

Securities and Exchange Commission Historical Society
Oral History Project
Interview with Marianne Smythe
Conducted on June 16, 2011, by James Stocker

JS: This is an interview with Marianne Smythe for the SEC Historical Society's Virtual Museum and Archive. I'm James Stocker. Today is June 16, 2011. We're meeting at the offices of Wilmer, Cutler, Pickering, Hale and Dorr, in Washington, D.C. Marianne, welcome.

MS: Thank you, I'm glad to be here. I thank my former firm for letting us use their space.

JS: I understand that you grew up in Long Island City.

MS: Yes.

JS: Were you born there?

MS: I was born in Manhattan.

JS: Were either of your parents lawyers?

MS: No, no lawyers, teachers.

JS: After high school you attended Bucknell University.

MS: That's right, yes.

JS: What did you study there?

MS: I was a biochem major.

JS: Did you take any courses in law or business?

MS: No, I did not. I took history and English, things that help you learn how to think.

JS: Why don't you tell me how you got from studying science and the humanities to business and law?

MS: I'm sixty-nine years old as of last week, so it would be too long a story. I would take up the whole hour with the story of my getting to be a lawyer. The short of it is I tried to go to medical school in Chapel Hill, North Carolina, after my husband and I came home from the Peace Corps in the 1960s. I couldn't get into the medical school there. I had always wanted to be a doctor. Eventually we had a baby girl, and I decided that I needed to help support the family and earn a living. The law school was beckoning, and so I went to law school.

JS: How did you decide to go to law school at Chapel Hill?

MS: When we came home from the Peace Corps, my husband was accepted into a graduate program in Chapel Hill, and so that's where we went. I must say I have no regrets. I love Carolina and I loved my time there. I have two daughters who are natives of Chapel Hill. We love the Tar Heels and we can't stand Duke.

JS: I think you're in good company there. At what point did you decide to study securities law?

MS: In the summer of 1973 I was going to be a summer associate at a New York Wall Street firm. It happened to be the firm that President Nixon and Attorney General Mitchell had been at – Mudge, Rose, Guthrie & Alexander was its name. It was a great firm. Since I was a woman – there weren't too many – I was put in the trusts and estates department. I could immediately tell that I would not like doing that. They had a wonderful muni-bond department there, but they were having trouble getting people to go into it because Attorney General Mitchell had been in charge of that department. This was the summer of the Watergate hearings and nobody wanted to go into that department.

I said, "I'm a liberal Democrat. I was born one. I'll live one. I'll die one. I'm happy to go into the muni-bond department. I don't know a thing about it." I absolutely fell in love with the securities market. That was my first real introduction to what it meant to create, describe, price, and sell securities. They were doing the work on the

Meadowlands Development. I fell in love with the whole area, and I've just loved it ever since.

JS: Was this after your second year of law school?

MS: After my second year of law school, yes.

JS: When you came back for your third year, did you take any courses in securities law?

MS: I took some courses in securities law, corporate law. Yes, I did do that.

JS: Were there any professors, either at Bucknell or Chapel Hill that played a role in influencing your career?

MS: Oh, there were many, too many to name. I would mention one at Bucknell. It's a fellow named Robert Hilliard, a history professor, who is just such a wonderful teacher. At Chapel Hill there really were too many to name. I owe that school a good deal.

JS: While you were in law school, were you already thinking about joining the SEC, perhaps in the third year?

MS: Yes. My husband wanted to come to Washington and do environmental policy, so we were going to be coming to Washington. The SEC was one of the places I would have

liked to go. I'd read speeches by a fellow named Manny Cohen, who had been a chairman of the SEC in the 1960s. So yes, the SEC was one. The problem with going straight into government is that we were poor as dirt and the government would not pay for our move. I was very fortunate to get an interview with Wilmer, Cutler and Pickering and very lucky to be offered an associate's position here. It turned out Manny Cohen was there, which is the person with whom I really wanted to work anyway, so I came to Wilmer and was very lucky to have come to Wilmer.

JS: So was that in 1974 that you graduated?

MS: Seventy-four, yes.

JS: Then you started here at Wilmer Cutler. What sort of work did you do as a young lawyer?

MS: Wilmer had and still has a pretty vigorous securities enforcement defense practice. Manny, of course, had been called into those assignments. A young fellow he had brought with him from the SEC, a fellow named Arthur Mathews – may his soul rest in peace, he died way too early – he was a partner. They had a young partner, and Manny was the senior partner. It pains me to admit that Manny was a good deal younger than I am now, but he was the senior partner. Art was the younger partner. There were other fabulous lawyers, some of whom are still there at Wilmer. Lou Cohen is one.

Steve Hut. There were great lawyers, and so I tagged along behind, trying to pick up as much as I could.

JS: Did you take the bar exam at this time?

MS: I did.

JS: Did they give you any time to study for that or was it –

MS: They said I could work part-time. That is an interesting question, because part-time, I soon discovered, meant that I could work from nine to six, and I could go home at six. It was a very hard summer to study for the bar, the summer of '74, because there were the second Watergate hearings, the impeachment hearings, really. It was so hard to study for the bar and not watch those hearings. With the bar exam you don't know how well you did, but I viewed it like a pole vaulter views a pole vault. It doesn't matter how high over the bar you get, you just need to get over it, and I did.

