Securities and Exchange Commission Historical Society
Interview with Barry Barbash
Conducted on April 18, 2016 by William Thomas

WT: This is an interview with Barry Barbash for the SEC Historical Society's virtual museum and archive of the history of financial regulation. I'm William Thomas. The date is April 18, 2016 and we are in Washington, D.C. Thanks very much for agreeing to speak with us. We'll start with a bit of personal background. I see that you were born in Massachusetts. Do you consider yourself to be from there?

BB: I still do, notwithstanding having not lived there since my mid-twenties. I will always think of myself as being a New Englander and from Massachusetts.

WT: Do you come from a family of lawyers, or were you the first to get into that?

BB: I was the first person in my family to go to graduate school. My father had the opportunity to go to business school at Northwestern, but turned it down because he had a fiancée – my mother - and he decided that he wanted to work right from the get-go. But I was the first in my family to go to graduate school. I have three brothers, one of whom is a lawyer.

WT: And you graduated from Bowdoin College in 1975?

BB: Bowdoin College. Brunswick, Maine.

WT: What did you study there?

BB: I was a double major, history and government. I always thought, while I was in the first years of college, that I would want to be a teacher. I had a terrific faculty advisor, a fellow by the name of Willie Whiteside, who when I was a junior called me up to his office. It was in what seemed at the time to be the fifteenth floor of the building—it was probably the fourth floor of the building—and from that perch above the campus we talked about my future, and I told him that I thought I wanted to be a teacher. He suggested to me that maybe that wasn't such a great idea because teaching positions weren't all that available at the time, and I would probably end up teaching at a private school, and he seemed to think that I could do better than that. He encouraged me to think about becoming a lawyer, and I didn't know better, and I always admired him and listened hard to what he had to say. So that changed the path, and that caused me to take the LSAT and the rest is history.

WT: And you went to Cornell.

BB: Cornell Law School.

WT: Did you have any notions or interests in law while you were there, litigation versus corporate work or anything like that?

BB: I was the first person in my family to go to graduate school, first person to go to law school, and I didn't really know that many lawyers. I knew my father's lawyer, who was a suburban lawyer outside of Boston who did a lot of different work. He had a lot of different clients. He represented a local newspaper, which I always thought was pretty cool, to be involved with the First Amendment. He did some corporate work, and I always envisioned that's what I would do.

My roommate from Bowdoin's father was a litigator with the Department of Labor for years and years, over thirty-five years. My roommate's father, who knew me from the time I was about eighteen years old, said to me, lawyers in his experience could be generally characterized as being of two types, litigators and corporate people, and he said to me he always thought of me as more of the corporate type.

I said, "If you say I'm a corporate type, then I must be a corporate type." He said, "Well, if you are a corporate type, let me make this suggestion to you. You should think about, after law school, going to Washington and taking a job with one of the federal agencies. Work there for five years," he said, "then you can go to any kind of corporate practice wherever you want to throughout the United States and you'll be better for it." I said, "Sounds like a plan to me," and I ended up doing that.

I came to Washington out of law school. I had taken a securities law class with David Ratner, who was well known in the area of securities regulation and wrote a textbook on securities regulation. He also worked at the SEC; I found his description of the SEC appealing. I also took a labor law class and I thought the NLRB sounded like a good agency. As it turned out, neither the SEC nor NLRB was hiring after I graduated, but the Department of Labor was hiring in an almost brand new area of regulation, the federal pension law ERISA.

WT: This is 1978.

BB: Yes, in 1978. The department was hiring for the unit of its Solicitor's Office that oversaw ERISA. I knew virtually nothing about the law or pensions. But the statute sounded like something new, sounded like the frontier, and I thought that was for me. I started out of law school working in Washington for the Department of Labor in the ERISA area, and it was a great experience. I did that for about a year and a half. The Department of Labor's budget in those days was always being called into question. It was somehow tied up with abortion funding, which was a hot-button issue on the Hill.

The result was, from time to time, the budget wouldn't be forthcoming, and when that would happen the Department of Labor personnel would have to stop working. You'd come into the office, but you couldn't work. I just found that incongruous and very disheartening, and when it happened the second time I called somebody I had worked for at the Department of Labor who had taken a high-ranking position at the SEC. He'd come to Labor from the SEC and went back to the SEC, and became an associate director in the Division of Investment Management. That would be Joel Goldberg –

WT: I'm talking to him in two days.

BB: – who later became division director. Joel said to me, when I called him and said "Are there any jobs at the SEC? I've always wanted to work at the SEC." Joel said, "I think there are." So we decided that we would meet, somewhat surreptitiously, at the Dubliner Restaurant near Union Station. The SEC was at 500 North Capitol Street in those days.

Joel and I meet and Joel said, "What do you think you'd want to do if you could get hired at the SEC?" I said, "Oh, I know I want to be in the Division of Enforcement." "Why is that?" I forgot how I answered Joel, but the real reason was I thought the Division of Enforcement was like the FBI. I figured that everybody in the Division was issued windbreakers that said "SEC" on the back and everyone got to break down doors and shut down shady boiler room brokers. That's really what I wanted to do, and that's what I thought they did in the Division of Enforcement.

WT: Wasn't it relatively recently established at that time, too, that division?

BB: Enforcement was a creation of, I think, the late '60s and early '70s.

WT: So it was pretty well established then.

BB: But it was generally viewed as a cool place to work. It was a place that was under the direction of Stanley Sporkin who was generally viewed—and I certainly thought of him this way—as a star and somebody who would be really great to work with. Joel Goldberg said to me, “You don’t want to work for Enforcement.” I said to him, “I don’t?” He said, “No.” He said, “You’re from Massachusetts, and ultimately don’t you want to go back to work someday in Massachusetts, in Boston?” I said, “Yes.” He said, “Well, the corporate law that’s securities-related in Boston is mutual fund law. Mutual fund law is administered by the Division of Investment Management, so you want to work in the Division of Investment Management.” So, for about the third time in my life, I took the advice of someone I considered a mentor and I ended up as a staff attorney in the Division of Investment Management.

My time as a young attorney at the SEC was great because I felt as if I wore a white hat, and I loved that. The SEC just struck me as not nearly as political as the Department of Labor was, tied up with abortion funding and those kinds of issues. The SEC had an independent existence. It didn’t have to kowtow to anybody. I loved working for the investing public. My work was not enforcement related, but I enjoyed learning about funds and I liked the substance of the Investment Company Act. That’s how I ended up going to the investment management area.

I found Washington an interesting place. I loved the idea of Washington as the center of national policy-making. I loved the history. I often used to go to some of the museums, particularly when I was at the Labor Department, and I thought it was great to be around Washington.

