Securities and Exchange Commission Historical Society
Interview with David Bergers
Conducted on August 4, 2015 by William Thomas

WT: This is an interview with David Bergers for the SEC Historical Society's virtual museum and archive of the history of financial regulation. I'm William Thomas. The date is August 4, 2015, and we're in Boston, Massachusetts. Thank you very much for agreeing to speak with us today. We usually start with a little bit of personal background. I gather that you're from this area originally?

DB: Actually, I was born in Mount Kisco, New York, Westchester County. But I came up to this area for college in the '80s, Eastern Nazarene College, and except for a few years away in law school and a law firm in the Philly area, I've been up in the Boston area.

WT: You were telling just before we started that you were a history major as an undergrad?

DB: That's right, history major. I love what history can teach us.

WT: Terrific. Then you went straight to Yale Law School.

DB: No. My first stop was at Pepperdine University. I went to my first year of law school there, and at the end of the year I had done well and felt like a transfer might make a lot of sense. I came to the conclusion that California is a beautiful state, but if I could transfer to Yale, I would do it. I had the opportunity to go to Yale for the second and third year and graduated from Yale.

WT: Had you always intended on getting into law when you were an undergrad?

DB: You know, that's a good question. I think I always thought that the law was a good avenue to get into public service, and it was for that reason that I was thinking law school would be a good option.

WT: And did you have any notions in law school of what you were going to end up doing with it? Did you want to be a litigator, or in corporate law?

DB: Yes. I started out at my first law firm, Choate, Hall & Stewart, with a split between corporate and litigation. I was one of the only people that had—because those are two very all-consuming disciplines. But I think growing up and in college I always thought a litigator is a lawyer, so litigation was on my mind a lot.

WT: What sort of cases, then, did you have at that first firm?

DB: I started at Choate, which was a good-sized firm. Starting out, I just did a lot of document review as a first-year associate, and very soon after I got there, I thought, "I like the people here, but I'd love to get some hands-on litigation experience." So, I left Choate the year after I got there and went to a plaintiffs firm, a litigation firm right outside of Philadelphia called Lowenthal & Abrams, and there did all sorts of plaintiffs work, everything you could imagine. That included commercial litigation. It included personal injury. It included defamation cases, whistleblower cases, and I got trial experience , arbitration, mediation experience.

I met my wife when I was at Choate, and then she moved down and we got married down there. She was a born and bred Bostonian, and after two and a half years in Philly she said, "David, it's time to come home." Her home, that is. I called Choate, Hall & Stewart back up and said, "Listen, I've got some great litigation experience. I'd love to come back." Fortunately, I hadn't burned any bridges and was able to return to Choate and be there about three more years, from '95 to '98. So, the work that I did at Choate that second time was probably the beginning of what led to me focusing on the securities laws, because I represented broker-dealers and investment advisers. I represented one client in connection with an SEC investigation. So I started to understand a little bit more about that space and found it very fascinating.

WT: Was that something you fell into, or were you aiming in that direction?

DB: I wasn't aiming there. What happened was that we had someone who had come from the SEC to Choate, Hall & Stewart named Jim Adelman. Jim Adelman worked for the SEC both in Washington and in Boston, and he was intent on starting up a newer and stronger practice at Choate that focused on the securities laws, SEC, and I started working with him. It really interested me, fascinated me, because so many people need good advice.

They need good counsel in this area. Getting it right and helping companies get it right was really fascinating.

WT: In 1998 you went to the SEC, then.

DB: Yes.

WT: You mentioned earlier that you had wanted to get into public service. Was that something that had been on your mind throughout?

DB: Yes. It was drawing me, and, obviously like many people, I had law school loans, and so starting at a firm where I could work on those loans was something I needed to do. But it was always in the back of my mind that it'd be nice to get into public service, so combining an interest in the securities laws with an opportunity to be in public service was attractive. I had started talking to Jim Adelman because he had returned to the SEC. He was saying, "This would be a great place for you to come." But I also had some cases I needed to finish at Choate, Hall & Stewart.

WT: Was he in enforcement?

DB: He was in enforcement. So ultimately I was able to finish up those matters and then join the SEC. It was a great combination of both the interest in public service and the work that I was enjoying.

WT: Tell me a little bit about the SEC, then. What sort of things were you involved with? You went to the Division of Enforcement.

DB: Yes, I became a staff attorney in the Division of Enforcement. When I got there, I think the office had probably between seventy and eighty people.

WT: This is the Boston office?

DB: This is the Boston office, and that would be both on the exam side and the enforcement side. I was one of the staff lawyers. There were a wide variety of matters that I was fortunate to work on—this was probably the first year and a half that I got there—one involving an investment company and a trader who had exceeded his authority, another one was a Ponzi scheme, another one related to financial fraud, another one was an insider trading case. So the whole spectrum of enforcement investigations were on my plate, and that was very exciting.

WT: Big companies, individual offenders?

DB: Yes, a little bit of everything, that's right. From the big companies, the trader that exceeded his authority, the company there was sanctioned by the SEC relating to supervision and oversight. Then we had Ponzi schemes and other schemes that involved individuals. And there were individuals that were charged, even in connection with the larger entity.

WT: You stayed for a couple years, and then you had an interim at a broker-dealer?

DB: Yes. I started there in ’98. In 2000 I was promoted to branch chief, which is the next level of supervision. But shortly after that, from a financial perspective, I was starting to think it would be nice to stay in this space, meaning the securities space, but move back to the private sector. There was an opportunity at Tucker Anthony, which was at that time a regional brokerage firm. They also had an affiliated investment adviser named Freedom Capital. I went over there to become assistant general counsel at the broker-dealer, and I also served as primary counsel to the affiliated investment adviser that had about $8 or $9 billion in assets under management.

WT: How did you find that experience?

DB: It was great. It taught me a lot. I’m very grateful that I had that experience early in my career, because I learned about how the business functions. I was in the legal and compliance department. I helped rewrite a number of the supervisory procedures and learned how business gets done and how clients get served. That was really helpful to me and everything that I’ve done since then, having that base.

WT: Was that really different from having been at a law firm?

DB: Yeah, because when you're at a law firm, it's a great experience but you're not living the business every day. You're giving counsel to people that are your clients. They take it or leave it. They do what they decide to do. But you're not part of the enterprise and jointly aiming towards that enterprise succeeding for a long period of time. It's kind of in and out for whatever the period of time is. When you're with a company, you're actually part of the enterprise in a much different way.

WT: You were there, then, from 2000 to 2001. Then you were back at the SEC.

DB: Yes, about a year and a half I was there. The reason I left was because Tucker Anthony got bought out by RBC Dain Rauscher. At the time, I think there may have been an opportunity to move to Minneapolis. That was not something my wife thought would make sense for us.

WT: That's my hometown.

DB: Is that right? At the same time, there was an assistant director position—at that time it was called the assistant district administrator position—open back at the Boston office, so I applied for that position and got the position and returned, again, only about a year and a half later.

WT: What were your responsibilities in this new position?

DB: At that point, I probably won't get the numbers perfect, but I was responsible for two branches. That means two branch chiefs reported to me. Within each branch there's usually three to five staff lawyers, maybe an accountant or two, a paralegal. It was two branches of enforcement, so it was just expanded responsibility from when I left, but still investigating cases. I'd sometimes bring them all the way to litigation. There was a trial unit that would sometimes join when a case got to litigation, but I also would be involved in working through trial strategy and investigation strategy.

WT: Roughly how many branch chiefs would there have been, say, at the Boston office?

DB: In 2001?

WT: Yes, around that time, just trying to get a sense of the scope.