JS: Two years later you went to the Enforcement and Market Regulation division?

MS: No, the Enforcement division.

JS: Oh, the Enforcement – okay, I'm sorry.

MS: Yeah, yeah, Enforcement. They're different divisions.

JS: Was it a difficult decision to leave practice after starting your career and earning a good salary?

MS: Well, the salary was not an issue because oddly enough, in 1976 when I went to the SEC the first time, there was no salary cut. What there was a very different slope on the escalator, so that in future years – my husband and I had lived for two years in Nigeria in the Peace Corps. We are still returned Peace Corps volunteers at heart. I didn't give the salary a thought, because I didn't need to. We did not have to change our standard of living. It was not an issue at all, for me.

JS: Tell me what it was like working at the SEC at this time.

MS: There was a legendary head of the enforcement division then, Stanley Sporkin, who is still a legend, and is still just the most wonderful person. He actually performed the wedding ceremony for my younger daughter in 1997. He's just the most inspirational person. So was Manny. Manny Cohen was spectacular.

The reason I left Wilmer is I really could not keep up with the hours. We had two young daughters then. I really loved the firm and it was, frankly, a hard choice for me to make emotionally to leave the firm, but I had to leave the firm if I was going to have any hope

of being even a halfway decent mother. After all, I was working to support my family, not the other way around.

Manny Cohen called up Sporkin, said somebody here wants to go work for you. Next thing I knew, I was over there. I just loved the SEC. Oh, I just loved it. Working for Sporkin was so inspirational. Again, I don't want to draw invidious comparisons with my firm, because working with Manny and working with Art Mathews and Lou Cohen and other people was also just tremendously inspiring. But the SEC with its mission to protect investors, its mission to help foster a safer environment for capital investment, you know, it was a real privilege for me to work there.

JS: You've probably been asked this question a lot, but what was it like to be a woman at the SEC at this point in time?

MS: That's an interesting question because there really were not very many of us. But those of us who were there were really good. We could hold our own against the best of them. I never personally felt much in that way. A few times I felt that somebody else was selected to do something that perhaps I might have been selected to do.

I think that what underlay the gender issue then maybe more than now is just the question of time management. There were no supports for our dealing with the very real need of looking after our families. I had to leave at 5:30 every day. That's why I went there, to the SEC. I think that had an impact, to some extent, on selection for assignments. I was

always keeping my head down when something was going to be out of town for a while. I didn't want to do that. I think that was more of an issue than, "Oh, she's a woman, she can't do the work." I never got that. I really never got that.

JS: When you got there, did they offer you any training or anything like that or did they just throw you on cases?

MS: They offered training. They had a training program. But I had already been out of law school for two years and I had been at what I call the best teaching hospital in the country. You know, lawyers don't have an internship and residency, but I sort of did: my two years at Wilmer. I think I hit the ground running pretty well.

JS: How many years did you spend in Enforcement at the SEC?

MS: I spent two years in Enforcement, and then something called the Special Study of the Options Markets came along. The fellow who was by then my branch chief, another – may his soul rest in peace – wonderful fellow, Tom Loughran, who tragically died in 1996 of lupus, of all things. Tom was my friend, my colleague. He was just a wonderful, wonderful person to work with. He became one of the deputy heads of the Options Study and persuaded me to come along with him on that.

It was a year-long review of the trading on the Chicago Board Options Exchange, which was pretty new at that time. There was some concern about what the impact of trading

standardized options would be on the underlying equity markets. It seems kind of quaint now, but at the time that was an issue. We had a very good year. Some people I consider friends to this day were people that I met while I was on that special study. We did that for a year.

Then a new office was formed in what was then Market Reg to act as an inspections and oversight office for the exchanges and for the National Association of Securities Dealers, now FINRA. Tom became the associate director for that office. Another fellow and I became assistant directors in that office, which was in Market Reg. That's how I transitioned from Enforcement to Market Reg.

JS: While you were working in Enforcement or Market Reg, did you work on any Investment Company Act cases or anything having to do with that?

MS: No, no. I mean, I just didn't. It didn't come up. In the late seventies, early eighties – well, late seventies really, I knew people in the Investment Management division, but our professional paths didn't really cross.

JS: How did you decide to leave the SEC in 1981?

MS: My husband worked for the Council on Environmental Quality, which was part of the Executive Office of the President. When President Reagan was elected, he decided to RIF, reduction-in-force, a substantial part of that staff, including my husband. Bob is a

wonderful person, husband, 48 years now, married, unbelievable grandpa. He had never finished his Ph.D. when we had been in Chapel Hill the first time, and he wanted to finish.

At the same time my law school called up, Chapel Hill, and said, "Would you like to teach?" The truth was I did not want to teach. The larger truth was this would be a good move for our family. Bob could finish his Ph.D. I could teach in the law school. My older daughter was approaching adolescence, and I could see that that was going to require a little bit more hands-on involvement than either she wanted or I enjoyed, but it was part of the joys of being a parent.

