Securities and Exchange Commission Historical Society
Interview with Thomas Riesenberg
Conducted on April 17, 2008, by Kenneth Durr

KD: This is an interview with Thomas Riesenberg on April 17th, 2008 in Washington, D.C., by Kenneth Durr. We were talking about background and you said you started out with a history degree.

TR: Yes, I was a history major in college.

KD: Were you pretty sure that you'd go into law at that point?

TR: No, actually, I worked for three years for a public interest group, an environmental organization here in Washington. I also worked as a newspaper reporter for a couple of newspapers.

KD: Around here?

TR: No, one was an activist newspaper in eastern Kentucky called the *Mountain Eagle*. Then I worked for the *Charleston Gazette,* in Charleston, West Virginia. A little different.

KD: What was it about newspaper reporting?

TR: I had done some journalism in college, and I enjoyed it. I think I'd always figured I'd probably go to law school at some point, and I just wasn't quite ready immediately.

KD: Some people go to Europe, you went to West Virginia.

TR: Right. I went to eastern Kentucky. Not quite like Paris.

KD: So you then went to NYU?

TR: I did.

KD: Did you have a sense at any point along the way that you were going to get involved with securities law?

TR: Not really. I spent a year at the Justice Department, and then I clerked for a federal judge. I did it not in the regular order, because people usually clerk right out of law school; but I worked for a year, and then I clerked for Barrington Parker, who was a Federal District Court judge here in Washington. Then I went to Arnold & Porter for about three years. When I was at Arnold & Porter I worked on some securities cases, and I found them to be interesting, and I enjoyed it.

KD: What kind of securities cases?

TR: There was a 10b-5 case involving Coca-Cola and its purchase of a company called Taylor Wine Company, which is an upstate New York wine company. There was another case in Virginia that involved an acquisition of some kind. Neither of them were very famous cases, but they were interesting cases, and I thought the law was interesting. It was developing in an interesting way. I was thinking of leaving A&P after about three years because I wasn't sure I wanted to be at a big firm for my career. A former Arnold & Porter fellow, Eric Summergrad, had gone over to the SEC, and he had mentioned that there was a job available doing appellate work. I had done a lot of appellate work at the Justice Department, and found it to be enjoyable. So I applied, and got that job.

KD: That was in the General Counsel's Office?

TR: Correct.

KD: Who did you go to work for?

TR: Dan Goelzer was my boss.

KD: I just spoke with him the other day. What was it like working with Dan Goelzer?

TR: Dan's a terrific fellow. I really enjoyed working with him. He's a very capable, smart guy, and just a really delightful guy to work with.

KD: How do you run an office like that? You've got basically a stable of lawyers, and do you divide them up and send them out into special details? Are there specialties?

TR: I think that's reorganized a bit since then. But they had it organized into three areas. One was the group that mostly did appellate work; another group did what they called counseling, which was to review the activities of the other divisions, and comment on them and work on legislation. The third area was really what a traditional general counsel ends up doing: the whole mixture of employment litigation, defensive litigation when the agency is sued, FOIA litigation—a whole grabbag of things.

KD: So that's the nuts and bolts, representing the Commission.

TR: The appellate group represented the SEC in appellate litigation either in courts of appeals, or occasionally there'd be a Supreme Court case, and the appellate group would work with the Solicitor General's office in drafting a brief.

KD: What kind of cases did you come into contact with?

TR: I had a mixture of all sorts of things. One of the very first things I started working on was an area that was really quite unusual. Some defense lawyers came up with a theory; in particular, it was a theory developed by a very prominent fellow, Art Mathews, who was a lawyer at Wilmer Cutler and Pickering. Art Mathews developed this theory that he

invoked in several cases that the SEC couldn't bring enforcement cases against individuals because it was unconstitutional to do so. He relied on what is called the "take care" clause of Article II of the Constitution, and it says that only the President or the Executive branch of government can "take care that the laws be faithfully executed." He interpreted that as saying that only the President, only the Executive branch of government, can actually go to court and litigate against people. The SEC can't do it on its own. The SEC, of course, is an independent agency. In fact, there's some law that talks about independent agencies as being more an arm of Congress than being an arm of the Executive branch.

He brought this up as a defense in several cases. I got assigned the responsibility for arguing all of those cases. It was kind of interesting. We won. We never lost. I think there was a Tenth Circuit case where it was raised, and there was a case in Florida where it was raised. The issue got put to rest ultimately when there was a challenge to what they called the special prosecutor, or the independent counsel, and a similar argument was made that the independent counsel could not bring cases against people because he or she was not part of the Justice Department; he or she had this separate role. The same argument on the "take care" clause was made in those cases, and the Supreme Court in the *Morrison v. Olson* case said that: "No, in fact, it is constitutional for the independent counsel to bring those cases." There was enough similarity to our case of the SEC that people stopped making this argument.

