

Securities and Exchange Commission Historical Society
Interview with Bill Morley
Conducted on June 11, 2003
by Mary Beach, Peter Romeo, Paul Belvin, David Martin

MB: This is an interview for the SEC Historical Society. It's June 11, 2003. We are interviewing Bill Morley, who came with the Commission in August of 1969 and who left the Commission thirty years later, in August of 1999. My name is Mickey Beach, and I was previously an associate director with the Division of Corporation Finance. Also at this interview, David Martin, who was with the SEC as an attorney, and then later as a Director of the Division of Corporation Finance; Peter Romeo, who was with the Division of Corporation Finance as its Chief Counsel; and Paul Belvin, who was the Director of the Office of Small Business Policy when he left the Commission. Before we turned on the tape this morning Bill, we talked about what you had to do to get hired by the Commission. Do you want to explain how the system worked at that time?

BM: Well, the system was different in that there was an actual test that we took when we came in to interview. You would arrive in the personnel office and they would give you a mimeographed sheet with a question on it, a securities law question, and send you off to prepare a response to it. They would type that response up, and then after the response was done, you know, after lunch, I think in most cases, we would get together with a panel of representatives from each one of the Divisions, and the interview would go through a normal interview process plus a discussion of the question.

I can remember that the question that I had was a question about whether something was a security or not, which was not too bad because I had actually had securities law in law school, and could actually bring some real information to bear on whether or not it was a security or not. And then following that interview, the group interview, the various Divisions who wanted to talk to you would call you in to have a face-to-face interview with a representative from the Division. And it's interesting that Mickey is here, because Mickey

Beach was the person who interviewed me for the Division of Corporation Finance, and in some way must have had some part in the fact that I ended up working for the Commission.

As she said earlier, I arrived in 1969 and went into a branch. I think one of the interesting things was that that was still the time in which registration statements were taken to the Commission to become effective, but not all registration statements were taken. And I never worked on one that went that far, because different than what goes on today, it was only S-1 that got that far. I never worked on anything more than an S-8 for about the first six months that I was there. In fact, the first S-8 that I worked on was a mining company in Arizona, and when I left that branch three years later, that registration statement had not gone effected, which was probably set some kind of a record, and I don't remember exactly why.

PB: Bill, did your grade on the initial test lead you to do only S-8's?

BM: I have no idea about that. I think I had the answer right, so I'm not sure that that was the problem. But what it does point up is that at that time, different than what we see here in 2000 and beyond, is that branch attorneys did a lot more with the interpretive process than they're doing today. For one thing, there were far more letters dealing with those questions, and so you got an opportunity to work on a lot more legal matters, as far as the interpretive process, and actually looking at the statutory provisions than is the case today. Lots of things like the 4(1) exemption, and what was known at the time as the change of circumstances doctrine and whether you had the intent to sell when you originally purchased the stock were the stock in trade.

I can remember that at the first training program that I went to, Courtney Whitney was the Chief Counsel at the time, and he went through all the provisions and left us with the

statement that, "Well, gee, I've got to get back to my office, because somebody's perched on a ledge ready to jump if we don't grant his no-action letter to allow him to sell his privately held stock," and those kinds of things, things where people came in with their medical records and all that kind of stuff, to establish the fact that they could sell the stock, that there had been a change of circumstances, caused there to be so many letters that at one point, when I finally moved to the Chief Counsel's office, there were typing boxes in the Chief Counsel's office for three months going back, just for letters to be answered, because even after somebody in the Chief Counsel's office had approved an answer, it was still three months until they got typed to get them out.

MB: Let me ask you a question. Back in those days, the no-action letters were not public, right? So there was no access to them by the general public.

BM: That's correct. That change came in, it was either '70 or '71 when the letters became public. And what you had was a situation where the big law firms had a tremendous advantage even over the staff, because you would get a letter and the lawyer would tell you thatCsay it was Sullivan & Cromwell. They would say, "Well, we have three letters in our file that say this," about that. Well, we probably didn't have those letters. They weren't public anywhere. Firms that didn't practice didn't have that ability to maintain large files of what was going on, didn't have the same ability, so it was more difficult for them to go through that process, making the letters public. At first they were public, only after, I think there was a thirty-day delay before they were made public so that the information didn't get out to everybody until the actual transaction or what was going to happen could be done. But that caused a major change in the availability of information for the public.

Up to that point what there was, there was a file in the Chief Counsel's office library, there was actually a library for the Chief Counsel's office, which had a bank of file cabinets and

then bookcases around the room, and the card files were keyed into hardcopy of letters and memos, and those memos were in dated notebooks that you could go and look through. One of the major problems with that was that you would often go to one of those "Aha! I found a card. This tells me what I need to know." And you would go, and lo and behold, the letter that it was keyed into would not be there. So all you would have was the brief.

Jack Henneghan, who at that point was not the Chief Counsel, he was the deputy Chief Counsel, used to complain that it was Manny Cohen, when he had moved upstairs, had taken all of these important letters with him. Jack being the curmudgeon that he was, that was one of those things that was probably unprovable, but he was convinced that that was why they were not there.

DM: Bill, before we get into the Chief Counsel days, I'm really fascinated by something you said that the registration statements were going to the Commission. Did that happen regularly?

BM: Well, I don't know exactly when the dates changed. In 1969, any S-1's were still Mickey?

MB: I believe it was only IPO's, actually.

BM: It was only IPO? I think there was a time in history when everything went to the Commission, and I think at that point the Commission met at least daily, if not sometimes more than once daily. By '69, it had apparently, I knew there were still some that were going, and Mickey indicates that they were just IPO's.

DM: It was a selective review by the Commission itself?

MB: Well, it started with everything going, and then it went to just going to one Commissioner, not the whole Commission, and then it went just going with IPO's to one Commissioner.

DM: Do you know what the lapse times were then, how long it took to get comments?

BM: Well, there were so few registration statements that it, I mean, how many IPO's were there in 1969? Not very many.

DM: How big was the Division then, do you think?

BM: Well, the Division wasn't much different. One of the interesting points has always that despite the increase in workload, the Commission staff has not increased appreciably from the time that I started thirty-one, thirty years ago. Certainly there are more, and I guess in recent years there have been larger increases and budgetary things and so staff has increased, but it wasn't all that much bigger. Just the total number of registration statements was far fewer than what we had when I left and what's certainlyCand maybe not. Maybe it's fallen down in the last several years. There may not be as many now, either, I'm not real sure.

PR: Bill, I came to the Commission about the same time you did, just a couple of months before, but my recollection was that the Commission at that time was right in the middle of a hot-issue period, when there were a whole bunch of companies that wanted to go public at the same time, and there were great demands on the staff at that point. Did that have any impact on you when you arrived?

BM: Once again, I don't know. I was doing lots of 8Ks, lots of 10Ks, lots of no-action letters, and lots of S-7's or S-8's, maybe S-9's, but at least early on, my early career did not involve many S-1 registrations.

MB: Do you mind pointing out what an S-7, an S-8 and an S-9 were, back in those days?

BM: The S-9 was for quality debt offerings, and also S-7's were for established companies that had reporting history.

MB: Was the S-8 for employee benefits?

BM: The S-8 was for employee benefits; it's always been employee benefit plans. There was one other thing that we've actually talked about in terms of getting information for this whole project is, that there was a memo file in the library, which was memos on all kinds of different topics that had been done in connection with enforcement actions, things that were going to the Commission, all kinds of different subjects, and that was another source of where you could look and find things.

The office, of course, was much smaller. There were the Chief Counsel and two assistants, Jack Henneghan and Bill Toomey, who were the only assistants for some time, until it started to expand three years later when Peter went and I followed him shortly thereafter, and then all of the rules and forms were written by Charlie Shepp. He was the fourth member of the Chief Counsel's office. He was the Branch Chief for forms. And those were the four people.

The other thing that's interesting, the other group that was interesting, there was a law clerk. The law clerks maintained this no-action file and what have you, an interesting group, a very

illustrious group of people, people who recognize, Jack Griffin was our law clerk for a while, and Kathy McCoy followed Jack. No, the guy who followed Jack was Doug Woodlock, who is now a district judge in Boston. So we had very good people, and they would work and they would help out with the various ministerial tasks. Because of the limited number of people, frequently if Jack or Bill was going to be out for one reason or another, people from the branches, the senior branch attorneys, would be called up to help out. One of the ways was just in telephone duty, sitting and helping answer all of the questions that came in.

I have another Jack Henneghan story on that one. I got a call which I had no idea about. And so Jack said, "Well, okay, we'll call him together." And we called him together, and the guy got about two sentences out of his mouth, and Jack said to him, "Did you read the rule?" And the guy floundered around a little bit and said, well, no, he hadn't read the rule. And Jack said, "Well, I'm hanging up now. Call back after you've read the rule, and we'll discuss this later on."

