Securities and Exchange Commission Historical Society
Interview with Daniel Goelzer
Conducted on April 15, 2008, by Kenneth Durr

KD: This is an interview with Daniel Goelzer on April 15th, 2008 in Washington, D.C. by Kenneth Durr. The most interesting thing I noticed right off the bat was that you are both an accountant and have a law degree.

DG: Right.

KD: Which, I'm sure you know, is a fairly unusual thing. How did that happen?

DG: My dad was a CPA, I was interested in studying accounting, too. By the time I started college, I pretty much knew that I wanted to go to law school. I never was really aiming at a career in accounting, but I thought it would be a good undergraduate background to have.

KD: Where did you go to school?

DG: The University of Wisconsin. John Huber, who was Corporation Finance Director; David Ruder, who was the Chairman during part of that same time; and I were all University of Wisconsin Law School graduates. We were very proud of that.

KD: Was that a coincidence?

DG: It was a coincidence, yes.

KD: And then you were pretty sure that you were going to go to law school after that?

DG: Yes.

KD: Were you thinking in terms of a legal practice that would bring some of this accounting in? How did you end up in the area of the securities?

DG: Really just by happenstance, I would say. I should add that I was out of school for a year between undergraduate and law school, and I worked for what was then called Touche, Ross, Bailey & Smart, in Milwaukee, Wisconsin. It would be Deloitte & Touche today. So I had a bit of auditing experience. After I graduated from law school, I clerked for a federal judge, Tom Fairchild, for a year, on the Seventh Circuit. I thought it would be interesting to be in Washington for a little while. I was interested in something connected to business, but I'd never had a special interest in the securities law, or the SEC. I interviewed at the Tax Division of the Justice Department and at the SEC. I thought the SEC might be a little more interesting.

KD: Who did you interview with?

DG: That's a good question. The most striking thing certainly about that interview was—perhaps you've heard this from others—that in those days, in the General Counsel's Office, without advance warning, when you came in to interview, they sat you down and had you take a written test.

KD: You're kidding.

DG: I don't remember the specifics of it anymore, but they gave you a problem, and you had to write an answer along the lines of what you would be doing in writing an appellate brief. My recollection is that you were given the relevant law, so it wasn't a test on the law; it was more of test of writing ability. It certainly came as a surprise to me, and I think it came as a surprise to many other people who confronted it. You would take your paper around as you interviewed in the office, and people would read it. They might ask you questions about it. That was what the GC interviews consisted of. Larry Nerheim was the General Counsel at that time, so I probably talked to Larry. David Ferber's title was Associate General Counsel, or something like that, and he was running the office's appellate litigation, so I probably talked to Dave. I think I also interviewed in Market Regulation and Opinions and Review. I remember that at the time I thought Opinions and Review seemed pretty interesting. But I decided that I would prefer the General Counsel's Office.

KD: Justice Department in the running at all?

DG: Yes. In fact, I had an offer from the Tax Division of the Justice Department. I didn't really have strong feelings about either Justice or the SEC,, but I thought: Well, the SEC might be a little more interesting than tax law.

KD: So when you started working what kind of jobs did they provide for a new guy?

DG: I believe that when I started there were thirty-five people in the General Counsel's Office, which would be about a third or a fourth of what it is today. Most of what the office was doing was appellate litigation. One of the early things I was assigned to was a case against the Commission called NRDC v. SEC. The National Resources Defense Council was trying to compel the Commission to require greater environmental disclosure from public companies, and they had arguments that we were required to do that under the National Environmental Policy Act. I was involved in writing the Commission's brief—this was a district court case at that time—in that litigation. We lost. The district court ordered us to consider environmental disclosure. The bottom line was we then had to have a rule making proceeding about environmental disclosure.

I don't think environmental disclosure was a high priority on the Commission's list, but since we had lost the case, they had to do it. I was assigned to that the proceeding to implement the Court's order, along with two attorneys from Corporation Finance. We heard witnesses about what should be in the SEC's rules, and reviewed comments on a rule making proposal. The disclosure requirements that resulted are still in the

Commission's rules today. The Commission adopted the rules, and then NRDC essentially said they were inadequate and sued us again. This time we prevailed in the Court of Appeals, and that was the end of the environmental rule making. But, at the time, I thought it was just a fascinating introduction to the agency, and to administrative law, because I saw the defense of the case against the agency, and I saw the rule making process; I also saw the internal Commission decision making on the subject. It was a good introduction. It didn't have a lot to do with securities law, per se, but it had a lot to do with administrative law.

KD: And that was pretty typical? You continued to be involved in cases of that sort?

DG: Actually, that was probably atypical. I was also involved in some garden-variety appeals from injunctive actions, appeals of administrative orders that the Commission had issued in disciplinary cases against broker/dealers, and appeals from NASD cases. That that sort of enforcement-related appellate litigation was probably more typical of what the office was doing in those days.

KD: Were there things like special projects that would come up? The SEC is focusing on X, and we want you guys to think about this a little bit?

DG: Well, yes. Something that made me a little unusual is that I was involved in many of these special projects, like NRDC, rather than just in the run-of-the-mill appellate litigation. Something else that rapidly became a big issue in the General Counsel's Office in those days was foreign corrupt payments, and the Commission's response to the foreign payments crisis. The Commission had several enforcement actions against public companies that had admitted to—or as part of the Watergate investigation had been discovered to have been -- making illegal foreign payments. As a result, companies began making corrupt payment disclosures about bribery, especially foreign payments, outside of the enforcement process. The Commission had the Voluntary Disclosure Program, where eventually upwards of four hundred companies made such disclosures.

I do remember a memorable event from those days. I think the Commission was investigating some companies that made voluntary disclosures. We received a subpoena from a Congressional committee asking for all of the nonpublic, internal records relating to these disclosures. Harvey Pitt was the General Counsel at that time. Ralph Ferrara was the Chairman's Executive Assistant. They organized a massive all-night project, which was typical of how things were often done in those days, to prepare a response to the subpoena. I think we prepared a petition to Congress to quash the subpoena. We prepared papers to file the next day in court, to block enforcement of the subpoena; letters we prepared to the chairman of the relevant Congressional committee. It was a full court press to address this problem. I think the next day, Rod Hills went over to the Congress and negotiated some agreement with the Congressional committee, and all the work was for nothing. At the time, it seemed kind of annoying and burdensome to have to work all night on this stuff; but in hindsight, it was exciting and the sort of thing you remember for a long time.

KD: A hothouse kind of atmosphere, I guess. What was it like working for Harvey Pitt in those days?

DG: What was it like? Harvey was, and still is, an extremely hard working, dedicated, intense kind of guy. I can remember one Saturday: I was in the office doing something. I was a staff attorney. The office wasn't too big. He was working also. It got to be three or four o'clock in the afternoon. We both lived in Maryland, and he said, "I'll give you a ride home. I just have to work a little bit longer." So, I went back to my office. Four o'clock turned into five o'clock. I checked with Harvey, and he said "I'm going pretty soon. I just have to work a little bit longer." I think I finally got home at nine o'clock. If I'd taken the bus home, I would have been home hours earlier. That was what Harvey was like. I remember some other staff complaining about working too much, and asking, "Can we take time off when we're not busy?" or something like that; and Harvey's answer was, "Hey, you don't have to come in at all, as far as I'm concerned. Just get all your work done." Of course everybody was always in a position where, in order to get all their work done, they had to be there about the same hours that Harvey was working. So it was demanding, and probably wasn't exactly everybody's cup of tea. But I liked Harvey a lot, and I think working with him provided good training for a young lawyer.

KD: One of my questions was about enforcement. During the mid to late '70s you're really looking at a period where enforcement, in some sense, is setting the agenda. I wondered if you got that sense from where you were in the General Counsel's Office?

