretary about what I'm going to say. You know, I really – "Okay. You want to be God, be God." He became, afterwards, a first head. And that was the last one. The one in South America, I talked over the phone. I didn't want to go there anymore, and I wanted my life back. And, of course, there was a time when at seven o'clock I would call Ira Magaziner. He wanted to know what was going on.

Then the other thing that was very important was the twelve people from Harvard Law School Berkman Center. They looked for something to do that they didn't have at the time. And here was a project that they could take, and they were perfect for it. They asked me then, "Do you want to be involved in writing the articles of association," and so on. I didn't. (Laughter.) Oh, there was one more thing. Postel asked me to come and talk to a meeting of about 2,000 techies in Chicago. And I wanted them – he didn't say it, but he wouldn't have brought me – I put two and two together. He wouldn't have brought me there if I didn't want them to vote for the design. Otherwise, he would have kept me away.

So I put two and two together, and he met with me and so on. And he was God. And then I started talking and explained why and so on, and I remember one of the audience saying, "What does Jon say?" I said, "You know how to read and write. You have a brain. Think for yourself. Say yes or not, but not anybody else." And I began shrieking, and they kind of – "I want an answer now." (Laughter.) I got it. Only an Israeli. American wouldn't have done it, but for me, it was natural.

KD: About how long did that whole thing take?

TF: Oh, it took about six to eight months. And then I wanted my life back. I said, "Enough is enough." But I learned a great deal. And I'm sorry to this very day he did not – he died on the operation table about a few months before this was clinched.

KD: Postel?

TF: Yes. One more thing. I did go, and that is when we reported to the congressional group that dealt with it, and explained what we've done, how we've done, and so on, and they agreed. And that was also important, because otherwise – okay. So this was the story. And afterwards, I did something, though. I wrote a teaching book on the Internet and taught it for a few years, never published it. Maybe sometimes I would.

KD: A whole different sidelight for you, just getting involved in that whole project. What other things did you learn besides the techie side and how the structure of all that worked?

TF: First of all, I learned that I don't want to be a politician. When you go to breakfast and twenty people congregate on you and each wants to say his thing, and each wants – and they're fighting there. That was not –some people may feel very good about it, proud and so on, and power. I couldn't stand it. So I wanted the results, but I didn't want it. And there was too much of this. I, afterwards, tried – I joined a meeting, and it wasn't – and then, by the way, I was disqualified because my son was doing something. My son is a lawyer and a businessman. And I don't remember even how it came about, but it was not my thing.

KD: Heading into the 2000s, you'd always been an academic. You'd written treatises. By this time, you'd written a couple of very large treatises, multiple volumes. You start to look to writing for the public, and this is a really interesting shift and something very few academics do. I want to talk about how you decided to do that and what the issues were and what the challenge was.

TF: It still is, because I haven't yet published this book. As I said, it's about 120, 130 pages, about living in different cultures. But I'm going to do something else, too. I hope to be able to dribble op-eds of 800 words, because I think I can offer – I'll give you an example. We all talk about the rules that would regulate money managers and so on, and I want to write an op-ed that would say to any investor, "Here are six or eight questions that you should ask any broker, especially when you retire and get your IRA."

And the questions will be in simple English and will be as simple as you can imagine, and something that you really ask when you go to buy shoes, except that your answer will give some idea. So, for example, I'm doing it now because – I don't know if I told you, but *Wall Street Journal* is writing – you know they have this kind of third of a page about someone?

KD: Yes.

TF: Well, two days ago, there was somebody I've known by talking to him. I've never met him, Jason Zweig. And he came, and we spent –

KD: Oh, terrific. So you're going to get that *Wall Street Journal* illustration, all that stuff?

TF: Yes, whatever it is.

KD: That's great.

TF: So, okay. Going back.

KD: I think that your book on trust and honesty is definitely pitched much more toward the public.

TF: Yes.

KD: So that would have been the first big one, where you're really stepping back and trying to reach people.

TF: Right. So here will be an op-ed on that. It's just on what questions you should ask. Very simple question, not on how you invest and what you invest and so on. And it's like going to the doctor and asking, "Will it be painful, or wouldn't it?" Yes, you don't want to know all. It's the same kind of thing. So I want people to know that. And they can then stop. Because everyone who retires is not only an object for one transaction, but for two, because he must take the rest of the money and put somewhere. So he is a double

whammy for any broker. They will understand, I think. So this is one thing. But I have a number of these, like the one with paying for grades. "I want it. I want it." And that. And I have about four or five, I don't remember what, of the same kind of thing.