MB: That's so Jack.

DM: In his usual polite, diplomatic way. [Laughter]

BM: Well, no, it wasn't particularly polite. But these were the learning experiences where I always felt, my feeling always, the whole time I was in the Chief Counsel's office was, and involved in the interpretive process, was that the best thing that we had going for us was the phone process, was the fact that people, wherever you were, and as the Chief Counsel's office got bigger, the fact that you had to sit and answer whether it be ten or forty phone calls a day about somebody gave you a note that this is a question about 2(1), or whatever,

and to think on your feet, and to consider the factors, and to go through them, clearly it was the best training program I ever had, and it was the kind of thing that really got me ready.

I did a couple of other things as I was a branch attorney, one of which was a year in which the first time the shareholder proposals seemed to become overwhelming for the Chief Counsel's office, and there was a group, I think it was Peter and myself and John Bailes who were called in to assist in cleaning up the backlog, and I think that was, for the both of us, the first opportunity that we had to deal with shareholder proposals which became a big part of Peter's life for a while, and a bigger part of my life for a long time. The other thing that happened was, one day I'm summoned to Levenson's office, the director has called, and here I am. And the answer is, well, the *Harwyn* case had just come down. The *Harwyn* case dealt with the question of whether a spinoff was a sale or not. And Alan says, "I need a memo on whether 2(3) applies, and the answer is that 2(3) applies."

And so he sent me off to write this memo, which I did with Jack, and finally came up with a theory to the effect that, yes, a spinoff was a sale because of the fact that you gave up something and got a trading market in something that didn't have a trading market before. And interestingly enough, I think to this day that that theory, things have changed and setups have changed a lot, but I think that the basic theory that the Division follows is still the same as it was at that point. So that was my first real triumph in the Division, and it was shortly after that that I was called up, and now Neil McCoy was the Chief Counsel, and Peter was already there, and Jim Clarkson was a second young attorney that they had brought into the office, and Jim was going upstairs somewhere, I don't know whether it was a legal assistant or what exact job it was, and they offered me the job.

In those days there was no posting. It was just, "Hey, you're the guy we want." And I also remember that about a week after all that happened, a guy came into my office and he said,

"Jeez, I didn't know this job was available, because I certainly would have applied if I'd known it was available," as if, "Well, I certainly would have gotten that job if I'd known, because I must be smarter than you are." But as it turned out, I was offered the job, and I took it, and I moved in. The one downside to that was at that point, the Chief Counsel's office adjoined the director's office, and Alan Levenson used to sit in his doorway at one end of the table; he never sat at his desk. My office was directly in line of sight from his office, so whenever he needed something, somehow I got called and, "Okay, get Morley over here," because I could see him sitting there at his desk. [Laughter] Which wasn't the worst thing in the world, but it was something of a downside to my position.

I think the next thing, I did move up. The no-action letters became public, but, as I said before, we were drowning with change-of-circumstances letters under 4(1). I was the one who drafted the letter on a 4(2) private offering that said we're not going to give any more no-action letters, the theory being that they're too factually intense, and we don't know all the facts, and so we're not going to give you that letter. And I guess that in the Wheat Report the Commission had recommended the 4(1), what became 144 for re-sales, I believe.

And so 144 was the first of those rules, and we worked on a series of those rules. The only one I worked on at all was 146. I didn't have much to do, 144 was the change of the re-sales, the change of the 4(1), and it set up certain parameters for when things could be sold, and specifically said there will be no more no-action letters on change-of-circumstances situations, starting April 15, 1972. And then along came 145; 133 was the existing rule which dealt with re-sales coming out of mergers, and 145 extended that, the difference being whether it was truly a merger, or whether it was an exchange, and 133 actually dealt with the exchange offers. It was folded into Rule 145, which dealt with mergers and exchange offers.

Rule 146 was the 4(2) rule, was the predecessor for Reg D and everything that came after that. 147 dealt with intra-state offerings, once again saying in that case that 3(a)(7) was still available, but if you wanted a safe harbor, you could get a safe harbor through using C and I guess 146 said the same thing about 4(2). They all sort of left the statutory provision, but were an add-on of a safe harbor. It was at that point that I think that the interpretive no-action process changed from a no-action process to an interpretive process. We were no longer giving anywhere near the number of no-action letters; we were now into interpreting the various rules. I think it also stirred up even more, because we were now interpreting all of these rules and you couldn't do it all through letters, that that's when the real beginning of the telephone situation began. That now there were just hundreds and hundreds and hundreds of telephone calls.

MB: I just wanted to ask you, what was the difference between a no-action letter and an interpretative letter?

BM: Well, a no-action letter says that if you do what you're going to do, then the Division will not recommend any action, meaning enforcement action, to the Commission. That's an interesting legal question, because all it really does is say the Commission is not going to do anything. When this process was going on, certainly in the early seventies, when I'm talking about, the courts gave great deference to no-action letters by the Commission, and private parties would have a great deal of trouble if a no-action was given. I think that as the years went along, in less and less situations was that same deference given, and there were more questions, and people became more cautious about what a no-action letter actually provided for them.

The interpretation was just interpreting, in the sense a rule said you've got a safe harbor if you do *x*, *y*, and *z*. You were interpreting provisions of it, so once again, somebody would

go back and take that interpretation and use it, plug it into his facts, but there was, once again, no comfort given by the Commission that you were okay, but it allowed people to make their own judgments about what they were going to do.

PR: Bill, would you agree, as I certainly feel, that 144, being the first of the safe harbor rules, really reflected a revolution of the Commission's whole approach in the matter of applying its rules, that no longer were they just going to just kind of have general rules out there, but now they were going to have specific rules that laid out exact guideline for complying with the law?

BM: The answer is yes. I don't disagree with that at all.

PR: I think those rules have never gotten the credit that they deserve.

BM: Clearly it was a different mindset that came in as a result of all of that.

PB: But you know, as history repeats itself, recently there's been a lot of talk about principle-based rules versus rules-based rules, which seems to be a call back to an era that went by before the 144 rule.

BM: But the thing about the 144 and other rules, were that they were safe harbors, and they were more stringent, probably, than the law actually required. If you stayed within those boundaries, you knew you were okay, and yet you had the flexibility to go outside. So I think they were kind of a combination that was extremely effective and continues so to this day. As we went along during this period, there was no longer a clerk to keep all of the information in the card file, and we now had the public no-action letters. We did, in the Chief Counsel's office, we still did, and kept a less formal file of notations on significant no-

action letters and those notations and those significant letters later became what is, still exists today, the significant no-action letters which the Commission staff publishes on a monthly basis.

In addition to that of course, as that went along, we made a deal with CCH, and CCH published those letters, which provided another way for the staff to get information that it wanted out. An interesting footnote to that is, as we got into that process, it became a real competition among the branch attorneys to see whose letters showed up in the significant, it was a real feather in your cap and if you never got a significant letter, you really felt like you were in big trouble.

PR: I wonder if you can tell us what your feelings were when the Commission decided to make no-action and interpretive letters public. Because up until then, of course, no one knew except a few of the more . . .

BM: Well, I mean, it was early for me to have any feelings one way or another, because I was still, of course, a branch attorney. I know that there was certainly hesitance on the part of the existing hierarchy in the division about those becoming public, but in the long run, I think that, once again, I think that the reason for that was what we always said was that each no-action letter is only applicable to its own facts. And so by making them public, we were afraid I think there was a fear that people would read too much into an individual no-action letter and take that to be gospel, and something that they could apply somewhere else.

As all of you may recall, and I can't remember exactly, in a real dispute, and I don't even remember the specific facts, but Ed Fleischman, when he was a Commissioner and Chairman Breeden at that time got into a real battle about what the effect was of a no-action

letter, and what it meant, and he wrote a dissenting opinion, or a concurring opinion, on a Commission action, and so I think Ed's feeling was, "Well, yes, we really have said that this is what it's all about," and I think other people, Dan Goelzer was the Cit wasn't Goelzer. Now the names are escaping me again. Who was Breeden's general counsel?

MB: I think to go back to sort of Peter's question . . .

BM: After having circled away, yes. Go ahead.

MB: I think that you have to remember that the Commission, in fact, the whole world of government, was very different back then. There was no Freedom of Information Act. The Commission meetings were not open to the public. Government in the sunshine was a big shock to the Commissioners, and so it was kind of the beginning of a change, I think, the fact that we made our no-action letters public, and then a lot of other things because public.