DG: Yes, absolutely. Stan Sporkin was certainly—it's probably fair to say -- the major figure at the Commission in those days. Something else that happened though—with Harold Williams, and continued with John Shad—was there came to be a concern that Enforcement was too much dominating the agenda. And there were a series of cases in which the Commission had some losses in the courts. I think there was some concern about whether materiality and other basic concepts were being defined too much through enforcement, and that there should be more non-enforcement regulatory guidance. But the bottom line of all this was that the General Counsel's Office then went through some fairly substantial transformations in the late '70s, beginning when Ralph [Ferrara] was General Counsel and continuing through when I was General Counsel.

Most notable was the creation of the Counseling Group: a unit in the office that does non-litigation work and monitors what each of the other divisions are doing. Counseling reviews everything that's on the Commission's calendar from the other divisions; and presents an independent viewpoint to the Commission. That was really a big change. And particularly for people who'd been there a long time, I think it seemed to be a breach, or a rupture, in the collegiality that had always marked the agency. Stan can speak for himself, but I thought that probably had something to do with his decision to leave the Commission and go over to the CIA as its General Counsel.

KD: Was this something that came in with Ralph Ferrara? Was this his mandate when he was appointed General Counsel?

DG: Yes, I think so. I wasn't directly privy to the conversations between Ralph and Harold [Williams] on that subject, although I was in the Chairman's office by that time. I think it's pretty clear that Harold wanted the General Counsel's Office to play a more active role in giving the Commission independent advice along the lines of: "If this matter is litigated, are we going to win? Don't just tell us is this good policy, or it is good for investors in the abstract."

KD: How hard was it to shift the General Counsel's Office into a role like this? What kinds of things had to be done?

DG: The main thing that had to be done was to create the Counseling Group. When I first arrived in the office, as I've said already, litigation, particularly appellate litigation, was really the focal point. It must have been seventy-five, eighty percent of the work. When I started, they had a practice in GC where each week one poor junior staff attorney would be assigned to read everything that was on the Commission's calendar for the following week, and then meet with the senior people in the office—the General Counsel and the associate and assistant general counsels—and describe each of these items, so that the office could decide whether there was anything they were concerned about. When you were assigned to do that, you knew you weren't going to be doing anything that weekend except reading the calendar. Each week there might have been thirty or forty items, and some might involve complex things like the net capital rule—stuff that, if you're a new attorney, you'd never heard of before. So you would have to study the legal background in order to understand the memo. It was a pretty burdensome thing. With the creation of the Counselling Group, that turned calendar review from one person doing it as kind of a sideline to their appellate work to a whole group devoted almost solely to calendar review. When I was there, there were three assistant general counsels, each with a special counsel, and probably three or four staff attorneys, comprising a group of between twenty and twenty-five people who were dividing this work up and looking closely at the calendar items.

KD: My understanding was they were trying to help channel things to the Commission, take a look at things before they hit the Commission.

DG: We weren't really supposed to be a hold-up in the process; although I suppose sometimes we were. The usual routine was that we would get calendar memos at the same time that the Commissioners would, which was usually a week or so in advance, and then we had those same meetings on Monday morning to discuss them, except it wasn't just one person reporting; it might eight, nine, or more staff attorneys. The assistant general counsel groups specialized—that is, there was one that specialized in market regulation, one that specialized in investment management, and so on. Anybody from the office could attend the Monday meeting, so we might have thirty or forty people in the room. Usually the divisions liked to attend so that they could hear what was being said about their items. We would talk about each one, and decide what position we should take. The process changed a little when John Shad became Chairman. His request to me—I never took it one hundred percent seriously, but his request to me, was: "I'd like the General Counsel's Office to oppose everything." In other words, "I think we make better

decisions when we have a sort of an adversary process. So whatever another division is recommending, you argue against it, like a lawyer in a court case for an opposing litigant."

KD: Might be a good exercise.

DG: Yes it was—it was challenging and stimulating. It was sort of fun. But some things just aren't very controversial, and it's hard to be against them. And presumably we're all there to enforce and administer the securities laws, and there are limits on how much devil's advocacy you want to do in that context.

KD: Right. And you wouldn't take this to the Commission and argue against it there.

DG: Oh absolutely.

KD: You would? Really?

DG: Yes, that was the idea—to do that before the Commission.

KD: So you really truly would argue against everything?

DG: Well, as I said, I didn't take it one hundred percent seriously. But we tried to do it as much as we could. And then for things that we really had a definite office position on, we'd write our own memo to the Commission. We also began to prepare, for the things that didn't merit a memo, internal notes of the views we might take. Those started to become circulated outside the office. I think at the time that I joined the Commission, the General Counsel would go to a Commission meeting when he or she had something to say. It then evolved, probably when Ralph [Ferrara] was General Counsel, that the GC was there for the whole meeting; to comment on everything. If there were things you didn't have any comments on, the Commission might ask you a question, or something like that. The General Counsel's Office became a more influential part of decision making and, to some degree, that was intended as a counter-balance to the great power that the Enforcement Division had accumulated.

KD: The point being that the General Counsel could say whether these things were worth spending our time on, whether we could win these cases.

DG: Yes. And I would say—and again, John Shad pressed it to the limit—our real guiding philosophy was the one I mentioned before: if this matter turns out to be litigated, even if it seems like something that isn't likely to be litigated, would we win? How strong is our legal position here? And more than that, even if we know that it's not going to be litigated, are we doing something that's outside of the agency's authority?

KD: Before we get into your moving up and John Shad's tenure: other areas of focus in the late '70s. Market structure was an issue with the unfixing of commission rates; there was some accounting reform going on.

DG: Yes. To some extent, now we're talking more about the time that I was in the Chairman's Office than my first stint in the General Counsel's Office. But yes, John Moss was like John Dingell was later -- the Chairman of the Oversight Subcommittee of the House Interstate Commerce Committee. He held a series of hearings on the accounting profession, which involved various kinds of testimony and committee reports. We also got involved in the foreign payments hearings and the effort to get the Foreign Corrupt Practices Act enacted, particularly, the accounting provisions of the Act. The requirement that companies keep accurate books and records, and have effective internal controls, came from the Commission. I ended up having a lot of involvement in testimony, letters to Congress, attending Congressional hearings along with other people; and all the things involved in seeing the Foreign Corrupt Practices Act enacted. Again, as still a reasonably young staff attorney, I thought was just a fascinating introduction to Washington. I can remember a meeting with William Proxmire, who was really the chief supporter of the Foreign Corrupt Practices Act legislation. We had a meeting with him to discuss some important issue; important to us, at least, involved in the Act. We made our presentation, and Senator Proxmire turned to his staff and said, "Now, what's my position on this bill?" This is our main ally. He has to ask his staff whether he supported it. But whatever he may have had in mind at that meeting, he was a stalwart ally in the Foreign Corrupt Practices Act enactment process.

KD: I'm sure you stayed in good touch with his staff person too.

DG: Lindy Marinaccio was a Banking Committee staff member on the Democratic side during some of those years. He eventually was appointed to the Commission. You also asked about market structure. I was never as deeply involved in market structure as in some other things, but certainly during the time that Harold Williams was Chairman, after the 1975 Act Amendments had been passed, the Commission was really grappling with what it meant to create a national or central market system as the Act envisioned. One of the big arguments in those days was what the fate should be of the New York Stock Exchange rule—it started out as Rule 394, and then they re-numbered it to Rule 390—that essentially required Exchange members to do their transactions in listed securities on the floor of the Exchange, not on other exchanges, or over the counter.

KD: So the General Counsel's Office would get into this as a matter of reviewing what's coming through?

