Securities and Exchange Commission Historical Society
Interview with Allan Mostoff
Conducted on October 30, 2002, by Richard Rowe

RR: This is an interview on behalf of the SEC Historical Society Oral History Project by Richard Rowe and Allan Mostoff, former director of the Division of Investment Management and Securities and Exchange Commission. The interview is taking place at approximately 2:40 p.m. on Wednesday, October 30 at Mr. Mostoff's office at Dechert, 1775 I Street NW, Washington, D.C. When and why did you decide to come to the Securities and Exchange Commission?

AM: I always thought in law school and as I was leaving law school and looking for employment that government service would be a good step and the right thing to do, sort of giving something back to myself, or of myself to government service. Having said that, I didn't do that initially. I went first to join a private law firm in New York, but continued to feel that it would be nice to be part of public service. At the same time I campaigned, my wife and I, Alice and I campaigned for Kennedy, and Washington seemed to be a very exciting place to be in the early '60s. And I felt that I wanted to be a part of it in some way.

The Securities and Exchange Commission seemed to be very interesting, although I had not studied securities law in law school. There was a lot going on that was discussed in the media. There was an investigation of the American Stock Exchange. Then all of a sudden, I learned that there was some kind of special exercise going on at the SEC, a group being formed called the Special Study of Securities Markets. As I followed that in the newspaper, I saw that the head of the Special Study was a man named Milton Cohen who had worked at the SEC in the early '40s. Jack O'Donnell, my boss, had worked at the SEC at the same time as Milton Cohen.

So one day I went in to see Jack and said, "Do you know Milton Cohen?" He said, "Oh, sure. We're friends." And I asked, "Would you put in a good word for me? Would you give me a leave of absence for a year?" He said, "Sure." And so that's when I left. I went to the SEC for what was supposed to be only a one year tour on the staff of the Special Study.

RR: And your year was up and you were working with the Special Study, then what happened?

AM: Well, it was a year . . . turned to be a year and a half before the Study was over, and Chairman Cary, then Chairman Bill Cary, met with the Study staff to encourage us to stay with the SEC. When he asked me where I, if I did stay, would like to serve, I said, "Well, I'm a lawyer and lawyers belong in the General Counsel's office. So if you could offer a job to me in the General Counsel's office I would really like to stay." The collegiality in the Agency at that time was fabulous. The sense of mission was really stimulating.

RR: And you ended up in the General Counsel's office?

AM: I ended up in the General Counsel's office in the middle of 1963, I suppose, and worked with people like Walter North and Dave Ferber.

RR: Was Phil Loomis with the General Counsel at that time?

AM: Yes. Dick Phillips was my immediate supervisor on one brief and I remember working hard on the brief and sitting down with Dick Phillips, who then told me how it should be done. [chuckles] But in any event, I worked in the Office of General Counsel starting in 1964 and into1965. By that time Cary had left, Manny Cohen was the Chairman, and for a variety of reasons, some of which I've only recently learned, the Division of Corporate Regulation was going to be reorganized.

And Sol Freedman was made the director and Manny wanted, as he put it, to put strength in the Division and he persuaded Jack Dudley to move

from the General Counsel's Office to the Division as an Assistant Director. And he asked me if I would move to the Division as the Special Counsel, which at that point was an illustrious title at the SEC. Today, if you're a beginning lawyer, you get that, but it was a big deal at the time.

RR: Not only was it an illustrious position but it probably paid a thousand or two more dollars than what everybody else what getting. [chuckles]

AM: That's right.

RR: It wasn't very much.

AM: That's correct.

RR: Before we leave the General Counsel's Office, did you work on briefs in any big, important cases?

AM: I should mention a couple suggestions I made for which I received a modest cash award. One related to Section 16 reports of insider trading. The other one had to do with registered investment advisors and the limited information that was then available to the public regarding the advisors. The suggestion was to expand the level of information gathered from investment advisors provided to their clients at the outset of the arrangement. This idea ultimately evolved into Part II of Form ADV.

A big case I worked on involved the question of whether a company was subject to the Investment Company Act. The company claimed it was not because it was registered with the Interstate Commerce Commission. There was an exemption in the act for companies regulated by the Interstate Commerce Commission. So I conceived of the idea that there might be a difference between mere registration and actual regulation. The company was ICC registered but was not regulated by the ICC. So I went into the bowels of the ICC and looked for precedents and came up

with some good stuff. The Commission then took the position that ICC "registration" in the '40 Act means actual "regulation" and ultimately prevailed on this point in court.

RR: Well, that demonstrates the imaginative advice of the General Counsel's office for then, probably now.