BM: Well, I think in the long run, somewhere we were talking also before about the fact that that's one of the things I think that made the SEC a model for things, and it was the fact that the no-action process and the interpretive letter process was good, and now these letters were public, and people could see what was going on and had some idea, and also because of the fact that, as I also mentioned earlier, that so much of this knowledge has gotten locked into the big law firms that had the ability to compile these letters, ones that they had, plus I think there were interworkings among the major Wall Street firms that allowed them to share that information, which lots of other people didn't have.

PR: At some point Chief Counsel switched from giving a nice long answer in a letter to doing the one little paragraph yes-no. Was that in response to volume, or to their becoming public?

BM: That was volume. The first one on that, which didn't go on for very long, but it was just after I came up and came to the Chief Counsel's office, and just before 144 and the April 15th date came along, we actually had stamps for 4(1) no-action letters. You had a *no* stamp and a *yes* stamp, and you would stamp it, date it and sign it. As I also mentioned, there were these three-month stacks of letters. And so a lot of that was done not necessarily to make it any more burdensome on people, but just so that we could get the letters out expeditiously, and then, of course, a copy of the answer was attached to the letter.

The one complication in that was that you then really didn't know what the staff had grabbed hold of within the body of the letter to make its determination. So it was nice to have the information, but the information was less fulsome and didn't give you as much information about what was going on as much as a letter. Because if you recited the facts then, aha, those are the facts. You could make an assumption that those were the facts that the staff grabbed hold of to do the answer.

PR: Would you agree that making no-action and interpretive letters public had sort of an unintended or unexpected consequence from the standpoint that, I know for myself, I was concerned, gee, all these things, all my sins now are going to be bared to the public, and just the opposite happened, at least in my experience. The public was so grateful to get these things, and the occasional letter that was off the mark really didn't stall the process, and the staff was widely praised, I think.

BM: I think that's the case, and I'm going to talk more at the end and sort of separately about shareholder proposals, but I think that, for the most part, I think you're right. I think in the shareholder proposal process, in later days that became a problem because anybody who could find a precedent things were so subjective in so many of those letters, that you ended up getting a lot of people, "What? You gave that letter to those people on these facts? My

facts are exactly the same." And I think that caused some problems at a later date. I think certainly in the initial phase that that was the case, that people were, I don't think we ever took too much grief over anything we did in those early days because now we had them, and that really helped them out.

In my early days in the Chief Counsel's office, we ended up with a lot of Cand this was, once again, done, I think, to do job descriptions so we could get more people into the Chief Counsel's office as it expanded. Everybody sort of had a specialty. And we fought as the years went along, there were periods when everybody specialized, there were periods when we said, no, that's not a good idea, we shouldn't specialize, everybody should do everything. But there was no question that people had certain specialties, and at this time it was actually written into most of the job descriptions. Peter had 16-b, and originally when I went up there it was 14(a)(8), he was the first 14(a)(8) guy, Roland Cook had the rules and forms, he was still in the Chief Counsel's office before this Office of Disclosure Policy was created.

I had an unfortunate circumstance. Cy Spiro had retired, and a guy named Tom Denson became the trust indenture specialist, and Tom, unfortunately, died very suddenly, and that left a specialty for me, being Trust Indenture Act. The Trust Indenture Act was interesting.

PB: You're the first guy I know who ever said that. [Laughter]

BM: No, it was. It was, and it became more interesting. This is another one where I have a history. The Trust Indenture Act, it was, we did interps, not a lot of interps, and we reviewed indentures that came in, the debt offerings. And there were certain provisions in the Trust Indenture Act that said "The indenture *shall* contain," and then there were others that said "The indenture *may* contain." And the only thing the staff attorneys had to do, really, was to

look at the thing and see whether the required provisions were included. But I can't tell you how many times I had one particular occasion with someone I had already told, "It is obvious to me you have not cracked the book. You sent out the form saying, 'I reviewed it and I have no comments,' but it's obvious to me that that is not the case."

But that same attorney, not two months later, sent up one, sent me all the materials, and I called him up and I said, "Well, is this the indenture that you read?" "Yes, this is the indenture that I read." And there were blank pages in places where the required provisions were. [Laughter] So, yes, a lot of people were not terribly interested in this. After a while I became the shareholder proposal specialist. The Trust Indenture Act went to someone else, and I was out from under that. But in 1989 I had the pleasure of amending the Trust Indenture Act, to take the staff out of that position. It was actually a group in the bar. Talking about the New York bar, there was a group of about eight people from firms in New York who gathered for lunch once a month. They were the Trust Indenture bar, essentially.

And they had these suggestions, and they came to us with suggestions. They eventually got Congress to tell us we had to amend the Trust Indenture Act. Basically what we did was, we just said that every indenture will be assumed to contain the required provisions. And so you didn't have to review them anymore, which cut the timing problems out. There were some conflicts that could be waived, and we would get requests for waiver of conflicts, and in addition to amending the statute, we rewrote all the forms and all the rules on trust indentures.

That was in '89. And that's probably, aside from shareholder proposals, the biggest rule-writing package I ever did, and if I hadn't of had Michael Hyatt, who had become the real expert on the Trust Indenture Act, doing all of the scut work for me, I would have been dead. But that was a later part. And then came the late seventies and the fact that a portion

of the Division of Corporation Finance was moved to First Street. Peter had become Chief Counsel when Jack Henneghan retired.

PR: You need to set the stage and remind people from where it was moved. Not the current building.

BM: We were on 500 North Capitol Street, and we moved to 100 First Street.

PR: Satellite office.

BM: A satellite office. We had three branches. One group moved over there. I don't remember, was it two groups?

MB: I think it was four in one and two in the other.

BM: Something like that. Mike Kargule and myself became the Chief Counsel's office in the satellite building. That was good for me, because it got them to be able to write a job description that made me a deputy Chief Counsel and got me more money. The other thing that ended up in that First Street office which had a real impact on the Division was the Office of Review. This was about the time that we went to industry specialization, and the big idea now was that there was going to be an office which reviewed the review process to see how we were doing with the review process. And that office was Ernestine, Herb Scholl, Ann Wallace, and Linda Quinn, who was at that time an attorney fellow, and while she was there, Linda Quinn turned out the proxy manual.

What were the two manuals? One was interpretations and one was practices. Or one was practices and processes. But there were two review process manuals turned out. Talking

about public information, that turned into a big fight later on, because people on the outside wanted access to those manuals. There was also a trust indenture manual, and the trust indenture manual became public, the proxy manual, most of it became public. One of the two, and I can't remember, practices and procedures and one was permitted and one wasn't, and I can't tell.

John Huber, who was the director at the time, fought tooth and nail to keep those things from becoming public, and the Division lost that battle. Things were blacked out. But it was smaller, it was congenial, we had a lot of fun. All of the shareholder proposal stuff followed me over. Mike Kargule had already been my assistant on the shareholder proposals out of the Chief Counsel's office. It was an interesting period. And about that time was about the time that Peter cranked up his series of interpretive releases on employee benefit plans and the first 16-b release.

PR: And Rule 144, too.

BM: Rule 144, too. Peter was writing releases, and I was holding down the fort on First Street, and that was an interesting time. Then I came back. When the First Street office was closed and we consolidated again, I guess it was at the opening of the new building, at 450 Fifth Street.

DM: Soon to be the old building.

BM: Soon to be the old building. I have a story about that, too, but I don't think I'll probably get to it. When I came back, they gave me the old job description. They now had to add something back to the deputy job so I could still be a deputy, and they gave me the duties

and part of the title that Roland Cook had had as the branch chief for rules, forms, and regulations.

PR: Chief Interpretive Counsel.

BM: Chief Interpretive Counsel.

PR: Of rules, regulations, and legislative matters.

BM: And since that was all being done in the Office of Disclosure Policy, what that really meant was lots of interps I can remember a day when I was doing that, when I had 100 phone messages. Now, some of these were repeat. It was back and forth, back and forth. And the calls were still coming in through the secretaries, they were writing messages to us, and this was the time that the phone calls were just going crazy.

MB: You might set the date.

BM: I would love to set the date, but I can't. I do not remember the dates. I thought about that. I can only say it was late, Peter, when did you leave?

PR: I left in '84, but I do remember vividly, some days, keeping a sheet of paper on the number of calls, and it would invariably be at least forty calls a day.

BM: So this would have been early eighties, because it was before Peter left, and it was before, I guess, Linda hadCbecause a lot of this changed when Linda came back to be the Director of the Division, which I guess was '88 or something like that. So we were inundated with phone calls, and we were keeping logs, and we had this fiction that we were answering

phone calls in twenty-four hours, which was purely fiction, because there were just so many of them. We were trying to get a handle on them, and I would skip all the way over to, I will say this about Linda coming in, one of the things that I fought her on when she arrived, was the phone answering machine.

