Securities and Exchange Commission Historical Society
Interview with John Olson
Conducted on May 8, 2013 by Robert Colby

RC: This is an interview with John Olson for the SEC Historical Society's virtual museum and archive of the history of financial regulation. Today is May 8, 2013. I'm Robert Colby. Today's interview is taking place in the offices of Gibson, Dunn & Crutcher in Washington, D.C. Mr. Olson, thank you for being with us today.

JO: Thank you, Robert.

RC: Let's jump right in. Where are you from originally?

JO: I was born in Santa Monica, California, Christmas Eve 1939. I'm a holiday child. I grew up in California, public schools all the way, went to the University of California, Berkeley, which was then and still I think, as a rather biased alum of more than fifty years, the greatest state university probably in the country. (Laughter.) I do acknowledge that UVA is right up there too since you went there.

RC: I'll throw our name in the ring.

JO: The reason I went to Cal Berkeley, which was 400 miles from where I grew up, is that my father was head of the grounds department at UCLA, basically chief gardener there. I had grown up literally on that campus all the time. We lived maybe ten miles away. Every faculty member knew me. I wasn't going to have any privacy at all if I would have stayed at UCLA. At a certain age, one wants to go off and be somewhere other than where one's parents are right at hand. My mother had actually taught there for a while. She was a preschool teacher. Neither of my parents finished college, although they both were very, very well-educated people. They were children of the Depression and had to go to work. Then my father was drafted. Somehow they just never got through college. Every one of their kids did and every one of their kids have graduate degrees. That was typical of that generation.

I was at Cal Berkeley and fully intended to stay on and go to law school there. I always knew I wanted to either be a lawyer or a college teacher. I ended up being fortunate enough to become both a lawyer and a law school teacher, at least part of the time. I was talking with a professor from whom I had taken an undergraduate course in international law and done well in it.

His name was Stefan Riesenfeld. I said, "Professor Riesenfeld, I would like to go to the Law School," meaning Boalt Hall, now called Berkeley Law School. He said, "I won't give you a recommendation for Boalt. You've spent your whole life in public schools in California. You should have another experience. You're a bright boy. You should go somewhere else." I said, "Where?" He said, "You should go to Harvard or Yale. I will contact them and I will write a letter for you. You can get letters from other faculty members."

I duly applied. He actually did give me a recommendation for Cal in case I needed it. I was accepted to Harvard and Yale. I didn't know how to choose between them because I had never been east of the Mississippi River. The farthest I'd been was my grandparents' farm in Iowa. I asked around. More people knew about Harvard than Yale. I thought that was a good reason to go there. (Laughter.)

I went to Harvard Law School along with two classmates who got in. We all arrived there wide-eyed and with no knowledge of the East. We rather quickly formed a group called the California Club. We also formed a study group. It turned out there were a number of us, a few from Cal, a few from UCLA, from USC, and a couple from Stanford undergraduate. We felt somewhat lonely, but it was a great experience. That's my educational background in a nutshell.

RC: What did you focus on at Harvard?

JO: I was going to be a trial lawyer. I passed up the opportunity to take securities regulation from Louis Loss. I had had him for agency on Saturday mornings at 8:30, if I remember correctly. Both Professor Loss and the class were bored to tears with studying agency at 8:30 a.m. on Saturday. I said, "I didn't enjoy agency so I'm certainly not going to take his securities regulation course." I really wanted to be a trial lawyer. I took all the trial practice courses there were. I took the constitutional litigation seminar from Paul Freund, who was a giant of a professor. I wrote my research paper for Professor Freund, which had to do with admiralty jurisdiction cases in the Supreme Court, an exotic topic.

I was going to be a litigator. I talked to a number of firms. I worked for the summer of 1963 in New York for a firm called Donovan, Leisure, Newton & Irvine. It doesn't exist anymore but it was a litigation shop founded by Wild Bill Donovan and his partners. He was the founder of the OSS, which later morphed into the CIA. He was no longer alive when I went there, but the other founding partners were all there.

Mr. Leisure, Shorty Irvine as he was called (he was Walt Disney's lawyer), Carl Newton, who was the guy that I spent a lot of time working with and who represented all the big railroads and had been the railroad czar in World War II. This was a tough group of guys. There were no gals in leadership positions in law firms in those days the way there are now. All these guys had been very active in various ways in the Roosevelt administration and the Truman administration during World War II, and then founded this law firm.

RC: That sounds like quite an experience.

JO: It was an interesting experience. We worked on a number of different cases during the summer. I was offered a position there. I thought of staying in New York, but I also interviewed with Los Angeles firms having grown up in Southern California and went out and visited with the three firms that were the leading firms of the time, and still are, Latham & Watkins (a smallish firm then, but rising), O'Melveny & Myers and Gibson Dunn.

I expected that I might like one of the others better because Gibson Dunn had represented the Republican Party and had actually represented Richard Nixon at the time of the Checkers speech and had that kind of a history. I thought I'd probably like one of the other firms better, but I didn't know. I did like the people who interviewed from Gibson Dunn immensely. Frank Wheat, who had not yet been an SEC commissioner, but was a corporate partner there and a fellow named Dick Wolford, who was a senior litigation partner. They were both Harvard alums that came out of the immediate postwar classes. They both served in World War II and were just terrifically engaging people. They made a real pitch.

I went out and I had a total reversal of view as I went through the three firms. Without saying anything negative about the other two, I just found that at Gibson Dunn there were a whole lot of really interesting, intelligent people. They weren't all alike. First of all, they weren't all Republicans. There were quite a few Democrats. Some of them even had beards and long hair in those days, and it was okay. Some of them dressed rather flamboyantly. Some of them dressed very conservatively. They weren't peas from the same pod.

I received an offer, accepted the offer, and didn't even stay for graduation at law school because I needed the money and I wanted to study for the California Bar. As soon as school was over, I drove with one of my roommates, who was also from California, across country and started at Gibson Dunn in Los Angeles in June of 1964.

RC: When you started there, what were you doing?

JO: Litigation. That was what I wanted to do. That's what I came to do. I started working on cases, took some depositions; the first couple not very well. I remember taking one and the senior partner sitting down with me and reading the transcript and saying, "John, you really prepared well for this. You had great questions. You covered all the issues, but if you read this transcript, you were doing all the talking. (Laughter.) You didn't get the witness to say much of anything except 'yes,' 'no,' or 'I don't remember.'" That was a very good learning experience. It wasn't a very important witness. I got better at that, argued some motions and won most of them.

I was starting in that direction when a former lawyer in the firm who had gone to join his family company as president—this was a company that owned a great deal of land in Southern California—came to see Frank Wheat and Art Schmutz, another senior partner in the corporate practice in Los Angeles. He said he wanted to borrow a young lawyer for a couple of years for about three days a week to come in and help him organize a law department for this family company because all of this land, 20,000 acres, was approaching development. They had all sorts of things to deal with—land use entitlements and all sorts of other things, which I didn't know anything about.

They came to me and said, "We think you are a good personality fit. You seem to be able to adapt to things. Would you be interested in doing that?" Having no very good reason to say no, I said, "Sure." I was a little bored with litigation. Although it was fun to argue motions, in those days we had no paralegals and no computers, so document review was done by young associates. If you had to look at a million documents, a group of associates went off to some client and looked at the million documents for six months. That wasn't much fun.