AM: Right.

RR: But then you went down to what was then the Division of Corporate Regulation as a Special Counsel?

AM: Yes.

RR: Sol Freedman was the Director. Jack Dudley was an Assistant Director.

AM: They brought Harold Leece down to the Division to enhance the disclosure process. He was an Associate Director in Corporation Finance and he functioned at that level in the Division of Corporate Regulation.

RR: As a Special Counsel in Corporate Regulation, what did you do there?

AM: I was assigned to a branch and was the chief lawyer in the branch. The Branch Chief was Phil Friedman. So he and I were coequal colleagues and I was supposed to be coordinating legal matters and review of filings both for exemptive and for disclosure purposes and regulatory purposes. But I was almost immediately pulled into special assignments. My first big project involved the question of whether an investment advisor to a fund should profit from the transfer of the advisor's business by selling it to another advisor or third party. Or should that money belong to the fund itself?

The Commission had taken that position unsuccessfully in the ISI case. The Commission was unhappy with that result reflecting the views of Manny Cohen. His executive assistant one day came to visit me to talk

about the issue and how critical it was for the staff to find the right case to raise the issue again and I was the right guy to find the right case. So I did. I found the "right case." It was a situation involving the People's Securities Company. The division took the facts to the Commission with the recommendation that the Commission bring a lawsuit. And Manny Cohen met his nemesis in the form of Bryan Woodside, who wouldn't let it happen. [chuckles] So it was a stalemate. And the Commission did nothing. And then the nail in the coffin, so to speak, came not very long after when Dreyfus went public.

And the Commission sort of backed away from all of that. To skip forward, the Commission in 1966 introduced its "Public Policy" report. In that report, the Commission made it clear that while it believed that an advisor should not unduly profit from the sale of its fiduciary office, it also believed that an advisor should be able to be compensated for his or its entrepreneurial efforts. So the Commission just waffled on this issue. And then nothing further happened, as the industry continued with these transactions until the Rosenfeld v. Black decision in 1972, I think, when Judge Friendly effectively said it can't be done. And at that point Bill Casey was the Chairman, I was the Division Director and Bill Casey said to me, "This is terrible. We have to reverse it."

So there I was in a position where we had to come up with something that would reverse Judge Friendly and reverse the position that so many at the Commission had fought for. We ended up doing that with changes in the Investment Company Act that was enacted in 1975.

RR: It's still a regulated process though, isn't it?

AM: Yes.

RR: They're not totally free.

AM: The regulation is really very limited. What it involves now is essentially you can transfer the fiduciary office, making a profit from it so long as you pose no undue burden on the fund, whatever that means.

It doesn't mean that you can't transfer at a profit. It just means that the fund can't immediately be subject to an undue burden. And to ensure that that doesn't happen, the amendment we created requires that, for a period of three years after the transaction, 75 percent of the affected fund's board of directors must consist of persons who are independent of both the seller and the buyer.

RR: [chuckles] They're becoming more and more important.

AM: Yes.

RR: Or at least more attention is focused. So you got a special assignment. In many instances the Commission in those days had titles where specific slots ended up with special assignments, which . . .

AM: But I still kept the branch responsibilities. That continued through the time that I was an Assistant Director. But at some point fairly early on in my career in the Division in the middle '60s I became involved in the Commission's investigation of the Fund of Funds. That became an all-consuming special project on top of the regular branch responsibilities.

RR: That was Mr. Cowett.

AM: Yes, Cowett was the senior lawyer and he, of course, had great credentials. He had worked with Louis Loss.

RR: And Bernie Cornfeld?

AM: Yes, Bernie Cornfeld.

RR: "Do you sincerely want to be rich."

AM: You are correct. That was Cornfeld's tag line in his pep talk to salesmen and it was used as the title of a book describing the rise and fall of his company.

RR: All those were exciting assignments but again, the variety of work that was done in the Commission in those days, not just what our formal assignment was, was something that kept a lot of us there.

AM: Right. And occasionally, you know, just occasionally, it wasn't all that often, I had real live taxpayers actually thank me for my efforts. So it was gratifying.

RR: Yes. But you were also getting awards from the Commission for your work.

AM: Well, some.

RR: When did the Division of Corporate Regulation become the Division of Investment Management?

AM: In 1972. Bill Casey decided he'd reorganize the Commission and the change was part of that reorganization. And as I recall, the reorganization involved a number of things. The Division of Corporate Regulation was split with the new Corporate Regulation group dedicated to the 1935 Act. And there was some Chapter 10 work that the Division did that was also put into that separate group. And the former head of the Division, Sol Freedman, was asked to continue as Director of the slimmed-down Division of Corporate Legislation, and I took the role of Director of the Division regulating investment companies, the new Division of Investment Company Regulation.