DG: Yes, we would. We had less expertise in that area than folks who lived and breathed it in the Division of Market Regulation did. But yes, we'd get involved in it. And again, a lot of what we're talking about now I remember more from my time in the Chairman's Office when Harold Williams was Chairman. I think Harold was reluctant to conduct too many experiments on the capital markets. And in fact, I think he was quoted publicly to the effect that he didn't want to be the guy who had to go tell Congress: "Well, I tried something on the markets. It didn't work, and they blew up. And now we've got to figure out how to put them back together again." So on that subject he was fairly cautious about changes.

KD: I want to get a little sense of your movement up through the General Counsel's Office, because I know you end up as an executive assistant.

DG: Right, yes.

KD: Were you one of these Assistant General Counsels in the counseling group, or staff person?

DG: No. I never held the position of Assistant General Counsel. I had been promoted to Special Counsel, which was the next rung up from staff attorney. But then about that time—it would have been right after Rod Hills left as Chairman -- Harold Williams became Chairman. Harvey Pitt was General Counsel, and Ralph Ferrara was the Chairman's Executive Assistant. Ralph asked me to join the staff in the Chairman's Office. That was in 1978, I'm quite sure. So I left the General Counsel's Office and became a Special Counsel to the Chairman. I think we had a four lawyer staff in the Chairman's Office at that time, with Ralph as the head.

KD: So what was the mission there?

DG: Well, Harvey Pitt had been Executive Assistant to Ray Garrett. Ralph Ferrara was Executive Assistant to Harold Williams. One of them, told me that the mission of the Chairman's staff was to take guys who put on their pants one leg at a time in the morning like everybody else, and turn them into "the Chairman of the SEC," in capital letters. A lot of what we did was write speeches for the Chairman, prepare correspondence for the Chairman, give advice to the Chairman about what was going on with the staff; prep him for meetings with the staff or outsiders. There certainly was also a function of preparing the Chairman for Commission meetings—I did some of that myself -- but there were also two other people on the Chairman's staff, Amy Goodman and George Yearsich, who would review the Commission's calendar, brief the Chairman on upcoming items, and help him figure out how he should vote. So that's what we did in the Chairman's Office.

KD: So you developed a pretty broad understanding of what the Commission was doing, I guess, in order to move into a position like this, and even to do what you were doing before.

DG: Well yes. Certainly, the Chairman's staff has to understand everything the Commission is doing, just as the Chairman does, because he's running the agency. Obviously, the Chairman is also getting advice from the division directors, and the working staff of the agency.

KD: And this would have been the point as well that a lot of this stuff was happening in the General Counsel's Office where the General Counsel's Office was starting to review what was going to the Commission.

DG: Well, right. If I remember the sequence of events correctly, Gerald Ford was defeated, and Jimmy Carter came into office. So Rod Hills left as Chairman, and Harold Williams came in. But Harvey [Pitt] stayed as General Counsel. I think Ray Garrett had appointed Harvey General Counsel before Ray left, but Harvey stayed through Rod Hills's term, and then he remained as General Counsel at the beginning of Harold Williams's term. Then at some point Harvey left, and Harold appointed Ralph [Ferrara] General Counsel, and then I became Harold's Executive Assistant. I continued as Harold's Executive Assistant until he left at the end of the Carter administration, when Ronald Reagan was elected.

KD: Any highlights in there? Any particular issues that stand out?

DG: Working with Harold was particularly great for me. He was just a tremendous, thoughtful individual, and very easy and stimulating intellectually to work with. Certainly one of his big interests was the then-new subject of directors' responsibilities and the importance of independent boards. I worked on a series of speeches that he gave on that subject. The implementation of the accounting provisions of the Foreign Corrupt Practices Act was also a big issue in those days. I remember we worked on a speech he gave about how the accounting provisions should be interpreted with a reasonableness element to them. Also, Harold used to have, retreats, or meetings for the division directors, and other the senior staff, at his house in Georgetown, from time to time. They were kind of fun. He had a pool. I think it was just a lap pool, a one-lane pool in back of his house. It was in Georgetown, so he didn't have a lot of land. He always used to say that anybody that wanted to could bring a swimming suit, which nobody did, except at one meeting. Stan [Sporkin] brought along his swimming suit. He had sort of like a rubber hat he put over his head, and dived in that pool, and swam laps while we all watched him.

I also remember discussion with Harold about directors' responsibilities and corporate governance. Amy Goodman, who had been on the chairman's staff and then moved to Corp. Fin., got involved in a study of corporate governance that Harold had the Commission do around that time. I think that really had a big influence on the rest of her career. She's certainly still involved to this day in those kinds of issues.

KD: Was this new look at corporate governance be part of the fallout from the Foreign Corrupt Practices Act?

DG: Yes, I would say so. The events that led to the Foreign Corrupt Practices Act really caused people to ask themselves how corporations were governed, in a way that they hadn't asked before.

KD: Did your previous life as an accountant help you at all, when you started talking about the implications of accounting?

DG: Well, of course, I had a brief professional life as an accountant. I was at the bottom end of the food chain in conducting audits. It certainly was helpful to have studied

accounting and be able to understand what was being discussed when accounting concepts arose. Clarence Sampson was the Commission's Chief Accountant during most of those years—just a tremendous guy. I remember Clarence used to say that I knew just enough about accounting to be dangerous, but not enough to actually be right about anything. Where I felt some restraint, I guess, about telling Market Reg too much what I thought in terms of market structure, I felt no restraint at all in those days in telling the Chief Accountants what they ought to be doing. Clarence and I actually got along very well, but I was probably a little annoying to him sometimes.

KD: Williams went out, and Shad came in.

DG: Right.

KD: You moved up to take Ralph Ferrara's position?

DG: While Harold Williams was Chairman, yes. And when Harold left Ralph was still General Counsel, and I became Associate General Counsel for Counseling. I became the head of the Counseling Group—if I remember correctly -- on March 1st, 1981.

KD: So you're back in the General Counsel's Office.

DG: So I'm back in the General Counsel's Office. Harold is gone. John Shad hasn't been confirmed yet, so we don't have a Chairman. One of the things that the Commission staff always does, usually led by the General Counsel's Office, is to prepare nominees for their confirmation hearings. Ralph and I, and a handful of others spent a lot of time prepping John for his hearings, explaining to him what the issues were, and the kinds of questions he was likely to get. I guess the job fell primarily to me because of the Counseling Group's broad involvement in everything going on at the Commission. John and I hit it off pretty well. So after he was confirmed, he asked me if I would come back to the Chairman's Office again and be his Executive Assistant. I was Associate General Counsel for counseling for three months, I believe, and then back to the Chairman's Office.

KD: What was it about John Shad that made you hit it off? Was he particularly easy to prep? Did he pick this stuff up well? Did he have deep understanding?

DG: John was an interesting guy. He was quite conservative. He was a strong believer in free markets, and very skeptical about regulation. He was also sort of skeptical about the SEC staff in a way that Harold and others I'd worked with weren't. John also liked to argue. I guess it kind of goes back to this point about, "Please oppose everything." He liked to do that himself—debate things. If you said the sky was blue, he might say it was black, just to see how you responded—whether you could defend your position. But, at the end of the day, I think John felt—maybe more deeply than he should have—that he didn't have a technical understanding of the laws and the rules that the Commission administered. He needed advice to guide him on legal questions. And so while he might argue with you

and argue with you—at least in my case, if I said, "John, you just can't do it that way," he'd say, "Okay." He was a very interesting guy to work with from that perspective.

He'd spent his whole professional at E.F. Hutton in investment banking. He'd gotten a law degree at night, just sort of for the heck of it. So he was a lawyer, but he never bothered to take the bar exam, because he'd never envisioned practicing law. He certainly had some grounding in law, and he certainly was familiar with securities regulation, at least as it affected his work as an investment banker. But, as I say, I think he felt—maybe more than he should have—that there was a lot he didn't understand about the SEC laws. I think a lot of people might say to you: "Well, he was stubborn and difficult to give advice to." But, I found that, actually, at the end of the day, the opposite was true. If you told him he just couldn't do something, or he had to do something a certain way, he would say, "Okay."