DB: I would say there were probably four or five branch chiefs at the time. There were two assistant directors. The other assistant director may have had a third branch. At that time, there might have been over 20 enforcement attorneys, somewhere in that number.

WT: Were the responsibilities divvied up in any particular way between you and the other assistant district administrator?

DB: I think that I probably stepped into the shoes of the person who had departed as assistant. That was David Marder, and he went to private practice. I think I took over the branches that he was supervising.

WT: Were you still seeing that whole gamut of cases?

DB: Yes, a large variety of cases. What was interesting—and we may get to talk about this later—is the Boston office has always had a very interesting mix of cases. There is a significant focus on investment adviser and '40 Act cases, just because of where we are. We have so many mutual funds andhedge funds in Connecticut and Massachusetts. There's always a focus on investment management. But we also saw some really interesting cases on the insider trading front, interesting financial fraud cases, and always prime bank schemes, and Ponzi schemes -- so a really interesting mix.

WT: Those sorts of things like insider trading, Ponzi schemes, are always there as part of the background?

DB: Yes, absolutely.

WT: Maybe we'll talk about some of the specific cases later. At this time, when you come back to the SEC, there are a couple of big new sets of rules. First there's Reg FD, and then there's of course Sarbanes-Oxley. Did that affect the enforcement cases that you were overseeing, those new rules?

DB: Yes and no. Anytime there's a new rule, there is a bit of ramp-up, so companies and individuals are getting used to the new rules. When you're in enforcement, as enforcement lawyers, we are looking at the new rules and what the impact was on firms and keeping our eyes open for potential violations of the new rules. During the period I was there, we had investigations relating to FD. We would always look, once Sarbanes-Oxley was in place, at the CEO and CFO certifications. Did they make their certifications? What was their approach for making the certifications? If there was a financial fraud, that would be something we'd look at as well: What were the rules in place that govern what is supposed to be done internally? Did that actually happen?

Any time there was a rule change that affected and changed how we investigated, we would have taken that into account when we looked at matters.

WT: Is there any sense that, as companies are getting used to new rules, that they're feeling their way around the meaning of them? Do you see that at the SEC level?

DB: Yes. We would often hear from companies the concern about regulation through enforcement, particularly when there was an issue that was not fully resolved—whether it's a new rule or whether it's an old rule that hadn't adapted to new technology. The question was whether we were enforcing something that people didn't really understand was a rule, or didn't understand our interpretation? Then, a few years after a rule's in place, people start understanding what's expected. I think any time there's been a new rule or new amendment, there's been a period where people are really trying to understand what they are supposed to do and how to get it done, and expressing significant concern anytime enforcement would investigate. It's clear from my experience that regulators need to be aware that most firms are trying to get it right. They just need to understand what the expectations are.

WT: One of the things I've heard is that on Reg FD in particular that there was a grace period in the year or so after it was put into place. Did you get direction on things like that, or on just general enforcement priorities from Washington and the Enforcement Division there?

DB: I'd answer in two ways. One, we did certainly get some direction from Washington in terms of priorities for the Division of Enforcement, whether that was Dick Walker or Steve Cutler or Linda Thomsen or Rob Khuzami. Our directors of Enforcement would articulate visions. Our commissioners would talk about what they were most concerned about, and that would help us to prioritize. I don't remember ever hearing from any Enforcement director, "We're going to give grace periods." But I think the focus was more on, "These are our priorities."

WT: Were there any certain priorities that stuck out to you as particularly significant during your time at the SEC?

DB: What Linda Thomsen would often say is that we have a broad set of responsibilities, and we really need to cover the waterfront. So, from her perspective, yes, we needed to be attentive to new issues, but we also needed to make sure we were doing the bread-and-butter cases that are so important to the integrity of the markets. I remember her saying that a number of times.

As different issues arose and came to the forefront, there would be a certain amount of additional attention that we would devote to those issues because it was clear that this became a higher priority. For example, in the early 2000s, market timing was something that was certainly not the top priority of any office. But after September, 2003, when Eliot Spitzer filed the Canary case, that became a higher priority. Some priorities were driven by external events such as that. Other priorities were driven by internal work and internal review of the types of complaints and trends that we were seeing.

WT: That is one of the things that I wanted to talk about in some detail, those cases that came up in that period. First of all, you mentioned earlier that, being in Boston, you do tend to see quite a few investment management cases basically no matter what historical period we happen to be in. Did you have any sense ahead of when this broke and Spitzer filed against Canary that you were seeing more cases in that area?

DB: When you talk about that area, you mean the investment management space?

WT: Yes, in the investment management space.

DB: If you look back at that time period, I think what you'd see is the Boston office generally did bring more cases at the investment management space than any other office in the country, sometimes parallel with New York, but still just a significant number.

WT: By virtue of the significance in the region?

DB: Yes. These were our registrants. There are a lot of investment advisers. I was going to draw distinctions between investment management and investment companies. Your question is did I see a lot of activity in the investment companies? Basically, the answer would be no. Did I see a lot of activity in the investment management space? The answer is yes. At that time, we looked—back in 2000, 2001—at hot IPOs. How were they being allocated? That was significant. You could look at statistical analyses of different accounts that were getting what seemed to be a disproportionate share of hot IPOs, and that would be in the investment management space.

There's always a question of how investors are learning about conflicts, and what are the disclosures for conflicts that are made by investmentadvisers? So we were always looking at that. I wouldn't say there was a high degree or level of activity in the investment company space.

WT: I know that one of the things that was happening at the policy level in the SEC is that there was, prior to all this, a certain amount of interest in mutual fund governance. Did that have an enforcement component as well?

DB: Not as significant, at least in Boston. I think that was an area where our Division of Investment Management wanted to focus on how it all worked, and is it working in the right way for the shareholders and the investors themselves? But that was not something that we were looking hard at from an enforcement perspective, the governance itself. We were looking at governance more broadly, and often that would come to fruition in the public company space. For example, in those years—2000, 2001, 2002—I remember the Boston office brought cases relating to directors of public companies who did not not understand their roles as members of the audit committee. So governance, more broadly, was something that was a focus from an enforcement perspective, not so much at the investment company level.

WT: Of course, Spitzer's well known for his rhetoric and in particular for knocking on the SEC's vigilance in some of these areas, so some of the claims that you see at this time is that things like market timing are common knowledge. What's your reaction to that?

DB: I guess it all depends on how you define that, common knowledge by whom, and what context? Clearly some of the activities that were investigated were activities that we learned had been going on for quite some time, so they were common knowledge for some people. The question is whether they were common knowledge to members of

Enforcement who would be looking for violations of the laws. That's not as clear to me, because I can only speak for what I knew and what I saw at that time.

In my opinion, it was a surprise to most people that were investigating it how prevalent the practices were, how those practices were so designed to benefit the individuals who engaged in the practices. What do I mean by practices? We had a number of different issues. It was market timing and short-term trading by not just investors in a fund, but by the portfolio managers, the very people that ran the fund. To me, when I look back, those were probably some of the most troubling allegations, that you have people that are managing the fund that are engaging in short-term trading.

WT: How often would cases come from things like inspection and examination? Of course you have the staff in Boston as well, and one of the claims is that there simply weren't enough resources for those people to be investigating these companies in the depth necessary to uncover some of these things.

DB: There were always something to resource concerns. The fewer resources you have, the more you have to spread your resources across a wide spectrum of issues. At any given time, we might have had—it changed throughout the years—but anywhere from 1,200 to 1,300 registered investment advisers in our region. As far as broker-dealers, I think we might have had around 500 at a peak, maybe down to 400 now, so a lot of regulated entities to monitor and inspect.