In addition to the entire Investment Management Regulatory Program, Casey then added to that Division the Investment Company Regulatory Program, which had been with Trading and Exchanges. He also made a great mistake and took from the Division the disclosure responsibilities for investment companies and moved their work to the Division of Corporation Finance. So the Division was then purely investment management regulation. And in fact that's what it was named. I, to be technically correct, I was the first and I am the only Director ever of the Division of Investment Management Regulation. When I left, they

changed the Division's name to Investment Management, and dropped "regulation."

RR: Yes, I remember the transfer of the disclosure branches to the Division of Corporation Finance because, as an associate director, I had responsibility for overseeing an operation, which I didn't understand. And if it wasn't for a young woman, Carolyn Lewis, who educated me or at least held my hand when I had to make decisions, I don't know what we would have done. Eventually common sense prevailed and that work went back where it should have been in the first place.

AM: And the Division of Enforcement was created at the same time.

RR: And you were the Director?

AM: And I had actually made arrangements to leave that Commission at the time. But I was on a consulting assignment in Mexico, when I got a call early in the morning from Chairman Casey, "This is Bill Casey." I said, "Oh, yes, yes. How are you?" He said, "Fine. We're doing a reorganization up here. Would you like to be the Director of a new Division of Investment Company Regulation?" I said, "Yes." He said, "Okay, then get your ass right back up here." And I did just that.

RR: Yes, I had several conversations because I had been in charge of investigations in corporation finance. During your time with Investment Management under its various names were there studies going on about the Commission?

AM: I am trying to think back. There was, of course, this exercise, which was really a series of efforts to find the right case to reverse ISI. There was a major study of the industry which resulted in the 1966 Report on Public Policy Implications of Investment Company Growth. That resulted in legislative proposals and the division was very active along with the General Counsel's office in trying to support Congressional efforts to get some of that legislation enacted. And that

took place over a three and a half-year period resulting in the Investment Company Act amendments of 1970.

During the late '60s and through the early '70s there was also a major investigation of Investors Services Overseas. The Commission and the Division were of the view that the investment company product, the mutual fund was really a good product but that the industry was growing too rapidly beyond the regulatory structure. So without any kind of clear statement of policy to that effect, that view influenced the way in which the staff functioned. It was very regulatory in its disclosure comments, which is why it was that function was shifted to Corporation Finance as part of the reorganization and in reviewing things like sales literature used to promote mutual funds and considering how mutual funds should be promoted.

That was a project that Harold Leece managed. I remember sitting in a meeting that Harold conducted once with a fund regarding its proposed logo which was a rocket ship pointed up. Harold told them that they could use the rocket ship as a logo but it would point down. [laughter] These things went on. But by the early '70s the industry was getting weak compared to the kind of rapid growth experienced in previous years. And so there was a lot afoot of thought being given to how growth could be stimulated and how the message could go out.

And when I became the Director, I tried to do something along those lines. We conducted some special studies; held public hearings on distribution matters that were really important, like the way in which mutual funds were sold; and published a report recommending that Section 22(d) of the Act be repealed in one way or another. It was not necessary and was anti-competitive. That never happened as a matter of regulation, but as a matter of business practice, the section largely doesn't exist anymore. The Division took a major "rearguard" action with the Commission on several matters. One involved mass merchandised discretionary counts, which were often sold to small

individuals. We called them mini-accounts and the issue was whether they are the equivalent of investment companies.

And when Chairman Casey got wind of what was going on in the industry, he pushed hard for some kind of a pronouncement that would make it clear that a thousand flowers could bloom in this area. And we were able to hold that effort back by organizing an advisory committee to study the issue. They produced a report suggesting limitations on the way these products should be managed and offered. And that exists in one form or another to this day. We also took a look at fund industry accounting. The division also had a major project involving the status of variable life insurance, and whether it should be regulated under the 1940 Act. There the division didn't do such a great job. We believed that it really was a clear case of product that needed to be regulated and that it did fall under the terms of the Investment Company Act.

RR: It took litigation to finally resolve that issue.