Despite we had all these calls, I still thought it was appropriate that somebody get a person on the phone. And Linda basically came down and told me that you either go to the answering machine or you answer all of these calls in twenty-four hours. And there was no way that was going to happen. I could have increased the size of the office, if they would have let me, to hundreds of people, and I would not have gotten them all done in twenty-four hours.

PB: Bill, isn't it true that Linda is the one that started the telephone interpretations?

BM: Well, that's right, and what came out of that was we went to the answering machine, and at the same time we then began the idea of doing phone interpretations, not unlike our significant no-action letters, another way of publicly releasing information that came out of the phone process, and that was because so much of the interpretive work was now being done on the phone and not through letters. I frankly do not know what the numbers were in the seventies and eighties, early eighties, when I didn't have an executive position in the Chief Counsel's office, but there were many, many, many more letters than there are—I don't know what it is today. When I left, I think we probably had 750 to 800 letters a year, and at least half of those were shareholder proposal letters. So we were only turning out 400. But we were doing all of this stuff on the phone.

The other thing that unfortunately happened, I think, is that many more of the things were being kept in the Chief Counsel's office and not sent to branch attorneys. Now, I

understand this was also during the period when registration statements were hot, and branch attorneys had all of this work to do, and a branch chief or lawyer and assistant director had the responsibility of getting the review work out, and taking people away from it was not a good thing.

But as far as training the lawyers in the Division, I think we lost a lot when we took away their opportunity to deal with some of the issues. And the issues have changed. In addition to the interps, the issues have become much more complicated. I mean, 4(1), 4(2), there were still a lot of 16-b questions, but 3(a)(3), all the sort of basic stuff had been decided, and we were now into very complicated dealings with employee benefit plans. At the end of my time what we were going to do with the Internet, and what we were going to do with broker dealers, and that kind of thing was all stuff that needed more time and more consideration than maybe could have been given by individual attorneys in the branches, but it I think it really hurt their development and clogged up what was happening in the Chief Counsel's office.

MB: Was there ever a feeling, did you believe, or did Bob believe in general, that there was any less weight to be given to in telephone interps than it would to letters? After all, the letters were reviewed by someone else in the Chief Counsel's office, not just by the person who wrote them, but the telephone interps were not reviewed. They were just the opinion of one person in the office.

[End Tape 1, Side A]

[Begin Tape 1, Side B]

BM: Mickey, in answer to your question, I think there's several aspects to it. One, I think that people call in and ask questions under several different situations. There are some people that just haven't got the faintest idea, and you've got to lead them along and lay it all out for them because they're lost. There are other people who have a pretty good idea of what's going on, and they're doing the one last check to make sure that somebody on the staff doesn't say, "What are you talking about?" Or doesn't come out with something that is totally different than what they thought and they're really . . .

PB: "We just changed that position yesterday."

BM: Yes. So that's a lot of the fun. Perhaps Peter's better than I am at saying how people on the outside rely on what they get from a phone call. Once again, I think a lot of people are confirming what they think their knowledge is, and then there are people who call to get sort of the initial view and then may want to write a letter. Peter never does that. He would never write a letter that he didn't know what the answer was going to be. He did that once to his detriment, and he will never do it again. [Laughs]

PR: Because you told me what the answer would be and then you changed your mind after I sent the letter in.

BM: I've had a couple of people tell me that from time to time. [Laughter] I think different people, depending on how sophisticated they are, take different comfort from what they get on the phone.

MB: I was talking about other people relying on them. I think you might want to clarify when these telephone interps were just internal and when they were public, and what's the difference.

BM: It was after Linda came back as Division Director.

MB: Middle eighties.

BM: Would have been maybe '85, '86 or something like that, when we started making the interps public.

PB: The interps were always public.

BM: I mean when the phone interps were public. When Peter left in '84, I became the director, I mean the director; I would never have wanted to be the director. I became the Chief Counsel. John Huber was the director at the time, and we had all the interviews and everything was done, and I went off to vacation. I went to France, as I was doing regularly in the 1980s, and I stopped in Paris, and I'm at the Ritz Hotel and go into not the coffee shop, the magazine stand, and who do I meet but Linda Quinn. Linda Quinn, it turns out, stays in a hotel somewhere in the area and likes to stop by the Ritz on a daily basis. It was great.

And she says, "Well, I've got to tell you, Shad just asked me to become his assistant, and I'm taking David Martin and Alan Dye with me. And oh, by the way, Barry Mehlman is going off to work for another" This is like the Friday night or Saturday night surprise during the Nixon years. But she doesn't say a thing about the Chief Counsel's job. She knows, but being Linda, Linda would never, and I understand, because I'm sure she wanted John to have the ability to tell me himself.

So I get back on Memorial Day and he calls me at home, and he tells me. But I'm now entering a Chief Counsel's office that is practically devoid of talent. [Laughter] It was nice to have the job, but it was not the best thing in the world. It is interesting, as I think back about all this stuff, that I have much better recollection of what I did before this than what I did after. And I think a lot of it is because so much of my time, even when I was in all these other positions with shareholder proposals, and also it became more administrative and less personal hands-on, and I don't think it was anywhere near as much fun as doing the hands-on stuff.

I'm just trying to think, there is one sort of ongoing process which actually even followed me into retirement, and that involves whether memberships at Lloyds of London are securities. In the late eighties, and I think at this point I was probably the Associate Director, Linda comes to me and she says a friend of hers from LeBoeuf, Lamb [LeBoeuf, Lamb, Greene & MacRae, LLP] in New York, a guy she knows, is coming in to meet with us. He represents Lloyds. He actually lived in Paris, and his wife was the director of the Paris Stock Exchange, and he used to call regularly from his garden in Paris. But he was coming in for this meeting, and Linda knew this guy.

He comes in and he says Lloyds is thinking about expanding and finding names, names are what Lloyds members are called, soliciting names in the United States, "And we want to find out what you think about this and whether these are securities or not." So they came in and we had a series of meetings. We finally, in reviewing all of the information, Lloyds has several levels, and Lloyds itself is the insurance body, and is the building and the institution, but you don't buy through Lloyds. Lloyds has what they call member's agents. And the member's agents are the ones that contract with individual people and get their money to put into syndicates.

So we looked at all this, and while Linda was deathly afraid and would never have given them a no-action letter that it was not a security, she was willing to tell them, and they were willing to go away with the idea that, well, whether it's a security or not, Lloyd's is not selling a security. The member's agents may be selling a security, although we don't admit that, but they're going to comply with Regulation D in making those sales, and they will only sign up sophisticated people, because, after all, Lloyds members have to have all this money, and we will limit each member's agent, won't have more than they're allowed, and then file Reg Ds, and they did file Reg Ds for years and years and years.

What they weren't telling us, of course, was that Lloyds was about ready to go down the tubes at this point, and a lot of these syndicates were in very bad shape. But Linda was very careful. We got Gary Lynch and we got Dan Goelzer, and we sent it to the Commission, at least informally, and we said, "Here's a memo. We don't think Lloyd's is a security. They're going to do it this way, so we're not going to raise any question, but we're not going to send them a letter." And they went away all happy.

As the years went along, these member's agents all went belly-up. They got asbestos claims, and a number of these agents' things went bad. They had bad experience with hurricanes in Florida, and a lot of these syndicates that got put together were in bad shape. A lot of U.S. people, and that was one of the claims, eventually, was that a lot of the U.S. people were put into what the member's agents knew were bad syndicates and were going to take it on the chin. But the trouble was that when the names in the United States started calling on counsel to try and sue Lloyds, they're sitting there facing with, and Mickey Beach has a part in this. She doesn't know it, but she signed a letter that I wrote to Congress saying what our theory about all of this was.

But the problem was, and there wasn't any question that these people could sue, because they were defrauded, and probably there were violations of Reg D because a lot of these people were not sophisticated investors and really didn't have the money they were supposed to have. But all the people that they were suing didn't have anything. Lloyds was where all the money was. And they needed something that said that these were securities being sold by Lloyds so that they could get, rather than suing for damages, what's the term?

BM: And this would be important because there was money still in the United States. In a lot of these cases they put money into bank accounts that were sitting in the United States, but the banks wouldn't give them the money. If they got rescission, they might be able to get to this money that was in Lloyds accounts, but they couldn't get it for fraud because the actual party they contracted with was out of business.

So we'd said what we said, and the names, counsels, went to Congress, and Congress came to us and we wrote them more letters and we explained what we said. We said, "Sorry." We even had meetings with poor little old ladies who had lost everything, and it was terrible and it was the Enforcement Division sitting there with us, and we were having all these problems. And then the General Counsel's office got involved, and they started to go to court, and the courts were taking the position that the staff has taken, was that Lloyds isn't selling a security. You can sue them for fraud, but you can't sue them for rescission.