Of course you've seen the broad discussion about resources and the fact that, at least on the investment adviser side, there's no SRO, no FINRA. So, if the federally registered investment advisers aren't inspected by the SEC, no one's inspecting them, and that time period can be anywhere from eight to twelve years if you look at the average. In that time, an investment adviser can open and close. That created issues with our ability to find all the issues.

But I think in response to your original question, we actually saw a great deal of referrals from the exam group based on what they did see. And that was really fascinating, the things that would come up. The regulated entity cases were, once again, something that the Boston office brought at a higher rate than the SEC's averages, and many of them were investment adviser cases. It was a great relationship, and that relationship changed over the years. Even back in the early 2000s, there was definitely a focus on what are investment company/investment advisers examiners, and the broker-dealer examiners finding?

I do think that 2003 was a banner year in that it showed the importance of even closer coordination between exam and enforcement. From that year on, you saw even closer integration between the two units. Obviously exam is doing one thing, enforcement's doing another, but that was probably a year where I would say you saw deepening relationships and work together between the groups.

WT: I'd like to stay on the topic for a little bit, so this will be a little bit of a tangent from what we're talking about.

DB: That's okay.

WT: First, would there be certain kinds of things that the examination process would turn up? Would it be more on the accounting side, or would it be some sorts of practices more than others that you would get from them, in terms of referrals?

DB: A big focus always was on the disclosures versus the actual practices. I would say the majority of cases that were filed by the Boston office related to conflicts and how they were disclosed. You see that across the board in almost every single case. What's the disclosure, and what's the conflict that's not being disclosed or not being clearly disclosed? Not all conflicts can be eliminated, but firms need to mitigate the conflicts they identify, and they need to disclose the material conflicts that can't be eliminated.

So when the staff went in, they're looking at: what is this firm doing, and how does that compare with what it says it was going to do? It gets wrapped up and dressed up a lot of different ways, but, ultimately, cases come down to basics: lying, cheating, stealing.

WT: You mentioned a few moments ago that there was an evolution in this area over time, and I'm wondering, since we may forget to come back to it, what exactly did you see in terms of evolution?

DB: I think that the market timing years were the first time since I joined in '98 where you saw what a lot of people would look at as a crisis in regulatory oversight, saying, did we miss something as an agency—or even more broadly than that, as to what was happening in funds, and how do we get to the bottom of this? That necessitated our lawyers, who were not necessarily industry experts, to coordinate closely with our examiners who did know the industry better, and it formed a model that I think lasted, and that's a model that I have seen throughout the years since then.

It's just more close coordination, more committees being formed that had significant involvement from exam. At that same time, in enforcement, there was an interesting change. We had a group which you've probably heard about in other interviews. It was called the Branch Office of Regional Assistance, and then it became OCC, Office of Chief Counsel. The current head is Joe Brenner. Joan McKown, for a long time, headed that office. In 2003 and '04, they were organized geographically, so there would be a person or two that would serve the Boston office, the New York office, maybe Chicago or something like that, and they'd help you get your matters through, help get comments from all the divisions down there.

I believe it was in 2004, Steve Cutler made the decision—and probably Joan was involved in the decision too—"We're going to change the Office of Chief Counsel to be substance-based, specialty-based," so that one person in there was responsible for investment advisers, investment company issues, another person responsible for broker-dealer issues, another person responsible for public issuers, trying to get more expertise and knowledge into the Enforcement Division itself and adding to that closer coordination with others with expertise.

WT: You yourself actually had a change in title to associate district administrator. That was around this time, I think?

DB: Yes. In 2003, I was promoted from assistant district administrator to associate district administrator. What that meant effectively was that I was in charge of enforcement at the Boston office. That was probably in the middle of 2003. I don't know if the numbers all remained the same, so let's just say there were four or five branches, a couple of assistant directors, and then I was in charge of that group.

WT: As far as the unfolding in these cases, it didn't start out very well for the Boston office. Basically there was the Putnam case, where there was a whistleblower who ended up eventually going to the Feds. Then, eventually, it goes to the Massachusetts regulator, and they're the ones who initially open the case. I guess that this had fallout here in the Boston office. Maybe you can talk about that.

DB: Sure. There were a number of articles that came out relating to a whistleblower who had said that he had come to the Boston office of the SEC first, that the Boston office didn't act on his complaint, that he went to the Massachusetts securities division, and that division did act on his complaint. The question was raised, what is the SEC doing?

What is the Boston office doing? The full story is never always laid out in the papers, but the impact of that was significant to the office, because we had people that were just incredibly committed, incredibly devoted to the protection of investors who saw those articles every single day, and it really was disheartening.

What I can tell you is that, actually, it was an opportunity for us to say, or, regardless of whether the public information was fully accurate, what we know is true is we always want to make sure we're listening to every single whistleblower, regardless.

WT: There's a large volume, of course, that you have to deal with.

DB: Exactly. The question is how to do it in the right way. What's also interesting—and this comes back to my earlier point, that some of the worst conduct that I saw was conduct relating to the actual investment managers themselves, portfolio managers. The allegation by the whistleblower that went to the SEC and then went to Massachusetts was that there was a group of investers trading in the fund, and that was being allowed. One thing that we always were limited by is what was the language in the prospectuses? We would look at prospectuses. If a prospectus says, "We do not allow this," then there was an obligation on the part of the mutual fund manager not to allow it. If the prospectus said, "We may stop this," or, "We may prevent it," it changes completely the strength of a case alleging a disclosure violation.

So one of the difficulties that didn't get a lot of play in the press was that some of the disclosures by fund companies, including fund companies that we're talking about, were of the "may" variety, which meant it was difficult to show a violation, even if you didn't like the conduct. There were other legal frameworks under state law that say, if it's an unjust and unequitable practice, you can bring an action. For us, what we had to show that there was actually a misstatement, and that was harder for us to do, given our parameters, than other regulators.

WT: After this, the number of cases expands, and I guess there are several here in the Boston area as well as in other parts of the country. Tell me a little bit about how the office became involved in that and how those cases developed.

DB: Without getting into any particular case, again, it was a natural outcome based on where we are and the number of mutual funds here. Once itbecame clear that this was a practice in some funds, it was natural that we need to look at all the fund companies or a significant number of them to see what's going on.

We had a number of these fund companies right in our backyard, so we became very much involved not just in following up on issues that came out with the first filing, but in looking more deeply across the fund companies in the region. As a result, from '03 to '05, we brought cases against several mutual fund companies with very significant settlements relating to practices that became more public in 2003. They were different. Some were about, "The prospectus disclosure says we don't allow this," and yet they did.

Others were about portfolio managers and other insiders trading in the account. But all of them related to the short-term trading.

WT: As far as cooperation with other offices, of course there are the state regulators. Were you working on some of the same cases that Eliot Spitzer was working on? Did his authority, did the Martin Act extend up here to businesses based in New England but that may have traded in New York?

DB: There were definitely cases where we worked alongside Eliot Spitzer's teams. There were other cases that we worked together and coordinated with the Mass. Securities Division and other states. The one thing that we saw with the states is that they had a big advantage, and the big advantage is that they were nimble, they were able to move quickly, that's a real positive aspect, and it's something that we tried to change as we moved forward, too, is how do we move more quickly? But that came later. We took a long time to change some of the practices that we'd had in place.

But that was something that always was hard, because the state was always ready to move before the SEC was. But it was also good because the state was sometimes the early warning mechanism, where they were going to hear about an issue or a complaint first, and if we develop a good relationship, we can work with them. That was also a change, I'd say, from 2003 forward. From 2003 to the time I left in 2013, there was a real growth and strengthening of the relationship between our office and the Massachusetts Securities Division. The person in charge of the division, Bryan

Lantagne, really cares about investors and just wants to do what he can to protect them. So I think coming to terms and understanding that we're coming from different places, we have different mandates, but we share the mandate of protection for investors helped us over the ensuing years from '03 forward to improve our relationships and work more closely together. That was probably one of the strongest relationships that we ended up having with a state.

