Securities and Exchange Commission Historical Society
Interview with David Sirignano
Conducted on February 25, 2008 by Kenneth Durr

KD: This is an interview with David Sirignano on February 25^{th}, 2008 in Washington, D.C., by Kenneth Durr. I want to start with a little bit of background to find out when you developed your interest in securities law. Was it while you were in college? Is it something you thought you'd go into?

DS: Probably pretty late in my law school career. If I had a focus in law school, it was in labor law, more than securities law. I did an internship after my second year of law school in the Southern District of New York, working with the Assistant U.S. Attorneys. I just loved the work they were doing and the responsibility they gave young attorneys. I asked them, "How do you do this?" They said, "Well, sorry. The U.S. Attorneys don't hire out of law school. But the SEC is a very similar experience, a great place to work. Go talk to the SEC." I loaded up on securities courses in my third year, and applied to the SEC and went there. I went into the General Counsel's Office.

KD: So was it the public service angle that interested you?

DS: Definitely. I have a bit of a family history of that. My dad was a government lawyer for most of his career in New York City. That somewhat appealed to me. He was both in the Manhattan DA's office and the Waterfront Commission of New York Harbor, fighting organized crime on the docks.

KD: That might have had something to do with your early interest in labor law. Did any of that labor law training translate over to the securities world?

DS: Not a whole lot.

KD: Tell me what you found in the General Counsel's office. Who hired you?

DS: I was hired by Harvey Pitt, but my first day there was Ralph Ferrara's first day there as General Counsel. I worked under Jake Stillman, who is still there, doing appellate litigation. It was just the best training a young lawyer could possibly have to develop legal skills: legal reasoning, legal writing, legal research. It was everything I expected in terms of immediate responsibility. Within the year, I was arguing cases before appellate courts of appeals. It was just a terrific experience. Plus the work they do is great anyway, because it's, by nature, appellate, so you get to focus more on the legal than the fact and discovery part of litigation practice. A good deal of it is amicus practice. So, by definition, if it doesn't sound cool to you, you don't do it.

KD: That wasn't a decision you got to make though, was it?

DS: No. The Commission made all those decisions. But by definition, we were just doing cutting edge work.

KD: What were some of those cutting edge cases you were working on?

DS: I did quite a bit of Williams Act work, which would be significant to the second step of my SEC career, both in terms of private right of actions, under the Williams Act—Section 13(d), private right of actions—as well as available remedies for violations of 13(d), which was a big issue back then. That's when hostile tender offers were heating up; and the Boesky-Millken days, and issuers were trying to defend against what they saw as acting illegally in their stock buying; not making adequate disclosure by bringing 13(d) suits, and trying to get disgorgement of the shares, or prevent the voting of the shares, or somehow block the takeover because of 13(d) violations. Constitutional pre-emption issues, when the states started adopting takeover statutes. The Commission came out—that was during the Reagan years—and said, "No, they're pre-empted by the Williams Act," and essentially fought back most of the defensive style statutes that were adopted in the 1970s, early '80s.

KD: You were involved in taking a look at those, and essentially finding that they were going too far?

DS: Yes, and arguing the pre-emption theories in court as amicus.

KD: What were the pre-emption theories?

DS: The state statutes were inconsistent with the neutrality of the Williams Act, particularly the statutes that require a hearing before you can launch a takeover for a Pennsylvania corporation, or an Ohio corporation, or a Virginia corporation.

KD: Was the Williams Act mostly about tender offers?

DS: Yes, it covers both the formal tender offer process, as well as rapid acquisition of shares under the 13(d) beneficial ownership reporting.

KD: How did you handle those cases? Did Ferrara just divide them up, and say: This is yours, this is yours; and then you report back later? Or did you work on teams?

DS: I would work on a team. As a young attorney, I would be the first line person who was responsible for the research and drafting and then those would normally get argued by somebody else. But eventually—I think after about three years or so—I was Assistant General Counsel, GS-15, and running teams and arguing cases. I think I spent eight years doing that kind of work. In most of the cases where I had a focus, it was on the Williams Act, but I did other things. One of my favorite cases was one we lost in the Supreme Court, which was the *SEC v. Lowe* case. The SEC used to require newsletter publishers to register as investment advisors. We defended that all the way to the Supreme Court and lost. But it was a great victory for the First Amendment.

KD: Did this have to do with insider trading at all? Was there concern about publisher knowledge?

DS: But a specialized type of insider trading where people put out these tip sheets, knowing that there's really nothing going on, to generate a lot of interest in the market, and as soon as the market got excited, they would sell out. The tip sheets were the reason Congress and the SEC said: We need to regulate this. But the Supreme Court didn't buy that.

KD: Now at this point you're in the General Counsel's office.

DS: Right.

KD: You talked about having teams. I never got the sense that the General Counsel's Office was that large. About how many people did you work with?

DS: It grew under Ralph Ferrara, but it grew more on the regulatory side. It essentially added the function of being a second voice, an overseer, of all the operating divisions, and their proposals to the Commission, particularly enforcement. Chairman Williams wanted a strong General Counsel to have a second opinion on enforcement recommendations coming out of Sporkin's Enforcement staff. Ralph was in Enforcement, was a counsel to the Chairman and got promoted to General Counsel when Harvey left. That's the office he built. I did a little bit of that as well—advising on regulatory proposals and matters, but my focus was on the appellate side. Jake Stillman headed that group, and there were something like three Assistant General Counsels working for him, so about three appellate teams, doing it.

KD: How much would the people in the divisions work with you when you were doing your appellate work?

DS: A lot, because we were essentially defending their cases on appeal quite often. They would help us prepare, help us learn the record, second seat us on oral argument. We definitely worked closely with the Division of Enforcement and the regional offices in arguing their cases.

KD: Any other cases that stand out? You talked about *SEC v. Lowe.*

DS: Unfortunately I left that cheat sheet at home.

KD: You said it was about an eight-year period in which you were essentially doing this appellate work, and you were getting all the best cases.

DS: I think so.

KD: Would the Commission decide this? Would Ferrara decide this?

DS: The Commission decided all litigation questions, what cases we would appeal, and what cases we would go in as amicus. You really wrote your brief when you wrote your memo to the Commission, explaining why we should appeal, why we should participate, and what theory we would take. That usually took you right up to the time your brief was due. It took an all-nighter to turn that into a brief that you would file with the court.

KD: So if you could convince the Commission, you were already a good part of the way there.

DS: That's right.

KD: Did you ever have to go actually and sit down before the Commission, and talk about what you wanted to do in some particular case?

DS: Absolutely. Some of those were very heated, particularly in the Williams Act area, because the Reagan White House wanted a very laissez-faire approach to tender offers. And so, to the extent we wanted to argue anything regulatory, it really was a push. You had to convince—by then it was Chairman Shad—that this was the right way to go. We had some very late night meetings with the SEC on some of these cases. One of the cases was *Hanson Trust v. SCM Corp.* It started as a street sweep phenomenon. Hanson was the bidder; he got blocked because SCM found a white knight and placed twenty-five percent of its stock with that company. The bidder announced he was calling off his tender offer, had a three-martini lunch with his lawyers and advisors, went back to the market, saw the market dive after that news, and just swept the street. He went to all the arbs and bought up all the stock. At that point, they bought up something like—I forget the exact facts—twenty-five, thirty percent, so they had a blocking position to the white knight's blocking position just to negotiate something.

KD: Was that chance? Or was that strategy?