KD: Did this Supreme Court case come pretty much when you were working on these Mathews cases?

TR: It came in probably about 1988 or so. For the first two or three years though, this issue actually came up several times. Until the Supreme Court case came down, it was still an open issue.

KD: So you were on the Art Mathews detail.

TR: I argued against him more than once.

KD: So you would actually go into court.

TR: Yes.

KD: How about the SEC Solicitor's Office? Did you work with them?

TR: Yes. Over the course of time, I worked on a number of Supreme Court cases. There was an amicus brief we filed in a case called *Pinter v. Dahl*, which ended up being a very significant case for private litigation under Section 12 of the '33 Act. I, along with others at the SEC, drafted a brief that ended up getting pretty much adopted by the Supreme Court in the positions we urged. So that was one case.

KD: What was the issue there, for the layman?

TR: It involved the question of who can sue under Section 12 of the '33 Act. There had been some fairly expansive interpretations of Section 12. Section 12 is a private right of action under the '33 Act. Somewhat surprisingly, the position the government took was that some of the courts had gone too far in interpreting the law, and interpreting who could sue. We took the position that it has to be somebody essentially in privity with the seller. It can't be third parties being able to sue. It was a little bit surprising. Some people thought it was surprising because the SEC—at least at that time almost always—took the position of the plaintiffs in litigation. This was actually a case where we thought that the plaintiff's position simply wasn't consistent with the statutory language and the legislative history.

KD: So you did an amicus for the defense?

TR: Yes. It ended up supporting the position of the defense.

KD: And so that's before the Supreme Court. Is that something that Paul Gonson would have done?

TR: Paul Gonson worked on almost all the cases that went before the Supreme Court. He didn't always argue them, because the Solicitor General, at least in recent years they have not been letting the SEC argue the way they once did. At one time, say in the '70s, and even into the early '80s, they would let the SEC senior people, like Paul, argue cases. But there actually is one exception to that. It was another case I worked on—a Section 16 case of the '34 Act, which involves what's called the "short swing profits provision," which is that insiders can't trade in securities for a period of six months. They have to hold onto their stock. This was a case that the Solicitor General let Jim Doty argue.

KD: He was General Counsel.

TR: He was the General Counsel at that point. That was in 1989 or '90. He actually got to argue a case, which was not very common. I think one reason was it wasn't a particularly monumental case. I think everybody realized this case was not as big a deal as it might have been.

KD: Why wouldn't the Supreme Court want the SEC to argue cases?

TR: It's not the Supreme Court. It was the Solicitor General's office at the Department of Justice.

KD: The Solicitor General's office in Justice would do it.

TR: They wanted to be able to argue the cases, in part, because the number of cases the Supreme Court has taken over the last thirty or forty years has declined. So, the number of cases per year where the Department of Justice files a brief went down over the period of time. They weren't giving the assistant solicitor generals enough cases to argue. They

wanted to argue more cases. So they would be more reluctant to give out the cases to others.

KD: Well, that gets to one of my other questions, which is: how closely did you work with the Justice Department?

TR: I worked on a few cases. The only real dealing I had with the Justice Department was on the Supreme Court cases. I don't remember any other dealings. There were at least two or three cases that we worked on at the Supreme Court. On that issue of constitutionality, by the way, a similar argument was made against the Federal Trade Commission, and their ability to bring cases. We coordinated our efforts with the FTC to some extent.

KD: So this was the big focus of your first few years?

TR: The first couple years, I spent a fair amount of time on that.

KD: What were some other issues that emerged?

TR: I did a whole range of cases involving insider trading, broker/dealer issues, just standard kinds of 10b-5 fraud cases.

KD: Insider trading was, at this point, fairly high profile.

TR: Yes. I actually ended up handling a few cases that were significant because they were among the first cases involving foreign individuals who were alleged to have engaged in insider trading. One of the first ones was a case called *SEC v. Tome.* It involved an individual—I believe he was Italian—who had engaged in some insider trading, and he couldn't be located. The SEC sometimes is able to seize people's money, but can't necessarily find the individual. There's some question as to service of process and jurisdiction over the individual, and jurisdiction over the assets. That came up in a couple of cases. One was *SEC v. Tome*.

KD: Was that the first one?

TR: I believe that was the first one that went to the Court of Appeals.

KD: Sometime around '88, '89?

TR: Yes, something like that. There was another one called *SEC v. Unifund*. That was maybe a little bit later. That was also a case involving a lot of jurisdictional issues. A lot of these cases involved personal jurisdiction issues and subject matter jurisdiction issues. Those are the two basic kinds of issues that come up when a court's trying to assert jurisdiction over somebody.

KD: Can you define those a little bit?