But the Washington dating scene for me wasn't so terrific, and after I'd been at the SEC, in the division for about a year, I got a call from somebody else, for whom I had indirectly worked when I was at the Department of Labor who had gone to Willkie Farr & Gallagher in New York City and was starting an ERISA practice. As it turned out, the practice had become more focused on investment management and mutual funds and investment advisers. Even though I'd been at the SEC for only a year when I received the offer from Willkie—I never thought I would stay only for a year, I figured it was a five-year job—I decided that New York was worth a shot. Joel was supportive of my taking the position. Sydney Mendelsohn, who was the division director, was also supportive. I ended up figuring that if I went to New York City, I would at least be halfway towards Massachusetts. I thought I would end up as a funds lawyer in Boston. And that's how I ended up, in 1981, with Willkie Farr & Gallagher.

WT: Now, between your work at the Department of Labor and the SEC, did you see that there were any connections? I know that the retirement fund area wasn't as prominent then as it later became, but were there connections between the kinds of work that you were doing?

BB: Absolutely, because Title I of ERISA, which sets fiduciary rules for employee benefits plan service providers, was modeled on the provisions and prohibitions of the federal securities laws. ERISA, for example, has provisions that prohibit transactions between the employee benefits plan and certain entities affiliated with the plan. Those provisions, which are in Section 406 of ERISA, are generally modeled on Section 1 of the

Investment Company Act, which was modeled on the provisions in now-repealed Public Utility Holding Company Act.

The fiduciary provisions of ERISA are generally thought to be codifications of the fiduciary law at common law, which are also the underpinnings of the Investment Advisers Act and the notion of fiduciary obligation of registered investment advisers. The 1940 Act, the Advisers Act and ERISA all seem to come from the same family with a lot of similarities.

WT: Now of course in the news we have the Department of Labor's Fiduciary Rule. Is that closely related to the sorts of things that you were working on way back then?

BB: Absolutely. I worked in the Department of Labor when the first version of the Fiduciary Rule was being developed. I didn't directly work on the rule, but I followed its developments closely.

WT: So when you were in private law, did you then continue on with the same firm until you returned to the SEC?

BB: I worked for Willkie Farr for thirteen years, came up through the ranks, and became a partner at the end of 1986. I was a partner for seven years. I always, in the back of my mind, had a notion that I would like to return to the SEC. From my time in college, I always liked governmental policy and legislative policy. I thought that I wanted to try my hand at policy making and I found the idea of returning to the SEC very appealing. When Bill Clinton won the Presidency there was a change at the SEC in personnel, which you often occurs after a Presidential election, and the Division of Investment Management director job opened up.

In those days, the path to the division director was different from that of today. What would happen was that the Chair and representatives of the Chair would canvass the bar associations and trade groups and put together a list of potential candidates. I had expressed an interest during the Bush administration about the Division of Investment Management director job, and was beginning to become known by some of the bar associations. I had done work in the bar associations. So, when the Division Director's position opened in 1993, people in the industry knew who I was and I was asked whether I would be interested. I talked with the then-Chairman of Willkie who was very supportive of my seeking the job, and I became a candidate. I fortunately ended up as the Division Director.

WT: Arthur Levitt had just come in as Chair, then, at that point as well.

BB: Yes.

WT: So he would have been the one who hired you rather than, say, Breeden, who had just left.

BB: Yes.

WT: He has an interesting section in his book, *Take on the Street,* where he says that when he came in to become Chair that was the first time that he'd ever invested in a mutual fund. He had to at that point to avoid conflicts of interest. He wrote that he asked you about how people who invested in these mutual funds understood them. He said that you had no idea, and he said that he couldn't understand the prospectuses himself. I'm wondering about, did he have a very strong interest in this area from the beginning?

BB: He did. Arthur thought, from a public policy perspective, that mutual fund disclosure was a good area to focus on because it was retail-oriented. During the 1980s, more and more people invested in mutual funds. I had reviewed disclosure documents during my time in private practice, and I thought that they were probably difficult to understand for somebody off the street who was interested in investing 401(k) money or to invest for college education for his or her children. Arthur was of a similar view, that the documents were packed with too much language that was designed generally to protect the fund companies and sellers of mutual funds from liability. He was very receptive to the idea of making the prospectuses more useful for investors. It became a highlight theme of the early days of his tenure.

WT: Ultimately you end up with Plain English, implementing it.

BB: The Division did not initiate the idea, but we sought to adapt it to fund prospectuses. My recollection was that Arthur had talked to consultants who devised the Plain English concept. Arthur was always talking to people on the outside to try to get what he considered to be the best ideas. Nancy Smith—I forget what her position was called in those days – worked for Chairman Levitt. She brought with her the notion that we had to make fund documents more readable for investors. I was not hard to convince. I pride myself on knowing *Strunk and White* backwards and forwards, and *The New York Times Manual of Style*; clear, effective writing was emphasized by many of my professors. Plain English in fund prospectuses seemed to be a natural extension of effective writing.

WT: There was quite a lot of history on this particular issue as well. I mean, I know there were issues as to what should be contained in a prospectus, what should be in an advertisement, what prospectus information can and cannot be in advertisements, and so forth. Now, could you kind of take me through the terrain there, a little bit, as far as that's concerned? Rather than where you went with Plain English, versus where you were coming from at that point.

BB: I think it's fair to say that seeking to make prospectuses readable did not originate in the early 1990s. The SEC had consistently over time sought to make those documents work better for investors. The mutual fund industry seemed to have taken off in the late '60s. By the '70s, mutual funds had become an established way for Americans to invest. An increasing number of American families were buying mutual fund shares, and the fund business came to be seen as retail-oriented.

The SEC recognized the retail trend in the 1960s and 1970s and developed an initiative to make mutual fund disclosure documents shorter and more understandable. Form N-8B-1, the form that the mutual fund industry had to follow in drafting disclosure documents during the 1970s, generally resulted in ponderous, dense documents overflowing with legalese. By the end of the 1970s into the early part of the 1980s, the Division of Investment Management had started to look critically at Form N-8B-1 and the prospectuses it spawned.

I think the first real revolutionary step was taken by the SEC in the early 1980s, which was the replacing of the N-8B-1 first by the N-1, which was a shorter-form document. That, I believe, happened at the latter part of the '70s, but in the beginning part of the 1980s you had the N-1A. The N-1A was really the revolutionary document, because the SEC accepted the notion that a prospectus should be split in pieces.

So the first piece would be what would be called the prospectus, and had the information that an investor needed to make an investment decision. But then there was a second piece called the statement of additional information that was generally designed to have all the other information. The statement of additional information was there to be asked for by investors. The prospectus was the main document. The two documents were toothed together, if you will. They were incorporated by reference with each other.