DS: That was strategy. Well, that was a disputed fact, whether when they called it off they really meant to call it off, or it was just opportunistic in the afternoon that the stock was presented to them. But the argument was: Can this be enjoined as a legal tender offer? Did they really not truthfully call it off? There was always this tension. The act contemplated that there wasn't any limit to how much you could acquire in the market, as long as you did it in ordinary market transactions. It was only when you did a, quote, tender offer that you had to comply with filing and disclosure and procedural rules that that applied to tender offer transaction. For us to argue that: "Yes, there is a basis to conclude that the market sweep was really a tender offer," was tough to get through the Commission.

KD: Did it get through?

DS: Yes. We argued it. The court didn't buy it. The Second Circuit took a very literal approach, and said the offer was over, and therefore you were free to buy. Hanson only dealt with sophisticated purchasers. Borrowing some concepts from the Securities Act, the court said when you're dealing with just sophisticated people, they don't need the protections of the tender offer rules, so you're free to buy with them. The problem with that is that the Securities Act doesn't have an all holders/equal treatment concept; tender offer rules do. Allowing you just to deal with sophisticated sellers, the people tendering to the bidder, violates that all holders/equal treatment concept.

KD So if Hanson had bought something from widows and orphans, you would have done better.

DS: That's right.

KD: You got that one through John Shad and the Commission.

DS: Right.

KD: It seems like it would have been fairly easy on the face of it, given the interesting circumstances. What was your batting average given that there was this hesitancy on the regulatory side, and it was all about insider trading—what was your batting average, as far as getting these tender offer cases through the Commission?

DS: Fairly good, because we stuck to the basic disclosure concepts of the securities laws. The arguments we made were that the act calls for disclosure, and once you make full disclosure, then that's it. Quite frankly, the positions we took were on the conservative side. We didn't say: "No, someone caught making inadequate disclosure in their 13(d) had to sell all their stock immediately, and promise not to buy the stock for another ten years." That's what the issuers wanted us to say. But we said: "No. Make disclosure, maybe a little cooling-off period, and then you start all over again." We did say in really egregious situations, where they blocked a possible competing bid by failing to disclose their position as they were required under 13(d)—maybe that would be an appropriate case for ordering disenfranchisement or disgorgement, but that was very much within the power of the court to decide.

KD: Was the staff conscious of not going too far? Was there any disjuncture between the staff and the Commission, from your perspective?

DS: We knew what the issues were. The Hanson case was probably the hardest one to go up and argue, and get it through. I haven't read the brief in a long time, but it was very much not taking a position on the merits, not taking a position on the facts, but if the court were to find these type of circumstances, they could conclude that it was all one tender offer. In that sense, we essentially didn't take a strong position on a particular outcome in that case. We didn't win or lose, and the court ruled the other way. I think the staff never was happy with the reasoning of the Second Circuit in that case.

KD: You had an interesting switch, because it appears that you went into Corporation Finance after the General Counsel's Office?

DS: Yes. My experience in litigating the Williams Act got me into Corp Fin. Linda Quinn replaced John Huber as the division director. She recruited Elisse Walter. I had worked with Elise on appellate teams, in the General Counsel's Office. Elisse's name is now being mentioned for Commissioner. She and Linda recruited me to head what was then called the Office of Tender Offers; is now called the Office of Mergers and Acquisitions. I came right into the division as an office head, running the Office of Tender Offers.

KD: How long had that Office of Tender Offers been around?

DS: I would say mid '70s, really when the 13d (g) rules came out. The Williams Act was adopted in '68, but I don't think they set up a dedicated office until the early or mid '70s.

KD: But the Williams Act is the thing that put all this in business, I guess.

DS: That's right. I guess I was the third head of it. There was a woman named Ruth Appleton who was the first head, and then Joe Connelly was after that, and I replaced him. That was '86. I joined the Commission in '78, and in '86 I went to Corp Fin.

KD: Had you worked closely with this office in your position in the General Counsel's Office?

DS: Yes. When we would argue Williams Act cases, they would review the briefs, and help us form the position and the arguments.

KD: So, did your perspective change at all when you went from General Counsel's Office to Corp Fin? You're looking at things from a slightly different place.

DS: One of the things that attracted me to the move is that every litigator worries that they don't really know anything; they're just litigators with no practical, marketable experience. So one of the things that attracted me is that I could say I'm an M&A lawyer. That was interesting. Just the whole regulatory approach was somewhat at odds to me. As a litigator, you are really constrained by what the law is, and legislative history, and judicial precedent. Regulators tend to take a little more leeway in saying: Well, we think this is the way it should be. Let's write the rule to say that. Or, let's issue a telephone interpretation that says that, regardless of the support for it. So actually, I probably represented a very conservative approach. And if I had any run-ins with the staff in the division it was more: Well, wait a minute; what's the basis for taking that position? Yes, I know you've taken that position before, but what's the basis for that position? I did come down with somewhat of a questioning attitude, and whether we really had a basis for some of the positions we were taking.

KD: So your legal experience kept your feet on the ground, so to speak.

DS: I think so, yes.

KD: Were you involved in rule making at this point? Is that what your office was doing?

DS: Yes. At that time, the office was fairly weakly staffed. I think when I got down there, there were two people there: Brad Belt was special counsel then. I was appointed chief. But we oversaw the special counsels in each of the operating groups in the Division of Corporation Finance, so if there was tender offer for a manufacturing company, the special counsel in the AD group that oversees the manufacturing companies helped us on the tender offer. And we worked with them. Eventually, that was all shifted internally to the Office of Tender Offers, and so we had our own staff attorneys and special counsels in that group. I think I was there six years—late '86 to early '93. The office was eventually expanded to proxy matters and proxy contests as well. So anything change of control orientated was handled by the Office of Tender Offers, which is why it eventually became Mergers and Acquisitions, because it was much more than tender offers.

KD: So, were you building this office up?

DS: Absolutely. I think at one point we may have grown to about eight to ten people, rotating some people in, some permanent staff. But Linda Quinn's goal was to get a good corps of rule makers there, because it was obvious to her that she was going to be writing rules in the Williams Act and proxy area.

KD: Why was it obvious to her?

DS: It was that era. This was the hostile, junk bond, breakup, leveraged buyout, Nabisco, Boesky, Millken era. This was the number one topic for the division. There was a lot of litigation going on, and a lot of issues that needed to be addressed by rule making.

KD: It sounds like Linda Quinn really gave you a mandate. She said "We're going to beef this office up. And I want you to develop that."

DS: Right.

KD: You started by getting a corps of rule making lawyers.

DS: That's right.

KD: What came next after that?

DS: It was a real fun time for me, because every two years or so, the whole focus changed, because the markets changed and the issues changed. I think we started off focusing on things like the going private rules. Although 13e-3 was newly adopted in the late '70s, I think '79 is when it became final. We had to figure out how to actually make it work, and develop positions. The market had changed. It was written for the typical controlling shareholder who brought his company public in Year One, when the market was high; and Year Two the market dies, and it buys back his minority interest that he'd sold to the public. That was really what the rule was written against, but then it quickly developed into the leveraged buyout model, where there was private equity firms, starting with KKR, and then others grew quickly—developed a new way of bringing the company private. But the private equity firms weren't managers, they definitely brought management along as essentially partners in the buyout. And so the big challenge in the early years of 13e-3 was how to apply it to leveraged buyouts, when you know that management was really part and parcel of the transaction. And that's really what the rule is about: when an affiliate is buying out the public shareholders. So, developing policies about applying the concept of affiliate to these leveraged buyout structures was very challenging at that time.