KD: So you've got a lot left on your agenda to get out there.

TF: Oh, yes. Oh, yes. And I'm not going to talk the language, but I'm going also not to talk the verbose language, which I never really did. That kind of something that nobody understands except you and your friends.

KD: Legalese.

TF: Yes, legalese.

KD: Let's talk about a couple of things that came in between there. One thing I almost forgot to ask about is, you're the expert on investment companies, mutual funds. In the early 2000s, you get the late-trading market-timing scandals. Did this change your perspective? Did this make you think, "Oh, when we revise the book, we've got to do X"? Tell me about that experience.

TF: The treatise just reports, and, therefore, no comment. The teaching book that I have, which is now a fifth edition, number one, I added, as I did with the treatise, a former student of mine, who is now coauthor. He will continue. There, yes. And let me tell

you. Now, when I looked at blockchain, I began to learn it a little bit. I want to know what it is. What I saw as part was distrust. So immediately, I wanted to know it. It seems that if blockchains continue – and I don't know – we may have less need for fiduciary law. Why? Because we will eliminate the intermediaries. It goes direct.

And I asked – my son knows a lot about it, and I asked him. And I said, "What if we made a mistake?" I said, "You've got to go back to the party and ask them to give another transaction. That's all there is to it. It's carved in granite." I don't know whether they will be able to give some leeway, but right now, whatever I say to you will go to half a million computers. You'll think twice, three times before you do that. (Laughter.) You'll think a lot. And you won't have someone who will say, "I'll do it for you," with this, that, and the other.

So in the future that I see, if this continues, there's no brokers, very few banks, very little intermediation, an entirely different world. Where will the problems be? In those who design it and those who service it, but it will be different. Now I'm going to tell it to my class. They are going to say, "Huh?" But they will remember it later on. I'll just spend two minutes, like I talked to you.

KD: Fascinating. My perspective on blockchain and Bitcoin and all that is that it's somehow threatening, kind of scary. It's interesting to hear this positive –

TF: Yes, there is a positive part. There is also scary. I'll tell you where. The government is out. I said it in two words. I could write. But that's a scary part. And therefore, that's where I want to know who designs it, who puts in his pocket something that I don't know. Because the power has moved to somebody, I want to know those people with the power are and who supervises them. For me. So it's not that it goes away, but it's different. And if we think that brokers will remain forever, I've got news for them. They better look and find another job. And you talk about making jobs, finding jobs, and so on. Think.

KD: Fascinating. I never thought we'd get to that one. I do want to conclude by talking about fiduciary law some more. You published the book, same title as your article, in 2010.

TF: Correct.

KD: Tell me a little bit about the experience of pulling that book together all these years later. What, thirty years after the first?

TF: Right.

KD: Just tell me a little bit about what you'd learned on your own and what you'd learned from people who you'd worked with and who had learned from you.

TF: Well, the one thing I looked for is to see whether that problem – first of all, I'm a lawyer, and I deal with problems, like doctors. And I wanted to know whether this was an eternal problem that is related to human beings, or is it something that is a speck that will pass? And when you open the Bible, when you look to Mesopotamia in 3,000 or 5,000 years ago, what do you find? Fiduciary law. My teaching book starts with the history, and I took it from there. And then you find that we can't live alone, we must live with others, and we must depend on others, no matter what. So the issue of fiduciary law of trusting is fundamental to human existence. Once I reached that conclusion, then I wanted history. I wanted to know how it was resolved in different environments. And you'll find very interesting when you look at Hammurabi Code, you'll find – do you mind that I talk about it?

KD: No.

TF: Okay. You'll find people in – Iraq, now – but they were sending their wares to Egypt on the Mediterranean. And the question was, the guy would come back and say, "I couldn't sell. I couldn't buy," whatever. So how did they resolve that issue of fiduciary duty – they said, "First of all, you must bring us double of the value. However, if you were robbed" – and this was a dangerous way; you could have been robbed – "you will not have to pay, except you'll have to show that your money was also robbed." Listen. We think that fiduciary law today is very different? No.

By the way, this is one of the things I do want – again, a very small – if you want to know, well, how do you treat people fairly, and you have so much of it, all you have to do is say, "If you want to know, ask yourself how would you like to be treated." Then you're okay. That's what they did. That was Hammurabi. (Laughter.) So if you ask me –history, and then a lot of the Middle Ages, a lot of other things can give – and that's what I want the students to understand. They're connecting part that goes from Adam and Eve. By the way, they have a story, too. (Laughter.)