WT: What was at the root of their ability to be nimble, as you put it? Of course Spitzer had the Martin Act, which was specific to New York.

DB: Obviously every state has its own parameters for enforcement, and legal parameters for bringing a case. But what they also could do is issue a subpoena the same day they heard about a problem or a question. That's not something we could do until 2009. We had to spend several weeks. Unless we were going to get an emergency formal order giving us subpoena authority, we needed to go through this significant process with comments from the divisions, get to the Commission, and then issue a subpoena. It took a lot longer to get things done.

WT: In developing these series of cases, what was your experience with the companies themselves? Did they tend to be evasive? Was there a level of cooperation once this was cracked open?

DB: I think this was a really tough time for a lot of mutual fund companies. Yes, we uncovered practices that shouldn't have been in place, but it took that industry by surprise. The mutual fund industry had not really had a significant set of negative regulatory issues. . So I think it was hard for them to figure out how to deal with this, because they just hadn't addressed it.

I don't feel now, looking back, that we faced a lot of opposition or a lack of cooperation. It did take a while just to work through the issues, because a lot of analysis needed to be done and trading needed to be reviewed to really understand what happened.

WT: There are some later cases, then, that develop as well, certainly things like the valuation of mutual funds. Then I know that there was, just from reading the newspaper archives, a probe into whether or not people were receiving gifts at Fidelity. Did those stem off of these cases, or were those separate issues?

DB: They were separate, but they demonstrated the principle that was made clear in 2003, that there's no one that gets a pass. I'm not saying that meant that mutual funds got a pass, but it means that everyone may have an issue, and we've got to make sure that we are diligent, to keep checking everybody. I do think the market timing cases brought mutual funds to a higher degree of scrutiny going forward than had existed before that—again, not necessarily because one led to the other, but just that there was, I think, a higher level of scrutiny applied to the funds by Enforcement after market timing.

So yes, we were really looking at all aspects of valuation. We had the valuation case related to a major mutual fund that held mostly mortgage-backed securities, and it was overvaluing those securities. One of the problems was, it just didn't have the right system in place for valuation. It would rely on, for example, a broker that would give price quotes but wasn't actually offering to purchase the securities. They just weren't reliable pricing mechanisms. That ultimately emerged to the detriment of investors. Once again, that's a disclosure issue.

Giving gifts and getting trading business raises the question of whether a trader is using investor assets or fund assets to benefit the trader. So once again, it ends up being very simple. There's a lot of rules, but how are you taking care of investors' money? How are you disclosing to investors what you're doing with their money? That's the heart of just about every single case that gets brought in the investment management space. Actually, I would say almost any space, but it does come down to those basics.

WT: Coming back to what you were saying about how this took the industry by surprise, was it your experience once you started developing these cases that their compliance was not at the same place as, say, broker-dealer compliance would be?

DB: That varied, I think, from fund to fund. I think every fund felt like they had a good compliance structure in place, and I think in many aspects they did. But I also think that there were certain things that compliance just wasn't overseeing, wasn't looking at within the funds, and was actually at times surprised to find that this was a problem. Again, I don't think that we went in and found the compliance programs to be missing, but there were gaps.

WT: Another element of this is the level of penalties that you sought, which were quite large in a number of these cases. Were those based on formulas to the damages that had occurred, or was there an attempt to be punitive or to set a precedent in this area to discourage this culture?

DB: This teed up another interesting problem that the SEC had, that we could not seek restitution. We could only seek disgorgement. What we were trying to find is a formula that allowed the SEC to recover for investors the losses that were created by virtue of the short-term trading, the dilution of the funds. So what we ended up with is the disgorgement as a restitutionary form of disgorgement, trying to focus more on how much had been lost from the fund as opposed to how much the fund managers had collected. It still had to be within this range, though. We couldn't get back more than they had collected, but we looked at the restitution amount as kind of a way to measure that.

Then, as far as the penalties go, which is I think where your question is directed, they were high penalties, but in part the nature of the penalties was driven by the significant amount of harm that was done. Penalties are punitive in nature. Penalties are not intended, at least at first blush, to recover money for investors. It is intended to say, "You did this. You shouldn't have done it. There were certain factors as a result, and this is the penalty that you pay for it."

I do think that there was an effort to think about what do these penalties mean. What messages are they going to send? But I think also the penalties were driven in part by how big the damages were.

WT: The last thing that I want to ask about in this area is your personal involvement. I gather that you were quite directly involved with all of these. Was there a heavy coordination responsibility, since they were all related cases?

DB: Yes. These were the priority cases, the biggest ones we were working on for those two or three years, and as head of enforcement I was on most of those calls. We had nationwide calls. Actually, Mark Schonfeld, the former head of the New York office, was tapped as one of the coordinators, because obviously the New York office had a lot of these cases as well. We would have weekly calls. Steve Cutler was on these calls, I was on the calls, and a number of others. I would work to be coordinate -- within my office -- all the different investigations.

WT: Is there any element to this whole set of investigations that we haven't really gotten out? I've asked my questions.

DB: I think two things that we've already mentioned. The first was the importance of close coordination with the exam group. The second is the importance of industry expertise within enforcement.

WT: The other really specific and high profile area that I want to ask about is that the Boston office in this period had been noted in the case of Harry Markopolos, who was whistleblowing on Madoff. The Boston office tends to come out rather well in that story as it's told by Markopolos. I'm wondering if you're able to offer any insight on the Boston office's experience with that.

DB: I knew Harry Markopolos pretty well. He had come to us a number of times, before all of this broke, on other cases. He had come to us with some thoughts about what fund companies were market-timing. He had some other observations. I had seen that he had, often, a good sense of the market and what was happening. Sometimes the issues that he would raise would be issues that we had already been working on. Other times, he provided really good insight that we then followed up on. All Harry was able to see is what's on the outside. We had the ability to issue subpoenas and learn information on the inside.

So sometimes, after we issued those subpoenas or asked those questions, we'd say, "Okay, we see why it looked this way from the outside, but it's really something different." There were other times where his observations led to us saying, "Yes, this is going on, and there's a problem." My point is I had some experience with Harry prior to

2008. I can't remember whether I had it prior to 2005 or not. I think probably. Probably in 2003 or 2004 is when I first met Harry and talked to him about different issues.

WT: So you weren't privy to when he first came and raised the flag in 2000.

DB: When he came in 2000, I was not at the Commission. He came in that year-and-a-half period while I was gone. In 2005, he did come. I don't believe that I met with him when he came, but I was very much aware of him coming and meeting. And I do remember that after that meeting we talked, and here Harry was raising concerns that the trading methodology utilized by Madoff didn't seem right, and that there was a relatively small accounting firm that was doing the accounting. And that was something that piqued the interest of the head of the office at that time, Walter Ricciardi, because Walter had come from twenty-five years at PwC, so he knew accounting.

But also at that time, we were in a situation where we were trying to figure out, how does each office work? What does each office do? What are the cases that each office works on? And here was someone that is working out of New York, and so it just made sense for Walter to send an email down to New York and say, "Listen, we got this information. We don't know what's going to come from it, but you guys should probably take a look." That's where we were coming from. We learned about something, it seemed interesting, and we sent it down to New York.