KD: You mentioned that you didn't have to look at the legal nuts and bolts. You could take a policy view, and figure out: This is what we want to accomplish.

DS: Right. And we had to, because we had a rule that wasn't written at the time this market structure was in place. So we had no guidance from the Commission, or certainly not from Congress, about how you apply a rule that says when an affiliate participates in a going private transaction that you have to comply with all these additional disclosure rules? And so what does it mean to have an affiliate participate? We developed positions back then that are still current, still being applied by the staff, and they're pretty much doctrine for the M&A practice.

KD: And these positions, they were just to get more disclosure?

DS: Yes. The rules the Commission adopted to address the guy who sold high and bought low—the goal was to get more disclosure about the fairness of the transaction. It was very much a federalism issue there: the federal Securities Laws on disclosure—state law imposed its fiduciary duties, and ensured substantive fairness, not the federal law. 13e-3 is the going private rule. It's designed to ensure that shareholders have adequate disclosure to assess whether the board and management were meeting their fiduciary duties under state law, to provide a fair price.

KD: You talked about going into this because this is the big era of M&A—Michael Millken and all that stuff is happening. How much were you able to anticipate what was going on? Or did you come in at the tail end of something that had already played itself out?

DS: I think we were on top of it. I can't say we anticipated. The rule making, I think, tended to lag, because rule making takes a lot of time. But in terms of developing positions, the enforcement actions that were brought in those days—which we played a role in—certainly just as General Counsel consults with Corp Fin when they write briefs, Enforcement consults with Corp Fin when they bring cases. And so it was a big part of what we did, liaison with Enforcement on some of those cases. I think they were pretty much on top of it. We were certainly helped by the adversarial nature of those issues. There were always two sides to all of them. And both sides would be in our door, as soon as the issue popped, telling us which way we should go. Issuers certainly alerted us to something they thought was a problem, because they wanted us to beat up on the insurgents, or the hostile bidders.

KD: Well, you either chaired or managed an advisory committee on capital formation?

DS: After '93, I was promoted essentially up and out of tender offers. I was made Associate Director of Corp Fin. It was an SES position, but the title was Senior Legal Advisor to the director, who was still Linda Quinn, at the time.

KD: An SES position?

DS: Senior executive service position. So I was promoted out of my manager position to a senior executive's position. That was in '93. I still had responsibility for advising on tender offer matters. Cathy Dixon was my replacement, and we certainly consulted a lot on ongoing projects and issues. But I did two main things in that position. One was Arthur Levitt's municipal security push. I wrote an interpretive release on municipal security disclosure, essentially a guide to municipal issuers how to avoid engaging in fraudulent conduct. And then I wrote rules on municipal security continuous disclosure to the markets, to be made just like a corporate issuer has to do: 10Ks and 10Qs to keep the markets current on the developments. Up until that point, once a municipal issuer went to market and sold its securities, it never had to go back and update its offering circular. So we did that. It was all rising out of the Orange County problems back at that time in the early '90s. I worked a lot on the Orange County enforcement matter; spent a lot of time in Orange County, working with the L.A. staff on that investigation and enforcement matters.

KD: This is before you were in the advisory committee, I guess, when you were working on Orange County?

DS: Yes, the two overlapped a lot but the municipal securities push was before I was assigned to help Commissioner Wallman on the advisory committee.

KD: Give me a little background on that Orange County municipal issue. Because I was really interested in how this municipal thing kind of flared out. And you got a lot of push back, I know.

DS: It was very much a keen interest of Chairman Levitt's, when he got there. His father was the Comptroller of New York State, and he did a lot of bond work when he was a dealer in New York. He knew what the games were. One of his big pushes was to end pay to play by dealers. When Orange County ran into trouble—that was the second big scandal for municipal issuers in ten years; the first one was New York City about ten years earlier—he took advantage of that to try to get a little bit more disclosure into the municipal securities markets. The two main tools he used were interpretive release, explaining that municipal issuers do have an obligation to inform the markets of material developments; and then codifying that, essentially creating information repositories that require issuers to put in annual and periodic reports so the markets could follow developments at the issuers, as they were trading the securities.

KD: Were those creatures of the municipalities? Or did the SEC create those repositories?

DS: They were creatures of the municipalities. SEC only had jurisdiction over the dealers, not the municipalities. Congress didn't want federal regulation of local officials. So—it was slightly creative—we essentially said: It's fraudulent for a registered broker/dealer to bring a municipal securities issue to market, unless it gets promises by the issuer that they will make information available to the market on an ongoing basis by depositing the information into these third-party, essentially private repositories. We said you could use a private repository, or the states could set up a repository; and some states have done that.

KD: Was there much push back on that?

DS: Oh sure. It was an interesting time. And it was great, because one thing I'll always remember about my career at the SEC: that it just constantly changed. Just to be thrown into something like that, and having to learn a whole new market, and new rules, and new players, was just so challenging. One of the reasons I stayed there for twenty-one years is that every time I thought about leaving, I got an assignment like that, and it was just thrilling.

KD: It sounds like some of this municipal bond regulation, though, was a matter of chance, because Arthur Levitt was where he was.

DS: Yes, exactly.

KD: Did you get the cities and counties saying: Why, all of a sudden, are you jumping on us? Why do we have to go through all of this?

DS: A bit. I remember doing panels to try to educate people about what we were doing, and why we were doing it, and getting arguments like: Why do you want us to put out bad news? It's just going to hurt the value of the securities to our holders. They're going to hurt our investors, because they won't be able to sell it for as much once we put out our bad news. So we had a bit of educating to do about the benefits of transparency and efficient markets.

KD: They'd been left alone so long, they hadn't really thought about it much.

DS: That's right.

KD: You'd learned this in the Corp Fin Office of Tender Offers, I guess. Despite the name, you were working on these municipal bond issues?

DS: No. That was a whole new assignment, a new life. I was out of tender offers. I was now the senior legal advisor to the Director of the Division of Corporation Finance. The position was created in order to get a bright policy guy freed up to do nothing but head policy teams and do special projects. So that's what position was about. And my first job—something like the day Arthur Levitt walked in the door—was to work on municipal securities disclosure.

KD: And was that when Commissioner Wallman—

DS: Commissioner Wallman. That was probably two years—probably '93. I left tender offers and got this new position that probably just started pretty much right then into municipal securities. And then as that wound down, I wound up into the advisory committee, which was probably late '94 and '95. But for quite a while, there was a substantial overlap between the two projects. The rule making was done probably in a year, eighteen-month period; and then the investigation lasted another six months to a year. Maybe during the investigation period is when I was really doing both at the same time. Commissioner Wallman was very interested in some of the issues facing the capital markets, principally the new issue market and the somewhat antiquated concepts that were applied to public offerings of securities. We were witnessing a lot of stress in those markets, because the SEC was trying to develop rules and positions that addressed how private markets can coexist with public markets. It did Rule 144A. But then it adopted a lot of positions about—we started seeing what's now called PIPEs, private offerings by public issuers. Because of the difficulty of doing registered offerings and the inability to control timing, issuers were looking to the private markets to raise capital, doing re-sales afterwards. You had a lot of tension, and a lot of what was then called the Securities Act metaphysics.

KD: Securities Act metaphysics?