And there was a question. The General Counsel's office kind of thought maybe it was a security. So we had one of the all-time long and great Commission meetings, chaired by Breeden. Who else did we have on that Commission? We had Fleischman, and we had Mary [Schapiro], I think.

MB: The guy from the West Coast.

BM: Yes, Joe Grundfest. And so for three hours, as you know, a Breeden meeting could go on for three hours, in a closed meeting, we went back and forth explaining our position. Breeden was in no way going to do anything about this because he thought that it was interfering with international commerce, and it was insurance. And so, boom. The guy who surprised me was Fleischman, because Fleischman was happy with the fact that it wasn't a security.

So this meeting went on and on and on, and we finally we said, "We're not going to go into these cases." The parties wanted us to go in *amicus* against Lloyds, and the Commission said no. So it went away for a little while, and then all of a sudden we get notice that we're going to have another Commission meeting. And everybody thinks, well, somebody has stirred the pot here and things are going to change. We went back for two and half more hours, and had exactly the same conversation, and came back in exactly the same place. And I have never been able to figure out why we had two Commission meetings. But at any rate, we never went into those cases.

We did finally go into one at the very end, in the nineties, after there had been a whole string of district court cases saying, no, it's not a security, there finally was one, and it ended up in a court of appeals down in Richmond. Harvey Pitt was representing Lloyds by this point. We finally did go in. No, I guess somebody at the district court in Richmond said it was a security, then it got to the court of appeals. We went in at the court of appeals level, actually siding with Lloyds, and that was overturned.

Harvey eventually masterminded the settlement with Lloyds and a lot of the names, but some of the names did not settle, and they were still suing. One day I was sitting at home,

after my retirement, and here comes a phone call from the staff saying the, "The New York U.S. Attorney would like to talk to somebody who knows something about Lloyds." And here we are, we're fifteen years down the line from when this all started. And I told him the whole thing. I thought I had left a file for Kathy Dixon, but gosh only knows where it happened. By the time I left, I had a full metal file cabinet all with Lloyds stuff in it. It just kept happening and happening. It was very interesting and very frustrating to have spent all of this time, but it was one of the more interesting interpretive questions that we ever worked on.

DM: I know we'd like to get you to talk a little bit about the shareholder proposal rule, as well as a little bit of a business about building movement.

BM: Well, that's all right. The one thing that I do want to talk about, the most recent interpretive thing was that after Brian Lane became the director, there was a new attempt, once again, to get public information out about interpretive issues. And he came up with a concept of staff legal bulletins. And at the time I left, there had been staff legal bulletins on 3(a)(3), commercial paper. There was one on 3(a)(10), bankruptcy. Also had an interesting state issue about whether state bodies doing hearings on whether securities could be exempt became a big issue back and forth, because the statute took it away, and we interpretively said that it wouldn't work anymore, and the states went bananas. That 3(a)(10) staff legal bulletin was changed a couple of time as things changed under that. There was a staff legal bulletin on shareholder proposals; that was after I left. There was a staff legal bulletin, I think, on plain English, and I'm not sure whether the SAB53 issue was done as a staff legal bulletin or whether it was a rule.

DM: It was a rule.

BM: It was a rule? And that's just another ongoing part of the line on what's happened with the interpretive process, and where we will go from there, how many more staff legal bulletins will ever be published, I have no idea.

DM: There have only been fourteen so far?

BM: Well, there were only about five when I left, I think. Five or six at the most.

DM: There was one on the year 2000, confidential treatment.

BM: That's right, confidential treatment.

DM: But the question I had, I would like you to say just a little war story or something about the building, because the Commission is about to move in a year or two, but before you turn it to that, I also have another question, and then you can get on a roll here. You have said that you didn't remember as much of your Chief Counsel years, and it was more administrative and not as much fun. But the Chief Counsel of the Division of Corporation Finance is by many reckonings on the outside, one of the key legal jobs at the SEC. You must have been approached ten times a month by outside law firms to get you to go out, and you stayed there, so you must have liked it some.

BM: Well, let me say one thing. I sort of misspoke. The time that became more wearing was after being Chief Counsel. It was when I became the Associate Director Legal, and now I was doing lots of hiring, and then moved over to the Senior Associate Director for operations, which was an area I didn't have an awful lot of background in, it was only a maneuver to get Abby Arms to become , I mean, there was nothing wrong with Abby Arms, but Linda was trying to get her to be the Associate Director Legal, so I moved over . . .

MB: I think the thing is, as we grow older, Bill, we remember a lot more of what happened when we were younger than we do as we get older.

BM: There's no question about that.

PB: Short-term memory loss?

BM: No question. Of course, for me the last couple of years became difficult because the interpretations involved things that I didn't know anything about, and that was technology, computers, and all that kind of stuff, and I had zero interest and zero knowledge about those things, and so for me it was like, "I don't care what happens with this stuff." [Laughter] At that point it was better that I leave, because I wasn't helping anybody out dealing with those kinds of issues. The move, we spent a lot of time. It was interesting. The lease was up on 500 North Capitol Street, and I think . . .

PR: No, on 450.

BM: The current building. And there was a battle with the owner.

DM: GSA?

BM: No, it wasn't GSA, it was the owner, because we didn't use GSA. We weren't under GSA. Breeden had negotiated that out a long time ago. We did our own leases. But at any rate, they put together a committee to consider sites for a new building, and there was one person from each division on the associate director level. We would meet in a war room, a locked war room, with advice from Bill Ford and his boss, whose name I now forget, conveniently.

DM: Bill Ford was personnel, right?

BM: No, Bill Ford was not personnel anymore; he was now in, I think, facilities. But at any rate, they were sort of our advisors, and then there were real estate people who had been hired who were our advisors, and we would go through these proposals, and we would meet with all these people, we would go look at the sites, and we narrowed ten sites to about five, one of which is where the MCI Building is now. They're now building on the corner. We got rid of them because they gave us a plan, then they found out about the MCI Center, and they changed the plans. And we said, "It's too late to change the plans. You made your proposal, the new proposal. Too late. Can't look at that."

Second one was where there is now a building, is where the old Salvation Army was across the street from the building, and that one went because too much of it was below the ground, below grade, and we would have been over the top of the fire station. Then the Acacia Life building, which is now being done, which was the building that from the standpoint of liking it, right across from the old First Street building, would have been the most convenient and the nicest, but it was also the most expensive. And while we were told, as a committee, that we didn't have to consider price, so they ranked first on our list, because we as a committee didn't have to consider what it would cost.

The one that we selected was in Silver Spring [Maryland], and the reason for that was, well, it met all the requirements. Well, the one that finally became the selection because when you put the price, we liked it third, but when price finally got put back in to it, it was by far the cheapest. It was like a third cheaper than anything else because of givebacks from Montgomery County in Maryland. But the staff was up in arms. It would have been a

great building. It was a very nice building. The location was bad because it was in Silver Spring. It became a political football, and Congress said, "No, you can't do this."

The thing that unfortunately happened was, well, what happened was even though we had gone through all this process, eventually a new lease was signed. The Commission then lost in the Court of Claims and paid a large fine, because of the developer's costs in Maryland. The developer sued to get his costs back. The only good part about that was there is a footnote in the Court of Claims opinion that says that the developers have no question about the integrity of the staff committee that considered this issue. The suit was aimed at Arthur Levitt, and that there was some backdoor dealings that went on in to that. I even received an award. They called the five of us up to McConnell's office one day, strangely enough, and they slipped us this little piece of paper very quietly, giving us a \$500 bonus for our work on this process. [Laughs]

PB: Hush money . . . shareholder proposals.

BM: Well, I don't know. This is sort of my cross to bear, I guess. As I mentioned just briefly earlier, when I was still branch attorney, I got my first chance to do some of this. At that point I think we were still getting fifty shareholder proposal letters a year or something like that, mostly Gilbert letters and a few church group letters. And then during the period, that it all sort of took off. Peter may remember it better, but I think it's like '69 or '70 with Project GM, which was the beginning of the social-issue questions.

Project GM had a lot of things that they wanted to get on the proxy statement for GM, and I think in the end got proposals dealing with minority board membership, but that was sort of the kickoff to the real beginning of the controversial things under the shareholder proposal

rule. Then when I moved to Chief Counsel's office in 1972, for the first few years I think Peter headed-up the no-action process in the Chief Counsel's office, and I assisted him.

PR: Five years.

BM: Wouldn't have been five years, would it?

PR: '71 to '76.

BM: Well, all of '75, because I was going to say you then spent most of . . .

PR: '71 to '75.

BM: Yes, most of '75 you spent writing, doing the first comprehensive redo of the rules. There had been a rule since 1942, and they kept adding little things on, and there were interpretive glosses on lots of the various provisions, but the basic rule was five things. Proposals went out in July of '75, the first major look at the rule. There were companion releases at the same time in '75, which dealt with procedures, on how you did things, what the Commission did with them, what the status of the letters were. Those rules were adopted in November of '75.