KD: There was pushback on the first article you talked about.

TF: Oh, yes. And how.

KD: So does that still exist, or has fiduciary law become much more –

TF: I'll show you something. About five years ago – now it's already five years ago – a guy whom I don't know called me and said, "We want to establish the Institute for Fiduciary Law. And the one other person who will join you as an advisor is Jack Bogle. I've known him, but I've known him because he knew me. In other words, we were at the same place. I didn't even dare talk to him. Who am I and who is he? He's that kind of a guy. So he joined. This is the institute. This is what they've done. And I told him that was so smart, because I told him, "What this says is we do take a bite, but we are transparent." He said, "I never thought about that."

KD: So it's a glass apple with a bite out of it.

TF: Correct. The other thing that I want to show you is this. This is Phyllis Borzi. There's a prize in my name, and we gave her the prize. But everybody got this, and she gave me that.

KD: Signed your hat, "Fiduciaries rock."

TF: Yes.

KD: And then the fact that there's a group now, an institute –

TF: But not only that. The people. What was interesting to me is who joined. The joiners were very large advisors. In other words, advisors to a lot of very wealthy people. Right now, I think there are twenty-six, but it creeps. And the one thing they are doing is establishing their own code. And it makes a difference. Now, will it take time? Yes. And so, the prize is given this year – and I forgot her name – to someone who has been working for work people and so on for a long time, and we're going to have the same brouhaha. Oh, this, I have just one, but I can show you. Oh, you don't have the time. I'm sorry I'm taking your time.

KD: Oh, that's quite all right. No problem.

TF: Yes? I don't know where it went. I made some order, you know? That's what happens when you make some order. In any event, that is when Brooksley is going to come. Yes, this is still the group. And Deborah DeMott is also one of the group, and she has – oh, I didn't tell you that. Two things happened throughout the years. One of them was the establishment of a roundtable discussion on fiduciary law, which is kind of a closed – it's not open. It has about twenty people, academics, and they are writing about it and meet. And among them, eight give a paper and the others criticize. And it is done every year, and Deborah DeMott is the organizer, and she's at Duke. And you can find the – by the way, there are people who come from Canada, two or three, but they are the ones in the best universities. So this is one thing that I see growing.

On mutual funds, eleven years ago, a young man who taught in Chicago came to me and said, "How about a roundtable discussion?" If he invited, nobody would come. He was an assistant professor somewhere. Would I invite? I said, "Sure, provided we have a discussion." He agreed on the format. This year will be the eleventh year. What happened in the first – by the way, Jack Bogle came a number of times. He's so sick now that it doesn't work, but – and some others. We had two people who appeared before the Supreme Court on the same case – forget what it was – and they screamed at each other. And there was another one. I said, "This is not going to be" – the one who did that was disinvited. The others – we designed it again and again. What happened – and it took a long time. So eight years later, it incorporated. There is now a corporation. William Birdthistle is very well known now.

KD: That was the one who asked you to organize, though.

TF: Right. He has incorporated. He has done everything, and I tell people. But he asks. Sometimes he takes the advice or not. It's his, it's not mine. But we did it here. We do it now in Chicago. He's now visiting in Chicago. I think he will get it. He's written. I gave evaluations and so on. And he has now – I don't know if you've seen it. He has a letter. He has a publication about what happens in a mutual fund area. I don't know how he does it. It's amazing. He's very able. So what was very satisfying to me is that one of the people who came all these years, and he is here – he used to be at Ropes & Gray, and now afterwards he's a president of some organization – wrote to me and said, "It was wonderful to see that in the last meeting we simply taught each other."

There was somebody from *Wall Street Journal*. There was somebody who just – from time to time, if she is here, from Australia. There were some who were advisors, some who were lawyers, some who – it's a mix. And it's just one day. We have four subjects. And each brings in his own perspective, his own history, his own, also, experience. And he said, "We learned something. I learned something." So this roundtable took ten years to become what it should have become. And afterwards, when I'm gone, I know William will continue, and I would like to see it continue, because it's a good thing. They argue, but it's done very differently. No shouting. (Laughter.)

KD: And it takes a lot to get things to that level.

TF: It educates people. There's really no need for awards. Some of them may be competitors. So what? There are some compliance officers there, and a compliance officer from Fidelity is also there. Yes. And then there's a lawyer who is there and there's a lawyer from Ropes & Gray who is there.

KD: Well, is there anything else we should talk about from your career that we've missed?

TF: Oh, there's this food that we should eat.

KD: I really appreciate it. It was a great talk.

[End of interview]