KD: But he wanted to argue about it first?

DG: Well yes. He was a very intelligent guy. He liked the intellectual give and take, and I think he felt strongly that truth, or the best answer, would emerge from a give and take among people.

KD: Well, speaking of give and take: I know one of the notable things you were involved with him in was the accord with the CFTC.

DG: Yes. That's certainly true. Ed Greene was the General Counsel at that time and was the lead person who negotiated that. But certainly what the SEC folks called the Shad/Johnson Accord, and the CFTC folks called the Johnson/Shad Accord was an important issue in those days.

KD: Where did that come from? And how much play was there? How could have it turned out significantly different?

DG: I think the thing that set it in motion was that the Commission had approved options trading on Ginnie Maes. The CFTC took the position that, since there was futures trading on Ginnie Maes, they were a commodity. And since the CFTC has exclusive jurisdiction over futures trading, including options, on commodities, that we lacked the authority to let securities exchanges trade these options. There was also litigation. The Chicago Board of Trade sued us, if I remember correctly. Basically, they won. I think many people at the SEC were a little stunned by all this. Obviously, by the time the litigation was going on, we had looked into it deeply. But offhand, the average person at the SEC thought: Commodity? That sounds like corn and wheat, and stuff like that, not Ginnie Mae securities. Everybody knows that's a security. We came into the negotiations with the CFTC in the weaker position because the statute did give them exclusive jurisdiction, and we'd lost the Ginnie Mae case. Chairman Shad and CFTC Chairman Johnson eventually negotiated what was a reasonable accommodation that envisioned options on securities that could trade on securities exchanges. There would be no futures on individual securities. Futures on stock indices could trade on futures exchanges, but the

Commission would have a certain amount of veto power, if it felt a particular future on an index could be used to manipulate the securities markets. Congress eventually wrote that agreement into law, ratified it. It's worked reasonably well, in a world where you have two different agencies regulating different parts of what you could broadly call the financial markets. These issues never go away, however.

KD: That's for sure.

DG: A couple weeks ago, the Treasury proposed that the SEC and the CFTC ought to be merged. Shortly before that, SEC Chairman Cox and the CFTC Chairman announced a new accord or procedure about how overlapping products would be approved. So that issue just keeps morphing, but it hasn't been solved yet.

KD: Well, they put it on the back burner for a little while anyway.

DG: Yes. Shad/Johnson let developments in the market go ahead without a regulatory turf war which was essentially stopping the markets from doing things.

KD: So, you would have gone in as General Counsel some time shortly after that?

DG: Let's see if I can do the dates. I went back to the Chairman's Office, I believe, in June, 1981, shortly after John was confirmed.

KD: 1981.

DG: 1981. I worked as his Executive Assistant and later became General Counsel. He appointed me General Counsel in late 1982. I went downstairs and started working as General Counsel at the end of January 1983.

KD: What did it look like, sitting in that desk for the first time, having been on the other side for so long?

DG: Well, let's see. I was thirty-six. Harvey Pitt had certainly beaten me, in terms of being a younger General Counsel, but I still felt like I was at a surprisingly early stage in my career to have this responsibility. It was sort of overwhelming.

KD: What was overwhelming about it?

DG: By then the office must have been in the neighborhood of eighty or so people. It was much larger than when I started, and there were people around me that just had had so much more experience and seniority with the Commission. Paul Gonson was in the General Counsel's Office when I arrived in September, 1974, and he was there when I left May 31st, 1990. He was just a terrific guy to work with. He's retired now, but was a mainstay at the General Counsel's Office for many, many years. I think Dave Ferber was still in the office doing appellate litigation when I came in as General Counsel. Jake

Stillman was certainly there. It was kind of awe-inspiring to be the head of such a terrific group of securities lawyers.

KD: Was there a sense of what the priorities might be? Were some external things happening at this point?

DG: Yes. We've talked about the kind of role that John Shad wanted the office to play. The big issues in those days? That was the era of hostile tender offers. Somewhere along the line, the Commission had appointed an advisory committee on tender offer regulation. I don't remember exactly where that stood when I became General Counsel. But there was a lot of foment about how tender offers should be regulated. Another big issue in those days was the law of insider trading. The Chiarella case, which was a very divided Supreme Court opinion, had been decided. It seemed to provide some basis for a misappropriation theory of insider trading without directly supporting the theory. Of course, Chiarella himself got off. The case did not directly establish misappropriation.

KD: But you could interpret it that way.

DG: Yes. Putting the various opinions together, it seemed to support misappropriation.

KD: That was Paul Gonson doing that.

DG: Paul was certainly involved in it. I think Don Langevoort worked on writing the Chiarella brief, if I remember correctly. Shortly after I came to the Office, the Supreme Court decided the Dirks case, which opened up new vistas of theories about tippee liability in particular. A lot of what we were doing on the litigation side in the General Counsel's Office in those days was trying to develop, flesh out the law of insider trading. We also had to deal with the tender offer phenomenon. In that area, we were very interested in the relationship between state and federal law, pre-emption where we could accomplish it, of state anti-takeover statutes, that type of thing.

KD: And did you have different teams? One team's looking for the insider trading, the other team's looking at tender offers? Or were people just sort of passing folders back and forth?

DG: When I arrived in the office, it was divided into three general groups: first, the Counseling Group. The assistant general counsel groups in Counseling did specialize to some degree. I think Diane Sanger's group did both tender offers and insider trading. And she also had Corp. Fin. issues, if I remember correctly. In any event, there was also a General Litigation group that defended cases against the Commission, handled FOIA litigation, and did professional disciplinary proceedings -- administrative case(s) against accountants or lawyers. And there was the Appellate Litigation group. To the best of my recollection, Appellate Litigation didn't divide up by specialties. It was more the sort of thing where, if you had one type of case, and then a similar case came along, they were likely to assign it to you. But, as best I recall, there wasn't any sort of formal

specialization in Appellate Litigation. Jake Stillman was the Associate General Counsel, heading that group.

KD: Given the way insider trading was developing, it seems that you're looking at the implications of various cases?

DG: Yes. This was one area where you could see the process all the way through. The Enforcement Division investigated the cases, and then came to the Commission with a theory as to why the matter would be a valid enforcement action. In the light of Dirks, a lot of questions arose like: If it's a tipping case, was there a personal benefit to the tipper? What was that benefit? Can you call enhancing the tipper's reputation a personal benefit? Does the benefit have to be something monetary? A lot of questions also came up about the misappropriation theory, and duties a trader or tipper might owe, such as to family members, and things like that. We were able to advise in the formation stage when Enforcement brought the cases. Then if a case did become an appeal, it became ours to defend the theory in the Court of Appeals.

KD: Was Dirks something that you worked on, that your office worked on? Did that happen before you came in?

DG: Yes. Dirks itself happened before I got there. I think the Supreme Court argument had taken place before I became General Counsel. Paul Gonson argued the Dirks case.

KD: I guess my question is: Everybody knew that there was something in Dirks that may be useful, that may provide an avenue. What did you do? Did you run around looking for similar cases?

DG: I wouldn't say that. One of the famous SEC scenes having to do with Supreme Court decisions was when the Court decided the Hochfelder case—holding that there had to be scienter for a Rule 10b-5 violation. People at the Commission were upset about it; they thought it was going to be a problem for Enforcement. Stan Sporkin allegedly said, "If they want scienter, we'll give them scienter." I think the reaction was sort of the same to Dirks. If, in order to make a tipping case, you've got to show that there was some personal benefit to the tipper, then we'll find that. We'll be imaginative in coming up with theories that fit with what the Supreme Court has said is the law. You could say the same about Chiarella. If equal access to information isn't the theory underlying insider trading, but instead you've got to be able to show some sort of a fiduciary duty breach, okay, we'll cast the cases that way. In any event, we weren't involved in finding the cases in the General Counsel's Office. Enforcement focused on situations where they thought there had been trading that they thought was—I don't know what you would say—abusive and improper, based on non-public information. Then they would work to fashion the case around the Supreme Court decisions. In General Counsel, we would express our views on how that had been done.