In the early ‘80s, when N-1A was first proposed and adopted by the SEC, you saw some pretty short documents that seemed to be working in the area of mutual funds. It’s almost inevitable, though—what ends up happening in the disclosure area is when there’s a problem in the securities business, the quick response is we need more disclosure, and that’s always been SEC’s answer. So, by the latter part of the ‘80s, into the early part of the ‘90s, the N-1A had become loaded up again and had started to use a lot more legal jargon, because a lot of fund companies thought that in addition to communicating information to investors, the disclosure documents had to also protect them against liability, and that just means putting in a lot of disclosure. That was what we faced when Arthur Levitt came in, was the N-1A having been crammed with much more information.

The original idea I had was to go back and take the N-1A back to its roots, back to the 1980s, early 1980s, and slim it down. I think Arthur liked that notion. What had come up, though, in the end of the ‘80s into the ‘90s was the notion that, instead of a prospectus, having a short-form document that investors could use to buy shares, called a profile. Arthur didn’t necessarily like the profile notion as it was outlined, but he did like the idea, and accepted the idea of having a short-form document. So, we were going to come up with a document that was short-form and that an investor could use. It would have all the information that the investor would need in order to make an investment. So, you would have your statement of additional information, your prospectus, and then this other short-form document on which an investment decision could be made.

WT: One of the things I was reading in your speeches, one of the things that struck me, is that you were thinking very early on, before the internet was what it later became, about exactly what role it would play in disclosure and in providing statements. And you mentioned personalized statements as being something that might become possible. I'm wondering if you could expand on exactly how you were thinking about that and who was driving the thinking about that in that time frame.

BB: Do you mean, I'm trying to remember exactly, personalized statements meaning what?

WT: I think just personal rates of return and that sort of thing.

BB: Oh, the idea of giving investors more of an idea of what their return would be. The issue with the prospectus—the prospectus is a forward-looking document, and as a result it ends up being a disclosure document that basically says this is what the fund can do. This is what it's authorized to do. This is what it's not authorized to do. But it doesn't necessarily tell the investor what the fund has done, which I always thought was something that an investor would want to know, is what has the investor done, what was his or her return, that kind of personalized aspect to what the investor was up to.

The idea would be to come up with a more personalized statement that would be handed out to the investor, or given to the investor, that would basically give the investor his or her history in the fund. That was the notion. It never really took hold as a concept. I still think it's not a bad concept, but it really hasn't quite taken hold.

WT: The other thing before we leave this general area that I wanted to address is that you're in the 1990s, and this is the period that Alan Greenspan referred to as irrational exuberance. There was a boom in tech stocks. How did that influence thinking about these sorts of things at the time? Did it create a particular pressure to think about them because of the notion that there were more retail investors who were jumping into the market at this time?

BB: That definitely was a concern for us. We had more and more investors who were getting involved with mutual funds, and we viewed ourselves as having an obligation to try to help them understand what was going on. In the early 1990s, you'd have blips in the market and investors would be hurt by the blips. In 1994, for example, there were issues with interest-only instruments held by mutual funds, and principal-only instruments. It was the then-latest and greatest of new instruments. The industry had funds that would buy those instruments, and in certain markets that didn't appear to be anticipated by the developers of those products, those instruments didn't work the way they were supposed to and investors ended up losing more money. We were attuned to that and wanted to come up with ways in which we could avoid those results going forward. We wanted investors to understand what it was that they held and didn't hold.

WT: Were there any ways that you had of doing that that we haven't covered so far?

BB: I think that generally it was to try to make the prospectus work better. We also had notions. We had a lot of initial ideas that ultimately came to fruition at a later point in time. So in the 1990s, for example, we thought it would be a good idea to have more information that's more current about the portfolio positions held by funds. We concluded that that was a lot to ask of the industry and the industry would probably never support taking that step. And we decided—it was a different time, in a different regulatory environment—we decided what we thought would be a good first step. Money market funds, a crucial type of investment for a lot of investors back in the '90s, we thought it would be a good idea to get more information about the portfolio holdings of mutual funds that were money funds.

We came up with a proposal that we thought was workable to get more information out there about the portfolio holdings. We had done what's now called by the SEC staff outreach with the industry. We thought the industry was generally supportive of it. We put the rule out for proposal and it was hammered, as always, and it cost a lot of money. It wasn't going to help investors, and the idea never really went forward.

Subsequently, in the 2000s and more recently, the SEC has embraced that notion and thus the Commission was able to get those ideas through, so you have much more information about portfolio positions than you ever had before. We thought about it. It was a different environment. I'm not sure the world of regulation was quite mature enough to accept it. But that was one way.

Also, in the '90s, we had the initial stages of a focus on compliance and a focus on enforcement in the asset management area. I like to think that we found and brought a number of really good cases that were out there as markers for this booming industry, this investment advisory industry. It was markers of what the industry could and couldn't do, and we did it through not just rulemaking, but we did it through bringing enforcement cases.

To this day I think we brought some very novel kinds of cases, and at the time, they were huge deals that we brought. Now it sounds like nothing, but we had the first million-dollar enforcement settlement, which was a pretty big deal back in the '90s. It hadn't been done before. Now it's nothing. Now you see billion-dollar settlements. But back then, it was a real step forward to be that aggressive.

WT: I know that one of the things that Arthur Levitt tried to do was to use that strategy in other areas, most famously in accounting. So was there a strategy behind the kinds of cases that were brought to try and clarify particular legal points? Maybe you could give an example if there is.

BB: I think Arthur was definitely of the view that there were cases that should be brought to place markers out there. The one that comes to mind outside the asset management area was with respect to NASDAQ. There was a major case that was brought. That was a significant step in that direction. There were some asset management cases that dealt with narrower principles, like allocation of securities. We started to focus a lot in the enforcement cases on conflicts of interest and having conflicts of interest disclosed. We brought cases and started to have a major focus on personal investing by portfolio managers of mutual funds and other institutional clients. We looked at what portfolio managers themselves, the individuals, were investing in and how those were situations where conflicts were raised, and that was a big focus of it. We ultimately did a Code of Ethics Rule fix, if you will, and tried to develop that down the road.

WT: The industry was also moving to limit personal trading by people involved with funds, too. I'm relying on Matt Fink's book, which obviously is a bit biased in that direction. But was that your perception as well, that industry was moving.

BB: I think the SEC was pushing in that direction and the industry saw the handwriting on the wall. He might disagree with that, but I think Arthur was pushing pretty hard on that. And I think the industry saw it coming and wanted to have involvement and input into what happened, and I think that was a good initiative on behalf of the industry so that we came up with, I think, rules that worked from an industry perspective. And when I say worked, I mean operationally worked. The notions were SEC notions of what needed to happen, but in terms of how you get there, I think we looked to the industry for input and the industry provided it at that point.