TR: Personal jurisdiction means is there enough personal involvement of the individual with the jurisdiction in which the case is being brought to enable the court to assert jurisdiction over that person. Subject matter jurisdiction is, even if you've got jurisdiction over the person, is there enough involving the U.S. and the interests of the United States to warrant having a court decide the issue? We did a lot of work in that area in those days, involving subject matter jurisdiction, because, if you look at the securities laws just on their face, there are no clear territorial limits. Of course, a court is not going to say: we have jurisdiction over anything that happens anywhere in the world. It was Judge Friendly, in the Second Circuit, who came up with this approach to that issue, and it's called a conduct and effects test, which is basically you either have to have conduct in the United States that involves the securities transaction, or you have to have an effect on the securities markets in the U.S. Unless you have one of those two things, the court would say: the issue is too remote. If you had a securities transaction that's in the United Kingdom and all the people involved are U.K. individuals, why would the U.S. court ever want to be involved? Courts would say you have to have either some U.S. people involved, U.S. people injured in some way, or else you have to have some significant element of the fraud take place in the U.S. In other words, it's planned here in the U.S., or something along those lines. We had several cases involving those kinds of issues.

KD: That's really good. That's the kind of thing I wanted to get at, which is the idea of when the SEC could move into foreign countries. How would Judge Friendly have done that? The SEC would bring a case where everybody was in the U.K., and say this is going too far?

TR: The first cases in this area by Judge Friendly were not SEC cases. They were private cases. The Bersch case was one of the leading cases. I can't remember one or two of the other ones. But so he looked at the issues in these cases, and he developed this test. He was just one of the first people to deal with the issue. He realized that there wasn't any case law that addressed the question, so he just developed what he thought was a sensible test. That has been the established test ever since, with a lot of nuances to it—how much conduct is required, what kind of effects are you talking about. There are all sorts of issues that have come up over the course of time as to how those particular tests are applied. And so there have been cases on that issue ever since, in the last thirty years.

KD: What was the SEC's position?

TR: The SEC, always when I was there, took a very expansive view on the conduct and effects test. It would always argue that the test should be applied in an expansive fashion, essentially, to get jurisdiction in the U.S. over transactions. The theory has always been that if you're defrauding U.S. investors—even though most of the investors are not in the U.S., but if there's an effect on U.S. investors—then a court ought to have jurisdiction over the matter. And that's the way the SEC did approach these issues.

KD: Was there ever any consideration that maybe that wasn't the best approach?

TR: These things are always somewhat controversial. I think over the course of time there's been more case law in these areas, and courts have wrestled with the questions. There have been a number of cases in recent years. I've not been involved with them personally, but there's been some Second Circuit case law, and other cases, where there is actually more concern about some of the more expansive readings of the law. It's a fairly hot issue right now in the securities laws. But when I came to Ernst & Young we had one or two cases involving—against the U.K. firm of Ernst & Young—whether it could be sued in a securities fraud case in Montana. Many of these exact same issues that I worked on while I was at the SEC were present in that case. That case actually went to the Ninth Circuit of Appeals. I argued it in the Ninth Circuit for Ernst & Young.

KD: Was the conduct and effects test still in place?

TR: Oh absolutely. That was the exact same analysis. At Ernst & Young, we argued that there wasn't enough conduct, and we won on that issue.

KD: Did the SEC ever succeed in pushing that back a little bit, and making more space for Americans to prosecute people abroad?

TR: Well they haven't. I have not seen what their briefs have said in the last few years, but in general, I think there is a less aggressive approach to asserting jurisdiction. I think that has been reduced to some extent.

KD: During those few years when you were involved though, were things pretty much where Judge Friendly put them?

TR: Yes.

KD: There's an interesting case that came up. It made headlines anyway, which involved the seizure of funds in a Hong Kong account.

TR: Yes.

KD: '89.

TR: That was the Unifund case.

KD: There was a lot of push back, in that the SEC's going too far in going abroad and removing this money from a bank.

TR: Right. It was a controversial case because of the way the SEC did it. It wasn't known at the time who the insider traders were. But we felt at the SEC that there was insider trading taking place in a trading account at a foreign bank, and so we got a U.S. court that had jurisdiction over that bank—because the bank had offices in the U.S.—to order a freeze as to that bank account. That was quite controversial, yes.

KD: Other than the basic "the SEC's overstepping itself," what was the controversy?

TR: I think that was basically what it was, is the SEC overstepping itself; that essentially you have a bank that has done nothing wrong itself, but is somehow brought into the process. And the bank's issue was—and this is what you frequently deal with in these international cases—that they have conflicting obligations. They say: "Well here we are pulled by the U.S. courts to essentially freeze the assets, or do nothing, hold onto the money; but then in our local jurisdiction we have contractual obligations, or even legal obligations to respond to the interests or the needs of the customer. And so we're caught between two conflicting sets of laws. This isn't fair." That's basically the issue. And that comes up in the international arena all the time, of course.