KD: Insider trading gets into international. The Santa Fe case had broken earlier, and you had John Fedders going off to Switzerland. Were you involved in any of those issues?

DG: Well, not directly. Ed Greene was General Counsel at that time; he was certainly involved in negotiating the Swiss MOU; although, as you say, John Fedders was the motivating force behind that. But yes, it's absolutely true that the hostile tender offers spawned insider trading, and that, in turn, spawned issues like: "What if people conduct their trading from outside the United States? How are we going to be able to get at the information that we need in order to make those cases?" That led to the Swiss MOU. Dennis Levine was trading through some Caribbean jurisdiction. That also opened up new vistas of issues, in the enforcement world in terms of internationalization and not having to stop at the water's edge in enforcing the federal securities laws.

KD: How about in the General Counsel's Office? Did you suddenly find yourself dealing with issues of international jurisdiction?

DG: Yes. There were issues about the Hague Convention on Gathering Evidence Abroad -- we commented on the revisions to that. There were cases that we filed amicus briefs in on the Hague Convention. There were both SEC enforcement cases and non-SEC cases where we we had an interest at stake. We filed several amicus briefs in cases relating to our ability to get evidence from outside the United States, or to bring enforcement actions where some part of the conduct had occurred outside the United States.

KD: Foreign payments was dominating the late '70s. Insider trading was all over the headlines in the mid-'80s. And I wonder if, to a similar extent, they were driving the agenda in the General Counsel's Office.

DG: The answer to that is yes. The overlapping phenomena of hostile tender offers and insider trading drove a lot of our agenda. There was certainly a lot of foment in those days about what the tender offer rules ought to be. That was largely an issue run out of the Division of Corporation Finance, but we also took an interest in those rules.

KD: Let's talk a little bit about the tender offer issue, because that must have taken up a good bit of your time during the 1980s.

DG: Well yes. From a litigation standpoint, there certainly were issues.

KD: Right. Early in the decade you had the MITE case.

DG: *Edgar v. MITE,* yes.

KD: Which essentially outlawed a number of schemes.

DG: Yes, it struck down the Illinois anti-takeover statute. I think it led many people to believe that state takeover statutes were doomed. CTS went the other way: it upheld the Indiana statute. The Indiana law was narrower; it only applied to companies incorporated in Indiana. That sort of limit had not been a feature of the Illinois takeover statute. CTS seemed to point out a way that the states could put in place valid anti-takeover legislation.

Our perspective in those days was that the Williams Act laid out what the rules of engagement ought to be for takeovers, and essentially that states shouldn't be able to interfere.

KD: *Edgar v. MITE* was '81.

DG: Yes, it was before I became the General Counsel.

KD: It seems like the SEC sat out for a while—because hostile tenders were really kicking up in the early Reagan years—and didn't really weigh in for a couple of years.

DG: I think that John Shad's philosophy was that hostile takeovers were a good discipline on the market, and also very beneficial for the investors, of the target company. So we should be interfering as little as possible. There were already tender offer rules in place to prevent abuses. In that sense, I guess it's fair to say in that we kind of sat things out. But a lot of questions came up. One big issue in those days was unconventional tender offers. People were making open market purchases, or spreading rumors about a takeover, so that target shares would go into the hands of arbitrageurs. Then the acquirer could simply buy up the shares from the arbitrageurs. We had many tender offer cases that were outside the area of the anti-takeover statutes. I don't think the Commission was involved in *Edgar v. MITE*. But we did become active in filing amicus briefs in tender offer litigation, including challenging, or supporting challenges to, state anti-takeover statutes.

KD: Right. There was one in Delaware, in particular.

DG: That was *Moran v. Household.* Delaware, in the wake of CTS, took a little different spin on anti-takeover regulation, and adopted a statute that permitted poison pills. We filed an amicus brief challenging the validity of the Delaware poison pill statute. However, the brief was approved by a split Commission vote. The fact of that split was reflected in the brief. I think it was a three-to-two vote. Disclosing the split doesn't help your litigating position. It's like telling the Court: "We're absolutely sure about this, by a vote of three to two." In any event, we were on the losing side of that case. The Delaware statute was upheld and poison pills became a fairly common anti-takeover tactic after that.

KD: Was the Commission's position controversial? Because it was real easy to see 'the good guys' and the 'bad guys'. The bad guys are the corporate raiders coming in. And the SEC is seemingly on—by some lights—on the side of the bad guys.

DG: Yes, it was controversial. As the split in Moran illustrates, there certainly wasn't unanimity at the Commission. I think those positions were controversial.

KD: And was there pressure to resolve that?

DG: We were being buffeted by pressure in both directions. I remember we'd hear from corporate raiders like Boone Pickens from time to time. I'm sure we heard from the

corporations that were the targets of tender offers. I think that was part of the reason that that Tender Offer Advisory Committee was formed, to divert the policy disputes to another group that could try to come up with recommendations to resolve them. It's not unusual in Washington to address a problem by forming a committee to look at it.

KD: Right. Ultimately, it seemed like it all boiled down to dual class shares.

DG: That's right. That was another part, maybe close to the end part of the story. The Commission adopted a rule prohibiting, under certain circumstances, the listing of dual voting rights share classes, so that you couldn't have voting control in one group of shareholders, and have the general public holding another non voting class of stock. That was a loss for the Commission also. The Court of Appeals here in Washington said that the Commission didn't have the authority to adopt that rule.

KD: How hard was it to get to that? Because, after all, the Commission was certainly taking other positions where it was against dual class stocks. The New York Stock Exchange wouldn't allow it.

DG: It was certainly controversial, internally—highly controversial. It was a subject that Joe Grundfest was very interested in. He'd been appointed to the Commission by that time. I was gone from the Commission by the time the case was decided, but I was certainly there during the time of the debate. There was a public hearing to decide whether or not the Commission should adopt the anti-dual class listing standard.

KD: That gets to the question of the Commission and the Chairman's role. I guess you're still the longest-serving General Counsel at the SEC, right?

DG: Yes, I think that's right. Roger Foster served for quite a while, but I think his titles may have shifted between General Counsel and Solicitor during part of that time. Unfortunately, Roger isn't still around to ask. Just as a footnote, I mentioned at the beginning, the NRDC case that I was involved in early on in my SEC career. Roger Foster was representing the NRDC in that litigation. He seemed—at least he seemed to me -- quite elderly at that time. It was sort of striking to have a guy that had had such a long, illustrious career at the Commission now suing us.

KD: Right. Which now happens all the time.

DG: But he was doing it from a public interest standpoint, not as a representative of a private interest.

KD: Well anyway, I'm pretty sure you get the title. And the point is that you were in there with a lot of different Chairmen, and you saw different configurations of the Commission. I wonder if you can provide a sense of how the Commission was working together, what the big issues were—particularly in the mid-'80s when the Commission was really in the headlines?

DG: It's hard to generalize. By the time I left, things were certainly a lot different than they were at the time that I got there. A big part of the change, I think, stemmed from the enactment of the Sunshine Act. Another project I got involved in back in those days was writing the Commission's rules to implement the Sunshine Act, which must have taken effect in the late '70s.