WT: I want you to come back to the point you made earlier about making portfolio information available. I understand that one of the concerns was that because mutual funds were such big actors in the marketplace that others would use that information to get in ahead of trades that they might make, for example. Was that a concern?

BB: I think we recognized it as a concern, and back then we thought in terms of putting out portfolio information with a delay. It wasn't going to be immediate, but there was going to be a delay, so that among other things the portfolio manager and the adviser came up with certain kinds of recommendations would have a period of time to have the advantage on behalf of clients to get the benefit, which is to say invest first before someone else comes in and follows suit. So, I think we recognized that it was a concern, and we viewed it as something that could be dealt with by a delay, which is still a notion that the SEC generally uses.

WT: Another issue with mutual funds being such large market actors is their place in the proxy process. I know that in 2002 Chairman Pitt comes out in favor of disclosing mutual funds' proxy activities, but was that something that was being discussed at the time in the '90s?

BB: Yes, it definitely was. We had an internal group—I don't know if was the level of a task force, but the Division of Investment Management was looking at proxy voting. We knew that was an issue. We wanted to make a statement about it, and we came up with a statement that was circulated internally. It wasn't signed off on. It was maybe ahead of its time a little bit, but it became in large measure the basis for the 2000 initiative, or 2002, or -3, whenever that came out, where the SEC did a rule on the subject.

A lot of the same notions, a lot of the work we had done made the foundation for the rule as it was proposed and adopted later on. It struck me: my experience over five years was that sometimes even notions that deserved to go forward don't go forward in the regulatory world because internally not everybody is prepared to go forward with it. The SEC's always been a consensus-oriented place, and there just didn't seem to be a consensus on the point. But we definitely did work on it, and we definitely had views, and the views were not all that different from what actually was articulated by the SEC later on.

WT: Another thing that happened a little bit after you left was the creation of a new rule, I guess it was overturned, but about the proportion of independent directors of funds. So you must have been talking about that as well, before that happened.

BB: We were. I think that reflected a change in attitude at the SEC. When I first became the division director and was trying to figure out what I might want to see the division undertake as an initiative, what I soon found out was a division director can take some initiatives, but a lot of the initiatives come from the chair. I think I knew that, but I thought I would have some input. But that was an area, directors, that I thought needed focus. There had been a number of press articles talking about independent directors not being independent enough, not being sufficient watchdogs.

In the 1979 Supreme Court case, the Supreme Court had accepted the notion that had been put out by the SEC that independent directors of mutual funds were watchdogs and that was their role. They were watchdogs and they watched over conflicts of interest, protecting the interests of shareholders in mutual funds. But the press had this notion that the watchdogs weren't biting, and there was a desire to get the watchdogs to do more.

One of the ideas I had was to focus more time and attention on governance, which was in tune with Arthur Levitt's own view that governance was important. So that's the situation where we were in tune and it became a major thrust. One of Arthur's first major speeches in the asset management area was about mutual fund directors and the need to be more aggressive in what they stood for. That particular speech, as I recall, was particularly well received.

WT: Is this the one that was after you left in 1999? I think that was when he made his first speech on it. But I could be wrong.

BB: No, he did one earlier than that. This was more in the vicinity of '94, '95. It was much earlier.

WT: Oh, okay, yeah, so the later one was the one that initiated the Mutual Fund Directors Forum.

BB: Right, that was at a later point in time, but we had emphasized during the whole time I was there independent directors. But where I was coming from, the statutory requirement of independence under the Investment Company Act is that 40 percent need to be independent. I knew just from having been working in the industry for a while that more often than not, the mutual fund industry had gotten to a majority of independents. That's because of the working of a provision of the Investment Company Act that calls for a majority of independent, if certain conditions are met, and for most of the mutual fund industry that condition was met. So the great majority of funds had a majority of independent directors.

So, we discussed early on my tenure, could we do a rule that would say that all mutual funds needed to have a majority of independent directors? The internal view was we couldn't do that at the time, because the '40 Act had a statutory framework, and we at the SEC couldn't override that statutory framework through a rulemaking. So the idea of going forward with a rule didn't really get any traction at that point in time. We said, instead, that we were just going to try to get out there and emphasize, all of us, including the chair—but others, too—were going to get out and emphasize the need for independent directors that act independently.

There were a lot of different speeches that were written and given at that time that spoke to that theme. I think it was before. It was during my tenure where the Investment Company Institute came up with ultimately what became its Independent Directors Council, the IDC. Because I was the division director who was on the first panel, during the first time that the Investment Company Institute held a conference that centered around the directors of mutual funds, and then that notion was developed over the course of time. And over the course of time, the SEC's General Counsel's Office got more comfortable that a rule could work in the mutual fund area to try to promote more independence. That was done during Paul Roye's tenure, he being division director after me, and that was done generally pursuant to the SEC's authority to grant exemptions.

Essentially what happened was the SEC went back and looked at a series of exemptions that had been granted under the Investment Company Act, from prohibitions in the Investment Company Act, and these exemptions afforded mutual funds and other registered investment companies the ability to engage in transactions that became a normal course of their business. The Commission went back and said, under Paul Roye and under Arthur Levitt, that those rules were all going to be conditioned on there being a certain percentage of directors who were independent.

I don't think the industry had a negative visceral reaction to that because most of the industry had gone to a majority of independent directors. Where the industry—and this was after I left—had a more visceral reaction was when the Commission started talking about having a rule such that exemptions were conditioned on having a chair of the board of a mutual fund being independent of the adviser. That was, in the eyes of much of the mutual fund industry, not a workable means from a practical standpoint. It was inconsistent with the history. It was inconsistent with the '40 Act, which recognized the idea that the chair of the board could be related to the investment adviser.

The SEC went forward with the rule and that was the rule that was knocked out by the Court of Appeals for the District of Columbia, but that was after my tenure. I have to say, in all honesty, that during my tenure the idea of conditioning the exemptive rules on governance, in a situation where it wasn't a new rule, it was an existing situation, and I wasn't sure whether there were enough facts to support it. I don't think we would ever have done it during my tenure. We weren't developed that way. We hadn't developed that way of thinking. That was for a later point of time.

WT: Coming back to when you first arrived, the staff had just come out with a report the year before on this area of the industry, and I'm wondering if there were priorities from that time that were carrying over into your own?

BB: Yes, to an extent. Let me explain what I mean. So the "Red Book" study of 1992, which was undertaken under my predecessor Marianne Smythe, was an attempt to take a look at the '40 Act and come up with some ways to improve it going into the '90s. There were a lot of interesting ideas that were put out in the Red Book study, many of which necessitated legislation. The Congress was aware of the Red Book study, Hill staff was aware of the Red Book study, so during the early days of my tenure the Red Book study became the basis of what we at the SEC and also the Hill were thinking of in terms of possible legislation to deal with the issues that had been described in the Red Book, areas that could be improved under the '40 Act.