We moved back to Chapel Hill. We thought we were going to stay just a couple of years. We rented our house here. My husband was in a bad accident. He was in a hit-and-run accident not long after we got down there. That sort of delayed things a bit. We stayed there for six years. I had to get and did get tenure. I was very fortunate in the friends I have there. One of them procured for me the job as assistant provost of the whole university. I had a very good time the last couple of years, both teaching law and also running things, which I sort of liked to do more than I like to teach. Then he finally got his Ph.D.

I wrote to friends at the SEC and said, "Boy, we'd like to come back now." One of my very close friends, Kathy McGrath, who was Director of Investment Management, said, "Come as an attorney fellow and maybe something will open up." After I got back, I was

an attorney fellow for awhile. Something opened up. So that's how I got down to Chapel Hill and back to the SEC, in that period.

JS: The story of the detour, you could say.

MS: Right. No, I do believe in full disclosure though, coming from the SEC. I left the SEC in 1980, not in 1981. I briefly went to the Environmental Protection Agency to be associate general counsel for pesticides. My friend was the general counsel. She had been a colleague at Wilmer. When Reagan was elected in the fall of 1980, I resigned. I just didn't believe that I could do an effective job in an environmental organization, whereas in the financial organizations it never mattered. There was no party politics at all.

So my friend, Tom Loughran, by then was the Head of Enforcement at the CFTC, so I spent six months at the CFTC in 1981, before we went down to Chapel Hill. So there, isn't that boring?

JS: No, it's very interesting.

MS: Sorry it's on tape, but there it is.

JS: Just let me ask you very quickly about teaching. What sorts of classes did you teach? Was it general law courses or –

MS: I taught contracts to first year students. I did that for all six years. I taught administrative law. They had a very good securities law teacher who's still there, Tom Hazen. I could have also taught securities law, but I really loved ad law, administrative law, which pervades all of the federal agencies and how they make law and how they function. I was glad to teach administrative law. I taught environmental law as well. I had a good plate of things to teach.

JS: Did teaching law change your view of securities regulation at all?

MS: No. Securities regulation is a complex, evolving subject, but my teaching law did not change my view of it.

JS: So you stuck to your principles there. You said you really enjoyed being provost.

MS: Assistant provost.

JS: Assistant provost, excuse me. The provost out there would be quite angry to hear that. Did you consider staying in academic administration or were you determined to head to Washington?

MS: In case it hasn't become clear yet, my view of my world has always been that of wife, mother, and worker, in that order. Bob wanted to come back; he did not want to stay in Chapel Hill once he finished his degree. He wanted to come back where he could have

an impact on environmental policy. I was so happy to come back, too. We still had our house. We had been renting it. Not that I didn't love Chapel Hill and there's still a part of me that's left in Chapel Hill. I was happy to come back. My friend Kathy made it so easy to come back and be part of investment management that that was no issue.

JS: You had worked with her at the SEC previously?

MS: I have a funny story about Kathy, just briefly. She's a fantastic lawyer and a wonderful person and can be dynamic. My first encounter with her was after I had written a memo, right after I had gotten over to the SEC in 1976. I was called into the assistant director's office and there was a speakerphone, and everybody's huddling around it. I hear this voice say, "Who wrote this memo?" Before my supervisors could stifle me, I said, "Who wants to know?" We were friends ever since. (Laughter.)

JS: That's good. You two both worked on the Options Study together as well?

MS: No, she was in Market Reg then, as an associate director. She was not on the options study, but she was a good friend of Tom's. You make really lasting friendships at the SEC.

JS: So coming back to the SEC I guess, eight years later or seven, eight years later –

MS: Seven.

JS: How had the SEC changed? Did you see a difference in the organization?

MS: People now say it's changed, so that I wouldn't recognize it. Of course, I left eighteen years ago now. In the seven years I was away, I didn't think it had changed at all or certainly not for the worse. It was full of esprit. The people were still wanting to get the bad guys and make them pay. I didn't think it changed at all. I felt at home from the minute I stepped back in there. I went from being assistant provost of the university and a full professor of law to being an attorney fellow in an inside office that was a reconverted broom closet, and I didn't care. I was back home with my friends – and it didn't take me long to have a view. It was just great to be back.

JS: What sort of issues were you working on in the attorney fellow program?

MS: The biggest issue I had was that the SEC had been tasked with doing a study on financial planning, and it had been languishing. There was a congressman who kept jumping on it, so Kathy put me in charge of getting that done. I spent a reasonable amount of time, the first few months, getting that done. Then I started to do the regular work. There were issues about sales charges, 12b-1 fees – just the usual – wrap fees were starting to come in.

The whole way that mutual funds are distributed were – the proliferation of distribution channels and how they were paid for, and how they were disclosed, and what incentives

were created, was an issue that had started about eight years earlier, when they allowed 12b-1 fees. It was starting to be more and more interesting when I got there, so I was helping with that. I would not say that I was a particularly important person in resolving any of those issues.