As an observer, and particularly a pretty young observer in the early '70s, the Commission seemed very collegial. The Commissioners were quite deferential to one another. You had the sense that, for most disputes, they'd retire to the Chairman's office in private, talk about it, and decide what to do. A big effect of the Sunshine Act was to make the Chairman more powerful, to give him a much bigger role in setting the agenda. The Chairman could meet with the staff freely, but he couldn't meet with his fellow Commissioners—except in a very formalized, announced-to-the-public kind of setting. That made the Chairman more dominant and eroded this collegiality that I thought I'd seen in the early years when I was at the Commission.

KD: Did John Shad have problems with this eroding collegiality at all?

DG: John certainly wanted to set the agenda, but I would say the same about Harold Williams and David Ruder and Richard Breeden. Earlier, I used that phrase about helping people to put their pants on one leg at a time. Essentially, following Harvey [Pitt] and Ralph [Ferrara] through the Commission, I came from a tradition that I would call Chairman-centric. I spent my formative years trying to help make the Chairman powerful and important.

Apropos of what you're asking, I want to mention one of the memorable things that happened when John Shad was Chairman. I feel that one of the things that I was part of that had the biggest influence on the law was the McMahon case, *Shearson v. McMahon.* It upheld the validity of pre-dispute arbitration agreements. John Shad—stemming from some initiatives or general philosophical positions of the Reagan administration—was quite skeptical about litigation against brokerages—probably a consequence of his working in a brokerage firm for twenty-five years. I didn't have that kind of background, but I had some sympathy with the idea that it might be better if more disputes could be routed into a less expensive dispute resolution mechanism. And so, when the question of the validity of these pre-dispute arbitration agreements came before the Supreme Court, I had the office recommend to the Commission that we should go in on the side of Shearson, on the side of the defendants, arguing, that these agreements were valid.

I think there may have been a split Commission vote, although it wasn't reflected in the brief. It was a very contentious issue internally, because traditionally the Commission had always taken the position that any kind of agreement to waive compliance, or give up some right that you had under the securities laws, was unenforceable. There's a provision in the Act that says that. The question was the relationship between that provision and the Federal Arbitration Act. The Commission had traditionally taken the position that arbitration agreements were unenforceable—that pre-dispute arbitration agreements were, with respect to securities law claims, unenforceable. But we

persuaded, the Commission majority, that we should go in on the other side in this case. Some people in the office refused to work on the brief; they thought it was an outrageous position to take. But the Supreme Court did see it our way.

I think this question is controversial again now. There's been a bill introduced in Congress, or at least discussion about legislation, to overturn Shearson. But for the last twenty-five years now most customer/broker disputes have been resolved in an arbitration system. Linda Fienberg—who was in the General Counsel's Office at that time, but wasn't involved in the case, runs the arbitration program at FINRA, and has for many years.

KD: You submitted a brief on the Shearson side.

DG: Right. In the Supreme Court.

KD: The idea among the opponents of this was that if it wasn't settled in Court, you really couldn't know where the thing stood.

DG: Well, yes—why are people against arbitration?

KD: Yes.

DG: For a variety of reasons, I suppose. One is that some people question the fairness of the arbitrators. The system the FINRA now has is supposed to be one industry arbitrator, or one person with an industry background, and one with a non-industry background—I've forgotten how it's divided up. But people question the fairness of the arbitrators. Also discovery in arbitration is essentially whatever the arbitrators will let you have. In a lot of civil litigation, the threat of costly discovery is one of the clubs that the plaintiff uses in order to get the defendant to settle. That tactic is generally not available in arbitration. Further, except in extreme cases, there's no appeal. The loser normally can't take the arbitrators' decision to federal court. In the abstract, you might say it's hard to see why the system inherently favors one side over the other. The investor advocates feel that it disadvantages investors. My own observation has been that arbitrators tend to split the baby. They won't give the investor the massive judgment that he might get in court; on the other hand, there are a lot of cases that, if they were litigated, they'd be thrown out in a court, but where the arbitrators award something to the investor. In general, there are no punitive damages available in arbitration either, which removes another big club for settlements in some types of private litigation.
I just bring all that up under the heading of the ability of the Chairman to set and control the agenda. I think Shearson is an example of something that wouldn't have happened if John [Shad] hadn't felt so strongly about it.

KD: Something I want to get to before we get to where you left the SEC. And that's something that clearly becomes relevant now, which is accounting. I think Sandy Burton was doing some things back in the '70s—I know safe harbors came out sometime there. And there were some other accounting rule changes.

DG: I'm not sure what you're referring to in terms of Sandy.

When I was in the Chairman's Office with Harold Williams—and I hope my memory is straight on all this—under pressure from the SEC, the AICPA set up what was called the peer review process, where the firms, in effect, inspected one another's practices. As part of that, they set up this thing called the POB, the Public Oversight Board, which oversaw the peer review process.

KD: Did you ever work with them? Did you see what it was they were up to, at any point—the POB?

DG: No. I never had any really firsthand professional contact with them. It was an issue that was important to Harold, so I was there as part of his discussions to set up the system. But in terms of personal involvement in seeing how peer review operated, or being part of the deliberations, or hearing the deliberations of the POB, no, I never really had any contact with that group. But, the scope of self-regulation in the auditing profession was a hot issue back in the '70s, and it's always been a hot issue. That debate culminated in the Sarbanes-Oxley Act, which created this Board, and abolished self-regulation.

Something else that was a big issue in the Harold Williams days was non-audit services; that is, what kind of services other than the audit itself could an accounting firm perform for an audit client? The SEC adopted a rule that required disclosure in the company's filings of rough percentages—what part of the fees went for non-audited services. It was something that was pretty bland by today's standards. The profession hated it. There was a feeling that the information wasn't of much use to investors. That requirement was abolished while John Shad was Chair. But then, of course, the subject of non-audited services came back with a vengeance, during Arthur Levitt's time as Chairman in the '90s. The Sarbanes-Oxley Act addresses that specifically. So, it's always been interesting to me that—like the CFTC/SEC jurisdiction—some of these things never really go away, they just morph and change their form.

KD: Did the Treadway Commission have anything to do with accounting practices?

DG: Well, yes. The Treadway Commission made recommendations—let me go back a step. During Harold Williams' tenure—it was some time in the late '70s-- there were questions about whether there ought to be reporting on the effectiveness of internal controls, as a corollary to the internal control provisions of the Foreign Corrupt Practices Act. There was a lot of opposition to that; I guess primarily because of the cost, and the presumed difficulty of doing it. The Treadway Commission looked at the auditing profession generally and at financial reporting. One of their recommendations spawned a study of internal controls for public companies, and how companies should structure their internal controls. That study is called the COSO Report, COSO standing for Committee of Sponsoring Organizations of the Treadway Commission. That COSO framework remains today the Bible for how companies should measure the adequacy of their internal controls. The Treadway group did its work, I believe, after I was gone from the

Commission. Jim was on the Commission. He was a Commissioner during some of those years that I was General Counsel.

KD: How much of these accounting and corporate accountability issues would have landed in the General Counsel's Office, given the nature of the General Counsel's Office?

DG: It's a tough question. It probably depends on how the issue came up. We generally did Congressional testimony and Congressional correspondence, although there might be situations where a division would do that. So if the issue arose in the context of something having to do with Congress, we were quite likely to be involved in it. Rule making in the area, or questions about disclosure, would have worked through either Corporation Finance, or the Office of the Chief Accountant. But, as we discussed at the beginning, we thought we had pretty much a roving commission to offer advice on anything anybody else in the agency was doing. And people were always interested in corporate governance issues, and to some extent in accounting regulation issues too. Those sort of questions are, for obvious reason, appeal to many SEC staff people.

KD: You touched on the Congressional angle, and testifying. I've had people talk about it as their least favorite experience. Do you have any war stories about going up on Capitol Hill?