So for example, one of the ideas that came up that had been talked about was the notion of—there is an exemption in the Investment Company Act for what was known as private investment companies. It was the Section 3(c)(1) exemption, and it provided that an entity that met the definition of an investment company wasn't an investment company if it didn't conduct a public offering of its shares and had a hundred or fewer investors—the 100-person test. That was the exemption that the private fund industry, the hedge fund industry, venture capital fund industry—what became the private equity business, the hedge fund business—all relied on to operate outside the scope of the Investment Company Act. There had been a notion in the industry that the 100-person limit was too low a number and that that should be increased.

I had done, when I was in private practice, work with hedge funds and I thought the number was low for the time. I thought what we would do is, we might raise it from 100 to 200 or something like that. But the Red Book study came up with a different concept to deal with the issue which was, rather than 100, we'll come up with an exemption that triggers on the nature of the investor in these pools. And if the pools are all limited to people who are sophisticated, as shown by what they have in their investment portfolio, then they could have an unlimited number, and that would be "qualified purchasers." That would be what became 3(c)(7). But the point was, the Red Book had laid that out and that became the basis for legislation that was considered and adopted as part of the 1996 amendments to the securities laws. So the red book came up with the—

WT: That's the NSMIA?

BB: NSMIA. The Red Book set out a whole host of initiatives, most of which required legislation, some of which didn't. We did some of them, and we used some of them. The Red Book study talked about the short-form prospectus, the notion of a one-pager.

WT: What was it exactly that was different after you had the legislation with NSMIA than before, when you had the exemptions?

BB: In the private fund area?

WT: Yes, in the private fund area.

BB: 3(c)(7) put out another exemption and said that a promoter or a sponsor, or an investment adviser could create a pooled investment vehicle that could have an unlimited number of investors, each of whom or which needed to meet the definition of a qualified purchaser, which was for an individual with, generally, $5 million dollars of investments, or for an institution $25 million. I think that 3(c)(1) was probably an integral aspect to the development of hedge funds and hedge funds becoming bigger.

The idea was that if you wanted to qualify purchasers, the qualified purchasers, because they were financially sophisticated, could watch out for themselves and those pools didn't need the protection of the '40 Act, and 3(c)(7) afforded the opportunity to hedge fund managers and private equity managers, venture capital managers, to have much bigger pools than they could before, subject to Section 3(c)(1). As I said, my notion would have been 100 to 200, but the notion in the Red Book became 3(c)(7) and that was of much more significance over the course of the late 1990s into the early 2000s.

WT: So, if I understand you right, the major concern at the time was with the protection of investors and people who were in the hedge fund not needing some protection.

BB: That was the notion.

WT: Right, so then of course there's the issue of the regulation of hedge funds. Of course, now after Dodd-Frank, I believe they have to register.

BB: But it's a different registration. The registration, it's really a question. What happened after Dodd-Frank is whether the investment adviser to a hedge fund needs to be registered under the Advisers Act. At the time, up until Dodd-Frank, there was an exemption that hedge fund managers, private equity managers, and venture capital managers, among others would use to operate outside the scope of the Investment Advisers Act, and that was the so-called Private Adviser Exemption. That said that the hedge fund manager couldn't hold itself out as being in the investment advisory business, and had to have fourteen or fewer clients. The SEC in the early '80s, predating me, had come up with a rule that said that, in effect, when counting to fourteen in the context of a pool investment vehicle, you count the pool investment vehicle and not the investors in the investment vehicle.

So, in other words, a hedge fund manager in the early 1980s could create a hedge fund that was exempt from regulation under the Investment Company Act by virtue of having 100 investors, and would have an adviser to that hedge fund that was exempt from registration under the Advisers Act by virtue of not holding itself out to the public as being an investment adviser and having fourteen or fewer fund clients.

What Dodd-Frank did was, Dodd-Frank wrote that second exemption, the so-called 203(b)(3) exemption, rewrote it so that it doesn't work the same way, with the result that hedge fund managers, most hedge fund managers, private equity fund managers, venture capital managers have to register under the Advisers Act.

WT: In the '90s, was there a concern—particularly surrounding things like the failure of Long-Term Capital Management, of leaving hedge funds too far outside the regulatory umbrella?

BB: It's interesting. Long-Term Capital occurred as I was leaving the SEC, so there was a concern but it was more from a systemic perspective, that one hedge fund could have a significant effect on the market. That's what I thought the history was of Long-Term Capital. It wasn't generally viewed as being an issue involving investor protection or fraud. It was viewed as being systemic concerns because of how much of an effect the failure of Long-Term Capital had on other parts of the market. Subsequently, during the

2000s, the SEC focused a lot more on fraud and concerns of investor protection in the hedge fund area and the other private fund area.

WT: One of the things that you mentioned in your speeches was the bailouts of money market funds. There weren't a lot of them, but there were enough that you had concerns that it was going to create a certain amount of security among investors who would then push for higher rates of return. How does that look in retrospect? Of course, that's another thing that was addressed within Dodd-Frank.

BB: Well, I think—just as an observation I would note that one of the initial instances of a money market fund breaking a buck occurred during my tenure, but it was a small bank out in Colorado. It was a fund related to a small bank out in Colorado—a regional bank as I recall—and that it broke a buck was really not viewed as that major an issue. But at the time the Commission staff, including me, but also Arthur Levitt for sure and the other commissioners, were concerned about money market funds breaking a buck.

The way we sought to deal with that during the 1990s, during my tenure, was to go back and look at the money market fund rules that the SEC had put out, Rule 2a-7, and tried to enhance the provisions of those rules so as to tighten up on the kinds of instruments that money market funds could hold, and we did. We did a couple of rule initiatives that went through that were designed to make money market funds perform better. Ultimately, what we didn't want to see was a breaking the buck by a money market fund.

WT: Another couple of things that you mentioned in your speeches which I thought were very interesting because they're pertinent today is, with the increasing number of retail investors in money market funds, whether or not that would create more market volatility, which one might argue we see more of today. But also, as more and more of the people who are in retirement funds retire, then withdrawing their funds from the market, and maybe we don't quite see the effects of that so much today. I'm wondering, looking back on those things, what your views are?

BB: We perceived the market to be different. If you asked me what the major difference is between who held money market fund shares then and who held money market fund shares prior to Dodd-Frank, and who holds money market fund shares today, money market shares are held significantly by other institutions. That's not something that we perceived to be going on. We thought of individual investors who would be influenced by press accounts.