Then I took over the interps, starting with the new interps beginning in 1976, meetings for the 1976 season. I think the most important thing, the '75 amendments codified a lot of the procedural things that we had done informally and had been done informally by letter over time. And it now went from five issues, it went up to twelve. There were now, instead of (c)(1) through (c)(5), there were (c)(1) through (c)(12). And a lot of those were procedural, some of them not so much.

PB: You're talking about the grounds for omission.

BM: Yes, the grounds for omission. I think the big thing, though, that that release set the stage for was the battle in the ordinary business area. There was an attempt made to come up with a new ground for ordinary business, having to do with, I think as proposed, it said things that didn't have to be done by the directors, issues that management could do on their own. The comment on that was negative. Nobody really liked that very much. So in the adopting release there was the key phrase, there was one particular paragraph and it dealt with, the example was a proposal to PEPCO, having to do with nuclear power plants. I think we had said that the building of a nuclear power plant, earlier we had said was ordinary business. And in the release was, no, and of course, part of the reason was that we said, and I remember this; it's amazing that because this plant involves spending \$25 million to build a power plant, a nuclear power plant, mind you, \$25 million, that it was either economically or socially significant.

PB: It was not just ordinary.

BM: It was no longer just ordinary business, and it was this idea of involving economic, social, or policy issues that were significant, and it was that economic policy and social which set the grounds for everything that happened, and still is happening, to this day on shareholder proposals, and is probably the most controversial area, and that is what is or is not ordinary business.

DM: Bill, would you agree that an overarching influence on the shift from before 1970, before Project GM, to this shift over to the nuclear power position was in large measure due to Alan Levenson?

BM: Amazing. Because that is exactly what happened. Alan's view of what we were doing in those early seventies on letters was very much pro inclusion of social issue proposals. And we went out of our way to find ways to do that. One of the things was coming up with the interpretation, which was later changed in the '82 amendments, that if you had a special committee or you were doing a special report which related to what might or might not be an ordinary business matter, the preparation of a report or having a special committee was not ordinary.

And that drove people crazy, because what the proponent groups did, the social issue proponent groups did, was they couched everything as "We want a special report on this," or, "we want a special report on that," or, "We want you to set up a special committee." And there's no question I had noted that, and I was going to say the same thing, that it was Alan's viewpoint on these things that set all of this in motion. That's not necessarily a bad thing or a good thing, but that was really was the impetus for that came from.

So I took over and started doing the interps in '76. I had one, I'm not sure whether Mike Kargule was the first or not, he may have been, but it may have been someone else in the Chief Counsel's office, who assisted me, and we gradually started adding the use of branch attorneys to assist on the letters. And we did brief cards, like the old Chief Counsel's office cards, on shareholder proposal letters, and had for along time what was used for many years, a card file on old responses that we used internally. I think that the gadfly proposals, the Gilberts, and Evelyn Davis continued, even after the move. We now had the church groups.

I think one of the most sort of comical situations in that period was the Synanon Society, out in California, got a bad name from the press, and so one year they came in to twenty five press companies with proposals having to do with the proposals on the press. They were more generally related to the press in general. They didn't emphasize Synanon. But the thing that was funny about this was if you remember the stories about Synanon and the fact that one of the stories that was in the paper had to do with a reporter who opened his mailbox and found a rattlesnake in his mailbox, which was supposedly tied with Synanon.

And all of these letters from the large law firms came in signed in the firm name, with a notation in the last paragraph that you can call and find out who is working on this. It was fine, that I had the answer to all these letters and deal with these people, but the law firms weren't about to put their names on these things.

PB: Could you talk a little bit about the decision-making process within the division for deciding how you were going to go on a particular proposal? Was the director involved in most of these, or not?

BM: No. I would say, I mean, once Levenson left, it was pretty much me, because Jack didn't want to be involved.

PB: Jack Henneghan.

BM: Jack Henneghan didn't. I mean, I talked to Jack, and I don't think that my recollection is that the subsequent was Dick the next director?

MB: Dick Rowe was, yes.

BM: He was interested, so, no, I think there was mostly just staff decisions, and there was not a great deal, we didn't come back to large-scale, upper-level involvement until Linda Quinn arrived, and then subsequently Breeden, who actually tried to take it all over at one point. Now we were going even to a higher level.

PB: I wasn't aware of that.

BM: And so clearly, when Alan was there and there were social issues, Alan was involved, but I don't think that involvement went an awful lot past him, as far as Director. Lee Spencer was never particularly interested. Ed Greene was not interested. Those were not issues that either of them were terribly anxious to . . .

PB: Alan tried to set the tone.

BM: It's funny; my own leanings are I grew up, my father was an executive, and clearly I have a pro-business side to me. But I had learned all this shareholder proposal stuff at the foot of Alan Levenson, so I knew I had to put all of that aside and think about what I was doing. I think we clearly continued to lean over backwards to allow social issues to get into the proxy materials. We used that language that this involved a significant policy issue, to allow things, and that drove the corporate world crazy that they had to include these proposals because of the significant language.

And so we went along. The numbers of letters increased. Clearly this was the heyday of nuclear power, it was the heyday of South African proposals, and I would say right now that the one thing that even people who don't like shareholder proposals will admit, that the

activities of the religious organizations on South African proposals actually had some effect on what happened in corporate activity in South Africa.

PB: Would you agree with the observation that, in contrast, when you started the shareholder proposals, that they had relatively little overall effect on corporations, to the point where thirty years later they have significant impact?

BM: Oh, there's no question. I think right up into probably the early to mid-nineties, they continued to go on, they had moderate effect one way or another, but when they got to the governance issues . . .

DM: CALPERS.

BM: CALPERS statements and what have you. Now, of course, they are much more significant. I think this is the next time after South Africa that there is a real meaningful nature to what's going on in the shareholder proposal arena. I don't think there's any question about that.

PB: Was there ever any pressure brought to bear on you from the Hill or elsewhere to change your anti-business stance?

BM: I don't think it was very obvious. You couldn't notice it much from the letters I wrote, because I probably tempered myself more than . . .

PB: Actually, I think more were being omitted that were actually being included, based on the letters.

BM: Oh, yes, they were. Certainly they were, but we certainly still found ways to get things in, and then sometimes it took us a while, and I'll talk about this later. When something finally became clear that we were on the wrong side of thingsCthis is why Cracker Barrel was such aCthe later Cracker Barrel case, was such a strange thing, is, we found ways to make changes to keep up with what was going on.

I think the other thing that happened was the social issue for any particular day changed from year to year. I mean, whatever was the hot issue, boom. The thing about South Africa was that it kept hammering away at the same thing. A lot of the other issues, nuclear power kind of killed itself, because other problems arose and so plants weren't being built and they were phased out, so that one went away. Other environmental issues, they would come up and they would go down. Or a particular country, you had Burma, later Miramar, and that would be Nigeria. Whatever was the issue of the day would come up, but . . .

PB: Isn't it true that some issues would start out not being hot, and you would exclude them, and the next year, things had changed?

BM: There's no question. I was going to say, the biggest one of those is smoking. I mean, for years and years and years, we said smoking was ordinary business, because those proposals started out with a proposal to AT&T because some guy said that he didn't like the fact that his officemates smoked, and so he wanted to change the policy. It was all about an officemate smoking. That was ordinary business.

Then we got to people who were going after the airlines, and whether they could smoke in the planes, or whether they could smoke in the waiting areas, boom, boom, boom. Then the power plant issue, it got to the point where it was saying to Phillip Morris, "Divest your

cigarette operation." Well, it's harder to say that's ordinary business. And so we held on a long time, but eventually we changed.

Then another of the big changed areas was compensation. We said for years and years and years that compensation was ordinary business. This is one where Carl Levin had Linda on the hot seat, testifying, and it wasn't long after that that Breeden came out with the interpretive change that said that at least executive compensation wasn't ordinary business, still day-to-day employee compensation was ordinary business. We did that with plant closings. We found the way in plant closings. It's another one that started out small. It was a proposal in Chicago about closing a particular Sears store. It was a neighborhood issue. And we said that's ordinary business, whether Sears closes one of their 3,000. But then you started having layoffs and large corporate closings of big plants that shut down half of Oklahoma. So that's not it anymore, and so we changed that interpretation. And that was the way each one of these things would develop over time.

PR: You mentioned that Chairman Breeden got actively involved. How did that come about?