DG: I don't know if you heard the Fireside Chat that Giovanni Prezioso and I did a month or so ago about the General Counsel's Office. I told my favorite Congressional testimony story there, and I'd be happy to tell it again. EDGAR, the electronic filing system, was devised during the time that John Shad was Chairman. One of the things that was important to John was that it be self-funded. In other words, it would be funded by users, so that appropriated funds didn't have to be used to support it. That was not a popular idea in Congress, because anything that's off-budget has less Congressional control over it. So there were a series of hearings about EDGAR, all of which were critical—at least on the House side. John Shad was a Republican, but the House was controlled by Democrats throughout that period. The Senate went back and forth. We had one hearing at which a Congressman—it was Ron Wyden, who is today a Senator from Oregon, and was then a Congressman from Oregon—held up a sign that said, "EDGAR." And he said, "The SEC's trying to devise this system. EDGAR is supposed to stand for Electronic Data Gathering and Retrieval. But this system won't be able to retrieve data." He tore the R off his sign. "It won't be able to analyze data." He tore the A off his sign. "It won't be able to gather data." He tore the G off his sign. Now he is left with a sign that says, "ED." And he folds out the front of the sign, which hadn't been visible before, but says, "Mr." So now he's holding up a sign that says, "Mr. ED." And he says, "The SEC has as much chance of creating this system as it does in finding a talking horse." So I thought that was certainly one of the low points, at least in terms of Congressional testimony. But very clever, on his part, I must admit.

KD: Points for creativity. Anything else that we should touch on, having to do with your time as General Counsel?

DG: It was a terrific time, and certainly I would say the highpoint of my professional career. Being here at the PCAOB has been a lot of fun too. But the SEC was just an amazing experience, for someone like me who was relatively young at the time that I was doing it.

KD: What was it that made you decide to go back into law practice?

DG: I got to a point where I thought: I'm either going to be here forever, or it's time to try something else. I left in 1990, so I was forty-three when I left. I'd essentially spent my whole professional career at the SEC, the first sixteen years. It just seemed like it was time, to go. Can I really do this, you know, until I'm sixty-five? That doesn't seem quite right. I guess you can hope to become a Commissioner, but that didn't seem to be in the cards. There was nothing else really to move to at the Commission. It was time to go.

KD: So, you went to Baker and McKenzie?

DG: Right. For some reason, we haven't talked at all about David Ruder in this conversation. John Shad left to become ambassador to the Netherlands in probably '86 or early '87--something like that—and David Ruder became Chairman. I'd known David—not well, but somewhat—before he came to the Commission. It was just a treat to work with him. He'd been a law professor for many years. He had a great intellectual interest in the securities laws, but I would say not the same kind of strongly-held conservative free market views that John Shad had. In some ways, I suppose you could characterize him as the opposite of John Shad. John was concerned about whether he really understood the law. David understood the law very well, and had been working with it for years. But again, he was just a treat to work with, and a fine guy who I still see very often these days. David went to the Chicago office of Baker & McKenzie when he left the Commission. When I was looking around for something to do, I had some conversation with David, and it seemed like it would make sense for me to go to the Washington office of Baker & McKenzie. So that's how I got to Baker & McKenzie in D.C.. That is the reason why I mentioned David Ruder when you asked me about leaving the Commission.

KD: He was in place during the market break?

DG: Right.

KD: That's what you think of. Did that leave the General Counsel's Office with anything to do?

DG: It was really much more a Market Regulation story. Rick Ketchum, who was the Market Reg director at that time, was certainly the lead person on the market break. We were involved in some of the Congressional testimony. The Brady Commission, was formed in the wake of the market break, and it was primarily Market Reg that dealt with them. It was an exciting time, in the sense that any crisis provokes excitement. But it wasn't primarily a General Counsel's Office issue.

KD: So we know why you went to Baker & McKenzie. And did you go into securities law?

DG: Well yes. I did a variety of things. I did some representation of people in SEC enforcement matters and advised clients on compliance issues. The firm had a lot of foreign clients, because it's a worldwide organization, so I often had issues arising from non-U.S. broker/dealers and investment advisors that wanted to have some contact with the United States, but usually preferred to limit that contact in a way so they didn't have to actually register with the SEC. I also got involved in a practice area called global custody. The firm was already representing most of the large banks, particularly the U.S. banks, that act as custodians -- that is, hold the securities of U.S. mutual funds with respect to their foreign investments. There are probably in excess of a hundred countries around the world that have some type of securities market. And there may be at least one U.S. mutual fund with investments in each of those markets. Obviously, for the major markets, the U.K. or Japan for example, there are many, many U.S. funds that are investing . The SEC has a regulatory system governing how those securities are held. By the time I left Baker & McKenzie, probably half of my practice had to do with the global custody banks, such as J.P. Morgan Chase. State Street is a major custodian. The Bank of New York is a major custodian. It was a fun practice because virtually nobody else was doing it. It was a very niche kind of practice.

KD: How did you get into it?

DG: There was a partner who retired from Baker in the mid-'90s, who had originally started the practice. The way the firm got involved in it was that, under the SEC's regulatory regime, which is Rule 17f-5 under the Investment Company Act, the custodian banks wanted to get opinions each year about the legal status of the arrangements covering the securities that they were holding in each different country. Baker had offices in—I don't know what the count was then—thirty or forty different countries. So we started out with the advantage of having offices in more countries than any other law firm. We developed correspondent relationships with lawyers that were knowledgeable about investment law in the jurisdictions where we didn't have offices. We had a natural advantage in doing this global custody business.

KD: So, are you looking at foreign securities laws?

DG: Yes. A global custodian like State Street will have a subcustodian bank, that it has a relationship with in—wherever you like, Tasmania—that's holding the securities of State Street's clients that are invested in the Tasmanian market. Questions arise like: What happens if that subcustodian bank becomes bankrupt? Is the U.S. investment fund going to be able to get its securities? Will the creditors of the bank have claims against those securities? The arrangement is supposed to be set up in a way that the U.S. investors won't lose their securities because of any problem with the subcustodian. That's the type of issue being looked at. And many of these securities are held not just by individual banks, but in central depositories in those foreign jurisdictions. Then you run into questions about how those depositories are regulated and operated, and what the rights of depository members are if either a participant in the depository, or the depository itself, were to fail. These failures are remote events, but when you think about the hundreds of

billions—probably trillions -- of dollars that custodians are holding for mutual funds, people take pretty seriously any risk that the custodian bank might have to make good on any losses.

KD: How well did your SEC experience prepare you for this?

DG: I'm not sure I'd ever heard of Rule 17f-5 when I was at the Commission.

KD: One of the focuses of this phase of the oral history project is matters international. And my research didn't turn up that you had a great deal of work in international matters. It's fascinating that you came up with this after you left, a really unusual niche that I'd never even heard of.

DG: I can't say that I knew or learned anything in particular about mutual fund foreign custody of securities when I was at the SEC. Although, I think, for a lot of securities practice, the important thing is knowing the agency; knowing who does what at the agency; knowing who to call if you have an issue; having a sense of how the staff's likely to react to a particular kind of problem. I think one of the fun things about securities laws is that it morphs. It changes so much. Three years ago, people weren't thinking about the impact of subprime loans on brokerage firms. Now, I'm sure there are a lot of people that are thinking about that.

KD: Do you deal with the international division at the SEC very much? Paul Dudek's office?

DG: Currently?

KD: Yes.

DG: Well yes. It wasn't the Paul Dudek-Ethiopis Tafaras-Michael Mann group that we dealt with in the custody practice; it was the folks in Investment Management, who interpreted the '40 Act. It was primarily in the Chief Counsel's Office in Investment Management.

KD: I suppose you were sitting there watching what Arthur Levitt was doing through the '90s, with some of the corporate accountability issues. Tell me a little bit about being approached for the position that you're in now, for the seat on the PCAOB, and the decision to take it.