There was a wonderful associate director, Mary Joan Hoene, when I came and she was terrific. There were great people in all of the positions. It wasn't as though I came striding on the scene in this wasteland and said, "Here I am." It wasn't like that at all. It was me being part of a group of very talented people.

JS: Did you already know Richard Breeden at this time?

MS: No, I did not, no.

JS: How did it come to pass that in 1990 you became his executive assistant?

MS: It was to his credit – very much to his credit. I was recommended to him by the woman who had been David Ruder's executive assistant, Linda Fienberg, who's now been in charge of the FINRA Arbitration Program for quite a number of years and who, again, is another absolute superstar. She knew me and she recommended to Richard that I would make a good executive assistant.

Richard also knew a fellow I had worked with here at Wilmer Cutler, Boyden Gray, who had graduated from Chapel Hill and, indeed, was the person who had made an entree for me at Wilmer all those many years ago, this being a small world. I guess Richard knew that if I knew Boyden, I couldn't be all bad. I told Richard right off the bat, I said, "You know, I'm a liberal Democrat and that's just not going to change. It's very unlikely."

"So? Do your job," was basically his view. He picked me to be his executive assistant and I was.

JS: Tell me about the role of the executive assistant. What does that position do?

MS: I think it varies with the person who's the chairman. Now it's called chief of staff, which maybe is a better description, maybe not. Whatever it is, they could've called me, you know, turtle. Whatever it was, I was the person who helped Richard get mostly the legal issues brought up and vetted, but also things like, "He took my pencil," and "The bathrooms on the third floor are leaking."

Whatever came up in the building, I dealt with the heads of all of the offices, both the operating divisions and the administrative divisions, personnel, HR, whatever, and just tried to keep the place functioning in a reasonably efficient manner. Part of my job was dealing with the other commissioners and making sure that they were kept apprised of what was happening, because it is an agency of five commissioners, not of one administrator. Depending upon the chairman, some of them would like the other four commissioners to just go away.

JS: Was that a difficult issue?

MS: It can be. I mean, with Richard it could be a difficult issue at times, but he got it. He understood that there was a need to have a consensus or he would not achieve his goals. A very smart guy and completely principled when it came to how things should be done.

JS: He once described himself in a speech as monarchical. Did you see that at all?

MS: One of the Wall Street Journal reporters called him King Richard. I never worked for a king, so I don't know. He is one of the smartest and most interesting people and good people, fundamentally. He and I are still friends, so maybe that tells you something. I still am fortunate that he considers me a friend and I consider him a friend.

JS: Was there any indication from the beginning that you would eventually be working on investment management?

MS: When he first picked me to come and be executive assistant, I made it reasonably clear. Art Mathews, my colleague from Wilmer Cutler, often said that, "if you don't ask, you don't get." I think maybe one of the places where women can sometimes do themselves a disservice is not to ask. It's to wait to be asked, because that's how we're raised. Oh, don't be pushy. There's the old dichotomy, if a man asks, he's being assertive. If a woman asks, she's being a bitch. I let Richard know that it would be nice at the end of a

year, if I survived the year – and I knew Kathy would be leaving sometime that year – that I would be very happy to do that.

The general counsel of the agency, Jim Doty, who is now the head of PCAOB, wonderful, wonderful person, you just could not find a better colleague. He was also helpful in reminding Richard that I would like to be the head of Investment Management, and it came to pass that I became head of Investment Management. I'd like you to know the first thing I did when I got the job and got the office was to put my big picture of Franklin Delano Roosevelt on the wall. He founded the agency. I mean, you can't blame me.

JS: No, no. It sounds like a great idea. So you were appointed officially on November 28, 1990. That's the date I have there.

MS: Is that right? Oh, okay.

JS: Yeah, that's the date I have.

MS: Thanksgiving, okay.

JS: Tell me about the state of the mutual fund market at this point. What was going on in that area?

MS: There were some rumbles that the Investment Company Act was getting in the way of certain things, and that it really needed to be reformed, and that it wasn't necessary in certain circumstances. It was a kind of odd argument for me to hear. As somebody trained in biology, I could understand why if the agent that caused smallpox was no longer extant in the world, you could not find it, it had been eradicated, that you didn't need to vaccinate people anymore against smallpox.

But the idea that because a statute has worked for fifty years, you don't need it anymore, in other words, the concept of fraud, cheating, abuse, overreaching, overcharging, hiding, that that somehow went away, I always thought that was hilarious. There was this kind of grumbling. Also, again, with 12b-1 fees acting as a fuel for distribution of funds, if you could put radioactive iodine on a buck and see where it went, you would see distribution channels, ferreting out into the population generally, where ultimately people might be encouraged to buy funds that weren't suitable, that were too expensive.

There were fair issues percolating because the fund market was becoming the key to Americans being able to save for their future. That was obvious – the defined benefit plans were going the way of the dodo bird, and defined contribution plans were being funded, 401(k)s were being funded with investment company products. That's what was going on then.

JS: I saw a number of news articles that said that the Investment Company Act largely wasn't broken. How did the SEC decide to do a study of the issue? Where did that idea come from?