BM: This jumps a long way, but it goes from the first proposal wasCI've got it here. It was Wal-Mart. No, it was Capital Cities ABC. The proposal to Capital Cities ABC in the early nineties, having to do with a report on glass ceiling, women executives, staff said this is an employment issue. This is the first of the employment issues. This starts the Cracker Barrel setting. It's the first of the employment issues. Staff says that proposal has to go in. That's a social policy issue, minority and female hiring. Cap Cities ABC, to their detriment, appeals, take it to the Commission.

Breeden is outraged, and he got enough Commissioners to go along with it, and they reversed. One of the reports that they wanted was something that was already reported to the EEOC. So this is ordinary. We prepare these reports for the EEOC. It's a regular matter. They get this information. It's an EEOC report. That small part of it that kills the whole proposal, because the whole proposal is out under (c)(7). And that is something we won in court. That is a position that was in the *Roosevelt v. Du Pont* case years earlier about what the effect of a partial defect. So they reverse.

Paul Neuhowser sues. Cap Cities doesn't want any part of this lawsuit, so they put it in. Paul went crazy in the '97 release because we cited Cap Cities ABC as his employment proposal. Well, that was mooted out because they put the proposal in, the Commission's decision in that was moot. So holding this as a precedent for anything, Paul being no dummy, that was part of his settlement in the lawsuit was that this will be considered moot. And the company went along with it because they didn't care at this point. They'd already caved. They had put the proposal in.

DM: Would you say that Paul was one of the more influential persons in the whole proposal process?

BM: Paul Neuhowser, who was at the time a professor at the University of Iowa, and was on the Episcopal Board, and started out representing . . .

PR: Was that the late seventies or so?

BM: Yes. Well, even earlier than that, because he started out defending the church groups, or representing the church groups in connection with their shareholder proposals on South Africa, because the Episcopalians were big in that area. Paul is very proud that he is persona

non grata in South Africa. They would go back to the Council of Churches, something called the Interfaith Center on Corporate Responsibility in New York, which is a group, a lot of church groups used him and now there's this other guy named Connor Hitchcock who represents them. But there's no question that Paul knows more about this than anybody else going. The important aspect is that he's a nice guy, he doesn't rub people the wrong way. He's very moderate. He fights for his clients, but he is willing to compromise on things, and he gets things done through that, that other people who yell and scream and pound the table don't get.

PR: Would you agree that he is just an exceptionally good lawyer?

BM: Yes.

PR: My experience with him was he would pick out the vulnerabilities.

BM: Yes, he knew. The only aggravating thing with Paul was he had so much work to do on this stuff, that he would slow up our response times on letters, because we would always wait for his responses, because they would lead us to the place, as Peter says, where the vulnerability was, where we had to make sure that we were right. And we would also get a good research tool to go and look and make sure we had things where we wanted them to be.

Later on in the Cracker Barrel suit, one of his clients was one of the coplaintives, and but for the fact that the State of New York said, "Our counsel has to argue this case," and Paul got five minutes at the end, they might very well have won this case. But the woman who argued it was a litigator with no shareholder proposal knowledge whatsoever, and tried to come in and litigate this case and she didn't know what she was talking about, and everybody knew she didn't know what she was talking about, and Neuhowser is down there

with his head slumped down, because he knew this case was going down the tubes, but he had a lot to say, but he never had any time to say it.

[End Tape 1, Side B]

[Begin Tape 2, Side A]

BM: Peter, to go back, you had mentioned Richard Breeden's involvement. Breeden got involved at that point, because he didn't like this decision. So the next letter that comes along is Wal-Mart, and we used, even though for the lawsuit purposes Cap Cities ABC position had been mooted out, Breeden says that's the right position. So in Wal-Mart, to the same proposal, we take the same position. That case, once again, having to do with reports on hiring and firing of women, and glass ceiling and that kind of thing, that case goes to the district court in New YorkCKimba Wood, and Kimba says, "You're wrong."

And she finds for the company that that proposal should have been included. Now, it's interesting that Kimba didn't understand either because she said, "You're wrong," but they have to change the proposal in order to take care of why we said it was no good. I mean, she did something right for the wrong reason. But she went out of her way to mention the Cracker Barrel case, and the Cracker Barrel case became the cause celebre. Cracker Barrel involved a proposal to Cracker Barrel, Old Time Stores, having to do with announcements they had made about firing gay employees. And the New York City, or state, I think it was the city, Pension Fund submitted a proposal on gay rights on gay firing or not hiring. And the proposal was submitted to the Commission by Cracker Barrel.

Staff took the position that the proposal has to go in, or we were prepared to take the position that the proposal has to go in. And by this time because he hadn't liked what was happening before, all interpretive letters that were filed that dealt with the ordinary business

went to Breeden's office. In addition, all answers went to Breeden, and all answers had to go back through Linda. So we said the proposal has to go in. It goes to Breeden's office, and he says, "No, the proposal goes out." So now have to find a way to make sure that this proposal is not included. We're not having this gay rights proposal in somebody's proxy statement. So he comes up with this, that we're now doing away with this significant point. Significance is not going to kill something that is actually ordinary.

So you have hiring and firing decision on whether to hire or fire gay employees. That's an ordinary business matter, that's hiring and firing, that's ordinary business matters. The fact that it may involve a policy doesn't matter. So we get together. Once again I guess it was Jim Doty. This letter is drafted and massaged and massaged, and it goes out. The person I feel sorriest for is this letter is signed by Bill Carter. The next day in the paper there's this article to the effect that "This idiot staff attorney named Bill Carter has taken this completely ridiculous position." It was just ludicrous. So, of course, the proponent did nothing. They go to the meeting; proposal is out, the meeting has occurred. Theoretically that makes everything moot. Subsequent to the meeting, the proponent comes back and asks for an appeal. Could have said moot, but we all agreed you can't say moot because we know this is all about. They're lining up to go off to court.

So the Commission took the position that the staff position was correct, so now it's a final Commission position. Goes back to Kimba Wood. She again says, "No, no, no, this proposal is significant. It's got to go in." The other thing that went to Kimba, there was subsequently then a lawsuit against the Commission under the APA, that the Commission has changed 14a-8(c)(7), by virtue of their interpretation, that this is a new rule, because in '76 interpretively, we saidCso of we go to the court of appeals. Now, having sued the Commission in the court of appeals under the APA, we were now all right, because the General Counsel's office wrote a very good brief and came up with the point that this was

not a rule, this was an interpretation, and under the APA, you can have an interpretive rule that doesn't have to comply with the APA, whereas if you have an actual rule, then it's not an interpretation, it's a rule, and that does have to go through the APA.

So, lo and behold, court of appeals agrees with this, that we didn't violate the APA in doing this. We still have the suit against the company, which says that the proposal has to go in, but the Commission hasn't lost, because the Commission hasn't done anything wrong. One of the things they said in that case, that other people have told me, have said we have won the battle and lost the war, was they said that's all right, interpretive letters don't mean anything anyhow.

PR: That's what Kimba would say.

BM: That's right. The Second Circuit said that was true, but that as far as the Commission was concerned, they hadn't violated the APA by what they'd done. It didn't mean that the proponent couldn't win and have the proposal; it just meant that the Commission hadn't lost.

PB: I'm just curious, how long did Chairman Breeden maintain this oversight?

BM: Not too long after this. He wasn't there much. He was gone by the time this got to the court of appeals. This was mostly 1992 and into the early part of '93. I don't know exactly when he left, but it went on for some time. We wrote long memos, what our position was with respect to (c)(7), on whether contributions were ordinary business or not. We had the distinctions between corporate contributions and charitable contributions. It was just insane. We did many of these.

Then we distinguished between corporate lobbying and political. We did this over and over again, and it was just slowing everything down. But he was going to narrow the (c)(7) ordinary business interpretation. Now, of course, it's funny, because of the political pressure, he had to do a different thing with respect to compensation, general compensation. Of course, after Cracker Barrel what happened was now the proponent community said, "Well, we're not going to get it through the courts, so here we are, we're going to Congress." And they did. The '96 statute, I guess it was. Which was the securities law amendments?

PR: Litigation Reform Act of '95.

BM: No, it was the one after that, because there was actually a requirement in the statute that we provide a report to Congress on Cracker Barrel, and the reason I say that, it had to have been at the latest '97, because we did that report in '97. And what we did was we did a questionnaire which they took as the report to ask questions on what we should do. We negotiated long and hard to try and come up with the deal, and now Brian Lane is the director and Brian has some real interesting ideas.

We finally in '97 came out with a rule proposal which would have done such things as, well, it would do away with Cracker Barrel. It would have put real objective numbers under (c)(5) significant business. It would have basically said that if you come in with a proposal, it would have done away with ordinary business, but it would have said that if you come in with any proposal that has gotten support of 3 percent of the shareholder body, it automatically goes in.