Obviously after 2008, after Madoff confessed, there was a lot of hand-wringing about what happened and who did what and who knew what. What we were focused on during that whole time is, we're one agency, so maybe if you look back and say different people had different roles and wish this had happened or this had happened—what I always was certain of is that everyone involved in that matter was acting in good faith. Through a combination of insufficient resources, and maybe due to a lack of industry knowledge, we missed it. We missed it as an agency.

So I've never felt like one group should be touting its role while another group should be essentially punished or vilified. We're one agency. We missed it, and we learned a lot from it. That's where I come out in the whole thing. Even after the Madoff matter came to fruition, we continued to have a good relationship with Harry. He had interactions with not just me, but others, about things that he sees. I think that when people heard from him after that, it may have been treated a little differently, given the notoriety of Madoff. It just highlights the fact that some of our best information is going to come from individuals in the industry, and that no matter how people come across, no matter what you think, if they're coming with information, we've just got to make sure we're handling it in the right way.

WT: I gather from what you're saying—the way the story is told is that the Boston office and the New York office, there was some friction there, and that that's the reason why it didn't get picked up. I gather that you would disagree with that, based on what you just said.

DB: Yes. I really don't see it resulting from friction. First of all, I don't have a direct window. Yes, I've read the inspector general report. I know what's said to have happened. But other than that, I didn't have a direct insight into what was happening at that time. When I read it, it sounded to me like there were resource issues, there might have been, again, less industry knowledge. There might have been a worry about what would happen: if I subpoena all these counterparties, how am I even going to review all the information that comes in?

Everyone is extremely sad that it happened in that way, but, in fact, I thought sending it to New York was an example of working together, partnership. I guess I never felt that regional set of tensions as being part of any of this.

WT: Thank you very much, very interesting insights on that. Now I'd like to do more of a survey as to the different kinds of things that you would have seen from the enforcement perspective here in Boston. First, accounting frauds, of course, the Enrons, WorldComs, et cetera period, is not the end of it. You do continue to see cases in this area. I know that GE was a big one that you saw here at that time. I'm wondering if you can talk a little bit about whether the manner of those sorts of cases would have been different in the wake of Sarbanes-Oxley, or would they have still been the same things you would have seen before?

DB: Well, I think it's interesting. If you look back to WorldCom, Enron, you don't see that kind of case in the same way ever since Sarbanes-Oxley has come into being. An argument could be made that more regulation and more attention to controls has really made a difference there. Yes, there continued to be financial statement cases, financial fraud cases, but the size and volume and nature of them is different. Back then, it would be a lot of revenue recognition cases, and timing of revenue recognition, and then your cases where the revenue was nonexistent—that's true, too—round-trip transactions.

One of the things that we always looked for, and of course now you know there's a new task force, the Financial Fraud Task Force that was set up after I left the SEC. It was headed by David Woodcock, who's now gone, but really set up a great task force that's doing a lot of analytics into the financial statements. Well, we didn't have the analytics piece at that point, but we would look for companies consistently meeting consensus earnings targets every single quarter. We would look for things like that.

I think the important thing for the SEC is always to remain vigilant in an area even if you think that it's been cleaned up somehow, because if you think it's been cleaned up and you walk away, the problems and abuses creep back in. So financial statement fraud has not been as high a volume since the Sarbanes-Oxley era, and people say, "Is that because there's less fraud?" I think there is certainly less of the type of fraud that it was meant to address. I think that there may be other practices that have crept in. But I also think you can look at it as perhaps there's been some success here. Perhaps firms are putting enough resources into their internal controls. They're saying, "You know what? I'm going to pay for the right person to do this. I'm going to make sure that we're looking for the right infrastructure."

Again, it's never something you want to get away from, and I think the new task force is designed to do just that, to ask, "What are we missing? Are the analytics showing that there are still financial statement problems and that we need to go after them?" But I do think that some of the problems that we saw in the early 2000s actually have diminished.

WT: A couple of people have told me about the importance of journalism in bringing one's attention to these kinds of cases, particularly in that circa 2000 period. Was that your experience that you'd look for restatements of earnings and then hone in on what was the cause of those?

DB: I think that's a really good point. When we read about a restatement, or a CFO stepping down, or a change in auditors, that would be a prompt for us to call the company and say, 'What's going on?'" Or say to the company, "We'd like to talk to the CFO that's stepping down. We'd like to understand the reasons why." Now, companies have more and more in the last fifteen years understood that they will be getting a call, so they proactively call and say, "Hey, we want you to know this is going to happen. Here's why, happy to share with you the reasons that this change is happening." But yes, at that point, our source of information really was the press.

WT: Does this analytics bit supersede that, in a way? It allows you to detect these things without having a beat reporter on it.

DB: Yes, I think so. I think that seeing the analytics of the actual reporting, the EDGAR filings, that those are now in databases that, as soon as it hits, you get it and you're not just trolling through the papers to find things. So I think, yes, that is true. It doesn't take away the importance of good financial reporters identifying a potential abuse in the market, and people within Enforcement saying, "Well, wait a second. That's interesting. Let's get more information about it."

So, I think up until the time I left and even now, there's still a wonderful opportunity for a good investigative journalist—not even on a particular issuer or a particular company, but more broadly, maybe in industry practice—saying, "This doesn't seem right." That could prompt a greater attention from the Enforcement staff, who is overwhelmed, tapped out, lots of things going on, and sometimes it's just helpful to have that brought to their attention.

Now, with that said, the influx of more expertise, greater expertise into the Enforcement Division also serves that purpose. You have people that have been in the industry that have come into the Enforcement Division as specialists and said, "Hey, this was a practice that I always thought was out of whack. Now I'm here. I'm telling you about it." So it comes from both directions. But there's still a role for the news in prompting it.

WT: As long as we're on that subject, I have a superficial impression that the *Boston Globe* actually has, compared to other regional areas, a fairly developed financial beat. Is that your experience?

DB: It was while I was there. Obviously every paper, and that includes the *Boston Globe,* has gone through a downsizing, which means less attention and depth in every area necessarily exists because there's fewer people. There are a few reporters at the *Globe,* including reporters that are still there, that just kept digging and keep digging, and that can be very helpful, just to get an issue out there.

WT: When they decide to pay attention to a case, is it your experience that they pick the ones that are significant, or the ones that are interesting in some way? When one's doing research for these pieces, of course, we look at the newspaper archives, and sometimes it seems to be, for whatever reason, an insider trading case or some sort of scam or something like that that piques their attention.

DB: From the press perspective, I think you always are looking for the hook. What would people be interested in reading about? Some of the stuff that we do doesn't have a great reader's hook, but it's really important. So I think it varied. I think, either when they were conducting investigative journalism or when we would end up filing a case, we'd get the most press when it was an issue that had all the elements. It might be a very senior executive that was involved, or it might be the amount of money that was involved. That's just natural. You're writing because people are reading, and so you're not necessarily going to write about an esoteric change in the rules that actually ends up being very significant if you can't bring it down to a public understanding of what went on.

But I've never felt that was a big handicap. What we always liked was when we did bring our cases the press helped us from a prophylactic perspective. It was a deterrent, because we can't get to every single company. When I was at the SEC, we couldn't get to every activity, but if people know we're on the beat, that we're on the job, then that might deter additional conduct. So the press, in my opinion, didn't always have the same objectives as the SEC did, but it was a really good avenue to get the message out.

WT: Concerning the Boston region, were there cases that had a certain Boston flavor? We've discussed things like investment management companies, Connecticut hedge funds, that sort of thing, but I'm also thinking of the high-tech sector here and if there were aggressive IPO markets and things that arose from that environment.

DB: I think back in the early 2000s, the IPOs were something that we would focus on a lot before the market went down in the early 2000s. But in addition, I think that there were cases that we brought that sometimes involved prominent politicians or prominent business executives that were uniquely Boston or uniquely New England, and that always brought a lot more attention. Or venerable companies, companies that, you think of that company, you think of Boston, you think of New England.