WT: Did I say money markets just now, because I meant to say mutual funds, if I said money markets.

BB: I thought you said mutual funds. You can go back through the tape. You may well have said mutual funds, but it was because back then we were talking about volatility. During our tenure, the volatility was in fixed income and we were concerned about mutual fund investors pulling out their money. And we talked about—back then, Congress was concerned whether we would ever see a mutual fund go bankrupt. We studied that, the staff looked at it. We didn't think it was really going to be the case. It would be an extreme case where a money market fund would go bankrupt. It would be an extreme case where a money market fund had to stop, or would seek to stop redemptions. We knew it could happen and we thought about those issues. We, at the time, didn't really think in terms of regulating that as much as we thought about making sure that people understood about the issues and made people aware of that.

WT: So, you were talking about a couple of instances of exemptions that the SEC made, but I'm wondering about your experience with the exemptive authority under the '40 Act in general. I know that it's fairly common, or routine, for funds to seek exemptions. I'm wondering what that looked like under your time as director?

BB: I always thought the exemptive procedure was a great procedure under the '40 Act. I always thought, though, that it was one of the hardest functions to operate as a division director. The reason is because you're being asked as a division, and as a division director, to give an exemption from a provision that has legislative support and was adopted by Congress, so exemptions shouldn't necessarily be given easily because essentially you're saying yes when Congress said no.

I think it's one of the hardest functions because of that. I think the hardest thing to do in the exemptive area is to say yes. It's easy to say no. It's much harder to say yes. The exemptive authority was important. What would happen from time to time with the exemptive authority is that the SEC would go down a line with exemptions, would give individual exemptions, and then the staff would find that all of a sudden it was overwhelmed by the same exemption being requested by most entities in the industry. Most mutual fund companies would ask for the same relief, and the staff would be overwhelmed by these exemption requests. So, during my tenure, we tried in a couple of occasions to replace individual exemptions by an exemptive rule.

The case that stands out to me was, in the late 1980s and the early 1990s mutual funds wanted to adopt what was known as dual distribution, later multiple distribution. It was one fund, one mutual fund, selling shares subject to different load structures. So, the same fund would sell shares subject to a front-end sales charge, and another series of that fund would be sold subject to a back-end sales charge. To undertake that arrangement necessitated, under an interpretation that the SEC had taken for a long time, an exemptive order.

When I came in as the division director—and it was an issue that Arthur Levitt was aware of—the SEC was being inundated by these exemptive requests so as to put together dual-distribution and multi- distribution, multi-series, multi-shares, that sort of distribution arrangement. What we ended up doing fairly early on in my tenure, with the chairman's support and encouragement, was to come up with an exemptive rule, Rule 18f-3, that didn't necessitate an individual exemption. It set out certain conditions and said that if a fund company meets these it will be deemed to be exempt and can have a multi-class type of arrangement.

WT: I know that the exemptive authority was peculiar to the '40 Act, but there were also things like safe harbors and no-action letters and that sort of thing. I'm wondering if you can just tell me, kind of at a basic level, what the relationship between those sorts of things are.

BB: Why you use different methodologies, a lot depends on what the philosophy is of the SEC, what the legal structure is, what the General Counsel's Office thinks the legal limits are of the authority. A safe harbor is a rule that basically says we're not going to take an interpretive position on a particular issue saying the answer is x or y, but what we will say is if you, the industry, does z, we're not going to think that we need to bring an enforcement case against you.

A no-action letter and a safe harbor are very conceptually similar. A no-action letter is on an individual basis, a traditional no-action letter is on an individual basis, and a safe harbor rule is a rulemaking. But a safe harbor basically does the same sort of thing. To my mind, one of the most interesting safe harbors that was done by the SEC in its history was one that it did in 1979 in an attempt to deal with certain kinds of financing transactions in the initial days of what became known as derivative instruments. This is the Investment Company Act Release 10666. That is in the nature of a safe harbor. It reflected to my mind—and this was done before I was there as a junior lawyer, it was done the year before I was there as a junior lawyer—and it was a safe harbor that we took note of during my time and we came up with some SEC no-action letters that sort of supplemented it.

It went down different lines of that particular SEC release, but it was an area where the Commission was concerned.

As I understand it, the Commission staff, which must be the General Counsel's Office, was concerned whether the SEC actually had authority to regulate derivatives, but the SEC wanted to make a statement. So the SEC put out this Release 10666 in which it said, here are some financing instruments, here are some concepts, here are some types of transactions that we think raise issues of leverage under the Investment Company Act and may be precluded under the Investment Company Act, but if companies in the fund business set up transactions this way, we will take the view that they don't violate the statute. That's how the SEC dealt with derivatives.

Interpretive statement 10666 set the core for the SEC's regulation on derivatives. Most recently, a few weeks ago, the SEC used a different approach to try to deal with derivatives, essentially saying certain derivatives transactions are inconsistent with the '40 Act, violate the '40 Act, and we're going to give an exemptive rule.

What's happened in rulemaking over time is the SEC's exemptive authority has been seen by the courts, particularly the Court of Appeals of the District of Columbia, as very broad authority, so that the Commission these days uses the notion of, here's a violation, here's our exemption, but the exemption is conditioned on all these things. That kind of methodology is used as a way to regulate.

WT: Am I correct that there was an expansion while you were there of exemptive authority beyond the Investment Management Division?

BB: I'm not sure.

WT: I could be mistaken about that. I ran into the reference. I may have misinterpreted it.

BB: I think what you're referring to is legislative and I think there may have been exemptive authority that was granted more specifically on certain laws besides the '40 Act.

WT: Yeah, I think that might have been it. The reference that I saw, I think that Corp Fin might have had it, but then not actually wanted it because of the burdens that it imposes on staff.

BB: It was always part of the IM regulatory tools and we came to use it. We thought it was useful. It was in the 1990s that you started to see Congress, though, putting limitations on the findings, or requirements in the findings that the SEC needed to meet in connection with rulemaking, and those became refined over time. Those are the rules that are essentially put on the rule makers when doing rules that they need to show that there's a certain set of facts that supports, you have to show that the rule addresses certain kinds of issues, there's a certain litany of findings that need to be made. And there needs to be a cost-benefit analysis.

WT: Right, a separate issue, just moving to another area, is the relationship between banking regulation and the SEC's regulatory power, because I know that that was pretty well eroded by the time that you had come there. Banks were very heavily involved in the mutual fund area, but then there's Gramm-Leach-Bliley a little bit after you leave, I believe—

BB: I think Gramm-Leach-Bliley only put into effect what was already functionally in effect. During the time I was at the SEC in the '90s, those five years, the bank regulators did a pretty good job administratively of breaking down Glass-Steagall barriers. The Gramm-Leach-Bliley bill, as enacted, essentially recognized that. But the regulators had done a lot of that.