DS: Metaphysics. Positions being taken by the staff about how you can't mix a private offering with a public offering, and gun jumping concerns—a lot of positions that really derailed people for no other reason than to try to maintain some purity of analysis under the Securities Act doctrines, that no longer really fit market realities. That's what the advisory committee started to look into. Was it time to change the paradigm for regulating public offerings of securities? To try to kind of meld the public and private markets?

KD: Is that the first time in your career that you felt that that was happening? Where the old paradigm wasn't fitting anymore?

DS: The process we jumped into was really somewhat ongoing, but accelerating. Way back at the Wheat Report days, they were talking about the need to coordinate, to reconcile the 33 Act concept and the 34 Act concept. We got into integration systems, disclosure system. But it was just accelerating. You started seeing side-by-side public and private offerings. There was just a lot of tension on the regulatory side, and people getting derailed, getting delayed. The staff was taking some positions that, while defensible maybe to preserve purity under the Securities Act concepts, were really indefensible from a policy point of view. What good does this do anybody, to take some of these positions they felt they had to take?

KD: Were these positions causing public issuers to not be able to get out of the market?

DS: Yes. It would delay them. It would prevent them from meeting their immediate cash needs as they ramped up to do a more formal registered offering, because the staff said you couldn't start marketing privately and then turn it into a public offering. Likewise, you couldn't do a public offering and turn it into a private offering. Those were all issues that people were grappling with and it just resulted in delays, because deals didn't get done until the staff was satisfied that if there was a problem, the problem was fixed. And it exacerbated the tendency to avoid, whenever possible, doing a registered public offering with the full protection of the Securities Act, including the disclosure and liability provisions; and doing most of your capital raising in the private markets, because it was quicker and less regulatory.

KD: So you were seeing the private markets grow larger at this point.

DS: Absolutely. And that's something Commissioner Wallman didn't think made much sense. His concept was to build on a concept known as issuer registration—rather than register a particular issuance where every time an issuer wanted to go to market, it had to go through the whole process all over again, and witness the delays, and uncertainties in getting to market. But that once a company got registered—once it was reviewed, and reviewed on a regular basis through its 34 Act reporting, rather than its 33 Act prospectus—then it could go to market any time it wanted. That was a concept that had been around a while, and Commissioner Wallman and the advisory committee really developed it, and came out with some proposals. It was really a catalyst to get the SEC firmly behind securities offering reform as a legitimate project, something worth doing. The immediate reaction to the advisory committee report were concept releases on securities offering reform, which I worked on as well; regulatory simplification proposals that Commissioner Levitt pushed through; eventually, the Aircraft Carrier, which was Commissioner Levitt's and Brian Lane's shot at adopting some of these concepts. But that got done two years ago, three years ago, in 2005, with the Securities Offering Reform. The concept of WKSIs that can go to market any time they want.

KD: WKSIs?

DS: Well-known seasoned issuers, which are essentially registered issuers who don't have to worry about the registration process anymore when they want to go to market. A lot of the projects that I was working on—we start talking about international work as well—I left the Commission in late '99, they really didn't get done until 2005, 2006, 2007. The reason for that is Sarbanes-Oxley preoccupied the Commission for a three or four-year period in between. And so it's interesting, just now everything that I was working on when I left the Commission is finally being put in place. It's pretty cool.

KD: The WKSIs, the thing you just described working on: this sounds like the kind of rationale behind shelf registration as well.

DS: Right. Well, shelf registration was one of the early attempts to address this problem. But it had significant limitations. But shelf registration built on the notion of one: integrating the 33 Act and 34 Act reporting schemes; and two: letting the seasoned issuers go to market without SEC review—that once registered, you could do that. So the issuer registration was really an expansion of shelf registration, to register types of companies—not a straitjacket, in terms of specific number of securities to be offered, specific type of securities to be offered, specific type of offering—all that had to be spelled out in the base registration for you to be able to do a subsequent transaction. That was the kind of straitjacket that didn't always work.

KD: So is it your perspective that it just takes a lot of time for these things to work through the system?

DS: Oh, absolutely.

KD: And for people to buy in?

DS: Absolutely. And you need a freethinker like Commissioner Wallman, and a project like the Advisory Committee Report to shake things up, and get these projects on the agenda.

KD: What was it about Commissioner Wallman that gave him this freethinking perspective?

DS: That kind of guy, I guess. He was definitely willing to challenge many of the staff assumptions. "I know you've taken that position for quite a while, but why?"—was the basis for it. "What good are you doing? Who are you serving?" He would raise those questions, both on the regulatory side and in the enforcement side, as well.

KD: Did you work closely with him?

DS: Absolutely. I was the senior staffer on the project. With his guidance, we set up an agenda to hold meetings, to interview market participants, to put out draft reports and position papers; and eventually draft the final report.

KD: Who worked with you on that group?

DS: Meredith Mitchell. Cathy Dixon, Louise Welby and Robert Comment.

KD: Were these Corp Fin people?

DS: Everybody was Corp Fin except for Meredith Mitchell. She was the General Counsel liaison and Robert Comment, who was an economist with the Office of the Chief Economist.

KD: How long did the process take?

DS: About eighteen months.

KD: So you released a report?

DS: Right.

KD: Were you conscious of being in the tradition of all these great SEC studies, at the time?

DS: Yes. If you read it, we give the history, and we say where we're fitting in. And we say: This has all been thought about and proposed before, and now it's time to do it. And here it is. So yes we tried to make it sound as least radical as possible, to get it done.

KD: And give it some inevitability, I guess?

DS: That's right.

KD: And when did it come out?

DS: I think the report came out in probably early '96. The Concept for Release, which followed the report, to try to get public input, was July of '96. I guess the report was actually in May of '96.

KD: What was the reception like?

DS: It was very favorable. The underwriter and issuer community said that is definitely something to be done. When Commissioner Levitt got that feedback, that's what convinced him he could try to do what Brian Lane dubbed—gave it the unfortunate name of—the Aircraft Carrier. That was an ill-fated attempt at implementing the proposals. The problem was that the thing was this thick, and it was just more of the same regulatory—try to define by rule how to free up the capital raising process. Maybe it was too ambitious, too regulatory and too complicated. It was Alan Beller's genius eight years later to do a much more simple and straightforward proposal.

KD: The Aircraft Carrier was trying to bring in new substance, but using the same old form, I guess, in a way?

DS: Yes. Maybe it took on too much. Some of the things it did propose got done sooner than securities offering reform. So breaking it up helped get some of the concepts done. So, one of the things that was a problem was just too much at once. And secondly, it was a very detailed, complicated, regulatory approach to the concepts.

KD: We've touched on everything but the international issues. You've mentioned that those had really come on your radar screen periodically throughout your career with the SEC.

DS: Right. I think back in my General Counsel days, one of my non-litigation projects was working on the restatement on international relations law, providing SEC comments on the ALI—American Law Institute—drafts of the restatement of international relations law—the whole concept of extraterritorial jurisdiction, long-arm jurisdiction, applications of the federal securities laws to foreign transactions, and ability to sue in the United States for cross-border transactions.

KD: Who had promulgated these? You were commenting on another organization?

DS: American Law Institute is an association mainly of law professors. They come up with these restatements of law, which they draft as both a codification of existing law, but also somewhat of a model law, as it might exist on the state and federal level. It's really their expert advice to the state and federal legislators about the best way to address the problem. And so, when they were coming up with guidelines on international law that could affect both the Commission and private plaintiffs' ability to bring action for securities law violations based against foreign companies, or foreign market participants, that was certainly of concern to the Commission. We would comment on the concepts in there, about when it's appropriate for a U.S. court to assert jurisdiction over either cross-border or extra-territorial conduct. So it was a very interesting project.