I guess that tees up another issue, which is, there's always this question of how hard does someone in Enforcement seek to enforce the law if they think that they won't be in government forever, and especially if you think, "Well, I'll be in Boston forever, so what consequence is this going to have in my future?" I just never really saw that kind of thinking at the SEC in Boston, or anywhere, even when I was down in Washington. I saw people excited to say, "What's the next violation, and how are investors being harmed?" without regard to, "Well, how does this affect my future?" I would just say that because that, to me, it was really important, that we have a mission here, and we're going to be true to our mission, and that's what we're all about.

WT: Shifting gears, did you have strategies that you used in terms of looking at companies and their culpability for employee actions? I know I ran into a couple newspaper accounts of cases like that. Were you generally able to go after supervisory negligence, or was that something that was challenging to bring?

DB: It depended on the situation. I think the more that we saw that the red flags went to the very top, and that they seemed to be tolerated or even encouraged, the more important it was for us to hold that company accountable, not just the employee. There is a very fine line that we were trying to draw, and we had some judges draw it, between failure to supervise and actual participation in the conduct itself. As I look back, I think the most important thing was just making sure that companies understood their obligation to make sure their employees are getting it right, and if they see that that's not happening, to step in and make sure that they hold them accountable and take care of things on their own.

For me, the lesson learned that I think was the most important—or that I would have wanted companies to learn—is you've just got to follow up. You've got to pay attention, and you've got to make sure your employees are doing the right thing. Ultimately, do you get hit with a fraud charge or do you get hit with a failure to supervise charge? It's not that it's not important, it's incredibly important, but you get hit with neither if you're able to supervise your employees and follow up on the red flags.

WT: When you're going up the ladder, what are the key criteria for delineating whether you're going to bring an enforcement action against a company versus certain executives?

DB: That's a really good question. I think for me the more the executive is involved in the conduct, and actually either directly engaging in it or aiding and abetting the conduct, the more likely it is you ask, "Should this person be charged?" There is a very clear separation that, towards the end of my tenure, I think was made even clearer, and that is if you've got a fraud charge, if you think it's a fraud charge that's appropriate against a company, then there's got to be a person that committed it. You can't just take this nebulous fraud and say no individual committed it. There are fraud charges that the SEC has brought and authorized without individuals, and that is in a situation where there's not one individual, but there are several that, between them, their knowledge and their conduct led to a fraud charge. Even those cases were hard. But once you have fraud, it's hard not to have an individual. On the other hand, if you have non-scienter, or negligence-based charges, those are charges where you really have to think about what individuals will be charged and whether they're charged. That's more a case-by-case scenario.

WT: On the level of, not particularly companies, but some of these petty cases—we talked a little bit earlier about Ponzi schemes, boiler room schemes, that sort of thing—you would continuously see these; was there cyclicality to them? Was there an evolution in their nature? Did they move more towards the Internet, for example, over time, or were there any other changes in their characteristics?

DB: There were a number of trends, and you identified them. There are trends that are driven by improvements in technology. The issue was often, the SEC was behind the new technology, so it would always be playing catch-up. When new technology was used to perpetrate a fraud or a scheme, then we had to figure out new ways to catch it. But the other thing I'd say is, in many ways, those were some of the most important cases. Even if those cases involved $200,000 or $300,000 lost, they're more important than some cases where it was $10 million, because they were real people with life savings totaling $75,000 and they lost everything, and in some of those cases they mortgaged their homes at the suggestion of the person committing the fraud so that they could invest more money.

WT: I noticed you did an interview I think a couple of years ago, where you were talking about things like affinity fraud and those being particularly prominent cases.

DB: Yes, and that's a big piece of these cases where the frauds are perpetrated on the friends and family. You join a church, or you're part of an ethnic group, and you find someone else in your group that is either really happy with someone they're investing with or they're talking up an investment. You have every reason in the world to trust them because you both are together in whatever effort you're involved in or whatever group you're involved in. Those are some of the saddest stories, because there are family members that were defrauded. There are lifelong friends that were defrauded. You look at those things and you think, "Wow, I have a really important mission." And you want to get into the sophisticated frauds and the sophisticated violations because that can protect millions of people, but you can never lose sight of the retail frauds that involve two people or ten people or thirty people and losses of maybe a total of $1 million, because that's changed their lives.

WT: In terms of your ability to obtain restitution for victims, I ran into one newspaper article where it was notable that you were actually able to get 90 percent back in this particular case, and that actually it's very rare to be able to make people close to whole when you do discover these things.

DB: That's true. That's the other sad part of these stories. By the time the SEC learns about it, the money's often gone. We do have emergency court action authority. We can go and try to freeze assets, and sometimes we'll get them. But often, by the time we learn of it, the money's gone through seventeen different accounts and it's been dissipated or you just can't find it. That's, again, the sad story, not just that people were defrauded, but that they really are not going to have a chance to get their money back.

WT: Then there was one or two other cases that seemed notable for their novelty. For example, there was I think a fund, correct me if I'm wrong, that was investing in socially responsible investments and it turned out they were not. Their screening criteria were being violated. Was that a new thing, that one would see this sort of behavior, given the fact that socially responsible funds themselves are rather new?

DB: There was an aspect that was new and an aspect that wasn't. The aspect that was new was that it was the first case that had been brought relating to socially responsible criteria and whether or not the fund was complying with those criteria. The aspect that wasn't was the question I mentioned a number of times: what did you say about what you were going to do, and what did you do? Comparing these two things leads to a determination of whether you kept your word or whether you broke your word to investors. In that case, very similarly to all the cases that are brought in this space over the years, the fund company didn't do what they said they would do. They said they would be socially responsible and follow these criteria, and they didn't. But most cases still boil down to, "Were you telling the truth? Are you complying with your practices? Are you taking good care of shareholders or investors and their money?"

WT: I want to come back at least for a moment to your career. You become the director of the Boston office in 2006. Tell me about the shift in responsibilities there.

DB: It was really interesting. I had worked closely with a number of the members of the exam group already, but becoming director gave me responsibility for both sides of the office, both enforcement and exam. I loved it, because the people in the Boston office were fantastic, really committed, really hard workers. There were always issues to work through and resolve, but people were committed to the cause. What I was able to do as head of the office is, even more, be able to understand the interaction between enforcement and exam and be involved in meetings with both teams. If I felt like there was something happening on one side of the aisle that the other side didn't know about, I liked to bring people together. I really enjoyed that. I also enjoyed the opportunity to interact with other office heads across the country. There were eleven regional offices outside of DC, and it was a good experience to be able to do that.

WT: Were there particular things that you were able to do from a managerial perspective, or was it mainly just this coordination between different groups?

DB: My philosophy always has been to help people to advance their lives, their careers, to find the right work-life balance. I'm firmly of the view that we need to make our workplace a good atmosphere for people, because we spend more of our time awake with our work colleagues than with our families or friends. I was always interested in finding ways to do that, and very open to alternative work schedules, because my philosophy is if you're good in the office, you're going to do a good job outside the office, if that's the kind of employee you are. So we wanted to make it easier for people to be productive, but also to be with their family, with their friends -- to have that balance, but work really hard. What I found is people really worked hard.

The other thing is, probably a couple years before I left, we had formed the Boston Regional Office Diversity and Inclusion Committee and tried to focus on not just hiring and diversity practices, but more broadly, how are we bringing everybody along? How are we making sure that people have opportunities to advance, to grow, to develop, and what are we doing to encourage that? Then, on the pure hiring practices and promotion, what are we doing to make sure we have a very diverse candidate pool? What are we doing to make sure that it's not just people that are relying on their connections to get jobs, but that we're asking, "How do we find the best team out there? How do we find the team that's very diverse in perspective and experience?" Because that's going to bring us to a better place, we're going to make better decisions when we have a team that's thinking in many different ways.