During the time that Richard Breeden was the chair of the SEC, and probably historically, there was a tension between the SEC and the bank regulators. By the time I was there and Arthur Levitt was there, I think the notion was that the regulators needed to work together and they couldn't be at each other's throats. It was clearly the idea that we were, as division directors, generally encouraged to be working with the bank regulators. We were encouraged to be working with the Department of Labor, that investors would be benefitted by the regulators trying to act together as opposed to acting like a separate republic and being engaged in hostile activities against each other. So the five years I was there, we were generally working with the bank regulators. But it was also during that time that the bank regulators, to my mind, allowed banks to get involved in a whole host of securities businesses. Our response at the SEC was generally to make sure that if they were going to be in the business they played by similar rules.

WT: Were there any formal means of coordinating with the bank regulators?

BB: My recollection was that it was generally encouraged that we operate that way, and that we would have periodic meetings of the heads of various divisions with their counterparts or similar types of officials from the bank regulators.

WT: Now, you'll have seen this, of course, not only from the side of the SEC but in private practice as well. I mean, you'll work with various people within the industry, be it a bank, an insurance company, a mutual fund, is that correct? I'm just curious what it looks like from either side, if dealing with multiple regulators as a private practice attorney is different.

BB: It depends on your client base. As it turns out, at Willkie Farr & Gallagher our client base, typically, in the asset management area, includes money managers who were not affiliated with banks. We have some, but I would say, as a result, my experience with bank regulation is more limited than had I gone into another firm that has a big banking practice. We do some work, but as a general matter I focus much more on the securities laws and not as much on banking laws, although frankly, after Dodd-Frank they all kind of merged together and you worry about a lot of different types of provisions.

WT: Another thing—this would have been in the very early days of exchange-traded funds, is that something that you were interested in at the time, at the SEC?

BB: I'm proud to say that I was the division director for the second exchange-traded fund that went forward. The first was done under Marianne Smythe's tenure, but I was there for the second one, and I think in the early 1990s none of us could have predicted that ETFs would become what they've become today. The focus back then of the SEC was generally on the application of the securities laws to ETFs to make sure that disclosure to investors worked, to make sure that provisions of the '40 Act from which ETFs wanted exemption made sense. So we were basically concerned about '40 Act concerns.

An ETF is essentially a cross between an open- and a closed-end fund and we were concerned on the IM side with what that meant for the shareholders of the fund. Would they be treated appropriately? We were concerned about how governance would work with ETFs. The Division of what was then known as Market Regulation was concerned with certain trading issues, but that market has evolved and the issues that are of the day today, I don't know that any of us perceived. But it was in the really early stages, and, by the time I left the SEC in 1998, ETFs weren't anything close to what they are now. I think it was after that, well into the 2000s, that ETFs really started coming to the fore.

WT: I have a series of miscellaneous things that don't really fit into a larger frame of question, but one is there seems to always be the perpetual concerns with fees and the disclosures of fees. I know they had put in the fee tables before you came there, but I'm wondering as to how adequate the situation was viewed as being during your time there?

BB: I always thought that the fee table, which was put in as you say before I was a division director—I believe it was put in place during the time of Kathryn McGrath's tenure as the division director—I thought that was one of the best steps forward that the Commission had ever taken in terms of mutual fund disclosure to provide the information about fees to investors. Because, when all is said and done, an investor doesn't have that much control over what his or her fund's going to invest in, for sure. You don't have that much control over that many variables. But the one thing you do have control over is what your fund is going to pay in terms of fees, and that has a substantial bearing on what you as an investor will have as a return, what you make on your investment. So, to me, it was always important to have information about fees.

The issue that came up during my time that we were concerned about was whether the Commission was doing too much slicing and dicing of fees. In other words, we all thought it was important back then that the 12b-1 fee, the distribution fee, that that be paid, be a separate line item, that the fees that are paid be generally broken out for an investor.

I can see the argument both ways, that most individual investors I think only care about the aggregate. They care about, what are the fees? "I don't care that much about what's being paid, but I want to know how much is being paid, and that will give me an idea of what my investment is." So, we used to go back and forth on should we split out the fees into component pieces, or should we require the one number and emphasize that and deal with expense ratios. Would that be a lot better way to provide information? Those were the kinds of things we thought about. So, in effect, it was refining of the mutual fund fee table, not really thinking about anything more revolutionary than that.

WT: There was this continual concern over the levels of fees, and yet the SEC, of course, is limited in terms of what it can or should do in that area. I mean was that something that you would hear about even during your time there?

BB: It was always raised as an issue. It's been an issue in the mutual fund business, I think, on and off, usually depending on performance of the markets, generally from the late '60s or mid-'60s onward. It usually is triggered by performance going up and fees being viewed as being extraordinarily high in the eyes of many in the press and commentators, that fees have gone up and shareholders are paying too much. We were aware of the issue. We looked at it from a disclosure standpoint. We thought long and hard about whether the Commission could bring an action under Section 36(b), under Section 36—36(b) is the shareholder rights—but under Section 36, could the SEC bring a claim that the fees were unreasonable?

We were always looking in the area of exams, for an instance, where we could bring an action. We looked at that. We talked about independent directors being attuned to fees and conditions, performance fees, and asking whether they were too high, to try to get more focus by independent directors. As you say, it's not an area where the SEC really has jurisdiction, and Section 36, 36(b) is a very convoluted provision. It was heavily negotiated in the 1970s, and at the Commission we were stuck with it, as are shareholders, and we tried to do with it what we could.

WT: As I mentioned, I am talking to Joel Goldberg in a couple days and of course we'll be talking about the early days of Rule 12b-1. I'm wondering what the status of the discussion was, because I know it's this very controversial rule and I don't have an intuitive sense for the controversy behind it, so I'm wondering if it was controversial during the '90s as well.

BB: It's always been controversial, and it's controversial because the basic notion of 12b-1 is that a mutual fund uses its assets to pay for distribution. It's a controversial notion, because within the industry, among academic commentators, there were many who believed that payments by the fund for distribution to make itself bigger don't necessarily provide a benefit to existing shareholders, so why should it be allowed? That's essentially the question, and I would venture to say that there's never been consensus within the industry as to the correct answer to that.

12b-1 reflects—and maybe it's a period piece—but it reflects the view that there are instances under which a fund's assets can appropriately be used to pay for distribution. If there's a plan that investors can know about, if there's disclosure about what's paid under the plan, in that situation there's enough control, or there are appropriate controls to allow those payments to be made. There are some in the industry, some in academia, some investors who believe that's just not enough and it should never be allowed.

WT: Is it mainly a question of principle, or are there actual practices that some view as particularly questionable that come up?