I went over to the family company three days a week. I worked with this guy, who's still around, a good friend of mine, Pres Hotchkis. He's now in his eighties. We dealt with every kind of problem you can imagine. I found I really enjoyed solving problems, doing transactions, and as one of my colleagues and I said, "It's much more fun to work on a deal and go to a closing dinner where everybody's happy and expects things are going to go great than to work at a lawsuit where everybody's ticked off at everybody else and unhappy that they're spending money and time in court and hating every minute of it." It's just a very different environment—not to say that litigators aren't important. They're very important and they're great.

I became a deal lawyer. I did various different kinds of deals. In those days, we didn't specialize so much. I did real estate deals. I did loan transactions. I began to do public offerings, IPOs and a general broad practice starting sort of midway through my second year. Then, just going into my third year, sometime in '66 (I got married in '66), we were opening an Orange County office. They decided they needed to have somebody who could do deals who was an associate down there. They asked me if I would go. I conferred obviously with my wife at the time who didn't love Los Angeles. She grew up in the East. We were thinking of starting a family. We went down to Orange County, which was very rural in those days. We really liked it. We thought, “This is a great place to create a home and start a family.” We took the offer and went down there.

I was one of the first people in our Orange County office. It actually was started in a trailer on the Irvine Ranch, which was our largest client in 1965 and I went down in ’67. I was the fifth lawyer in the office and was one of two associates, I think. The other people in the office were doing real estate development work for the Irvine Company. One guy was doing municipal water district and entitlement-type stuff. I didn’t have any particular assignments, so I did everything else. Over a period of time as that community grew—it grew very rapidly as the Irvine Ranch was developed into a new town, the town of Irvine and then Newport Beach and Garden Grove and Costa Mesa and all these others that expanded into new suburbs.

Then Irvine Industrial Complex was opened and a lot of companies located down there. I was the guy that had the opportunity to represent these companies. I represented a restaurant chain. I helped organize a community bank, which later became publicly held. I set up a savings and loan. I did the first public offering for what is now Denny’s Restaurants which used to be headquartered in Santa Ana, California. It’s now, through lots of corporate changes, somewhere in North Carolina with Hardee’s, but in those days it was founded by a guy named Harold Butler, from Anaheim. I did a lot of things like that.

Through working for clients that were largely privately held but then were going public and raising money, I got into financings and securities. I learned my securities law on the job. Of course, I had wonderful mentors, Frank Wheat chief among them. He was in Los Angeles, but he was wonderfully generous with his time and very interested in young lawyers. I spent a lot of time consulting him. I worked with him on several matters including some investigations.

I became a partner in the Orange County office. I think I was one of the first associates to become a partner in the Orange County office. I was also, at the same time, even before I was a partner, head of the Orange County corporate practice. By then I had five or six younger lawyers working with me. By the time I left in ’77, I had about twelve to fifteen younger lawyers working with me. I wasn’t that old myself. It was a very young group. We developed a very good, strong, vibrant corporate practice there.

In 1976, ’77, about ten years after I had gone there, our then managing partner called me and said we were opening an office in Washington, D.C. We were in the process of recruiting, though we were competing with some other firms, an outstanding official in the Ford administration. I always referred to it as the Nixon-Ford administration because these guys all started under Nixon, but at that time it wasn’t polite to refer to the Nixon administration because he had resigned. There was a guy named Gerry Parsky who was Assistant Secretary of the Treasury for International and Monetary Affairs, a brilliant guy, brilliant career at Princeton and had gone onto UVA Law School and worked very briefly at Covington and then gone into the Treasury Department as a tax guy and then ascended to assistant secretary. Ultimately he agreed to join our firm. I showed him around Southern California.

I was vulnerable because my then wife had grown up in Baltimore. By that time we had several children. We moved here in 1977. Our managing partners thought I was vulnerable because my wife might like to get back to the East Coast, which was true. Her family was here. I had done enough securities work with Frank Wheat and others. I had actually been to the SEC. I had been to Washington. I knew something about regulation, but I certainly was not a regulatory specialist. I was a deal lawyer.

Here we came. We opened the office, two of us with a shared secretary. We were very fortunate. We found a lot of things to do fairly quickly. One of the interesting things about this was that we and some other firms, Latham was here just before us. O'Melveny came a bit before. The Pillsbury firm came a bit after that and the guy chosen to head that office up initially was my very good friend from California Mike Halloran, who was also a deal lawyer.

Those of us from California and some people from Chicago, from Sidley, actually knew how to do deals whereas the Washington firms in those days were all about regulatory work and work in the D.C. courts. They knew regulatory agencies backwards and forwards. If you wanted something at the FDA, you went to Covington. If you wanted somebody at the Fed, you went to Arnold & Porter. Wilmer had great strength. They were not firms that ever did deals because there wasn't a strong vibrant business community here then, but one was growing.

It was a wonderful opportunity for firms from the West Coast and the Midwest who had the foresight to open here. Most of us thought we were opening to do regulatory work, and we did, but we also had experience, many of us, in doing transactions so that we could do them more efficiently and on a basis where the local firms at the time were not really very well equipped.

RC: Can you talk a little bit about what you mean when you say doing deals and doing transactions?

JO: For example, I handled multiple acquisitions for a company called Planning Research Corporation, which was a New York Stock Exchange traded conglomerate of professional services companies that ultimately itself was sold to another company, which in turn was sold to Litton which is now part of Northrop Grumman. They came to me because they had actually started out in California and then moved here because so much of their business was with the federal government.

They had a lot of black work through various subsidiaries here for the Defense Department, CIA and so forth. They had moved their headquarters here. They had tried to use one of the outstanding Washington-based firms and found it very frustrating because the people in the firm just really didn't have the experience in putting a deal together because they didn't have that much opportunity to do it. Because they knew some of my colleagues from California, they called and said, "Who do you know?" They said, "We've just opened an office there. Call John." I did a lot of deals for them. I did deals for other people.

Over a period of time though we also wanted to take over the regulatory practice for our clients in California and elsewhere. A number of serendipitous things happened. We were retained through Frank Wheat to represent a special committee of the board of directors of a company called Textron, which is a major defense contractor. Their former CEO had been named Secretary of the Treasury.

RC: Is this G. William Miller?

JO: Bill Miller, yes, and later the chairman of the Federal Reserve board. During his confirmation hearings, issues had been raised about whether or not Textron had made improper payments in order to obtain a helicopter contract with the Iranian Air Force then under the government of the Shah. Through Frank, we were retained to work with a special committee of the board of Textron to conduct a multi-national investigation. Frank was in California. He came back and sort of got things rolling and was available, came to some of the key meetings, but he asked me to manage it. We recruited people from all over the firm. Through that, we got to know a great many lawyers in Washington because there were a number of people, including Bill Miller, who had their own individual counsel, as happens in an investigation. Through that and some other matters that came through our California office that I was assisting Frank and others on, I got to know people like Stan Sporkin and Harvey Pitt and others.

I found myself basically moving from being a deal lawyer to being an investigative lawyer, which called up my old interest in litigation, interviewing witnesses and assembling evidence and writing reports and so forth. My number two (or maybe three after Frank Wheat on that matter) was a senior associate in our firm named Ken Starr, who later had some fame for other kinds of investigations. I always say the first investigation he ever did was under me. Maybe I trained him well, maybe not, depending on your point of view. He's a wonderful guy. I'm still in touch with him, now president of Baylor University.