AM: Not for variable life insurance; that litigation dealt with variable annuities. But we had a tough time persuading the Commission of our position. Jake Stillman, on behalf of the General Counsel's Office, saved the day. He argued that variable life was and should be subject to regulation. I was hoping for help from his office. And together we managed to persuade the Commission. And then I remember the distribution hearings that concluded in the middle '70s, participating in a meeting with the former chairman of the SEC, Hamer Budge, who was at the time the chairman of the IDS Mutual Funds where he was seeking compassion from the Commission because the funds were in net redemption and he argued that something needed to be done to help funds with distribution. I remember after the Commission meeting speaking with Irving Pollack, who was then a Commissioner. He said, "You know, we've got to do something here." And I said, "You're right." And we started on the path that ultimately led to the adoption of Rule 12(b)-1 in 1981.

Internationally, I was also active. I served as consultant to foreign countries like Spain and Mexico with respect to regulation of their fund industries. The Division also sent Alan Rosenblat to Germany on investment company regulation.

RR: But other than Canadians, there hasn't been very many foreign funds, were there?

AM: That's right. Since Rule 7d-1 was adopted, there have been no foreign funds registered. And it's been a great source of contention with foreign regulators and foreign investment managers who had wanted to access the U.S. Now, because of U.S. tax laws, and for practical reasons as well, the restriction no longer seems to be an issue.

RR: The investment company industry has always had a strong industry association, the Investment Company Institute. What were your relationships like with the ICI?

AM: Well, I thought they were very good. I had worked on the special study with David Silver, the president of ICI, before the time I was the Division Director. Before that, he was the general counsel of the Investment Company Institute. And then he became the president. I tried to work with him, consistent with my regulatory responsibilities. On a personal basis, I liked the people at the ICI and admired their lawyering. I thought they were topnotch for a trade association. During my day, at least, I thought our relations were good.

RR: And would you . . . not only your relations were good but they were . . . it was always my impression that you were a help, that they saw that certain kinds of regulation were good for the industry. In fact, they might even be proactive.

AM: Yes and I think there's even more of that today. For example, if they had been given the choice of repeal of the 1940 Act, or enactment of the 1970 Amendments, I think they would have gone with the amendments. Yes. I think that the issue generally was that regulation

was good for the industry, that it avoided problems, that it's been reasonably well managed, and that while it may be for some a pain in the neck, it has generally been an important facet in the industry's success. Of course there are still people in the industry today who might prefer less regulation.

RR: But there are others who think that regulation, or at least some regulation legitimizes an industry in the eyes of the people who invest. During your tenure in the division there were people working with you and for you who those of us in other divisions sort of thought of as characters. As you mentioned, Alan Rosenblat, a character, but Alan was a terrific lawyer who had encyclopedic knowledge of the Act and came up with some interesting legal theories or responses to requests for interpretation. Were there other people like that?

AM: Well, you know, the Division and the Commission were chock full of talent. A lot of old timers came and made it a career. A number had their marbles and a good sense of perspective and were dedicated to the public interest. Harold Sweetwood was really a very fine lawyer as was Bob Olson. Both were Special Counsel. They were career people. Also there were branch chiefs like Brownell Ellis, Rodney Russell, and John O'Toole and someone like Carolyn Lewis; Carl Smelzer, a financial analyst going back to the '40s; Sol Freedman and Arnold Pines.

These are wonderful people all dedicated to the Commission. Harold Leece came in, I am sure, with a mission to bring stability to the Division and he too was to be a dedicated regulator. Who else? There was Frank Kelly and Alex Gordon, who had significant tenure. And, of course, Jack Dudley, who was very creative.

RR: What were the relationships like with the other division offices in the Commission?

AM: Well, investment management in my day was the "pits" in the Commission. Not too many people wanted to work there. It wasn't where the action was in Corporate Finance for a young lawyer and

Enforcement, as that activity came to be more significant. So it wasn't the greatest place. It wasn't viewed by some people as the greatest place and it didn't get the highest level of attention from the Commission or commissioners. The good part of that is that it gave me a lot of flexibility.

Relations with the other divisions, I think it's fair to say that the Commission staff was very collegial but that, having said that, everyone at the Commission thinks that he or she is smarter than everybody else. That's probably the case today and probably the case in most organizations. Its competition is getting shelf space at the Commission, getting the attention of the Commissioners and getting your ideas heard. We saw that on the enforcement side. We had in the division an examination program, which is now part of the Office of Compliance and Examinations. We were frequently critical of the enforcement efforts that were directed by the regional offices, or even by the home office, to investment management needs. Certainly when I was the Division Director and disclosure was being handled by Corporate Finance, there was a feeling of competition.

RR: Well, yes, and I remember that we didn't appreciate the regulatory implications. And our position has always been disclosure and despite some bad experiences in the real estate area, we've pretty much stuck to that. My recollection, which is probably entirely wrong, is that one of the reasons it was transferred was, not only for substantive reasons, but other reasons. But all of a sudden they decide to transfer the disclosure operation to investment management . . . whoever was the Chairman at that time decided.