WT: A couple years before you left the SEC, you won a couple of different awards. I'm wondering if you can talk just a little bit about your activities in these areas. One is Law and Policy, what were your interests there?

DB: I spent a lot of time in 2010 and '11 working with a small group on whistleblower rules. We worked together on first proposing this to the administration, then legislation that was proposed both by the House and the Senate, and then finally working, after Dodd-Frank was passed with the whistleblower provision, on the SEC rules for the whistleblowers.

That was a great experience. I worked together with members of the general counsel's office, a few other members of Enforcement, and other members of the team just asking, what is it we need to do, how do we encourage whistleblowers to come forward? How do we do it in a way that doesn't supplant the companies as a resource and entities that want to get it right, too? That was a really interesting experience.

WT: What were some of the main things that you were trying to balance there? I had a couple other discussions with that, so I know that they start giving high rewards to whistleblowers after Dodd-Frank. A separate question, I guess, is were you able to draw on the lessons learned in the Boston office from your experiences with whistleblowers previously to 2011?

DB: I think one of the big issues that was significantly controversial was whether we would require a whistleblower to go first to his or her own company to report it before coming to the SEC. The industry generally was saying, "If you don't require reporting to us first, we have no way to address these issues and we're not going to be able to make it better. It's going to take you reaching out to us and bringing an action against us to make it better, and that's not a good way to operate. It's not good corporate governance."

Our concern was that if we required whistleblowers to report first to their company, we couldn't assess the strength of that company's whistleblower program before requiring that. There might be a program where the whistleblower wants to report on the very people running that program, or the very people that would hear about that, and put themselves in danger of either losing their job or other things that could come of that. On the other hand, we did want companies to act on their own to improve their systems and controls and procedures, and the best way that we learned is from individuals that are inside—the same thing with companies, the best way to learn about problems.

So we ended up with what we thought was the right compromise, and that is that you don't have to bring it to your company first, but that if you do bring it to your company first and then later come to the SEC, you get credit for having brought it to your company, and if your company does an awful lot of work and brings it to the SEC, you get credit for all the work that your company did to dig into the problem.

I don't think everyone loved that, but it was what we thought was important in balancing those aspects. It was interesting. I think the program has worked. There's cases that came out of it that I don't think we would have heard about. Our office was actually involved in granting the last bounty that came from the insider trading bounty program before the whistleblower program. That was about $1 million, and it was to the former wife of a tipper in a hedge fund insider trading case. It was done the day before the new program went into effect.

So we had some experience, as you said, with whistleblowers for a number of years. I also had done a whistleblower case in private practice, more traditional. It was a false claims act case, so I had that background, too. And when we worked on the SEC's whistleblower program, we also spoke to the DOJ and the IRS about their programs.

WT: The other area is labor-management relations. You got an award there, too, in 2011 and 2012. I'm curious about your interests in that area.

DB: It brings me back to the points I was making before. I think that it's really important that we don't rely so much on hierarchy to make sure we're getting it right. You want to bring in everybody, every person and every group that has an interest in what you're doing. The SEC has had a union since the early 2000s, and the president of the chapter for the SEC happens to be in Boston. So, over the years, he and I developed a very strong relationship, and I came to the conclusion that, yes, I'm in management and I can do certain things, but if I team up with the union in saying, "Hey, here's what we'd like to accomplish. This is what I'm thinking," the union may actually have some thoughts and ideas that make it better. So, again, it's the idea of working together and teaming with all the constituents to make the end product better.

WT: You've had the opportunity to work under several different division directors in Enforcement. I'm wondering if you can characterize if there are stylistic differences in how the division has operated, particularly with respect to the regional offices under them.

DB: My experience has been influenced by how closely I've worked with the directors. It's not as if I can really say I had the same level of experience with each director and so this is how I'd rate them or rank them. I do think that Rob Khuzami, when he came in, really was trying to figure out, how do we move to the next level? Even though he brought in a few people from the outside, he also relied on the current structure and leaders to ask, "What should we do differently?" What I really liked about that is he had a great amount of reliance on both the regional offices, the home office, and said, "How do we make this work?" I worked a lot with Rob and with the team that really restructured Enforcement. We eliminated a management layer, created the specialized units. I felt very engaged with Rob.

Steve Cutler and Linda Thomsen, I think they did great work. Remember, I come back to Linda and what she had always said about what we need to be doing – "cover the waterfront." I ended up working more with Linda and Rob than Steve, because I was head of the office, I was one of the office heads. I think they were all really great in their own space, and I really enjoyed working even more closely when Rob came in. Of course, then George Canellos was deputy and then was appointed acting director and I was appointed acting deputy director, I couldn't say enough good things about George and his intellect and passion. I think he's awesome, just a wonderful guy.

WT: Tell me a little bit about that position. It was the last one you had before you left. Had you resolved that you were going to leave the SEC when you took that position?

DB: Yes. Back in 2012, I was exploring opportunities to leave and went down and spoke to some folks in D.C., and really put it on hold because of the idea that I might be able to help down there for a period of time. I didn't actually think it was going to be even five months. I thought it would be shorter than that. I have a great respect for the leaders of the SEC, and a great respect for the institution, and from my perspective, if there was anything that I could do to help down there I would absolutely do it and wouldn't let the desire to leave the SEC get in the way. So that was a wonderful experience, and my colleagues throughout all the offices were so welcoming. It was really easy to move into that role, because I had good relationships with all the people throughout the country.

WT: What were your particular responsibilities?

DB: George really partnered with me. We would talk about cases. We would do case reviews of different offices. There would be some cases where George would say, "Hey, can you take this?" and I'd be the one to meet with the attorneys coming in to talk about the case. It was really a partnership. To have conversations with the commissioners—when Mary Jo White came in, George and I and Joe Brenner, the chief counsel, met with her a few times about enforcement before Andrew Ceresney arrived. There was policy. There were legal decisions. There was analysis. There were meetings. And Commission meetings, of course. Every single week we'd have the closed Commission meetings and George and I and Joe and Matt Martens, then head of the trial unit, would be there to provide insight from the perspective of the division on particular cases.

WT: Going back to the formulation of the more specialized enforcement groups, when did that come into place exactly, and what was driving that at that particular time?

DB: That came into place in the summer of 2009. Rob joined earlier that year. What was driving that was the question of how you get even more expertise and knowledge into the Division of Enforcement? Maybe the way you do it is not by having everyone be generalists but let's get some specialists in here, so we talked a lot about what that means. What should it look like? Should the entire division be all specialty units? Should some of it be more general?

There were a lot of discussions. We ended up landing on five specialized units in five areas that we thought required a lot of expertise and knowledge and where there was a lot of potential misconduct. That didn't mean that those units were the only ones doing that kind of case, but that they would bring a lot of expertise to it, and that all the other staff members were going to be working sometimes on cases within those five groups, sometimes on other cases. But we really wanted to take advantage of the expertise. Take the asset management unit. We hired specialized senior special examiners, or senior specialized experts -- subject matter experts that came from industry -- and they would say, "Hey, when you're seeing this, this is what it means." What a difference that makes, because if all you have are your legal team and your accountants and not someone coming from the industry, it's harder to understand what makes things happen.

WT: Was that organization at the regional level as well, or were those units headquartered in Washington?