RC: You all worked together on Textron?

JO: We worked together on Textron. The chairman of that special committee was a prominent Washington lawyer from Baker & Hostetler, Webb Cook Hayes. Webb is not with us anymore, but he was the grandson of President Rutherford B. Hayes, and a great guy. We finished the Textron work and made a report. There was a settlement with the SEC and the Justice Department. As counsel for the special committee, we were involved. Arnold & Porter was counsel for the company. Others were involved. Williams & Connolly was involved representing some of the individuals and so forth. We got to know a great many people, including Webb Hayes, who was also chairman of the audit committee of the National Bank of Washington, which was the oldest bank in

Washington. That bank had some issues. The bank regulators had questions about how they had made loan underwriting decisions because their stock was majority-owned by the United Mine Workers through an investment made many years ago by John L. Lewis back in the time when the bank had been troubled. The allegations were that the bank had made loans to friends of the Mine Workers which were not properly underwritten, resulting in possible losses to the bank. I was brought in there because Webb knew me from Textron. Later, I was brought in to do a similar investigation at another bank. I won't bore you with it all, but we got to the point where we'd be doing a couple investigations a year but I was also still doing deals.

RC: These are investigations into the internal workings of companies.

JO: Right. These were internal investigations either under aegis of a special committee or an audit committee. We would then produce a report. This whole technique was pioneered as part of the SEC's voluntary disclosure program created by Stan Sporkin in '76, '77, the problems coming out of Watergate.

RC: It's all part of the voluntary disclosure program?

JO: Part of the voluntary disclosure program, although after a period of time, it became less voluntary after the FCPA was enacted. These bank investigations were not FCPA issues. They were not foreign payments issues. They were questions of improper activities within banks. I had one involving an agricultural bank up in Pennsylvania where the guy was in cahoots with some farmers and taking kickbacks and making loans that were no good. I had one involving a bank that was being merged with another one and they were doing diligence. I did a large number, a couple a year. Now we have people who are real pros doing it, all former prosecutors but Ken and I were learning our way.

RC: I'd be curious to hear a little bit about what it was like doing these investigations.

JO: It's immense fun because it's a little bit like what you do as a historian. You're trying to reconstruct what happened, whether laws were violated or not, who was responsible. You are conducting a lot of interviews. You are looking at a lot of historic documents, some recent history usually but over the last several years because they cover a period of several years.

Each one is different. Over the years I've done many. It's a very interesting exercise because it brings together a lot of different skill sets, analytic skills; both the rules of law and factual analysis, the kind of skills a litigator has in conducting interviews, getting information from witnesses. You don't have subpoena power. You have to be persuasive, dealing with other lawyers because people that are subjects of these inquiries often have lawyers.

At this stage, I was not yet directly involved in corporate governance except that these committees were part of the corporate governance apparatus. I mean they're key committees. The ultimate report goes to the board. You meet with the board. You brief the board. As counsel to the committee, which you become sort of special counsel to the board, you make recommendations. I was spending a lot of time in board rooms with a number of different kinds of companies. As another example, I did one for a title insurance company here that had some corruption issues here in D.C.

And, I represented a special committee of the board of the big department store, Woodward & Lothrop, in looking at competing bids to take over the company. There was a wide variety of things. Like doing a public offering in securities work, you have to learn about the company, which is a lot of fun, which is what I'd enjoyed with that old job in Los Angeles working for the big family land holding company. You've got a huge variety of problems and you're learning about a new business every time you do one of these.

RC: This is at the same time, as you said, the FCPA reforms are coming, the reforms that the New York Stock Exchange puts out. Did you see those having an effect in the companies that you were working on?

JO: Yes. As that time period went on, I had joined the Committee on Federal Regulation of Securities at the suggestion of Frank Wheat. In those days, each firm could only have two members. We had three I think, George Bermant, Art Schmutz, and Frank Wheat. Art Schmutz, who was very busy with other things, graciously gave up his seat so I could go on. Years later in the eighties, I became chairman of the committee. My predecessor, Jim Cheek and I, did away with that and opened the membership up to all interested ABA members. Actually Dick Phillips, Jim's predecessor, started that process.

I got involved in that. I think Dick Phillips was either chairman or was rising to leadership. He asked me to head up a taskforce examining the law of insider trading and making recommendations as to whether there should be a federal statute more clearly defining insider trading, to see what the Bar should do because there were a lot of insider trading cases, but there was a feeling among the Bar and among academia that the law was developing in ways that were very much case dependent, case by case. There is no federal law of insider trading except Section 16.

RC: This is the wake of *Dirks* and *Chiarella*?

JO: This was actually right around the time of *Dirks* and *Chiarella*, exactly right. We put out a two-volume report. I was doing that while I was doing all these other things. I was getting deeper and deeper into securities law and finding it very interesting. Because of that work, I was asked to chair a subcommittee of the Committee on Federal Regulation of Securities, which I did for a number of years. Ultimately I was asked to become vice chairman. I was going up through the ropes there.

As a result of that and the work I had been doing with Frank Wheat and others, I was getting more and more matters before the SEC. For example, when the Boone Pickens attempt of a takeover of Unocal occurred, we were representing Unocal on the defense side. My now retired partner, Andy Bogen in Los Angeles, was leading that. Here in Washington, we and Wilmer were co-counsel for Unocal. Ted Levine, who was then at Wilmer, and I were dealing with the SEC on a daily basis and ultimately prepared a Wells Submission to persuade them not to sue Unocal when Unocal did an exclusionary tender offer.

They did a tender offer which was available to everybody except Boone Pickens and his allies. He screamed bloody murder, and the SEC wanted to do something about it. They had previously proposed a rule that would have prohibited exclusionary tender offers, but they never adopted it. We ultimately persuaded them and particularly persuaded Gary Lynch, who was then the head of Enforcement, that they were going to lose the lawsuit if they brought it because although they had talked about the rule, they never adopted it. They subsequently did.

I was dealing with the Commission in connection with our transactional and defense work. I grew up in a firm – when I came in, there were over ninety lawyers. Now we're 1,100. I think Wilmer was probably seventy lawyers in those days. We were smaller firms. People tended to do a lot of different things. We didn't specialize as much. It's kind of hard to go back and recapture those times.

Although they were wonderful times, we worked hours and hours and hours. It was very common to work 2,300 chargeable hours a year and seven days a week, but it was a lot of fun. Over time I think people came to think that I knew something about the securities laws and within the firm at least I was thought of as an expert and the go-to guy for dealing with the SEC.

RC: Did you take over from Frank Wheat in that respect?

JO: Yes, Frank was by that time getting closer to retirement. He wanted to stay in California. He was very interested in a lot of public interest things. He was really primarily responsible for creating the California Desert National Preserve and doing lots of other really good works with the Sierra Club and so forth. He was moving into those areas. I think in those days we had pretty much mandatory retirement at sixty-five. He had a very active career after that in public service of various kinds. Yes, I think I got his mantle, to the extent that anybody did, for the securities part of the practice.

RC: The early eighties you think of as the liveliest time for tender offers and deals.

JO: They were. We had our share of those. I would be involved, along with the team I built here, and I've got to give great credit to them because we brought in a lot of good people. We were involved in the Washington end of those. We dealt with the Office of Tender Offers, as it used to be called, now the Office of M&A. We dealt with the Enforcement Division. We dealt with Corp Fin on a regular basis on all the different deals from all around Gibson Dunn.