KD: Was this in the late '70s, early '80s?

DS: Early '80s.

KD: It would seem that that was fairly early to be concerned about international securities.

DS: Definitely. And I think it was the second restatement, so it wasn't the first part—the initiation of it. But this was when the Commission was starting to see insider trading problems going cross-border, and we had to develop remedies for freezing assets in the United States, when the people who were doing the trading were offshore. We started to see more and more investment in the United States by foreign entities, so you had securities transactions taking place in the United States. Foreign issuers were starting to list in the United States. One of the questions was, to what extent could a U.S. investor get a remedy for fraudulent conduct?

KD: The American Law Institute: It sounds like they were pushing this.

DS: Yes, to modernize the law.

KD: Okay. Rather than the SEC.

DS: Yes. I mean, we were pushing it by enforcement actions, and saying: Freeze the bank accounts, and brokerage accounts of John Doe one to ten, who were foreign traders who traded ahead of breaking news in our markets. And we were figuring out, at the SEC, new ways to assert our control over transactions that had both U.S. and foreign elements. And so when the ALI was going to speak to those issues, and come out with a restatement of law that the courts would look to for guidance, we wanted to make sure that they got it right.

KD: Did this go to issues of accounting?

DS: To a certain extent. It was more jurisdiction: when can a court assert jurisdiction? But to the extent it went to fraudulent accounting: yes. And it made distinctions between when it was appropriate for a government agency to assert regulatory jurisdiction—say, for example that you must register with the SEC, and you must start filing reports with the SEC, including complying with the United States GAAP versus fraud concepts. When investors are defrauded in the United States, we have right to go after you, no matter where in the world you are. And certainly, the fraud jurisdiction, everybody recognized, should be broader than the regulatory jurisdiction. Those are the type of concepts that the restatement addressed.

KD: Was the focus mostly on the fraud jurisdiction?

DS: Yes. That was the principle concern. But, we wanted to make clear that that was a distinction, and that while we recognized there were reasonable limits to the extent the SEC could force everybody in the world to register with them, and use U.S. GAAP, we felt pretty strongly that both the SEC and private plaintiffs should be able to haul foreign issuers, foreign market participants, into court for fraudulent conduct that impacts the U.S. markets.

KD: The Shad Commission made some headlines with the MOUs. This is all part of the insider trading.

DS: Absolutely.

KD: Was there any other concern about the regulatory side—about what became the dominant issues later, which is the competitiveness of U.S. markets, and the ability of foreign issuers to use U.S. markets?

DS: At that stage, no. It was still very much enforcement-focused. Insider trading was a big concern. At that time, to encourage U.S. listings by foreign companies—so they would submit themselves to jurisdiction in the United States—there was a move at Corp Fin to develop a foreign issuer reporting system that still made reasonable accommodations to foreign issuers coming to the United States, but still holding the line on basics like U.S. financial statements. At that time, some people were arguing that: No, it should be comity. And if you have a public company in England, they should be able to come in and be a public company here, based on their English documents. Donaldson, when he was running the New York Stock Exchange, that's what he was arguing for. But, the SEC bent a little, but still held the line that: No, if you want to list, and access U.S. investors, you had to comply with U.S. rules, with reasonable accommodations. And the accommodations were mostly in the corporate governance, internal affairs areas, than the capital markets areas.

KD: Was there anyone in the SEC raising the possibility of revisiting this and maybe allowing reciprocity between different regulatory regimes?

DS: Yes, absolutely. And that gets me into when I moved into tender offers. Throughout my period there, cross-border acquisitions was certainly an issue I was focusing on, because you're forced to deal with them. By that time, there was enough cross-border investment that in virtually any transaction you can find investors who you need to buy the shares from to acquire that company in multiple jurisdictions. It became more and more of an issue of: How do you do one transaction, but you're buying from multiple jurisdictions? And our focus was mainly: a U.K. company wants to buy a Canadian company that has both Canadian and U.S. and Australian shareholders. What do you do about the U.S. shareholders? And we have these tender offer rules: How do you comply with several sets of rules at the same time? And so, maybe if you're going to buy a company for shares, and offer shares into the United States, that implicates the 33 Act securities registration issue, including the reporting, and U.S. GAAP financial reporting issues. So, potentially, if a Canadian company wanted to buy a Canadian company that had a handful of U.S. shareholders, you have the potential of having to be a U.S. reporting company. The first step in that process, the first real project I worked on was a multi-jurisdictional disclosure system, MJDS; which was not limited to tender offers, it was limited to cross-border financings as well—public offerings. But it was a notion that the Canadian system was being developed very much along the same lines as the U.S. system. It was maturing; their regulators were becoming more efficient, and more sophisticated. At some point, the Commission should get comfortable that their rules were as good as ours, and that to comply with Canadian rules for a transaction that was essentially Canadian-centered, then you wouldn't have to also comply with U.S. rules.

KD: Where did the impetus for this come from? Who came up with this idea?

DS: I think it was probably the Canadians pushed the idea, and we explored it. It was a very awkward model, because it really depended on a detailed examination of each country's laws, and the conclusion that the laws are very similar, and adequate. While that might have been possible at that time, with the U.S. and Canada, it proved to be the wrong model going forward, because you could never do that on a true multi-jurisdictional basis. On a bi-jurisdictional basis: yes, but not on a multi-jurisdictional basis. So the name was a bit of a misnomer.

KD: Wasn't the U.K. supposed to be involved at some point?

DS: Yes. Early on, that was the thought. Linda Quinn, spearheading these types of projects, went to a different approach. MJDS set the concept that if less than forty percent of shareholders were in the United States, if you were going to do a public offering, or tender offer for a Canadian company, and comply with Canadian law, then you did not also have to comply with U.S. law. That was a big project and big groundbreaker. But it still wasn't enough. It was quite common for any type of cross-border acquisition to exclude U.S. holders from participating. So if a U.K. company was buying a Swiss company, on the face of the offering document it would say: "and this offer is not extended into the United States." The courts upheld that, saying that it was reasonable because of the regulatory burdens of—particularly in a share deal—extending the offer into the United States; that they could say that: "no, we won't make the offer in the United States." It was tested a couple of times. In one case, Goldfield Mines in the Second Circuit, they said: Well, when you reasonably anticipate that foreign custodians will send their documents to U.S. investors, then you're subject to at least fraud jurisdiction in the United States. And then, so everybody marked out their documents prohibiting—you know, U.K. custodians would send their documents into the United States.

But the most part, the courts, and to a certain extent the SEC, recognized that because the implications of formally extending an offer—particularly an offer to sell securities into the United States—had significant regulatory costs it is the better approach to just respect that, to saying that: Okay, the offer's not made into the United States. And that left U.S. investors essentially to scramble. One: they didn't get the documents directly, so they really had no idea what was going on. And two: if they wanted to participate, they had two choices. One: to sell into the markets, and take advantage of the premium built into the market, reflecting the announcement of an acquisition—but they couldn't get the full price offered in the transaction, because they couldn't participate directly, because they were excluded. That was great for the international arbs, who would buy up all the U.S. shares, and transfer them offshore, and then tender over there. The SEC started exploring ways to facilitate direct participation by U.S. investors.