MS: The statute was celebrating its fiftieth birthday in 1990 and commensurate with that, Chairman Breeden thought it would be a good idea to have us review the law to see if there were places where it had become fossilized and needed some cleaning out, and other places where maybe it was perfectly fine, and people should stop complaining about it.

Basically the statute had worked for fifty years, but it had really been only the last ten that it had been truly put to the test. It was only since 401(k)s became the savings vehicle, and money market funds and 12b-1 fees had created the right formula for the growth of the industry, that the 40 Act had really been put to the test.

Kathy actually had started the study before she left. I inherited it and we pursued it. It's always hard to do a study because you have to take staff out of your regular work. I would not say that the people were jumping up and down, begging to get on to work on the study. I had wonderful colleagues working for me and my associate director, Matt Chambers, who is now partner at Wilmer Hale and has been for some time.

I would say that it was not zooming along. Then, sometime in '91, President George H.W. Bush made a speech about deregulating. We hear these speeches occasionally,

both from Republicans and Democrats and then, of course, ten years later you hear the, "Oh my God, we've got to regulate" speech that comes after. There's a cycle. There's a pendulum swinging. President Bush was concerned that there were too many regulations, and so we were able to rev up the study again, not so much as a deregulatory study, as a comprehensive look at the statute.

I do think that in the 40 Act study – I haven't looked at it for a while, and probably should've looked at it before I came here. I believe we said in the introduction that the old lady had worked pretty well. It was basically sound. There were a few areas where it could use some tweaking. That's how the study came about. There really wasn't much more to it than that.

The other thing about the study, which is not interesting from a scholarly point of view, but just shows you that sometimes things happen for funny reasons. I had Carolina blue all picked out as the cover of the study. It's a beautiful color. Chambers wanted Duke blue, which was never going to happen. Then Richard said, "It's going to be Stanford cardinal," and that's why the study is the red book and the cover of the study is red.

Richard wanted Stanford and he was the chairman, so that's what the cover was. There's more content to it than there is interest in the color of the cover.

JS: Absolutely. I'm not going to quiz you on specific paragraphs of the report, but I did want to talk about its recommendations, just in general terms. The study made

recommendations basically in three categories. I guess the first of it talked about, not really mutual funds directly, but the scope of the ICA, as it concerned structured finance.

MS: Yes. Nobody will call it the ICA, it's the 40 Act.

JS: The 40 Act, okay.

MS: If you call the Advisers Act the 40 Act you will demonstrate that you're a rube. The 40 Act is the Investment Company Act of 1940 and the Advisers Act is the Investment Advisers Act, so we're talking about the 40 Act. The first quiz is about structured finance, right?

JS: Of course, today the type of structured finance that most of the public is familiar with is the mortgage-backed securities. Is this what you're talking about in this report?

MS: There were mortgage-backed securities and other asset-backed securities that technically came under the definition of an investment company. Depending upon how the thing was structured, whether it was a whole pool or partial pool, it either was or wasn't in the Investment Company Act. If it was in the Investment Company Act, there was a line out the door of people seeking exemptive orders to be able to offer these securities.

The existence of the Investment Company Act in those products was a function of history. Fannie and Freddie were issuing these things. They were issuing them as whole

pools, and they were not under the Investment Company Act. If it happened that a partial pool, rather than a whole pool, was going to be offered, then they had to get an exemption from the act. We simply recommended that these partial pools be out of the Act. We did recommend, and I will probably long live to regret it, that one of the big safeguards would be that they be rated.

But that wasn't the only safeguard. There were all kinds of other ways that we thought we were protecting the public, and I suppose in 1992, it worked. Actually what happened was that the following year the commission passed an exemptive order, Rule 3(a)(7) that made the products not have to go through the 40 Act. They still had to have an offering document. All of the other securities laws were still in place. I'd like to emphasize – because the head of the Investment Company Institute, then Matt Fink, is fond of telling me I caused this financial calamity – the great bulk of those securities were being offered outside of the Investment Company Act. It was just the peculiarity of the partial pool.

JS: Did the SEC usually grant exemptions to just about all of the applications or were there pretty –

MS: Yes, it was a pretty standard form of what you had to say, what you had to do. I called it a conga line. It would tie up lots of personnel.

JS: Another area in this first area was exceptions to the private investment company provision of the 40 Act. The study argued that for funds to sell exclusively to

sophisticated investors, that was unnecessary. Could you tell me a little bit about that issue?

MS: The statute essentially said if you offered to fewer than 100 people, actually I think it was 100 or fewer people – up to 100 people – you didn't have to register. We thought offering funds to people with a lot more money ought not to require the protections of the Investment Company Act. The other protections would apply, but not the Investment Company Act. We did not believe could happen without congressional action, and congressional action happened in 1996, I think.

JS: Maybe 1996.

MS: In '96, yes, 1996. The closing days of '96, maybe. That's right, because it was a congressional term.

JS: After the scope of the ICA, the second big area was –

MS: See that? You did it again. That's okay.