RC: Your role was to smooth things with the SEC or make sure you were in compliance?

JO: More than that. Yes, we would do compliance checks, but it was really to help the people that might be handling a deal in New York because we had a New York office by the mid-eighties and in California, to understand what the SEC's concerns were. We helped them plan the deal in a way that was not going to run into problems. Then we would lead meetings at the SEC if there were problems to work through. Over a period of time, I came to know many, many people at the SEC quite well.

Of course, when you live in this town, you meet people and you see them socially and you have kids in the same school and so forth. I remember Elisse Walter and I had kids at Concord Hill, which is a little private elementary school out in Bethesda, at the same time for a number of years. I used to see Elisse and her husband at meetings and things like that. Washington was and still is to some extent a fairly small town. People that are in government and the law know each other pretty well, which is one of the appealing things about Washington.

Our practice has been more than just doing compliance checks. People who don't live and work here regularly don't always understand the imperatives under which government employees work. The people at the SEC are outstanding people for the most part. It's a very fine agency, but they have statutes that govern what they do. They have a Congress that watches their budget. They have procedures that have to be followed. They have to be conscious of the fact that they're working in a fishbowl because of all of the various transparency statutes, the Sunshine Act which covers Commission meetings, all the statutes that require the production of documents.

Those statutes didn't exist thirty or forty years ago, but they certainly do now. Basically these folks are operating under constant scrutiny in a way the people in the private sector are not, which causes them to sometimes seem cautious. They also have a responsibility for consistency, for even-handedness and for understanding that whatever they're doing is going to be second guessed. Until you spend time dealing with folks in that situation, you don't fully understand how challenging that can be.

RC: So you're almost serving as a liaison between your own people and the folks at the SEC.

JO: Yes. Now as this community's business segment has grown and there have been more companies based here, we've also developed a significant transactional practice. I don't personally do that anymore, but we have several partners and a team of people who do. For example, one of the clients for which I've been the relationship partner for going on twenty years now is Marriott International. We do almost all of their transactional work. I don't do it personally but I do meet with their general counsel regularly and have lunch and talk about how we're doing and see to it that it's properly staffed. That's a management function. We do their securities and compliance work as well. We do that for quite a few companies in this area.

We have very good longtime client relationships all over the country. We feel that we have an obligation with all those clients. We have about eighty companies that we regularly counsel on securities disclosure and governance issues. We put out regular client bulletins. We try to keep track of what their particular concerns are to see that they're kept informed. We want to be the place they come when they have an issue. I think we've succeeded in doing that. I've spent a fair amount of time on that and again, I enjoy it. I like working with clients.

RC: I was going to ask a little bit more about insider trading. One of the things I'm curious about is how did you get involved with trying to rewrite the insider trading laws?

JO: It's all because of Dick Phillips. It's because I did that study. I don't remember the years anymore. I'd have to go back and check my records. *Chiarella* and *Dirks* came down. There was a case involving Foster Winans.

RC: That's *Carpenter*, 1987.

JO: When the *Carpenter* case was pending in the lower courts, before it got even to the Second Circuit, where the government prevailed. It was actually a criminal case, not a SEC case. But the SEC was very concerned that they would end up with a precedent that limited the reach of the emerging doctrine of insider trading particularly the misappropriation doctrine. They had a strong interest in that case. That case was in the lower courts. There were some other similar cases around the same time.

Senator Riegle was a senator from Michigan who, when he was a member of the House, wrote a book called *O Congress* which was a record of his experience in Congress. He was the Chairman of the Senate Banking Committee. He and Senator D'Amato, who was the ranking minority member on the Senate Banking Committee, decided with advice from their staff to introduce legislation to establish a statutory definition of insider trading. Their senior staffer at that time was Steve Harris who is now a member of the PCAOB. Steve was on the Hill for a long time. That's where I first met him. They decided they ought to try to put in place a bipartisan bill defining the scope and extent of insider trading liability dealings, particularly with how far the misappropriation theory was going to be carried and so forth. There was a lot of concern in the business community, but also on the SEC's side.

The SEC was nervous about the Supreme Court narrowing the concept. The SEC Chairman at that time was Dave Ruder whom I had known from the ABA work. With Dave's support, the two Senators put together a drafting group that consisted of Harvey Pitt, Ted Levine and me. I think for some reason we were the co-chairs because I had written that study and Harvey had been prominent at the SEC, Harvey as general counsel, and Ted had been a senior member in SEC Enforcement. We were all in different firms. We wrote a statute with a lot of help from various people.

It was introduced in the Senate by the two Senators, a Democrat and a Republican. They scheduled hearings. We testified about it. Then, sort of in the midst of the legislative process and before it got too far, the Supreme Court split on *Carpenter*. The result was that the Second Circuit decision supporting the government's expansive view of the misappropriation theory was still good law, at least for that circuit.

The senior people at the SEC, career people, said to Dave Ruder and I think Dave agreed, "We don't want to have a statute now because we're doing fine in the courts." They withdrew their support and the pressure for it from those who were supporting a strong SEC enforcement program in the Congress, including Senator Riegle, evaporated. I think Senator D'Amato would have loved to have gone ahead with it because the Republicans would liked to have put a ring fence around the concept of insider trading.

In fact, our monthly luncheon group with senior securities lawyers talked about whether there was any end to where the concept of insider trading might go. Reportedly, the SEC is looking at people who do research into what the government's likely to do on various issues and then sell the information. "The government's going to do this with respect to health plans. That's what I've heard." Is that insider trading or is that simply good research?

RC: The market break helped put the brakes on the momentum on that also, didn't it?

JO: Yes, I think that's right. That was an interesting exercise and again I think helped identify me and my name in the minds of clients and others as somebody who knew something about the SEC.

RC: From there, how did you get into the governance issues?

JO: I was actually doing a deal. I was selling a bank and an insurance company to a bigger financial services conglomerate. This would have been about twenty-five years ago. I was negotiating across the table from a senior partner at King & Spalding named John Hopkins who went on to become general counsel of an insurance company, not the one we were dealing with then. We got to be quite good friends. Even though we were going toe to toe over the table, we'd actually have a drink later. We found we got along very well; sort of saw things more or less the same way. We both had done a fair amount of board work as a result of our deal work and investigations and other things. We had occasion to advise boards of directors on various questions in connection with deals or these investigations that I had done and so forth. We found that the dynamic in the boardroom was interesting. We swapped stories about what that was like.

Maybe a year or so after that deal, he called me up and said, "Bayless Manning is retiring from Paul, Weiss. He has been serving as independent counsel to Coca-Cola's audit committee since 1976 or '77," when they had had a big questionable payments problem. It was actually pre-FCPA. It was a problem in South Africa, as I remember. "They're looking for somebody new who can give them a good fifteen or twenty years. I think you'd get along with those people. You'd be good because you understand what things are like in boardrooms. You've done deals. You're not one of these people who spent all of his time in government or only thinks like a prosecutor. I recommended they talk to you. They're going to talk to several people." I said, "Gee, I haven't thought about doing that but I have worked with audit committees. I've done investigations. I'd be happy to talk to them." Coca-Cola's Coca-Cola so I'm certainly not going to say no.