Again, you had to take your shareholders where you find them, when you're doing an acquisition, or a rights offering—rights offering are much more common in Europe and other countries than the United States—you had this problem of: you have to take your shareholders where you find them. You can always do a public offering, and say: I'm only going to hire dealers and underwriters in this country, and distribute it in this country, and you get fairly good control over where the shares are going. But when you want to buy another company that already has an international shareholder base, you're kind of stuck with what you have. So we tried to develop rules—this was another decade-long project—to allow cross-border transactions, and to find when it made more sense for the SEC just to step aside, and allow the whole transaction to take place under the foreign laws, rather than say: "no, if you dare to extend your offer formally into the United States, we're going to make you register, we're going to make you file tender offer documents in the United States. And then we did that without doing the tough analysis we did on the Canada and the MJDS, and saying: Okay, we're happy with U.K., but we're not happy with France. And Italy: forget about it. We didn't want to do that. So we wanted to come up with rules that we could live with regardless of the level of regulation by the home country. And that was what eventually became the cross-border tender offer and rights offering rules.

And just to give you an idea of the bare bones requirements: if you could determine that less than ten percent of the public shareholders are in the United States, then you're free. You can mail into the United States, you can offer securities to U.S. holders—just treat our guys the same way you treat your guys, give the same disclosure, give them the same right to participate, the same economics. If you're over that level—we proposed five percent, we eventually adopted ten percent—and then, if it was a share deal, you would have to register. But by then, the foreign issuer disclosure and registration system had developed a bit, that it wasn't so onerous for foreign issuers to come in. By that time, we had significant experience with foreign issuers listing in the United States, and registering. So, it wasn't that unreasonable to say that if you already have ten percent of the targeted shareholders in the United States, there's a significant enough focus in the United States, we think it's worthwhile that you register the shares you're offering in the transaction. In share deals, in practice, that has had mixed results. It is still very, very common to take the 'We're not extending this offer into the United States approach,' to avoid registering the transaction in the United States.

KD: They have to register just like any U.S. company would have to register?

DS: Right. If Company A wants to buy Public Company B, and do it—by nature, it's going to be a public transaction, because they're dealing with public shareholders—and wants to offer shares, then Company A has to register those shares with the SEC before they offer them to Company B shareholders. And if a foreign acquirer wants to offer its foreign shares to either a U.S. company, or another foreign company, but happens to have U.S. shareholders, the same problems arise.

KD: Then you had something like two or three tiers, where there's a forty percent cut-off?

DS: Exactly. That's in the cash context. If you go over the ten percent, you're going to have to comply with the 33 Act, but you know, all the accommodations are made for foreign registrants there. And then we made some additional accommodations under the tender offer rules, between the ten and forty percent range. Essentially, we were dealing with this on an ad hoc basis, through no-action letters; dealing with deal counsel, to give them the relief they needed to extend the offer into the United States. Very much the scenario was: someone would call us up, saying: We've got to tell you, we're going to do this offer—an example is Ford buying Jaguar, and there were a couple others at the same time. We can't do this offer in the three jurisdictions at the same time, because all the rules conflict, at different timetables, different disclosure levels; we really have got to exclude the U.S. shareholders. The SEC would push back: Ford, you can't exclude the U.S. shareholders.

So we worked with no-action letters, and interpretive advice to help them accommodate the different regulatory requirements of the different jurisdictions—essentially have the offer occur simultaneously in the several jurisdictions. That worked. And so we experimented by no-action letters, interpretive letters, to find out what was necessary to allow these offers, particularly the cash deals to be seen in multiple jurisdictions. We essentially codified all that relief for persons between the ten and forty percent range, to allow their offers to take place simultaneously in different jurisdictions. That's what the tier two is. Then above forty percent, you're back under the ad hoc approach. We did this thing as, "we think you should comply with our rules; but if you have a real problem, we'll see if we can accommodate you. And come in to talk to us." And that's still been a very active practice for many lawyers, and the SEC staff.

KD: Now, were you Associate Director of International Finance, at this point?

DS: Yes. After my stint as the big policy guy, as senior legal advisor—after the advisory committee, again, these things didn't have clear cuts, probably about a six month overlap there—I was appointed Associate Director for International Corporate Finance. That was in '96, I think early '96.

KD: Okay. And this was within Corp Fin?

DS: In Corp Fin. Right. And again, what my role was principally policy making and rule making. I was given responsibility for overseeing the office of international corporate finance, which is the operational office that actually facilitated foreign companies making filings with the SEC, coming in and listing. They handled the filings—and Paul Dudek headed that office then, as he does now—he reported to me. I oversaw that office, but I also did the projects. I was both straight SEC rule making in the international area, as well as working on the IOSCO projects, as well. I was on the working parties—working party number one for international corporate finance issues, including international disclosure and accounting standards, and other working parties. I did a special project for IOSCO for Internet matters.

KD: Let's step back, and talk a little bit about those, and your involvement with IOSCO, through the Commission. When we're getting to what's going on internationally: clearly, how the SEC's relating to IOSCO is pretty important. Can you set that up? When you first started dealing with IOSCO, what was the relationship like?

DS: The working party had already been around a bit. Linda Quinn took a significant interest in it, and really got it set up, and got the process going, where the regulators, representatives of the major markets, would meet—it was actually quite often, at least quarterly, if not more—and work on projects, which would come up with a recommendation to all the jurisdictions on how to better integrate the markets. My focus, of course, was Corp Fin and disclosure matters. But there were also working parties for market regulation, trading practice issues, investment management issues, and enforcement issues.

KD: These are IOSCO working parties?

DS: Right. And the main focus of the corporation finance working party was international disclosure standards, and international accounting standards, to facilitate cross-border public offerings and listings. And the disclosure side of it, we did. We came up with a template for non-financial reporting disclosure that could be used by several jurisdictions to allow you to list in several countries. We reformed the SEC forms. So we put out rules to adopt those standards as the SEC standards, that it applies to foreign companies coming to list in the United States. So that was quite significant. We essentially came up with a common set of disclosure principles, level of disclosures for companies wanting to list in the IOSCO markets; and then we went ahead and adopted it. We were the first jurisdiction to adopt it.

KD: The U.S.

DS: The U.S.

KD: Did the IOSCO working group come up with these rules?

DS: Right. It issued a paper, essentially, saying: We think these are the standards that are necessary and appropriate to demand of a non-resident company wanting to list cross-border in a host country jurisdiction.

KD: So you worked with regulators from different countries—

DS: Absolutely.

KD: —to do this. Do you remember who the ones who were really pushing things? Who had the good ideas?

DS: The U.K., France. Italy was very active. It was mainly Europeans, but we also had Japanese. Were there any other Pacific? Certainly Australian: they were great. Canadian.

KD: Do you remember any important people that you worked with?

DS: I wish I did. No, I can't remember names now. If it's important, I can maybe try to go through my cards, and notes. But the names will be on those reports from back then.

KD: Yes. I've heard that the U.S., being the big gorilla in the room, tended to drive things.

DS: Yes. And maybe that's changed now, but that certainly was the case then. It was all—particularly on the accounting side, it was all: "What can we get the SEC to accept?" The main work product on the accounting side was commenting on draft standards published by what was then the International Accounting Standards Board. IOSCO would come up with its own set of comments, as IOSCO, on those standards. The SEC would put in its own comments, as the SEC. But IOSCO would put them in, and the SEC certainly had a lot to say about what IOSCO said about those proposals. But that was really where the concept of convergence started. And the notion is: Through this process of improving the international accounting standards, at some point they'll be good enough to be either equal of quality, if not totally the same, as the U.S. standards. And I thought that was a fascinating process.