DB: It was across the country. The first group of specialized units had heads of the units in Washington, Philadelphia, and New York. Then, every office determined how many units it was going to have in its office. There were only two offices at first that decided they were going to have all five units, because it was a bit of loss of autonomy. Boston and L.A. were the two offices that ended up having all five units.

I think it was a great experience. Every change like that takes time, and there was an adjustment period relating to who's in charge of what and who's responsible. You have a unit head that's making a decision about a case, but if the case is litigated then the litigation staff may be coming from the regional office, so there had to be coordination. Some of the coordinations worked better than others, but ultimately getting that expertise into the division, I think, was a good thing.

WT: We talked about division directors, but of course the Commission itself has changed over time. I've spoken to some of the commissioners, I know that there are divergent opinions on which cases, ultimately, should be brought, penalty levels, that sort of thing. And of course there are differences of opinion as to whether or not enforcement should be a policy tool. Would that be something that you would have to contend with at the regional level?

DB: Oh, sure. Depending on the case that we brought, I'd be down in D.C. talking to commissioners asking really probing questions. Why are we doing this? What's the reason for doing this? What end does this accomplish? Each commissioner would have a different perspective. My role was just to have respect for each perspective and say, "This is why we think this makes sense." Different commissioners were interested in different things. I found those conversations really interesting, and not always easy. I wouldn't always have the answer that a commissioner was looking for.

But our goal was just to say, "We're here to hold accountable those who engage in misconduct. This is how we think it should happen." And the commissioners, they're the boss, they're the client, so they have a right to ask every question, and there would be times where we would take a settlement that we proposed and say, "Well, we can make this change if that makes it easier for oure client to approve the settlement."

WT: You'll have to remind me of the proper terminology, but I guess that it's Mary Schapiro who allows the enforcement division to, I guess, authorize investigations?

DB: Issue subpoenas, really.

WT: Right, rather than having that happen at the commission level.

DB: Yes. That was in 2009 as well.

WT: Is that something that takes place in Washington, or do all the regional offices handle that side of it?

DB: All the regional offices. The authority was given to the head of each office and the head of enforcement for each office, and that was a gigantic change. It allowed more autonomy and let us say, "We have to investigate this. We know it's important to investigate. We know the Commission would think it's appropriate to investigate." Because all you're trying to figure out is whether there are possible violations, so putting the issuance of subpoenas in the hands of the individual offices was a big, big step.

WT: Tell me a little bit about the evolution of your relations with criminal investigations. Was that something that you were always doing, or was that something that developed more over time?

DB: In Boston, we always had a close relationship with the economic crimes unit of the U.S. Attorney's office here in Boston. I remember different heads of that unit coming over. We would have periodic meetings. We'd talk about cases. I would say for at least a ten-year period, there was a lot of interaction. I think it only strengthened. We actually hired a former prosecutor from the U.S. Attorney's office. It always helps when you have people moving back and forth between those offices. It makes you even more sensitive and thoughtful, saying "Maybe this is something that they should know."

So I think the trend was always towards stronger interaction. I remember we appointed a number of our attorneys as special assistant prosecutors, even in the early 2000s. I remember two of our attorneys, Sandy Bailey and Scott Pomfret, tried a case with Paul Levenson, the current head of the Boston office, when he was a member of the economic crimes unit. They tried a case with him against someone who had lied to the SEC and got a conviction. That was probably in the mid-2000s—so strong relationships continued to grow for a long time.

WT: Dodd-Frank, as those rules started to come into effect, were there ones that had a particular impact on your activities in the Boston office?

DB: Dodd-Frank gave the SEC staff more powers, allowed us to bring more cases in the administrative law context. Obviously there's been a lot of discussion about that recently. I would say, in my opinion, the biggest change was the whistleblower provision, because it did give much greater incentives to people who would be in the middle of misconduct to come forward.

WT: I think I've gone quite a bit through my list. We've been going for quite a while and I've exercised your vocal cords quite a bit here, but is there anything in particular you wanted to talk about that we haven't gotten to?

DB: Working at the SEC was one of the best experiences of my life. The people and the mission were so aligned. It was incredibly rewarding. I will always treasure those years, and would never rule out the possible future of coming back and helping out again in some capacity. It was just a great experience. I think you did a great job covering all the issues. You clearly did a lot of research on this.

WT: Thanks. Let me just ask you, then, what is it that made you decide to move on?

DB: I guess I felt that I had come to the point where I had learned a lot. I had gone as far as I could in Boston and spent years learning that job. It was a great experience to be in D.C. for a time, but I wasn't really contemplating moving to D.C. at that point. I also thought it could be good for the Boston office to see a change, too, so I thought this would be a time for me to go to the private sector. Also, it seemed to come to a good point. I had a great experience, first as an office head, then working closely with Rob Khuzami and other office heads in helping to change the nature of the Enforcement Division.

Then, I also was working on the OCIE side, the exam side with Carlo DiFlorio and Norm Champ and helped to restructure these. So I had some great experiences, I said, "Okay, this has been great, and now I'm ready to make a change." I think public service is one of the most wonderful things that you can do. That was reaffirmed for me every year I was there, even though there were some years that were tough. There were some years where, coming in, the papers would be excoriating the SEC, but I knew what our mission was, and I knew how important it was, and I knew that I was going in to a group of people that cared about it, and that made all the difference.

WT: One question that I ought to have asked earlier, but I skipped over it so this is out of sequence, but I know that there were some cases at the Boston office in the hedge fund area and I know that those only became registered after Dodd-Frank. Did that make any difference in that area, whether or not hedge funds were registered, in terms of the ability to detect things going on there?

DB: Sure, it made a big difference in terms of the fact that, prior to that, we didn't have inspection authority. We couldn't go in and say, "Give us your records, show us what you're doing. Show us what you're saying." We always had jurisdiction over fraud, so hedge funds were responsible for complying with Section 206 of the Advisers Act—again, don't lie, cheat, and steal.

So we certainly had cases, Rule 105 trading cases, other types of cases, and sometimes just plain old fraud cases against hedge funds, insider trading cases, all of those could still happen. The change was, though, that when we got inspection authority, we could look more broadly at the conduct internally. So I think that did help both the industry and regulators come to a different place as far as certain practices that may have been less prominent prior to the changes.

WT: Thank you. Finally, you've been out of the SEC for a while. You're back in the financial area, so you had previously spent that year and a half at Tucker Anthony. Is it a similar experience? Is it a different experience this time around? It's a different kind of company.

DB: Yes, it's a different experience. Both were broker-dealers. Tucker Anthony was quite a bit smaller. LPL Financial is about 1,400 brokers and 3,300 employees, and then we support another 4,000 or 5,000 advisers on the custody side. So all together, it's 20,000 people to think about and make sure we have the right systems in place. LPL is also a company that grew very fast, and its infrastructure didn't grow with it, so it's been on a journey, for this company, in a really positive way, to say, "We're going to strengthen our infrastructure. We're going to make sure that we have the right procedures in place."

So yes, it's been different in the sense that I am really trying to help the company through that. One thing that's been impressed upon me is how important the culture really is. The culture is so important in a private company. I feel very good about the culture here. I feel good about the commitment of our top leadership to making things happen in the right way for investors. That's been encouraging.

And things move fast. When you're at the SEC, the people that are subjects of investigations are happy for you to take your time, have meeting after meeting after meeting. Here, you've just got to move forward. You make the best decisions you can and make reasonable decisions, but this is a business and you've got to make those decisions and strike that right balance, making sure that investors are protected and that, at the same time, the business can be successful.

WT: I think that brings us up to the present. Thank you very much.

DB: You're welcome.

WT: If you have anything else, please do.

DB: No, that’s great. Here’s a card in case you have a question that comes up.

[End of Interview]