Lo and behold I'm visited by the then-deputy counsel of Coca-Cola who came up, he later became the general counsel. We had a very good meeting. He said, "Thanks very much. I'll get back to you." A bit later, I had a call that the chairman of the audit committee, who was a former cabinet secretary, was going to be in town and asked if I meet with him, so I had lunch with him. Then I got a call about a week later that said, "You're it, if you want to take it, but your firm can't do anything else for Coca-Cola." I said, "We do some work for Pepsi." They said, "You've got to have an ethical screen. No information is supposed to pass." I've been ever since that time, and still am, independent counsel of the Coca-Cola audit committee. I go to the meetings. I try to keep them briefed on relevant developments. I am consulted about issues that would come up.

Word got around that I did this because there were a number of people who were on the audit committee. Warren Buffett, for one, was on for many years as were a number of other prominent people. People would say, "Who knows about corporate governance," or "who knows about audit committees?" My name would come up. Thus, I backed into it. It was never a huge representation. It's always been a very interesting one. It's a great company, very, very interesting. That's how I got into corporate governance. I got there really two ways: one, by doing investigations for a number of different kinds of companies and having to make reports; and second, by the Coca-Cola audit committee work. I found the work really interesting.

I started writing a bit about it. Along with Harvey Pitt and some others, I was one of the original contributing editors of *Legal Times* when it was first founded. I wrote fairly regularly for them, short pieces. I had started writing about audit committees. I started writing about other governance issues. Amy Goodman, my now partner who was then just leaving the SEC where she had worked on corporate governance issues with Harold Williams and was editing publications for what was then Glasser LegalWorks, now Wolters Kluwer, had asked me to serve on the editorial board for *The Corporate Governance Advisor* when she set that up. I wrote some articles for her. I got more and more interested in the area and wrote more about it.

Then I wrote a book with a co-author on director and officer liability, indemnification and insurance. We were talking about directors and officers and governance duties and liabilities and what you do about insurance. I got into that because after the *Smith v. Van Gorkom* decision in 1985 in Delaware, there were a number of leading companies that had problems getting insurance. Insurance rates went up. There were concerns.

RC: Insurance for?

JO: Director and officer liability. *Van Gorkom* was the decision where the Delaware Supreme Court held the directors personally liable for the failure to take adequate care in connection with the sale of the company. Basically the company was sold to Jay Pritzker for, in the court's view, too cheap a price with too slight a process to justify the sale, which was negotiated very quickly with the CEO of the company personally involved, and without much reliance on outside advisers.

It was a real wakeup call for corporations. It impacted the availability of insurance against that kind of liability, sent the rates up, made it less available, got people worried. At the end of the day, I think Pritzker paid the damages that were assessed against the directors interestingly enough because I guess maybe he thought he did get a good deal. I was working with corporate clients on addressing those issues. I started writing about that. That's corporate governance related. In that same time period, I was chairing the Committee on Federal Regulation of Securities. It's a mouthful. We usually just say Fed Reg. I was chairing Fed Reg. We were having programs dealing with those issues.

RC: Were they just particularly prominent at the time?

JO: I think they were prominent at the time because all of the sudden, directors were worried about liability. People were worried about process. Suddenly, the process by which decisions were made became very important, not just in that case but a number of others because courts have a hard time (that's why we have a business judgment rule) deciding whether a business is right. It's not really the court's job to decide whether it was a good deal or a bad deal, but they have an easier time, because lawyers are trained to do that, deciding whether or not the process was thorough. Cases in Delaware tended to focus on process.

Even in the case of federal securities class actions, particularly if you're talking about decisions by a board made in connection with disclosures related to a company that's offering securities to the public, either because of Section 11 liability under the '33 Act where you have a defense if you exercise good due diligence and don't, after exercising good due diligence, have reason to believe that there's any deficiency in disclosures or, in the case of the '34 Act, Section 10(b), where there's a question of scienter or were you reckless. Both to establish that you're not reckless and to establish that you satisfied diligence, two core issues under the key liability statutes, process is all important.

Companies became focused on process, as class actions were mounting and as the risk of liability was perceived as being greater as a result of Smith against Van Gorkom and a few other cases. Governance is process. What does the board need to do? What advice does it need to have? What kind of meetings does it need to hold? What information should directors have in front of them? All those are governance issues. I found myself, as did many other lawyers, advising companies about those things. Because I had this history of being in the boardroom for other purposes, I think people thought I had some credibility. I was comfortable. Directors were comfortable. A lot of them knew me from other situations. There were a number of us that really moved heavily into governance in that time period. Marty Lipton was already there because he was the chief defender of corporate America. Ira Millstein came in as an anti-trust lawyer originally for GM but then began advising directors. Others became involved. This really began in earnest in the early eighties and intensified in the mid-eighties.

RC: As you're talking about process, is that something that at that point was not well defined and you're defining it or was it –

JO: I think the courts were defining it as they went, but we were trying to anticipate what the courts would require and also take the court decisions, particularly the court decisions in Delaware, but also looking at what federal district courts and federal appellate courts were saying constitutes recklessness. What do you do to avoid being reckless? Of course later on we had all kinds of add-ons through Sarbanes-Oxley and Dodd-Frank, particularly the certification requirements of Sarbanes-Oxley and the requirements for an independent audit committee and for the audit committee to independently relate to the auditors and to hire and fire the auditors. All that came in but that was later.

I will say though after Sarbanes-Oxley—I used to go to meetings at the Coca-Cola audit committee and others as needed. Once that was in place and particularly the procedures under 404 to verify the adequacy of internal controls and to get the auditors' opinion on that and the concerns about what you do when you retain the auditors and what the audit committee has to do in terms of reviewing quarterly filings and so forth, all that sort of came to a head. I started being asked to go to all the audit committee meetings for a number of companies at least for a period of several years.

I started going regularly to board meetings. The practice really exploded in part because of federal legislation. We had the federalization of some of the standards of corporate governance first with respect to audit committees. We moved over to Dodd-Frank in connection with compensation committees. Again, this drumbeat of potential liability on the state law front and new governance requirements on the federal front and under class actions where you'd have to establish that you weren't reckless or that you exercised due diligence.

RC: This is in the early nineties is when you get involved with the Fed Reg committee or is that earlier?

JO: I can't remember my dates. You'll have to look at my bio.

RC: At that point, were you also working the advisory committees of the New York Stock Exchange and NASD?

JO: I think I was either chair or was active at least in Fed Reg when I was asked to join the advisory board of what was then the NASD. I served on that for a term of six years or whatever the term was. I can't remember. Then simultaneously and rather uniquely, I was also asked to serve on the legal advisory committee of the New York Stock Exchange, of course they were fierce rivals at that time. The thought was you couldn't do both.

Either wise or reckless people decided that a couple of us could. I think I was on both and I think the late Al Sommer was on both. It was unusual but I wasn't unique. Then I stayed on the New York Stock Exchange legal advisory committee for three three-year terms. After each term, you had to take a year off, so I was on for nine years but it was actually over a period of eleven years, more than a decade. I chaired a task force on listing standards and undertook various other special assignments for the NYSE.

It was a very interesting time. It was when the New York Stock Exchange was really riding high and had a very, very strong chairman. He later had issues raised about his compensation, but I thought he was a great chairman. I've done work with some other exchanges since that time. In recent years, I've done governance work with two different exchanges. It's a lot tougher to be a stock exchange now than it was then. Basically there were two major markets. Exchanges are fierce competitors. Now it's a much tougher environment with so many different markets and dark pools and so on. It is an interesting time to be involved in that.