KD: About when was this, that you started working on these things?

DS: '96 to when I left in '99. It was well underway when I got there in '96. It already had a year, or so, of this notion of commenting on the international accounting standards. So it was already well underway. But it was still definitely in the heat of it. And one of the last things I did in that area was put out a concept release on international accounting standards, about what would it take for the SEC to eliminate the reconciliation requirement for international accounting standards. And that really was the template, again, for what happened seven years later, in 2007 when they eventually approved it.

KD: Can you trace that directly back? Were all the pieces in there, or most of the pieces in that concept release?

DS: Yes. I think there might have been a slight veering from the hope of getting identical standards, to getting good quality standards. And there was more of a notion that: Well, maybe it shouldn't be the rest of the world coming up and matching FASB. It should be FASB matching the rest of the world. And so FASB took up a bunch of projects to conform their rules to what was actually better, more state-of-the-art, rules being developed by the International Accounting Standards Board. And so that's where the concept of convergence came in. It wasn't the rest of the world coming up to the U.S. standards, it was the world converging on best practices. And now it's totally flipped. The idea is: How long do we need FASB? We can't really have dual competing standards. Shouldn't FASB be somewhat rolled into IASB—the International Accounting Standards Board?

KD: How much, if any, did the crack-up in the American accounting business help move this along?

DS: Well, it delayed it for a while, because, again, the Commission got preoccupied with Sarbanes-Oxley. So a lot of projects were shelved, not only securities offering reform, but international accounting standards as well. They would have all gotten done pre-'95 if it wasn't for the crack-up and Sarbanes-Oxley; because the Commission went on a rule making binge to implement the statutory mandates that took every able-bodied person on the staff to get done. So, groundwork got laid, work got done; but they really couldn't throw the resources into making the final pushes until after Sarbanes-Oxley was done with.

KD: In the international area: Were you involved at all in the SEC Institutes?

DS: Yes.

KD: Tell me a little bit about those, who ran them, and how they worked.

DS: If I recall, Chairman Breeden was the one who started them. Linda Quinn was a driving force in organizing them and my participation: I guess they were already well in place by the time I took over my international role, formally. But the three or four years I did that, I was certainly key in putting together each year's programs, as well as participating, as a lecturer, and commentator. You're talking about training other regulators. I can't say I was a driving force, but by the time I got directly involved in them, they were very sophisticated, well-attended programs.

KD: Did you see results?

DS: Oh yes. I think the world markets have benefited greatly from that. Being on the private side, and dealing with regulators throughout the world, and dealing with my counterparts who administer their rules—in the late '90s, all the major markets reformed their regimes. Some took a slightly different tack, and in a certain sense leapfrogged the SEC, in terms of the best way to approach public offerings and regulatory matters. But I think it'd be definitely attributed to those sessions, those programs; because we really did train the securities regulators of the world.

KD: You talked about people leapfrogging the SEC. Who were the leapfroggers?

DS: For example, when the EU did its prospectus directive to allow you to be passported—to make an offering anywhere in the EU if you qualified in any one jurisdiction, that pre-dated the securities offering reform, and it was probably a little bit more efficient than the current cross-border rules. But they have a much closer tie than the United States has with any other jurisdictions. So it kind of made sense for them.

KD: Any other activities in the international area that we haven't talked about?

DS: Reg S.

KD: Yes. And 144A?

DS: Right. I didn't work on the adoption of Reg S. I was still in tender offers when that was done. But when I came into my role as the head of international corporate finance, there was a significant problem with Reg S abuses, particularly with U.S. companies selling in what purported to be offshore transactions, but really just parking it offshore with U.S. hedge funds, and other investors, who would wait the forty days or so—that was written into the rule as a compliance period in which the securities are supposed to come to rest offshore and then just float them back into the U.S. public market. This was, again, part of the balloon squeezing tensions that were occurring when issuers trying to find ways to raise capital on an expedited basis without having to do U.S. public offerings—because of the problems and costs of those offerings. They would go to these offshore markets, and then—these are public companies, listed companies, NASDAQ companies—sell to these private investors offshore, who would then immediately sell back into the U.S. markets. And so you had the U.S. markets being flooded with shaky securities—that there was a reason that maybe the issuers didn't want to go through the registration process at that particular time. And so there were scandals. The SEC realized it had to tighten Regulation S, and we did. We put in new rules, particularly governing U.S. companies that try to rely on Reg S to offer their shares offshore. And essentially, the approach of the rules was to treat Reg S offerings by U.S. companies on the same basis as private placements—a buyer of securities, in terms of ability to sell back into the United States, would essentially get restricted securities which they could only sell either pursuant to a registration statement, if the issuer registered for re-sales in the United

States; or have to wait till Rule 144 became available to re-sell in the United States, and trickle it back into the public markets that way.

KD: But you had to sell them to qualified purchasers.

DS: We wouldn't make you comply with the full private offering regimes—no general solicitation, sophisticated investor—you could do essentially what was a public offering offshore, but those offshore buyers got restricted securities; and so they could trade offshore, but if they wanted to bring them back into the United States—and since a lot of these were public companies in the United States, it was a real risk—they could only do that by complying with 144. The goal was to shut off the flow back into the United States of these securities.

KD: Did it work?

DS: Yes. It somewhat hamstrung U.S. companies trying to do offers offshore. You may be familiar with some of the transactions taking place on the AIM market of the London Stock Exchange by U.S. companies who, particularly after Sarbanes-Oxley, decided to list offshore rather than the United States. And it is quite cumbersome to do that, because you're essentially doing a private placement in a public offshore market. Those offshore public investors are trading restricted securities that have legends on them, and everything else. It's a very difficult area to practice in, because it's definitely trying to fit a square peg of a public offering into the round hole of a private placement restricted securities.

KD: But you can do it if you know what all the rules are, and you know how to fit things into them.

DS: That's right. And deals get done.

KD: It sounds as if these were U.S. companies wanting to do these—they were parking the securities offshore, and then bringing them back, right?

DS: Right.

KD: It sounds as if the bulk of these shares probably weren't dodgy at all. They were probably perfectly good, I would think. And they were just trying to avoid the expense of registering.

DS: That's a fair statement. And just like PIPE transactions today, the SEC has done a lot since then, even more to open up the public markets to the smaller companies. But, when they're burning cash, it's either lay off the people, close your doors, or raise money on an unregulated basis. They either do it on a private placement, PIPE transaction, with a promise to register the re-sale into the public markets later, or they go offshore and do the same thing.

KD: Tell me a little bit about the office that you were running in international finance. How many folks did you have working with you? You were working, I guess, with IOSCO, working on some rule making.

DS: Right. The office of international corporate finance probably had about five people staffing it. I normally would use one or two of those people on my rule making projects, as well. But I also went elsewhere in the division, and Commission, for people to help me with the IOSCO projects and other rule making projects—either General Counsel, the Office of International Affairs—by that time, there was a dedicated office so I worked with them a lot.

KD: Who was running that office?

DS: Marisa Lago. It was right before Ethiopis got there. She's still there. Sandra Folsom, who's now in that office, was in Corp Fin at the time, and we worked together extensively on IOSCO matters.

KD: And these are mostly working on these IOSCO—working groups?