AM: I think it was Roderick Hills.

RR: But they . . . it was recognized that the Commission needed to make the division a more attractive place. But the way that things work in the Commission, the idea made sense generally. What are some humorous incidents for . . . while you were there, if you can talk about some people . . .

AM: I can think of three incidents right off the bat. In the course of the investigation of I.U.S., we were searching for evidence of violation of U.S. law so that the Commission would have jurisdiction over this company that was organized in Canada and operating from Switzerland. And two things come to mind. One is . . .

RR: I've got to change the tape.

[End Tape 1, Side A]

[Begin Tape 1, Side B]

AM: As I said, two things come to mind on this question. First was the discovery one day that there were a number of Fund of Funds investors in Guam. And I wanted to get these people on the record and nail this down. But how to do this? Alan Gordon, then the Division's Chief Counsel, was at that point in charge of the investigation. And he was the guest speaker at a Federal Bar Association conference, which was then being held in San Francisco.

So Allan said to Alan [Gordon], "Why not go to Guam?" Alan said, "That's great. I'll do it." So then he traveled many, many more hours than we anticipated to get to Guam. And Alan is a very detailed-oriented person and believed in careful preparation. So before going, he sent a Telex, which was the way we communicated internationally in those days, to the U.S. Attorney in Guam telling him who he was and that he was coming, the kind of help he needed in connection with interviewing some 20 to 30 people we thought were U.S. shareholders in the Fund of Funds, who were identified in the Telex by name and address.

Something happened at the SEC's communications system and copies of that Telex went to each person named, whereupon they, and these people were investors in the Fund of Funds, whereupon they called Geneva and said, "What is happening?" Whereupon Geneva sent their clever U.S. lawyer whose name was David Silver, who subsequently became ICI president, to Guam. David got to Guam before Alan, got the best room

in the only hotel available, got the witnesses prepared, and really frustrated Alan very much. That's not the end of the story. The end of the story is when it was all finished Alan came home somewhat dejected by the whole experience and we got a bill for all the Telexes.

RR: [laughs]

AM: The other story, which had a better ending for the Commission involved Gary Cohen, a young lawyer in the Division and me, again searching for evidence of U.S. investors in the offices of a subsidiary of IOS in the United States. We found nothing, except for one document. It was a cable from Geneva with detailed instructions on how to destroy everything else. They destroyed everything else but they left that cable. So when the Commission brought its lawsuit, the complaint quoted extensively from that cable.

On a personal note, I have a funny story involving the much beloved Manny Cohen. I really thought it was great to be at the Commission. I thought it was great to be a Special Counsel when I became an assistant director. I thought I achieved Nirvana and saw myself as the equivalent of at least a junior partner in a law firm, I was proud of myself. Manny was the Chairman and Lyndon Johnson was President. Manny decided he wanted to have a communication system comparable Lyndon Johnson's communication system. So he wanted each of his senior people to have red telephones with a direct line to his office.

RR: Yes, I remember the red phones.

AM: So they were installed in different offices. I was hoping they would get to me. I really wanted that as a status symbol. And sure enough, one day a red telephone was installed in my office. People used to come in the office and ask, "What is it?" I'd say, "It's a direct line to the Chairman," but it never, ever was used. Maybe a year or two passed and it did not ring. Finally, one night about seven o'clock, I was working late and the phone rang. I heard Manny's voice. He said, "Who the hell is this?" I said, "It's Allan Mostoff." He said, "Oh, shit. I don't want you,"

and he hung up. [laughs] And that was it. The telephone never rang again.

RR: Well, all good things come to an end. So you finally decided that you would leave the Commission.

AM: Yes.

RR: And to the extent you feel appropriate, give us some idea as to why that decision came about.

AM: Well, it was . . . my decision to leave was purely financial. When I started to search, I had been frozen at $37,500 for three years. We had moved from one house to another more expensive house, with a larger mortgage. We were tight for money. And new lawyers were leaving and going to work in private practice at much more money. I started talking to a handful of firms for which I had a high regard and where I thought there was no conflict and things moved quickly after that.

RR: Well, I think of our days, probably a motivating factor for a lot of us, the mortgage, kids in school.

AM: And I didn't really want to give it up. That's one of the reasons why I think I was reasonably successful in the beginning. I enjoyed being Division Director, and I wanted to continue being Division Director even after I left the Commission.

RR: Well, thank you. Unless you have something else you'd like to add we'll conclude this interview at about 3:40. Thank you.