JS: Oh, I'm sorry. I did call it the ICA. You're right. The second area of the 40 Act was barriers to cross-border sales, so the internationalization of the security market. What was the study talking about there?

MS: I don't hardly even remember, because it wasn't much of an issue. You know, it was just something that we noticed as being a potential barrier to capital formation, but I can't tell you right now what it was we did. I should've looked at it.

JS: The third area - the area with the most recommendations – concerned the regulation of investment company operations in different ways. One of the recommendations was that the 40 Act be amended to require that a majority of the investment company board be independent. Was that ever acted on?

MS: I think it was acted on later on. It wasn't acted on immediately. I'm pretty sure most investment company boards now are the majority independent. I think the SEC did act on that.

JS: The report also recommended the creation of some new types of funds, such as so-called interval funds.

MS: We were always thinking we could encourage the industry to do something sensible. The truth is that how these products are structured comes from within the industry and is based on their own economic models. The question of liquidity, as it relates to how investment companies invest their money, is an important one. That is, if it is a large cap fund that trades on the major exchanges, well then you can assume liquidity. But if it's a small cap fund, what is it doing being an open-end fund when you are not even sure you

can liquidate securities quickly enough? That is true of bond funds, too, that they don't really trade on such a liquid market, and certainly didn't then.

We thought an interval fund was a great idea, but actually what came along at the same time, which supplanted it, were ETFs. That was an independent thing that had come up during my tenure. We allowed the first ETF spiders to crawl through the agency and be authorized. ETFs addressed the issue by simply having the securities traded on the secondary market, where the funds' securities themselves are what provide liquidity, not the underlying investment. The whole idea of interval funds was to enable companies to offer funds that maybe were redeemable only once a month, or not every day. It was stillborn.

JS: What did the report have to say about the fees that were being charged to investors?

MS: The whole shtick of the SEC, and for those of you who don't know it, shtick means the whole way of thinking, is that people should be allowed to pay what they want. If somebody wants to buy a Lexus instead of a Toyota, and it's the same car with the same stuff except one has maybe slightly nicer trim and you pay double for that, that should be your privilege, as long as you know what you are paying. The trick with investment companies was to have the fees visible.

Kathy McGrath had pushed through a fee table, which laid out the fees. Like with anything else, as soon as you put the spotlight on something, then the fees will tend to

migrate to where they are not so visible, so maybe in commission charges and, quote, soft dollar payments back, rather than actual direct fees to the investor. But there was an ongoing effort of the SEC – there still is – it's an ongoing, never-ending effort to encourage people to recognize the impact of fees. I think the SEC's view would be everybody should invest in Vanguard. Why would you buy any other fund? Because people do and people want certain kinds of services, and I guess the issue of fees is going to be with us for as long as there are choices.

JS: Of course, at this time Jack Bogle, of Vanguard was traveling around the country and talking about high fees.

MS: Well, yes, exactly. Bogle lives as he preaches. One day I was supposed to have a meeting with him at the SEC and I was running late, so I went racing down to the Roy Rogers in the basement to get a hamburger to grab before the meeting. And who's standing in line getting his own hamburger but Jack Bogle, who had come down from Philly on the train by himself, no acolytes, no stream of shirts, just him with a briefcase? So I said, should we dine down here or should we dine up in my office? We had a great time. He's wonderful.

JS: There's a lot to respect in that.

MS: Yes.

JS: The report also recommended the creation of what was called an advertising prospectus that would take the place of a regular prospectus.

MS: Right. Again, this is another never-ending wish. I think it's a fool's errand, but nonetheless, I had the same errand as my predecessors and my successors, trying to get a prospectus short enough and readable enough, so that the average American would actually read it. There is still that effort. There were all kinds of different proposals for shortening the prospectus and making it more readable.

Maybe if you could put it to some kind of rap music and have it come down on an iPod, somebody might listen. My mother-in-law would spend more time worrying about what cut of chicken she was going to have for dinner than what the nice boy at Paine Webber was telling her she ought to invest in. I mean, it is just how we are.

JS: At the end of the day, you can't force people to take their medicine.

MS: You can't force them to read and you can't force them to care.

JS: Were there any major issues that were considered but did not make it into the study?

MS: We're talking twenty years ago. If you're asking me whether there was anything we were told we could not discuss, the answer is flatly no. I would remember that, because I'd

remember being mad about something and there was nothing that I can recall that we were not allowed to raise and launder and analyze and chew through on this study.

JS: When the study finally came out, how did Chairman Breeden and the other commissioners react?

MS: They were very supportive. We kept them informed all along. I mean, we're not stupid. We would do what I call the Stations of the Cross all the time to make sure each of the commissioners was – and it's as it should be. I'm not cynical about that at all. I did teach administrative law. The commissioners are the agency. They flat out are, and the chairman is the head of the board of commissioners. Those of us who are on the staff are their servants. We are not there to make policy ourselves. Nobody appointed us, who was a president, and confirmed us, who was the Senate. So it was as it should be.

JS: One newspaper article called the proposals the most sweeping deregulation of the fund industry in more than half a century. Did you see it as a deregulation?