DS: Yes. But also the rule making implementing. So we did rule making implementing international disclosure standards. We did rule making on the Reg S side. We did another piece of rule making on cross-border press releases—again, to make sure that the bidder could honestly tell a court they stayed offshore, there were no contacts with the United States. If a foreign company wanted to buy another company, and held a press conference announcing the bid, they would keep out all the U.S. press. So we wrote a rule saying that wasn't necessary. And we did the concept releases on international accounting standards. Worked very closely with Market Regulation, as it dealt with its issues on cross-border matters. They're now just coming to a head again. They're a little bit behind Corp Fin, but the idea of reciprocity, and those issues were active back then. To what extent could a foreign electronic market put screens into the United States, and allow a broker in the United States to trade foreign securities from the United States on those foreign markets? And you know, all of a sudden, every listed company offshore was tradable in the United States without ever complying with the U.S. disclosure requirements, or accounting standards. Those issues are still being wrestled with. So I was certainly working with them on that. You will see some of those issues popping up in the releases addressing alternative trading systems.

KD: Anything else that we should talk about, that we've missed?

DS: Proxy rules. As I said, after '87 and the markets died a bit, and hostile tender offers might have not been the way to take over a company, you started seeing good old-fashioned proxy contests come back. You also saw the advent of shareholder activism. You saw dejà-vu all over again. In the early '90s, we did executive comp disclosure, and we did proxy reform. So, the office of tender offers was given jurisdiction over all proxy contests. We commented on materials filed by insurgents and managements, and the opposition on election contests and other contests. Quite often they were tied to takeover, tender offers. By that time, states got smart, and managements got smart—and they were backed up by state courts—on what type of takeover defenses worked, without running afoul of the Constitution's commerce clause. They were upheld. So you had poison pills. You had takeover statutes, which really gave the power to managements to just say no. But what they did—particularly Delaware—was to leave room to—yes, management can say no, but shareholders can replace management. And so, the tactics shifted to proxy contests to essentially put the takeover to a vote of shareholders, as a way of getting around the board. And so that was natural for the office of tender offers to jump into that, and to start investigating those issues. But the rule making we did was more on the shareholder activism side. Before we did rule making in '92, if a CalPERS wanted to put out a press release saying that we think the option plan proposed by IBM management is ridiculous, it's overly generous, and we're going to oppose it—they just committed a federal crime.

Because the proxy rules said that anybody engaged in a proxy solicitation—which meant any communication that would likely lead to anybody granting or withholding a proxy, was engaged in a proxy solicitation, and had to comply with the proxy rules. And the proxy rules made no distinction between management, or shareholders, or insurgents, or different types of communications. CalPERS would have had to prepare a proxy statement, complying with all the disclosure rules that the SEC would apply to management, file with the SEC ten days in advance of sending it out; undergo a review process by the SEC—so you'd need lawyers to interface with the SEC, and fix up their document—and then mail this thing out to everybody, all shareholders, because they wanted to do a press release that possibly could reach all shareholders. That was absolutely prohibitive.

So what we did in '92 was to say: now, you have to draw a distinction between the type of people who communicate: between management, certainly, on one side—when they're putting proposals that they want shareholders to approve, that makes sense for them to fully comply with all the SEC rules; and insurgents, who want to take over the board, or want to convince people to give them the power to vote someone else's shares—they should comply more fully with the SEC rules; and the CalPERS and the other activists, who just want to express their views on matters being proposed by others, whether it's management's option plan, or it's some bidder's takeover—you know, do they favor management or the bidder in this transaction? Why can't CalPERS not only put out a press release, but maybe call up, maybe write a letter saying: support the other side, we think that's the better deal. And so we freed them up and essentially said that those type of communications, while subject to the anti-fraud provisions—so you couldn't lie and cheat—but so long as you didn't have a special interest in the matter being voted upon, other than as a shareholder, you could just go ahead and communicate. The one requirement we had to do, to give it some transparency, was that if you wrote a letter, for example—anything in writing—and you owned more than five million dollars in the securities being voted, you just had to send that letter to the SEC. It wasn't reviewed. The SEC would not comment on it. It just had to be put in a public place, where everybody would be aware of it.

KD: Was this controversial?

DS: Absolutely.

KD: I would think.

DS: Because you expose managements to their shareholders. All of a sudden, proxy rules no longer protected management from their shareholders. Without it, you couldn't have shareholder activism today, because it was absolutely prohibited. But those early '90s rules freed up the activists to communicate with each other about matters being proposed by shareholders. You couldn't have the Joe Grundfest 'Just Vote No' campaigns, because those would have had to be lawyered up, and run through the SEC. And you'd have all the printing, and mailing expenses of putting out the proxy statement before you could communicate.

KD: Was this something that your office did all on its own? Or was this an initiative from the Commission?

DS: No. We're the ones who knew there was a problem. But it was no secret that there was a problem. Breeden was definitely behind it. I think if you asked him today, it was one of his proudest achievements, particularly in his new life as a shareholder activist, when he takes full advantage of it. It was a great project. You start to get an idea of why I stayed there twenty-one years.

KD: Yes. You did cover a lot of different areas.

DS: That's right.

KD: Well, given all that, what was behind the decision to leave the SEC? Did you feel like you were starting to repeat yourself?

DS: A bit. I think, principally, it was I had kids in high school, and they were facing college, and so I had to figure out how to pay for that.

KD: I've heard that one before.

DS: That was driving it. It wasn't the first time I thought about leaving, and maybe put out some feelers; but every time I seemed to do that—every two or three years—one of these projects landed in my lap, and I'd say: "Forget about it. I'm going to stay a while." But this time, I did it. More seriously, I didn't think I would be promoted above that. I don't think I was going to be the next Director of Corporation Finance. So I probably played the ride out as far as I was going to play it.

KD: So, your next step: Did you come to Morgan, Lewis?

DS: Right.

KD: And is international finance a specialty for you now?

DS: Very much. One of the things that attracted me here is it was a big firm with a lot of cutting edge work. I had worked with them over the years on different projects. They were very much involved, representing clients, or asking for relief, or just commenting on things we were doing. So I knew they had the intellectual power here, and the practice to allow me to apply what I knew, and did, but also learn a whole lot more, particularly on the transactional side. So it was a great move in that respect. I definitely continued on, and kept a presence in the areas—all of them, from international to proxy and shareholder activism matters, and certainly M&A. I work on all the public M&A deals in this firm. So, unfortunately, a lot of the international work these days is advising foreign clients on how not to come into the United States. But, very much applying the rules that I developed, and got adopted by the SEC. It's a big centerpiece of my practice.

KD: So, if you're advising international firms not to come into the United States, it looks like you can't get the square pegs in the round holes.

DS: That would be an example like a rights offering that has more than ten percent in the United States, and it's a choice of either the exclude the U.S., or register, approach. And it just doesn't make sense to register. So you advise them how to do that, how to control their publicity. Reg S deals are still very common. The whole push of all these companies is to list on the AIM. We've done quite a few of those. So, all those tension areas, what are the rules for being able to claim that your offer satisfies the standards as a Reg S, and does not trigger U.S. jurisdiction, both on the public offering side, or on the acquisition side.

KD: It sounds like some of the things you did back in the '90s, having kicked in in the 2000s, have made your job a little bit easier.

DS: Yes. It's fascinating, because it's important to keep up with these developments. I've been active in the ABA, and putting together comment letters for the ABA on SEC proposals. So, I was very much involved in the later stages of all those projects I helped generate while I was still on the staff.