KD: Is that something that the SEC would take into account?

TR: Yes, but the SEC—particularly in those days—was very aggressive in saying: If you have some involvement or some connection to the U.S. securities markets, we're going to assert our jurisdiction over it. And generally, these intermediaries—banks—quite frankly, have been able to work things out. They've been able to deal with the local officials, or local laws, or whatever, and generally the SEC has gotten what it wants. They used the classic area of bank secrecy laws with respect to Switzerland, which was dealt with in the early '80s. I think you talked to Michael Mann at some point, and he had a big role on all that.

KD: Did you turn to that as a model, and say this is what we did in Switzerland?

TR: I'm trying to remember now how the facts may have been somewhat different, but it was a similar kind of situation.

KD: Were there any memorandums of understanding involved?

TR: I don't believe so. Not at that time, no.

KD: You said that at that time the SEC was more aggressive—as you say, "if there's an American investor involved, then we're going to get involved."

TR: Right.

KD: Would you have rooted that in the staff's approach or in the Commission's approach?

TR: I think that obviously anything that the staff does ultimately has to be approved by the Commission. So I think it was both. I think the SEC was—particularly in those days—very reluctant to cede jurisdiction to foreign regulators, because the theory was always: They don't do enough. They're not aggressive. They don't do much. It's the SEC that has to be the enforcer of the laws. That was certainly a very strong view. That has been modified. In the last few years there's been some talk of how you defer more, and there's an article that was written by the current head of International Affairs, Ethiopis Tafara.

He wrote an article recently about how you might defer to foreign regulation over broker/dealers. And that's been a big issue in recent years. It's been an issue since the securities markets became internationalized. In the early days of the SEC there really wasn't much internationalization of securities. But starting in the '80s or so, it became much more internationalized, and a lot of U.S. people began buying foreign stocks, and foreign people began buying U.S. stocks. And so it got to be much more of an issue.

KD: It was an issue when you came in then.

TR: Yes.

KD: That's a really expansive view of the SEC's area, if you're saying: We're going to protect people everywhere, because the rest of the world isn't doing it right.

TR: Well they don't say: We're going to protect people everywhere. They say we're going to protect Americans; even though a lot of what might be taking place might be outside the U.S., we're going to be protecting people within the U.S.

KD: One of the other arguments against this, I think, was that it would discourage foreigners from wanting to get involved in U.S. markets.

TR: Right. That's been the issue forever.

KD: Was that considered at the time that you were working on those cases?

TR: Yes. I think so. But the countervailing thought has always been: Foreigners like to come to the U.S. First of all, they feel they need to come to the U.S. because it's where all the action is in the securities world—particularly in those days, it's less so now—and secondly, that they like to come to the U.S. because it's considered to be a safe, well-regulated market where fraud is aggressively prosecuted. And so, the countervailing view is that foreigners feel comfortable in the U.S. when you have an aggressive SEC. So there's that element. I think that was always the prevailing view.

KD: In '87, while you would have been in the General Counsel's Office, there was a study of international securities. It was pretty big. All the divisions were involved in that. Was the General Counsel's Office involved?

TR: Yes, it was. I worked on it to some extent. The whole study was headed up by the General Counsel's Office.

KD: Tell me a little bit about the process. What drove that? Why did it come up? And how did you do it?

TR: I can't remember if maybe Congress asked for it. I think that may have been what prompted it.

KD: I think that is the case.

TR: And so, on studies like that—broad, far-ranging studies that affect all of the divisions—the General Counsel's office would usually do those. There's another fellow who was more or less in charge of it, in the General Counsel's Office. I think it was Bob Mills, who's deceased. I worked on portions of it and lots of people throughout the Commission worked on portions of it. At the time, it was one of the most comprehensive analyses and surveys of international issues that existed. So, I think it was certainly interesting and helpful at the time. It's long since outdated.

KD: Things have changed a lot since then.

TR: Absolutely.

KD: What was the part that you worked on?

TR: I remember our working on some of the jurisdictional issues, and some of the litigation-related issues—the kinds of things we've been talking about.

KD: So again, you'd given a lot as to how far the SEC could go in other jurisdictions.

TR: Yes.

KD: Was the word "extraterritoriality" something that was used?

TR: Absolutely. People have often thought that to some extent all of these cases involved some extraterritorial reach. There's the question of just how far do you want to go? How much is required to be in the U.S. in order to justify the extraterritorial element of whatever the SEC might be doing?

KD: So was the intent to get into the study what the SEC's view of this was at the time? Or definitions?

TR: Yes. I don't remember how much was discussed, but there was certainly some discussion of it. But a lot of the study, as I recall, had to do with issues relating to corporation finance filing requirements, broker/dealer requirements, investment management, investment company requirements. That was a large portion of the study.

KD: Right. Well I assume this is how you got involved in the International Legal Team then?