MS: No. You take a statute that's that involved and has so many provisions – we didn't go through all the provisions that didn't need to be changed. We went through those that we thought could use some change. It started as, "Let's have a fresh look at this fifty-year-old thing," and you're going to find some things that you can argue about.

What's interesting is that this study occurred before the telecom revolution. When I came back to the SEC in '87, there were two computers in the investment management division. One of them was in Kathy's office, and she didn't know how to use it, but she did want it in her office. The other was rented. I said, "I don't care where my office is, but I won't work without a computer," because I had one at Chapel Hill. If that was 1987, by '92 everybody in my division had a computer, and I prohibited them from giving their secretaries things to type longhand. "Don't tell me you don't type. You're drafting and you'll learn how to do it."

I think that the telecom revolution has made such a difference, the way people now get information. I know that Chairman Cox tried with XBRL to juice up the disclosures again. But no, this is a long way of my saying I don't think it was deregulatory. I think it probably was not revolutionary enough, but we were pre-internet, pre-e-mail, pre-digitized communication.

JS: So you were working within the context of the times. Overall, how would you rate the implementation of the study's recommendations? Do you think that many of them were implemented?

MS: I think the ones that were meant to be – like the advertising prospectus was not, but other things were, that were of similar nature. Cross-border sales I can't tell you, because I just never really focused on that much. The structured finance issue is a sensitive one, but I

think we were right to say, "Get this out of the exemptive line of the SEC. Most of these things don't need to be exempted, and it's silly to have some of these caught in it."

Do I think what happened subsequently is horrible? Yes, I do. I'm not privy to why these things happened the way they did, and it seemed to me that it was particularly bad in this past decade. The one thing I will not agree to is any suggestion that the SEC, the staff itself, did not want to do a good job. The same people, the same mentality, only a generation younger, now work there and worked there when I was there and they cared just as much as I did about getting it right and protecting the investor.

JS: Did you have much contact with Congress during your time with the SEC?

MS: I had quite a bit during the year I was executive assistant, because Chairman Breeden was called on to testify quite a number of times, and preparing him for testimony was always an exciting, adrenaline-inducing experience. He often was still writing portions of the testimony on the way over. He was very careful and excellent giver of testimony. He took it very seriously.

Sometimes the timing of how we got things over and when we got them over was a little challenging. I had a lot to do with congressional staff, not with elected officials. I had almost nothing to do with elected officials in my tenure as a government employee or since I have been in private practice. I can tell you I have met maybe a handful of them.

JS: Would Chairman Breeden send you over to the Hill to brief congressional staffers or they would come over?

MS: I would be sent over to the Hill to brief congressional staffers. We had a wonderful series of people who were in charge of congressional relations and I wasn't that person. I think the current chief of staff at the SEC actually has the Hill as her background. But I didn't. I never worked there. There was always a person who was in charge of that congressional liaison office. I was frequently involved in talking to the people on the Hill.

I must say again, as with my little speech about the commissioners are the agency, Congress is Congress and the White House is the White House, because they're elected, and bureaucrats aren't. So I always tried to be straight up and not play games, and didn't care if it was Republican or Democrat, anybody who wanted us to tell them what we were doing deserved to know, and that was pretty much it.

JS: Was Congress interested in the mutual funds issue at all?

MS: I wouldn't say that the mutual funds issues were high on their agenda. More of concern to them was the whole question of functional regulation and who should regulate what – the same things that, to some extent, vex the country even now, you have bank regulators, you have securities regulators, you have commodity regulators, the whole relationship of the different agencies, whether they were cooperating. The banking model of safety and

soundness versus the securities model of rip their throats out, how did that all fit together? I do not believe that once I became division director I had nearly as much to do with going over to the Hill as when I was Richard's executive assistant.

JS: Congress also did some work during this period regarding the creation of a secondary market in asset-backed securities. I think there were different bills in the House and the Senate and one proposed the creation of an agency like Fannie Mae, Freddie Mac, that they were going to call Velda Sue. Did the SEC take a position on this issue at all?

MS: I don't remember us taking a position on that, no. I mean, I just don't remember. They may have.

JS: In February 1993 you announced your intention to leave the SEC. Was five years just enough or was it because of the change in administration?

MS: The change in administrations meant that Richard would be leaving. It also happened that we were reaching a point with the tuition of our daughter's college that, either I left the SEC or I stood out in the evenings with a cup. I think that the new chairman always deserves to appoint his own people in those positions. It was only a matter of time before the current division heads would leave anyway, so it was the right time. I asked Richard and got his permission. I would not have left if he had said no.

JS: Of course, he left a few months after that, I believe.

MS: Right and that was the point. We knew that he was going to be going, and he was very gracious about my leaving a month or so before he did.

JS: Right. And then you rejoined Wilmer, Cutler & Pickering, as a partner now.

MS: Yes, as a partner. Seventeen years from my beginnings. I guess seventeen years since I left.

JS: Had the firm changed much?

MS: No, I didn't think it had. It's changed a lot since, but when I came back it was still the partners meeting every Tuesday for lunch, and very much an Athenian democracy, the managing partner having as his job hearing all the complaints from all the other partners, and graciously trying to resolve the issues. It was a great, great firm to come back to.