We would have changed the resubmission requirements under (c)(12) and raised them to ridiculous numbers. We were trying to balance off, and we did the rule in plain English. Now, what did we eventually do? What did we adopt? We adopted the plain English rule

and we adopted doing away with Cracker Barrel. Although Commissioner Steven Wallman supposedly was trying to broker a compromise, that compromise fell apart. It was never going to work. Part of the reason it was never going to work was that the congressional pressure was there, and the proponent side marshaled their forces in Congress.

The corporations were not about to use any political clout or capital on the Hill to push their position. Even though there were things that they would liked to have had, it was not an issue that they were willing to go to bat on, and so the comment process comes through and we've got all these comments, "Don't do that," and we got a few corporate letters that said, "Do this," and there was no way that it was going to happen, and rightfully so. We might have gotten something on the change of the resubmissions if we put in numbers that actually, I mean, after three years you had to have at least 20 percent, if it wasn't more. The numbers were justCor it was even more than that. I mean, the numbers were just totally off the wall, so there was no way.

That's the one thing that the company community has always wanted, is something on the resubmissions. They don't like having to run things over and over again. Neither side wanted the numbers that we had for (c)(5). Neither side wanted this business of having a certain percentage to support the fact that a proposal goes in, because the proponents thought, "We'll never be able to get it." The company thought, "Jeez, how are we going to do this?" So it was just not a viable proposal. But Brian wanted to make the big splash and it just wasn't there to be made. And then, of course, I don't know what's happening today, because not too long before Harvey [Pitt] left, he made a speech saying, "We're going to do away with (c)(7)."

PR: It's not (c)(7) anymore, but that's the ordinary business.

BM: Ordinary business. And he was really responding to questions about compensation, but his way was to just do the whole thing. Marty Dunn, now the deputy, is charged with doing something about that. He keeps telling me he's actually going to try, you can't do away with it altogether, because there still is this situation where somebody comes in and says, "We want to wear blue uniforms instead of green uniforms." There has to be some ordinary business.

It's interesting to go back just one step to '82, '83 when we proposed rules. The interesting thing that happened in '82 and '83, there were three proposals. And it sort of shows what's always been the case. There was what was known as the Shad proposal and that was that each company would have its own shareholder proposal rule that sunsetted every five years. You had to set up a set of rules to deal with shareholder proposals, get shareholder approval for those rules, and then look at them every five years. Then there was the Bevis Longstreth proposal which I think, in my heart of hearts, if you massaged it right, is the best way, and that is that every company has to run and unless it's something that is illegal under state law, as long as you meet the requirements to submit a proposal, the first five proposals you get have to go in. Or maybe the first three, and then depending on a sliding scale of how big the company is, you add more for each number of shareholders. And you just have to run them.

Now, the problem with that is that you're going to run some junk, because you know Evelyn Davis is going to race to the courthouse every year and get her proposal in first, but the churches can do that too, although the churches' problem always was that they say, "We have to meet and vote on it and get the wording right," and so they always submitted right at the

last minute. But if people truly want to get the Commission out of the mix of doing anything with these things, you've got to have something that is just that cut and dry.

PB: It takes a subjective element.

BM: Yes, that's right. And then, of course, with the furor over the last few years about what is legal under state law does raise some questions, but it's a state law issue and not a federal law issue. Then the third proposal in '82 was to just make minor changes. We had 400 comment letters, and there were four for the Shad proposal and five for the Longstreth proposal, and everybody else said keep the staff in it, and that's part of the problem is that neither side trusts each other. Half the time they're not going to like what the staff says, or not maybe half the time, but a lot of the time they're not going to like what the staff says, but it's better for them that there be somebody there actually making a decision and saying up or down, because if we don't have the staff, then the companies are going to leave every proposal out and we're going to have to sue them.

I don't really think the companies would do that, but that's what the proponents say, and there are some companies that would do that. But most companies I think, would not take the chance that they might end up, well, what they would do is they would look at who the proponents are. If you've got Joe Blow down in the street, they would leave it out if they had any colorable reason, because they'd know Joe Blow wasn't going to sue them. But I think if they've got a church group or particularly a union that submits a proposal, they're not going to take the chance on leaving it out on purpose, on their own, and then having their meeting held up, and have to resubmit and do all that. They don't trust each other, and I just don't think it's ever going to change.

DM: One last question. Do you miss your old proposals?

BM: No, I will say this about shareholder proposals . . . no, I don't miss them, but there's no question that it was very interesting stuff. The only thing that was bad about them was the numbers and the time. In other words, we were so compressed on the amount of time that you had to do the answers because most came during the proxy process because they were all bunched together, and you had to get them out. But really, the issues were interesting. The vast majority of company counsel working on these things are good people. In recent years there have been a couple of proponents that have really taken advantage of things, but most of the church groups, and I must admit I'm not a big fan of unions, and so unions used to bug me a lot.

But they were interesting issues, and I think you will find that, strangely enough, when we went out to recruit staff attorneys or to get staff attorneys to work on them, staff attorneys liked it. It was legal in some respects, and the people who did that, for the most part, advanced very quickly and very well through the Division, because it was a way to make your name and let people know what you could do. You could kill yourself if you did a bad job, but if you did a good job, it was a real advancement.

DM: It was a way to demonstrate your analytical ability.

BM: Do I miss it? No, I don't miss the fact that I'm sitting there doing three hundred of these things in three months, but it wasn't the worst thing in the world.

MB: Well, Bill, why don't we wrap it up. Thank you very much for your time. That was great and we appreciate it very much.

BM: It was a pleasure.

[End of interview]

Index

Arms, Abby.....	36
Bailes, John.....	9
Beach, Mary.....	2, 31
Breeden, Richard.....	15, 16, 32, 33, 37, 45, 49, 52, 53, 55
Capital Cities ABC.....	49, 52
Carter, Bill.....	54
Clarkson, Jim.....	10
Cohen, Manny.....	5
Cook, Roland.....	19, 23
Cracker Barrel.....	47, 49, 52, 53, 56
Davis, Evelyn.....	43, 59
Denson, Tom.....	19
Dixon, Kathy.....	34
Doty, Jim.....	54
Dunn, Marty.....	58
Dye, Alan.....	29
Fleischman, Ed.....	15, 32, 33
Ford, Bill.....	37, 38
Goelzer, Dan.....	15, 31
Greene, Ed.....	45
Griffin, Jack.....	8
Grundfest, Joe.....	33
Henneghan, Jack.....	5, 8, 21, 44
Huber, John.....	22, 28
Hyatt, Michael.....	20
Kargule, Mike.....	21, 22, 43
Lane, Brian.....	34, 56, 58
LeBoeuf, Lamb, Greene & MacRae, LLP [New York].....	30
Levenson, Alan.....	10, 11, 42, 44, 45
Levin, Carl.....	48
Levitt, Arthur.....	39
Lloyds of London.....	29-34
Longstreth, Bevis.....	59, 60
Lynch, Gary.....	31
Martin, David.....	29
McCoy, Kathy.....	8
McCoy, Neil.....	10
Mehlman, Barry.....	29
Neuhowser, Paul.....	50, 52
Pitt, Harvey.....	33, 58
Quinn, Linda.....	22, 24, 25, 28-31, 45, 49, 53
Romeo, Peter.....	8-10, 16, 18, 21-24, 28, 40
Rowe, Dick.....	45
Schapiro, Mary.....	32
Scholl, Herb.....	22
Securities and Exchange Commission Historical Society	
Building issues.....	37, 38
Change-of-circumstances.....	11
Compensation issues.....	48

Employee benefit plans.....	26
Employment issues.....	49
Gay rights.....	53
Harwyn case.....	10
Hiring practices	1, 2
Internet issues.....	26
Interpretive letters	13, 15-17
Interpretive rulings.....	19, 23, 26-28, 41, 43
Law clerks	8
Memo file	7
No-action letters	3, 4, 7, 11-17
Office of Disclosure Policy	19, 23
Office of Review.....	21
Phone interpretations	24, 25
Plain English rule	57
Plant closing issues	49
Project GM.....	40, 42
Registration statements	2, 3, 5-7
Review process manuals	22
Shareholder proposals	9, 18, 42-44, 46, 59
Smoking issue	48
Social issues	42, 45, 47, 49
South African proposals	46
Staff legal bulletins	34
Staff size.....	6, 8
Trust Indenture Act.....	19, 20
Trust indenture manual	22
Wheat Report	11
Shepp, Charlie.....	8
Spencer, Lee.....	45
Spiro, Cy.....	19
Toomey, Bill	8
Trust Indenture Act.....	19
Wal-Mart	49, 52
Wallace, Ann.....	22
Wallman, Steven	57
Whitney, Courtney.....	3
Wood, Kimba	52, 54
Woodlock, Doug	8