TR: Yes. At some point Dan Goelzer thought we should, within the General Counsel's Office, have more of an emphasis on some of the international issues. So although I continued to do appellate work, and I also worked on legislation—I ended up having an unusual career, because I ended up doing a lot of different things; but one of the things that I ended up working on was internationalization. I guess starting in about 1990, we had more emphasis on international matters within the General Counsel's Office. That

ended up actually being an emphasis to a fair extent on the emerging markets issues. I got involved with that, which wasn't really where I'd been spending my time. But I helped coordinate a lot of the SEC's efforts with the developing markets in Eastern Europe and elsewhere. This was right at the time when Eastern Europe and Central Europe adopted free markets. Chairman Breeden was very interested in trying to have the SEC assist these foreign markets in developing their securities markets. And obviously, in any securities market that people feel warrants their investments, you have to have some degree of regulation, or it's not going to work. So first of all he organized an advisory committee called the Emerging Markets Advisory Committee.

KD: Who would have been on that committee?

TR: Well, it was a lot of very high level people from Wall Street and elsewhere who came to Washington and met, and talked about how the SEC might have an impact on helping these foreign economies develop their markets, and develop some regulatory regimes that would assist in developing the markets.

KD: This was a blue ribbon kind of a thing.

TR: It was a pretty blue ribbon thing, yes. They had a couple of meetings. And I worked on that. Chairman Breeden also wanted to have people go overseas. I went over a few times to Hungary and Czechoslovakia and some other countries and talked to people. In that context I worked with the World Bank; the International Finance Corporation of the World Bank was trying to help foreign governments develop some of their securities laws. And so we, at the SEC, helped them. We actually got some contractual arrangements with the IFC, and then also I arranged to get a contract with the AID, which actually ended up funding efforts by the SEC to assist in these foreign governments in developing their securities markets. I arranged for this, and got a guy who was working at the SEC—a guy named Bob Strahota—to go overseas and spend a year in Poland working on helping the Poles to develop their regulatory regime. He ended up then coming back after that, and spending the rest of his career, for the next ten years or so, working on giving advice to foreign markets. He and others at the SEC started doing this all over the world. And so it wasn't just confined to Eastern Europe, but we started doing it all over. The actual focus with the SEC for doing that came out of—we decided at some point, I don't remember when—it was shifted from the General Counsel's Office to the Office of International Affairs, which had been set up around that time—so when Bob came back from Poland, I think he went to work for the International Affairs. We just thought that was functionally probably a better place to do that kind of thing. It really wasn't the kind of traditional General Counsel type thing to be doing.

KD: So when you were charged with getting involved in this, mostly in Eastern Europe, there was no Office of International Affairs?

TR: I don't think it had been formed yet. Or maybe it had been, but it was really quite small. But ultimately, they took over the task. I think probably around 1992 or so.

KD: I just want to dig a little more into that, because this has got to be really valuable for the folks who are working on these angles. Chairman Breeden wanted somebody from the SEC to go share expertise in Eastern Europe.

TR: Right. Well he wanted the SEC, institutionally, to share expertise with Eastern Europe. And so, in order to do that, obviously there needed to be some lead within the SEC to take responsibility for coordinating that, and to try to make sure it's delivered appropriately.

KD: So for a time, that was you in the General Counsel's office.

TR: Yes, I did that.

KD: I saw a reference to an international legal team being created in a newspaper article. So apparently, you had a name for your organization.

TR: Yes. We had a group that did a lot on the international area.

KD: Who were the people working with you?

TR: There was a guy named Walter Stahr. Walter now works for an investment fund that works on emerging markets. It's comprised of former World Bank people. So he stuck with it. Bob Strahota was the other one. Those were the two main guys.

KD: And then you went to AID for funding.

TR: Yes, AID ended up giving some money to the SEC for this.

KD: Why was that?

TR: Well just because the SEC didn't have a budget for sending people overseas. The AID, at that time, got a fairly sizeable budget to assist in free market development; and they provided funding to the Department of Commerce to develop a program, which I think is still quite active. The SEC did it. They also gave money to some American Bar Association organization that got developed at the time. There was a lot of activity in those days, in the early '90s, in trying to give advice. Many people think maybe there was too much advice being given. But presumably, it had some positive impact. I certainly hope it did. These markets actually have done very well; some of the Polish ones have done extremely well.

KD: Everybody recognized there's this huge opportunity to do something.

TR: Right. To try to mold them. I think there are a couple things. One is to help them get their markets together, and at the same time having the SEC and the Americans involved in that process is certainly helpful to America and the U.S. markets. The U.S. develops ties between U.S. regulators and foreign regulators. So overall, I think it's a helpful kind

of thing to be doing. Although I did not take the lead in it, Chairman Breeden organized this Institute for Securities Markets, where regulators come from all over the world, and have a two-week program. And that's still very active. But that was another kind of thing that he ended up wanting to do. He was very interested in that kind of thing.