I would say, Robert, that the nice thing about this career and what I've liked about securities law once I really got into it is that it is a profession that is practiced by people that have an intellectual interest in the law and that care about the development of the law. They tend to be very bright people. It's somewhat complex. It's got its own universe kind of like the tax code.

You have to spend some time before you really understand it, but once you're admitted to the brotherhood and sisterhood of the securities bar, it's a very good place to be. I think that's still true. I think of myself as a corporate governance lawyer, but I think of myself first as a securities lawyer. The funny thing is I never took the course. The first time I systematically really examined the federal securities laws is when I taught the basic course at Cornell as a visiting professor in 2003. Then I had to actually pick out a case book and read everything and prepare all the lectures. I learned a heck of a lot. (Laughter.)

RC: (Laughter.) Yes, I'm sure going back over it.

JO: Write an exam.

RC: In teaching, you have to decide what your students need to know.

JO: Yes, it's a real art. I think I've gotten somewhat better at it having been doing it for quite a while now. It's very different from CLE instruction to practicing lawyers. I like that too. You have to learn that you really have to have an objective in each class of getting across a few things. You really can't get across twenty-five things. You're dying to because you've got twenty-five things to say. You've got to edit your lesson plan, at least in your mind, and say, "Okay. Here are the things I think that this class really needs to accomplish." You need to get to what the takeaway is going to be. Each class you want to build so that at the end of the semester you have created a system of knowledge that's going to be useful to the students going forward.

I remember when I was teaching that securities regulation class at Cornell in the spring of 2003, we got to about the second or third class. We're talking about materiality. I realized that most of these students had never had a course in accounting, or at least many of them had not. I said, "How many people have had an accounting course?" Less than half the class, maybe less than a third. I said, "We'll stop here."

I said, "Next time I'm going to have a special class. I'm not an accountant but I'm going to teach you what you need to know about accounting because we can't continue talking about materiality if you haven't had an opportunity to learn about the basic concepts of accounting." That was a real good lesson for me. Now law schools are putting accounting classes back in the curriculum and making them available. If you want to be a business lawyer, and you don't understand the basics of accounting, you're kind of at a loss.

You learn to be humble. You also learn that you may think you're saying a lot of great stuff but only about 20 percent of it is getting through, which is why teachers repeat and why they have outlines and why they come back. It's a good practice. It's also good because those same skills you have to use in a boardroom. If you're talking to a group of lay directors, you really can't go off into a bunch of legal technicalities.

You need to tell them what your recommendation is or what your conclusion is, why it is, give them an opportunity to ask questions, and then go back over it and make sure they're comfortable with it. It's not unlike teaching a class, but it's a different kind of class. With students, you're owed a certain amount of respect and they call you "Professor" and so forth. Directors don't owe you anything. They're mostly saying, "This is a lawyer. What does he know about our business?" You've got to earn your credibility.

RC: If I could jump back a little bit, I'm looking through the issues in the nineties. Is there anything else from the early and mid-nineties we should discuss?

JO: I noticed on the outline you sent me that you do talk about one share, one vote at the New York Stock Exchange.

RC: I didn't know if you were on the advisory committee at that point or if that was something you were involved in.

JO: I was, but actually I was involved in a different way. I was retained to represent a group of companies that had dual class voting systems, the *New York Times*, Dow Jones, the publisher of the *Wall Street Journal*, the Los Angeles Times Company, and the A.H. Belo Corporation that publishes the *Dallas Morning News*. I was retained by them to represent their interests in connection with the SEC's attempt to adopt a one share, one vote rule, which was struck down in *Business Roundtable v. SEC* here in the D.C. Circuit. I think I wasn't retained until right after the case was decided. Arthur Levitt was the incoming chair of the SEC. He was using a lot of moral suasion basically issuing dicta that the exchanges were going to adopt a rule.

I represented those media clients in meeting with the exchanges and with the SEC senior staff in trying to be sure that the rule grandfathered them in, allowed them to continue to issue high voting shares when they thought it appropriate in connection with options to employees and in connection with acquisitions and so on. We successfully negotiated that. You could maintain your system. Also, you could go public with differential voting as many of the high tech companies were already doing. However, once you were public, you couldn't change the rules of the game. That was the compromise. Eventually it was adopted by the exchanges.

I was very much involved in that on behalf of those companies, which was I suppose something of a conflict with my position on the New York Stock Exchange legal advisory committee. However, the legal advisory committee was an unpaid, advisory group that didn't make any decisions. The legal advisory committee was designed to be a cross-section of people with different points of view. There were practitioners, academics, people representing investor groups.

Dick Grasso did not want anybody to tell him how to run the Exchange, let alone a bunch of lawyers. It was a purely advisory body. We got briefed on things. We gave advice. We did give some advice on some technical parts of listing standards having to do with approval of equity-based compensation plans for officers. I actually headed that task force. The legal advisory committee was consulted a little bit about this, the one share, one vote rule, but it was really negotiated at a very high level. The SEC staff, under Arthur Levitt's direction, had the final say on what was in the rule for the exchanges.

They were very, very heavily involved including Linda Quinn, who was then head of Corp Fin and various other people. I'm trying to remember whether Rick Ketchum was head of market regulation then. Whoever the heads of those divisions were, they were very heavily involved, as was the SEC's general counsel and members of the Commission.

RC: I'd like to jump ahead to auditor independence. How did you see that looking from a governance perspective?

JO: I think with respect to auditor independence that Sarbanes-Oxley and some predecessor rules that had been adopted under Arthur Levitt after a lot of negotiation with the AICPA have generally been pretty successful. I think that the old overweighting of consulting, which could be viewed as interfering with the independence of the auditors, has been largely corrected. There's a lot of awareness of that. Audit committees are certainly aware of that. The various proxy advisory agencies look very carefully at the balance between audit and non-audit services when they make recommendations. I think that's a success story.

I had been involved. I advised a lot of audit committees. Our firm—I wasn't heavily involved, a little bit—represented the AICPA in the negotiations that led up to the final provisions of Sarbanes-Oxley with respect to the PCAOB and auditor independence and with respect to the rules prior to that that had been adopted by the SEC under Arthur Levitt when David Becker was general counsel for the first time. I was peripherally involved in that, gave some technical advice, but it was other Gibson Dunn partners who did most of that.

RC: I'd be curious to know how the boards you're advising at that point viewed the reforms.

JO: Boards are always concerned about reforms because they're not sure they're going to work. They think they're going to be burdensome. They may require additional process. They may create risks of liability. I think there was trepidation about this. The audit firms had the same trepidation, if not more so. It was affecting their business model. There was a fair amount of angst.

I think after Sarbanes-Oxley, the principle irritant was the cost and elaborate process required for the 404 assessment of the adequacy of internal controls. There's a view among many in the business community that that was a bit of a conspiracy of regulators who really wanted to regulate a lot and audit firms who saw it as a business opportunity to do a lot more work.

I don't know if that's necessarily true, but that was the view at the time. People were unhappy. Ultimately under Chairman Cox with AS-5, the standard which was originally the AS-2 standard was altered in ways that made it less burdensome to do the 404 assessment, allowing a risk based top down approach when appropriate and so on. Now to some extent, the PCAOB is pushing back and saying the firms may have carried that too far. Section 404 turned out to be the major irritant.