JS: What sort of work did you focus on?

MS: I can tell you, except what does this have to do with the SEC Historical Society?

JS: It doesn't necessarily. We're interested in your career as it deals with financial regulation broadly.

MS: Once I got here I was involved in a variety of things having to do with investment companies, investment advisors. I can't really go into specifics.

JS: During this period you were required to register as a lobbyist?

MS: Yes. At first not, but then the laws became stricter, and I obviously would never risk not being in compliance. One of the sidelights of being the Director of Investment Management was being in charge of the Public Utility Holding Company Act of 1935, known is PUHCA. There were efforts to repeal PUHCA that went back many years. I was involved with some of those in my work here at Wilmer, Cutler and Pickering. It was largely in connection with that that I was a lobbyist, but there were also some things dealing with that bill that passed in '96 where I think I was also maybe involved. I don't remember.

JS: Did you deal with any of the issues that you had dealt with in the study of mutual funds?

MS: I'm thinking that I was involved in some way in the raising of the bar for private investment companies to allow for more qualified investors to invest in such a thing without the company having to register.

JS: That was the National Securities Market Improvement Act?

MS: NSMIA, yeah, I think so.

JS: To finish up, I'd like to ask you just a couple of final questions. First of all, the relationship between the political world and the SEC – do you feel that the SEC is pretty independent from broader political trends or does it tend to get caught up in them?

MS: The SEC was always more closely monitored by the Hill than by the White House. That is, even though it's an independent agency, it's an executive agency. It's not a creature of Congress. The number of inquiries from the Congress could be two feet high for every one inch that you might get from the White House, but at least during the time I was there, and I think even now to the extent they can do it, the SEC has tried very hard not to be a political animal.

I worked at the EPA for three months, from summer of 1980 until November 1980, and got a real taste of what it is like to be at an executive level agency where there is an administrator, not a commission, and where the issues are highly political. I was sitting there with studies showing us the figure of pesticide was hard on bats, but rats didn't mind it and insects loved it, and trying to make some sense out of that for policy for human beings, and having the chemical industry screaming at me at one side, and the environmentalists on the other, and the Hill yelling.

There's no market for fraud. Nobody is yelling, "Let us do more fraudulent things, please, please!" It's really a question at the SEC of trying to gauge it right between too

much regulation, which really can stifle capital formation, and too little, which can really stifle capital formation, if you get a blowout like you got a few years ago.

You know, God bless it, but I think the SEC is always trying to get that right. I've never met anybody who went over there saying, "How can I give things away or screw the American public?" It makes me really angry when I read stories that ridicule the SEC. I'm sorry about Madoff. I would not use the words that I readily could use in describing him and what he did, but I know that my agency and the people in it have never not wanted to do the right thing. So, there.

JS: You just mentioned the financial crisis of the last couple of years. Has that changed your view of securities regulation at all?

MS: Well, it hasn't changed my view, but I'm somewhat mystified about what happened, about what during some of the years between the mid-nineties and 2007 and 2008, what was happening? There were clearly some things that during the time I was there and during my tenure, we may have laid the seeds for by loosening things, especially in the structured finance area. But we didn't say, "Now, go out and rape, pillage and murder." I mean, we thought there were plenty of protections. It doesn't change my view.

I don't understand what happened. People have said the budgets were cut. I'm hoping a good historian like you will get really interested in what caused this meltdown that seems

to me really took wing in the early part of this millennium. Again, I don't blame the George Bush II administration, either. Nobody wanted this to happen.

JS: You mentioned the resources question. While you were at the SEC, did you ever feel that there was a problem with resources?

MS: Only all the time. I remember once making a speech in which I said, "I'm tired of hearing 'we can do more with less.' At some point you do less with less." Yeah, definitely. I was always bitching about that. (Laughter.)

JS: We talked a couple times throughout the interview about the role of women at the SEC. Just reflecting back over your career, do you think that the world of corporate and securities law, for women, has adapted enough?

MS: We have a woman chairman. We have two other women on the commission, although Commissioner Casey, who's done a terrific job, will be leaving. There is a woman head of investment management. I think that women are still struggling in some ways with exactly the same things that I struggled with a generation ago. How can you be in two places at the same time? How can you be in a position where you are having to argue with your spouse about whose turn it is to stay home with a sick child? I mean, nobody wants to ever be in that position.

I think there are some aspects of being a woman that may be our biology's destiny. It's certainly more welcoming now. You know, I still look at a picture – I just came back from Bangladesh, where I was working for six weeks, and they try to get a woman in every picture, every picture. It's always eighteen men and then there's this one, colorfully dressed, usually, lovely burst of color. That's how you can find the woman there, look for the one that's nicely, colorfully dressed. It's still very hard to be a wife, mother and full-time worker. Some women do it and God bless them. I don't know how they do it.

JS: Do you have any final thoughts, looking back on your long career?

MS: No. Thank you.

JS: Marianne Smythe, thank you very much for talking with me today.

MS: Thank you very much.

[End of Interview]