KD: The International Office ran that?

TR: I think they ran it, yes.

KD: Did AID come to you, or did you go to AID?

TR: I think we went to AID. We'd been talking to them about certain programs that they had going. I think we had worked with them a little bit on a couple of things. But the actual process of obtaining a grant—I think it was something like a two or three million dollar grant for a two or three-year period—that was a new thing. That was our idea.

KD: So, when you went over there on the first few visits, was this just a matter of organizing conferences with people in Eastern Europe, and talking generally about how we did things?

TR: Yes, there were a lot of different things. There were some programs and conferences. There were panels and speeches. There were one-on-one meetings with people. There was drafting of securities laws and securities regulations, where we helped them work on those. We worked quite a bit with—there was a private lawyer who was with a big Wall Street firm—named Bill Williams—and he developed a model securities law that we ended up talking to people about. But I think the most significant thing was having somebody actually placed overseas for a year. Bob Strahota was there every day, essentially working alongside the regulators and trying to work through problems with them, and trying to help them design inspection programs, and help them design regulatory processes, and help them on institutional and structural issues. We got Jack Katz, who was the Secretary of the Commission, and knew probably better than anyone how the SEC is organized, how it's structured, who does what. So when these foreign regulators were trying to come up with these institutional frameworks for their operations, Jack went overseas and met with people several times. We organized that activity. At one point, there were some corporation finance issues on review of filings; and so I arranged to have a woman from our Corporation Finance division, Abbie Arms, go over to Hungary for a week or two and work with them on some issues relating to that. There were a bunch of different things. We had some people who worked on broker/dealer regulatory issues who would spend some time overseas, talking to people about how things are done, and going through regulatory issues.

KD: It sounds like the Europeans were highly receptive to the SEC.

TR: Yes.

KD: Was there ever anybody said: Well, you know, we want to do it this way. Thanks, but no thanks.

TR: I think there probably was. From what I recall Bob Strahota's experience was probably mixed in some ways, because I think there were times when he felt frustrated they weren't really following his advice. So, I'm sure that that happened—it happens a lot.

KD: You would think that there would be some push back along the line.

TR: Yes, I think there was.

KD: You mentioned the SEC Institute, where instead of going out, people are coming—

TR: I think they come in for two weeks in the spring.

KD: Tell me a little bit about your involvement with that.

TR: I did work on it for the first few years. I didn't have the lead role. I think it was really done by the Office of International Affairs. I was on some of the programs in the first couple of years, talking about legal issues relating to the SEC and its status within the U.S. government. I believe I spoke about certain administrative law issues, because that's an important area that foreign officials were interested in. That was an area that was useful to them. Some of the other divisions played a very active role. We would bring in a lot of prominent people to speak. I did arrange for a lot of that. We had a lot of prominent regulators from other agencies, people from some Wall Street firms, and New York Stock Exchange and NASD would come and speak about different things.

KD: What about IOSCO? Would you get other people internationally?

TR: Yes. Well, to actually appear on the programs? I don't remember whether they would actually appear. It was really the U.S. people talking to all these foreign regulators. There would be huge groups of them. I remember in the first year, we were just astonished at the return we got of people who wanted to come. They were from all over the world. I think it's become much more institutionalized and routinized since then. But the first year or two we got essentially the top securities regulators—the heads of regulatory bodies from forty or fifty countries. It was really kind of amazing.

KD: All this was fallout from the collapse of the Wall?

TR: Yes. To his credit, I think it was Chairman Breeden who was really very interested in doing this. He pushed for it and he liked the idea. He was very interested in international issues.

KD: You mentioned administrative law. One of my questions is: it's easy to see this in an American context, because we've got a century or more of administrative law to build on. What happens when you get these countries that don't have that?

TR: I guess that's a significant issue, and the point here, of course, is that what we have in the U.S. can't just be picked up and shipped overseas. That reminds me of the very first time that some Russians came over to the U.S. I remember hearing about some Russian economic official who went to look at Pentagon City shopping mall in Virginia, and said, "Well, I'd just like to copy this entire mall, and just plant it in Moscow, because it's so perfect." You can't really do that exactly. I think the same thing is true for the securities world. But, you just try to explain how some things are done over the course of time. The thing that does make the U.S. kind of unique—and we talked about this, we always talked about this at these programs—is the relationship between the private bar and the SEC, that there is this gatekeeper role that lawyers have, that others have; that the private companies want to act, for the most part, in ways that show their good faith and their interest in trying to do the right thing. And there are a lot of different players in that process. So it's not just the SEC sitting there and trying to hit people with a hammer all the time. There is a cooperative spirit to some extent between the private bar, many people who have worked at the SEC and want to make sure that things continue to be done in the best way possible. Those kinds of things don't develop overnight in foreign countries. There's no question about that.