The business community fairly quickly after initial concerns about it, accepted CEO and CFO certification of the quarterly and annual reports. I think audit committees felt empowered and continue to feel empowered by being given direct responsibility for hiring the auditors and overseeing the auditors and hearing from them privately. The AS-16 requirements on communications between auditors and audit committees I think had generally been pretty well received.

There are some issues that are of concern. The mandatory rotation of auditors is a real concern. It hasn't happened. Whether it'll happen or not is hard to say. I think that the current structure has worked pretty well. I think that Sarbanes-Oxley has been something of a success and indeed, compared to Dodd-Frank, it's almost a model of judicial economy. At the time Sarbanes-Oxley was adopted, we thought it was kind of a dog's dinner, a mess of different things. Sarbanes-Oxley was thrown together in a big hurry after Enron and WorldCom. Basically the President announced he wanted to sign a bill by the end of the summer. The Congress took that as an opportunity to put everything that was in the hopper into the bill. It's a somewhat messy bill but not nearly as messy as Dodd-Frank.

RC: In talking about Dodd-Frank, one of the things –

JO: Let me tell you one thing. I have a very strong philosophical view about auditors and audit committees. They are engaged in a symbiotic relationship. The independence of both and the good faith of both are critically important to corporate America. It's very important that they be candid with each other. I think the structure of having the audit committee in charge of the auditors is a very good one. Too often, and I think it's changing for the better, auditors were either viewed as, by some company managements and sometimes by directors, as sort of a necessary evil, kind of like lawyers.

You had to have them around at certain times. You don't want to feed them too much or give them too much information because they're going to aggrandize their role and get in the way of a real business. I think that's got to change and that the audit committee has a real responsibility for being there to see that the auditors are listened to and that they have the resources that they need. I think it's not an adversarial relationship at all. It is a relationship where the auditors are being retained along with the audit committee to try to provide an appropriate independent check on the financial statements. They're not perfect. It's not a guarantee. It's an audit. People need to understand that.

I've enjoyed over the years very good relationships with all of the audit firms, even though we've disagreed on things. I worry because I'll have clients who will come to me and say, "Boy, these auditors are terrible. They're making unreasonable demands. They're taking a position that doesn't make any sense." My view is you've got to understand where they're coming from. There's almost always a reason. Sometimes you can persuade them that they're headed in the wrong direction. I feel pretty strongly that in general, auditors play a very beneficial role in corporate governance.

I feel the same way about investors being in corporate governance. I've come over the years to be much more understanding of the drivers behind institutional investors. It's not just short term performance, although they are criticized for that and sometimes rightly so. I think that the good institutional investors, and there are many of them, are really concerned about the long term health of corporate America.

I've been very happy to be involved for the last decade or so in the work of the Aspen Institute Corporate Values Strategy Group, which has put out two statements of principle bringing together all those different disparate forces to try to focus on long term issues as opposed to making short term decisions and also trying to focus on bringing people together in a cooperative relationship as opposed to adversarial relationship. I read the papers every morning. You always see one board or another that seems to be in a battle with institutional investors. Sometimes maybe that's justified but my overall view is it's not productive. Both sides or all sides ought to be able to find a way to come together because they have common objectives, which is the health of the enterprise.

RC: You've been in this industry since institutional investors really started wielding their power.

JO: I have.

RC: How have you seen that change?

JO: I think there's been a maturing on both sides for all sides.

RC: How so?

JO: I think well-advised companies understand the imperatives that institutional investors operate under. They are performance driven because they're measured by performance. They're in some cases compensated by performance, which is probably better than compensating them on the basis of assets under management. Companies are driven by various goals including performance over various periods of time.

One of the problems, as you say, the shareholders are the owners of the company. The board ought to represent them and the company ought to be run for the benefit of the shareholders. There's some truth in that, but in practice, do we mean the person who's only a shareholder for twenty minutes or who's in and out of the stock four times in the same day? No. Do we mean somebody who's in there as a pensioner investing in his own or her own company's stock? Maybe. We used to talk about the widows and orphans whose trust funds are in there. Do we mean the big pension plans? We mean all the above. To say it's for the benefit of the shareholders is only the beginning.

The way I get comfortable is saying, "Well, if you're worried about the health of the enterprise and the reputation and long term value of the enterprise, you're probably on the right track because you can't really figure out what the goals are of every individual group of shareholders." If you did, you'd drive yourself nuts because they'd all be at cross purposes. What about a short seller? Do you have an obligation to the short seller? To make the stock do a terrible job so that they can cover on the cheap? No, you really don't.

It's fun to think about those things. When you're advising a board, they know they've got a fiduciary duty and they know that the duty is to the entity and ultimately to the various stakeholders. In some countries like the U.K. now, it's explicitly to stakeholders and not just shareholders, but then when you're making decisions, what does that mean? Do you have to take the premium offer right now because it's on the table and it's higher than the current market price? The answer of the courts has been no as long as you're not conducting an auction.

If you're conducting an auction, you've got to get the best value you can get or at least make an effort to do that. If you're trying to manage a business for the goal of having a bigger business in five years and you've got a master plan for doing that and you've got the building blocks, is it reasonable to say, "Let's wait and see what happens over the five years?" Probably. The courts say that's okay as long as you're doing it honestly and not trying to game the system in some way. It's fun to be advising in situations like that because there isn't any easy answer.

I was at a symposium at Seattle University a couple of weeks ago. A couple of guys, Chris Pereira from GE who's head of their corporate governance and securities now, and a hedge fund manager who's a friend of his, put on a series of mock problems for boards of directors making choices between different strategic alternatives where you don't know the outcome. Then they said now here are the actual possible outcomes. There was a room full of corporate directors and advisers.

We were really struggling and actually voting how many of us would take the choice which was reasonably sure to double your return in five years at very little risk of loss or do we take the alternative where you can get 400 percent on your money in five years but the risk of loss was also 400 percent. Which one do you take? How do you make the decision? Which is right? Well, neither is right. It depends on your risk tolerance. It depends on what the nature of the decision is. It depends on your assessment of the likelihood of success. It depends on what you think about whether the management can actually carry this out. There are very interesting complex, multi-part decisions. It's really fun to be around when that happens.

RC: There's just so many factors.

JO: How much can lawyers do? The lawyers can basically say a few things. They can say, "If you got a personal interest or some family member or business associate does in this transaction, you've got to be very careful, full disclosure, maybe recuse yourself, don't participate." That's fairly easy. For the rest of it, you've got to be careful. You've got to take the time to understand what the choices are. You've got to get the right information. You've got to think together with your fellow directors. You've got to deliberate. Then you make a decision. You'll probably be okay; even if it turns out that you made the wrong choice. You made the 400 percent choice. You had the big loss. Generally people don't get in trouble for business decisions if they're sincerely made without conflicts of interest, as long as they're careful about it.

RC: I think you were talking earlier about decisions made through the right process.

JO: Yes. Lawyers do know process. We're good about that. That's essentially what corporate governance is. It's process. It's process for making decisions that are going to be both more likely to be sound decisions because the process is good and also going to be defensible if there later turn out to be problems.

RC: We should take a few minutes to talk about some of the Dodd-Frank issues. One of the things that is the latest iteration of an old debate is the shareholder access issue. I'd be interested to hear, as you've followed corporate governance, how you have seen that debate?