DG: I was following the events that led to the enactment of the Sarbanes-Oxley Act more as an interested observer than anything else. At Baker & McKenzie, we were certainly studying Sarbanes-Oxley, and making presentations to clients about what it might mean. But I really never thought anything about it having any personal meaning to me, in terms of my employment. In September 2002, I had a call from Bob Herdman, who was the Chief Accountant at the SEC at that time, asking whether I would be interested in going on the [Public Company Accounting Oversight] Board. He asked if I would I come in and talk to Harvey [Pitt] about it—which I did. Harvey reminded me that I was a CPA because of him. After I got my undergraduate degree in accounting, I

took the CPA exam in Wisconsin, and I passed it. I worked at, as I said, the Deloitte & Touche office in Milwaukee for a while. Wisconsin had an experience requirement for CPAs. You had to pass the CPA exam, and also have a certain amount of experience in accounting to get your certificate. The time at Touche counted towards the experience requirement, but it wasn't enough. So after I got to the SEC, and when Harvey was General Counsel, he wrote a very glowing letter about how everything I was doing as an attorney at the SEC was closely connected to accounting, and sent that to the Wisconsin licensing board to indicate that my SEC time should satisfy the rest of the experience requirement. They agreed with it, and issued me my CPA certificate. The certificate is on the wall somewhere here. When I met with Harvey to discuss coming here to the PCAOB, he said he'd gone through his old files, in his garage or something, to see if he could find a copy of that letter, but he wasn't able to. I wasn't able to either.

More seriously, under the Sarbanes-Oxley statute, there must be two CPAs on the Board: two, and no more than two. I think Harvey was interested in finding Board members that he'd worked with, or had some knowledge of, so he felt he would have a good working relationship with them, and maybe some understanding of how they would approach the issues. Charley Neimeier, who turned out to be the other CPA on the board, was at that time the Chief Accountant in the Division of Enforcement at the Commission. Harvey obviously knew him, and was working with him. Apparently, my name also came up. So I guess that's how I came to be appointed to this board.

KD: When you came in: clearly you're set up by statute. And a lot of your job is laid out. How much was the PCAOB able to design its own mandate?

DG: Yes, the statute certainly laid out our job. But in the same sense that a road map showing where New York is and where Chicago is lays out how you get between one and the other. You still have a lot of choice as to exactly how you're going to do it. That's what's made being here a professionally fascinating experience. When we started out, we were essentially four board members -- because, of course, our first chairman, Bill Webster, resigned after two weeks, and it was quite a while before he was replaced. It was just the four of us, and the statute. We had to create everything else from scratch. Certainly the broad outlines are all laid out in the statute: we have to inspect firms; we have to inspect the large ones annually; have to have a registration system. But we had a lot of flexibility as to exactly how we would implement those mandates.

KD: What are some examples of some things that have been innovative, or that have been particularly rewarding, that you and your colleagues have done?

DG: Certainly the whole process of getting an inspection system up and going is one. We had a meeting in a conference room at Baker & McKenzie after we'd all been appointed, but before we had office space, where we decided that in our first year we would conduct inspections of the four largest firms. The Sarbanes-Oxley statute didn't compel us to have those inspections in the first year. And, at that time, we had no staff at all; no plan for how to conduct an inspection; no knowledge of what an inspection report would look like—nothing. But we made that commitment. And we were fortunate to be able to hire

some really top-notch people with backgrounds in accounting and auditing -- including George Diacont, who is our Director of Inspections and Registrations, and who came to us from the NASD -- to get that process going. And at the same time, we set up an office of risk assessment to help the inspection staff focus on -- not simply audits broadly -- but on what seemed to be the riskiest, or the most difficult or most problematic parts of particular audits. That's certainly something that's still evolving, and will probably always be evolving. But I think that's one of the big challenges -- to make sure that we're not just looking at the mechanics, at the box checking, but that we're really focused on asking: "What's the difficult part of this particular audit? Where are the challenges? Where might some sort of mistake, or oversight, have occurred?"

KD: Is this also a way to improve efficiency? To get things done?

DG: Well yes, sure. It's better to spend time looking at things where there could be an issue that really has an impact on the investing public, rather than just looking broadly. Absolutely. I know from a big picture standpoint, or newspaper reader's standpoint, the most difficult issue we've grappled with over the last five years has been internal control reporting under Auditing Standard No. 2. There were a lot of complaints, some justified, some not, about the efficiency of the internal control auditing process. Now we've replaced AS No. 2 with Auditing Standard No. 5. It's been intellectually and politically, and in many other ways, a challenging process to make Congress's idea of auditors reviewing the effectiveness of internal controls work, in a way that's meaningful but doesn't break the bank, in terms of what it's costing companies to pay their auditors to do this work.

KD: So, you're going on five years, or something like that. Does it feel like you're still putting this thing together, and figuring out how to make it work? Or does it feel like you're starting to maintain the organization?

DG: I think there's still a lot of feeling of newness about it. And there are still some basic things that we're putting in place, even after five years. For example, the statute clearly envisions that we should have -- not just a registration system for auditing firms -- but also a reporting system, so that the firms periodically update the information they have on file with us, for our benefit and for the public's. We're just about to put those annual reporting rules in place. Another example: We've got around eight hundred and sixty non-U.S. firms registered with us. They're not all actually engaged in U.S. auditing, but many are. We're still developing our relationships with foreign auditing regulators. Those relationships are fundamental to how we're going to conduct inspections in the 86 countries that these firms are spread across. In many of those countries, English is not their primary language; some have strong local audit oversight bodies; some don't have any local oversight bodies at all. The whole aspect of internationalization, in terms of this board's work, is still something that's very much unfolding.

KD: Are you working with IOSCO, and organizations like that?

DG: We're not really working with IOSCO. We don't count as a governmental regulator, so we're not eligible for membership. There's been a group set up recently called IFIAR, the International Forum of Independent Auditing Regulators—I think I have their acronym right—which is a version of IOSCO for audit oversight bodies around the world.

KD: How many of them are there?

DG: I think that group has in the range of twenty or twenty-five members currently. Many countries are either creating, or restructuring, their audit oversight bodies. In many cases, they want to be more like the PCAOB—in other words, more independent from the accounting profession than they traditionally have been. So it's an evolving area, in terms of the international picture of how auditors are regulated.

KD: That's interesting. Sarbanes-Oxley is having an international impact.

DG: Yes. For all the criticism that you can read of on some aspects of Sarbanes-Oxley, Title I, the part that created the board is being copied in other countries. If imitation is the sincerest form of flattery, then a lot of other countries are flattering us by trying to develop their own PCAOBs.

KD: Well, at this point, I generally ask if there's anything that we've left out that we should talk about - insight from your experience. I know you said earlier that your time in the General Counsel's Office was probably the most rewarding point in your career.

DG: Yes, it largely comes down to the terrific people that I worked with—other people on the staff of the Commission, and the Commissioners and Chairmen that came through the agency in those sixteen years. It's hard to capture that feeling of collegiality and common purpose. I would have to say it eroded somewhat over the sixteen years that I was there, but I think it was still a strong characteristic of the Commission. In some ways, you could still feel like you were part of a spirit that ran back to 1934. I know the sense of crisis they felt in those days: that capitalism and the markets might collapse, and that it was important that the SEC save them. I think that spirit has really been important to keeping the Commission the premier agency that it is, throughout the decades after the '30s.

KD: Hopefully, it won't go away.

DG: Well yes. That's right. I understand why people feel that the Commission isn't, or hasn't been, large enough to perform its job. I've always been a little uneasy as the size of the agency increases, because I think it's harder to maintain that collegiality, and prioritization of work. When you're a little short-handed, then you concentrate on the most important problems, rather than the less important ones.

KD: Well, it's a good sign that so many SEC people are interested in their history too.

DG: Yes.

KD: And I appreciate your taking some time to talk to me.

DG: Oh, it's been fun to do it.