KD: Was this a surprise to some of the foreigners? That that's really how it works?

TR: I don't know if it's a surprise. I guess it depends on how much background you have. We got people in the early days who knew really nothing about the U.S., or how it's structured; so I'm sure that to the extent they really understood. Part of the problem here is that there are a lot of conceptual things. One thing that I always was struck by is, you've got language problems in talking to people—these are unusual concepts. It's not clear that you can even just describe them and have it sink in. If I were somebody coming in from some of these countries, I'm not sure I'd completely grasp it just because somebody's sitting on a panel explaining it to me.

KD: Right. Which I guess is the point. Because even lots of people in the U.S. assume that the SEC just sits there and issues rules and everybody follows them, and that's how things get done. There's also administrative law: the idea that you can have this whole other legal system. So it would seem like those were some pretty big challenges.

TR: I think they are very big challenges. I can't say I'm aware of how easily they've been adopted or utilized. The U.S., in general, we have a lot of different programs in the last eighteen or twenty years on foreign legal institutional development. The American Bar Association started developing this program where they send people overseas for about a year or so, and help them work on legal issues. There are all these different missions that go overseas. So there's a lot of that interplay. And all you can assume is that some of it rubs off. I think this is one of the elements of all of this: first of all, when you look at the amount the U.S. is spending, it's not very much money in the grand scheme of things. The amount of time, it's really not in the grand scheme of things, all that much time. So, if you're feeling that you're not really transforming these markets, I think you have to realize: Well, look the only objective here really can be that some of it rubs off. That

maybe it's five percent, maybe it's ten percent, maybe it's fifteen. Who knows? But some of it has some impact. Some of it has some utility. And more than that: there's the development of some ties and some friendships, and a showing of good will. And so for all those reasons, I think it's always been a useful thing to do, even though people could certainly say: The foreign regulators aren't like the SEC—they don't have administrative law issues. I mean I think that's too much to expect. I don't think anybody really realistically can expect this. I think you have to lower your expectations a little bit.

KD: Well some concrete stuff: IOSCO. How much did you interface with them?

TR: That was more International Affairs that did a lot of the work with IOSCO. I did spend time. I worked with our International Affairs people quite a bit on different legal issues. But I can't say that I did an active thing with IOSCO. But one thing that was quite significant in this area though that is probably worth talking about is that we felt that in part of the enforcement program—the issue has always been getting foreign governments to assist the U.S. in getting documents, or other information, when that information is located within their jurisdiction. And this is Michael Mann's idea, but then I carried through on—we thought that the U.S. securities laws needed to be amended so that the SEC could essentially assist a foreign government in enforcement of its laws. Because if the SEC could do that, then you would assume that that foreign government would be willing to reciprocate. And under the U.S. securities laws, up until we got the law changed, the SEC could only investigate violations of its laws. You couldn't subpoena documents from somebody unless there's a showing of a possible violation of U.S. securities laws. We actually got Congress to change the law in—I guess it was 1989; we got an amendment to Section 21A of the Securities Act to allow the SEC to investigate a violation of a foreign law if the foreign government made the request to the SEC. And so that was actually very significant development. I drafted that provision, and we met with people on the Hill, and they all seemed to say: Fine. So we got that passed; actually it wasn't too hard.

KD: Which is unusual, I guess.

TR: It was called the International Securities Enforcement Cooperation Act of 1989, I believe.

KD: So you had this vision for that act, that it would begin a process that would create more cooperation.

TR: Right. The theory was that unless the SEC had the statutory ability to do these kinds of investigations when a foreign government asked for it—unless that took place, you couldn't realistically ask the foreign government to do an investigation when the SEC asked for it. So, we would say: Well, we have the authority. You ought to have the same authority. If we're willing to do this for you, then you ought to do the same thing for us. That allowed a lot more foreign investigations to take place in assistance of the SEC's efforts.

KD: Did it add greatly to the SEC's workload?

TR: I don't think so. At least it doesn't come up all that often. I really don't know how often it's been utilized—but it has been utilized.

KD: But as a matter of principle, it was pretty important.

TR: I think that's right.

KD: Did you stay on this international legal group all the way through then?