JO: I always thought it was kind of a sideshow. My friend Ann Yerger and I talk about this fairly often. She heads the Council of Institutional Investors. She comes to my class every year. She said that it's not going to be a factor for most companies very often, for several reasons. One is that people are not going to vote for dissident nominees unless they're unhappy with the current board.

In order to have dissident nominees through proxy access, you first got to put in place a system that gives you proxy access, which requires the support of the majority of the shareholders voting and then action typically by the board because most of the proposals are precatory. They're not mandatory, although there have been a few attempts to put in place a bylaw through the proposal process. Which is hard to do given the word limits and the given the fact that it's hard for people to understand the details. I think it's going to be limited number.

An interesting thing is just this few weeks ago, the shareholders of Verizon by majority vote, adopted a precatory resolution saying they wanted proxy access. Verizon is not a troubled company as far as I know. I'm not quite sure what motivated that, but that's kind of interesting because that would prove that maybe Ann and I are wrong in our view that it's not going to be used all that often. I think the general thought is it will be used when companies are really troubled. In most of the few cases where it's been adopted, that's been so.

I think the SEC by being stubborn about a mandatory proxy access rule going way back to when Harvey Goldschmid and Bill Donaldson started the ball rolling and they weren't able to carry through. Then it was looked at during the Cox time, there was a lot of back and forth, which we don't have time to talk about. The net result was a proposal that was put out early in the tenure of Mary Schapiro. Then Congress came along in Dodd-Frank and said, "Yes, you got the power to do it." That took away the argument about whether the SEC had the authority. The question became should they do it and how should they do it?

The business community by and large and the American Bar Fed Reg committee, not under my leadership, under new leadership, said, "You really ought to try private ordering first." In other words, let people have the ability to put in place a system through the shareholder proposal process. Then if that happens, see how it works. Only if you think you're not getting where you need to get should you have a mandate, because mandates are one size fits all. They don't always work.

The SEC didn't listen to that. They went ahead with the rule after the statute came in and had very, very quickly made a mistake in trying to cover investment companies, which got the mutual fund industry upset with them. Investment companies already have a lot of governance protections and are a totally different kind of structure. They ended up with an embarrassing and really brutal opinion in the D.C. Circuit striking down the rule that was adopted.

Many of the SEC's alums, many people at the SEC, are hurt by the tone of that opinion. I understand that. I think personally that the Commission would have been well advised to follow the advice of the Fed Reg committee and others and try private ordering first. The result is we have private ordering now because the business community didn't challenge the changes in Rule 14(a) that would make it possible to have private ordering. Now we are in our second proxy season of seeing how many companies are going to see those proposals, whether they're going to be approved by shareholders or not and how they're going to work.

It's early days. I'd be very surprised if the SEC comes back with a mandatory rule because I don't think they want to get burned twice. I don't expect to have a ton of companies go to proxy access by private ordering because even if you get two nominees on the ballot, if you really want to get them elected, you've got to spend some money to campaign.

Just getting them in the proxy statement is helpful, but unless the company's shareholders are really upset, why would they pick two people that they don't know? They'd have to be outstanding people and it has to be a company where it's appealing to have them there. I'm not quite sure what the end game is at Verizon. I'm interested to see if the board responds by putting in place a system and perhaps they put it to shareholders next year and it's approved, then the following year will we see people actually making nominations or not. We'll see that at maybe a few other companies. I think it's an experiment that'll go on for a while but I don't think it's the major action.

I think interestingly enough the other thing that Dodd-Frank did that's turning out to be more important is say on pay. Again, it's not a majority of companies. The majority of companies are getting approval, but a significant minority are getting negative recommendations from one or more of the proxy advisory firms. In those cases, not a major fraction, but a significant fraction of those cases, they're getting negative votes or very high, close to negative votes. I think that is impacting the way compensation decisions are made. One can argue whether it's a good or a bad way. It hasn't lowered total compensation much, but it's probably changed the way it's put together.

RC: How so?

JO: I think we're seeing people making an effort to demonstrate to the satisfaction at least of the proxy advisory firms that it's performance based, that when the return of investors from the company goes down, the compensation goes down. A recent example that is very much in the press of course is the reduction made in Jamie Dimon's compensation at JPMorgan Chase.

Interestingly enough, it wasn't that his bank's earnings went down. It's just because of the problem with the London Whale thing that led his board to take action. Would they have done that in a non-say on pay environment? Very possibly. It's hard to know, but people are very focused now on whether or not executives' compensation responds to problems with performance or perceived problems in management.

RC: Are there other things that come in out of Dodd-Frank that you see as affecting corporate governance or are those the two?

JO: I think the others are pretty minor. There are a number of changes with respect to compensation committee consultants and independence and so forth but they're things that were already underway with the SEC. I don't think they're major changes. I don't think they'll change behavior a lot. People were moving to independent consultants anyway. I think say on pay is the biggest thing. That's something that the institutional investor community has wanted for a long time. It's interesting to me that the statute was carefully crafted to permit companies to select between annual, biennial, or triennial votes and almost everybody ended up going for annual and all the investor groups wanted to go to annual except for the Carpenters Union who wanted a triennial vote.

RC: Why do you think they did that?

JO: The Carpenters?

RC: No, just the general trend towards annual.

JO: I think it became the view of the institutional investor activist community, which is not all the institutional investors, and of the Bebchuks of the world that holding directors' feet to fire on an annual basis in any way that you can is a good thing. I think that concept can be carried too far because what it does is promote short term thinking and short term action. But in the compensation area, I don't think it's terribly harmful.

There was a concern, which I shared. Not that anyone paid any attention to how I voted my few shares of each company but I voted for triennial because I think most good compensation plans have a longer time horizon than one year. I'm much more interested in what the company's compensation is as compared to performance over a three to a five year period than I am in one year. Intellectually I'd rather see a more meaningful, less frequent vote. I understand the idea of making directors accountable on an annual basis. That's why the academic activists, the theoretical activists, are working so hard for declassified boards. They want to have excitement every year. There are some problems with the declassified boards. One is it makes it hard to evaluate directors.

RC: Declassified board meaning?

JO: Every director's up for reelection every year. It's a little bit like a problem we have with the House of Representatives. If you're running for reelection all the time, it's very hard to get you to think long-term. In corporations if every director is running every year and the directors are supposed to evaluate each other's performance, how do you do that? With a classified board where only a third are up each year, it's quite easy to do because the governance committee usually is made up of members of each class and the people that are up that year don't participate in the evaluation.

It’s done by the governance committee remaining members who are not up that year and in consultation with other directors. It’s easier, but that’s not the fashion of the hour. I think Marty Lipton and I and a few others think it’s too bad the staggered board or classified board’s going away because we think actually it provides some stability and continuity and it makes it easier to manage board departures on a three year cycle than if you have to worry about who’s going to be on the slate every single year.

If you have a director who’s new on board, you already know it takes them a while to get to know the company and it takes the other directors a while to evaluate how effective you are. If you’re doing it on a three year horizon, it just works better. I think that battle’s been lost, at least for large companies. You see many companies going public with staggered boards. They’ll keep them until the activists get after them and then they will give them up.

RC: I know we’re running a little short on time. Is there anything else you’d like to cover?

JO: No, I think you’ve indulged me greatly.

RC: It’s been a pleasure talking to you. I appreciate you taking the time to do it.

JO: No, it’s been fun. Looking back, I’ve been practicing almost fifty years; I could be talking for another four hours and really bore you to tears.

[End of Interview]