TR: I did. I worked on that. That group filed some legal briefs on the jurisdictional issues I've described. But then I got pulled in on a bunch of different things my last year or two that were actually a lot of fun, on litigation reform, which is completely different. I ended up working on—I think it was because I worked on the Supreme Court case involving the statue of limitations of the *Lampf* case. It was a very important case on the statute of limitations for Rule 10b-5. *Lampf* was the first time there was a Supreme Court case dealing with statute of limitations. And some private plaintiffs were concerned about a more limited statute of limitations that hadn't existed previously. So there was actually some effort to extend the statute of limitations for private plaintiffs. Well, that gave rise to a fair amount of talk generally about: Well, if we're going to talk about reform of private litigation, let's talk about it in a bigger picture. And there was a lot of talk, starting in the early '90s—actually originated within the accounting firms, but it spread to the high-tech sector and elsewhere—about how everybody was getting killed by private litigation. And the last year or so this became a fairly hot issue at the SEC. I did quite a lot of work on the position papers that Chairman Breeden took, and that Jim Doty took, and the position the SEC took on litigation reform; which ultimately led to—it took a little while—but in 1995, Congress passed the Private Litigation Securities Reform Act, the PSLRA. But the very early stages of that actually were actually starting around 1992 at the SEC. I ended up spending quite a bit of time on that, right then. So it was kind of a different thing.

KD: Yes, somebody wanted it to be a five-year statute of limitations, and the Court maybe said two—and it was a two-tiered thing where you had the—

TR: You're very knowledgeable about this. It is two-tiered. The SEC actually took an unusual position in the brief that ended up not getting adopted, which was that there was a statute of limitations that was adopted for one of the insider trading laws. And we said: Well, if Congress adopted that, for that purpose, that should be the rule. The general two-tier thing is that the shorter year is from the discovery, and the longer is from the actual event itself. So, at some point there's finality. You can't just go on forever. But what they adopted in Lampf was one and three, which was the statute of limitations in the '33 Act. And they adopted that for Rule 10b-5 in the '34 Act, because they said it was the closest analog, and that showed Congress's intent to the greatest extent possible. That was a very significant cutting back of the limitations period. This gets a little bit complicated, but up until then, courts had, for the most part, said: Well there is no limitations period on the 10b-5, so we'll look to state law. So they borrowed from state

law and state law, generally, was much longer. New York was as long as six years. So adopting this one and three period was very significant.

As a result of that, there was all of this furor and there were bills introduced in Congress actually to lengthen it. The SEC did not want to start saying: Well, we should lengthen it—unless there was a bigger assessment of private litigation generally. Now this is actually an interesting thing, because the SEC was, probably for the first time, wondering whether it's always in the best interest of everybody to have essentially plaintiffs being able to have extensive rights. There was some question as to the degree to which there needs to be some tradeoff here; that there are some downsides to private litigation, as well as upsides. I think part of it was that there was a Republican President and there was a Republican Commission and I think they felt that business was really getting sued perhaps more than it should be. So the very early discussion of litigation reform started starting right after Lampf. Lampf was in 1991. Throughout 1992 there was a fair amount of discussion of this, and I spent a fair amount of time working on that.

KD: Now did the SEC get involved just because this is its area? Were you doing amicus stuff?

TR: No, it was mainly that the SEC was being asked. When there are bills and legislation involving securities laws, Congress wants the SEC to be involved. And there were hearings; there was testimony.

KD: Were you in some of those hearings?

TR: I helped on the testimony, yes. I didn't actually testify, but I helped the people who had to testify. Chairman Breeden did.

KD: Where did the SEC come down on that?

TR: Well ultimately—this is now not until '94, '95—at that time, there was a new chairman, Chairman Levitt. He had more ambivalence about a lot of this stuff and to some extent didn't want to take a real active role, was my impression, although I wasn't part of it. I actually had the position here at Ernst & Young at that time, and I was seeing it from a different vantage point.

KD: Funny how that works.

TR: It was.

KD: How did you get in that position? When did you decide—

TR: To work at Ernst & Young?

KD: Yes.

TR: Starting around 1992 I just decided I wanted to do something different. Somebody told me about the job, and so I made some inquiries.

KD: And you're working as Deputy General Counsel for an accounting firm?

TR: Correct.

KD: What was your involvement with accounting before?

TR: I didn't have much.

KD: Was that a qualification for this job?

TR: No, not really. One of the great things about this job—and it's really been a terrific place to work—is that I learn new things every day. I've learned some accounting over the years, take an occasional course—program here and there. But, we actually have a group of accountants in our General Counsel's Office who work with the lawyers on cases. So, when I work on a case—I do a lot of litigation, but I also actually do a lot on public policy issues, the same way I did at the SEC. But when we have litigation that I'm working on, we have an accountant who's assigned to the matter as well; and so he or she can explain stuff, and make it more understandable. So they're invaluable actually to our functioning here.

KD: I'm sure. How about your SEC experience? Is that perspective invaluable?

TR: Yes, absolutely. I'm sure everybody says their SEC experience was a great time in their lives—and I learned a ton. One of the things that I must say is that working with the senior people in the General Counsel's Office—Paul Gonson and Jake Stillman, in particular—on brief writing and on oral argument was an unsurpassed kind of experience, because they were just both such marvelous people to work with. And that kind of experience, I think, has carried me very well over the years.

KD: Terrific. Well, you've carried me through an hour.

TR: Okay, good.