BB: I think, over the course of time, there have been some practices that are not great. What happened was in the late 1980s—12b-1 was adopted in the early 1980s, and it really wasn't thought of as being that monumental at the time. I think the thinking when the Commission adopted the rule was that funds that were kind of stuck at a point where their size was so small that they couldn't get any benefits of economies of scale, and would use some of their assets to pay for marketing to try to get to a point where their operations were more economical and therefore beneficial to investors in the fund. I remember when the rule came out, I was in private practice at the time, thinking that a 12b-1 would never be more than twenty-five basis points.

But what happened is, in the early 1980s a proposal was made by—I'm pretty certain it was E. F. Hutton, the E. F. Hutton fund—to tie a 12b-1 payment with a back-end sales charge, and the extent of the 12b-1 payment was going to be fairly high because it was going to be used to basically pay the folks who were going to sell the shares of the mutual fund. That was a revolutionary idea and it really took the notion of twenty-five basis points, and all of a sudden fund companies thought, gee, the rule doesn't say that you're limited, and now there's an instance where it isn't limited. And the industry started to follow it and 12b-1 payments got to be extremely high.

There's always been this sort of ping-pong arrangement. The industry goes so far, and then the regulator swats it back, and that's what happened here. In the late 1980s the SEC, working with what's now FINRA, put caps on 12b-1 money. Now, just philosophically, I think that caps have the potential for causing monies that would be paid in full view to somehow be routed so that they're not seen. But for the service provider to provide the service, that service provider wants a certain dollar amount of revenue, and if it can't be paid through a 12b-1 it's going to be paid somewhere else. I think that's when you started to see, in response to the caps, that's when you started to see revenue-sharing start up, and other types of practices that at least some in the industry think of as questionable.

WT: Now, you had to deal with the issue of shelf-space disclosure, too, is that right?

BB: We thought about shelf-space disclosure. It was a developing notion, but the idea was that the broker dealers would require certain payments to be made for higher shelf to be used. In other words, would they emphasize this fund over that fund? There were a lot of funds, and a lot depended on the payment that was being made by the either the fund or its adviser. So we started to see shelf-space payments being made, a lot of payments of those sorts. That's where it was a concern, those kinds of payments. I can't say personally I was ever thrilled as a policy matter with those kinds of payments when I was the division director.

WT: And then finally there's an issue which I have to confess I don't quite understand, so maybe you can explain it. It's this issue of 17(d)(1) covering joint transactions. It's come up in at least one of your speeches and I'm wondering if you can explain what the issue with that was.

BB: Section 17(d) is a provision of the Investment Company Act that restricts dealings between a registered investment company—say, a mutual fund—and affiliated persons of the mutual fund, affiliated persons generally being defined so as to mean the adviser and affiliated entities of the adviser. By its terms, 17(d) says that a fund, a registered investment company, an affiliated person, can't engage in a joint transaction with a third party.

What Congress had in mind in 17(d) was a situation where the affiliated person, which generally would be deemed to be the investment adviser—the investment adviser being the best example of an affiliated person—would cause the fund to enter into a transaction with a party with which the adviser had entered into a transaction, and the transaction would act to benefit the adviser.

So, for example—what I always use as an example in classes when I teach 17(d)—an investment adviser needs office space. There's a need for office space for the mutual fund. So the advisrr goes out and finds a landlord who would rent space at $50 a square foot, hypothetically. I can't deal with big numbers. If the fund was brought along with it and there was space for the fund, it would be $25 a square foot. So that would cause the adviser and the fund to enter into a transaction with a third party, namely the landlord, and the transaction would generally be designed to provide office space for the adviser and for the fund, but the adviser would get a benefit.

17(d) is written extraordinarily broadly, and the definition of affiliated person is written extremely broadly, and when you put them together what could happen is you could have an organization that has, say, separate and distinct subsidiaries, one acting out of Hong Kong and one acting under in the United States, the two not having any idea of what either is doing but they happen to deal with the same third party. That could be viewed as a 17(d). Those kinds of transactions, the question that came up is, is that really what 17(d) was designed to deal with, and I would argue the answer is no. But it was always hard to come up with a form of relief to deal with that kind of transaction, because what could be a 17(d) depends a lot on the facts, and it was hard to come up with some kind of exemptive relief that would really work as a practical matter.

WT: And last thing is I'd like to circle back around to enforcement. You were talking earlier putting forward selected cases to try and, I guess, define or push the industry in certain directions to define the—

BB: Message cases.

WT: Message cases, thank you, yes, it's a good word for it. I'm wondering about your experience with enforcement more generally. I mean, traditionally, or at least at that time, before the scandals of the early 2000s, this had a reputation for being a relatively clean area. I'm wondering what your perception was, being in the SEC at that time?

BB: I think I had come from industry and I wasn't convinced that all companies in the industry operated the same way. I thought that there were some practices that deserved to be focused on in the enforcement area, because I thought that they weren't necessarily broad enough to require a rule but it was clearly a situation where some selected enforcement cases could have a big bearing on where the industry was going. Enforcement during the time I was there, the five years I was there, was operated with a different philosophy.

The Chair of the SEC now, Mary Jo White has a philosophy that she stated as "broken windows." If there's a technical violation, we want to bring an enforcement case to have that technical violation focused on, because if you don't focus on technical violations, then the industry may well go down the road and be engaging in worse problems. The idea is technical violations, you can bring enforcement cases.

That was not the philosophy back in the '90s. The philosophy in the '90s was that the Division of Enforcement would look for harm. So, if the division knew of instances where there was harm to investors, where investors lost money, Enforcement was right there and we would bring cases in the area. If you could come up with a theory as to why investors were hurt, then Enforcement would go down the road, but we didn't have this notion of broken windows. And, as a result, the cases that were brought when I was there were relatively big cases on bigger picture issues designed to send messages, but also get, for the time, fairly big settlements.

I always found the support we got in Enforcement, whether it was from Washington or the regional office, to be very strong, subject to the understanding being that there needed to be some showing of fraud or some other harm to investors. But if that could be shown, Enforcement would have no problem focusing on the case. We had a very, very much in-tune relationship with the Division of Enforcement.

WT: What was the balance between, say, the regional offices and the DC Enforcement Division in terms of finding and bringing cases? I spoke to Juan Marcelino last year, who of course ran the Boston office, I believe, at the same time as you were division director.

BB: He did. I think the regional offices were responsible for some of the real strong cases of the time. I think back to some of the cases, I know San Francisco Regional Office brought one, the Boston Regional Office had one, Chicago had one. The regional offices were significant, and the regional offices at the time, relative to what was going on in the home office, the examiners and the exam team and the folks in Enforcement had more experience. I used to enjoy going out to the regional offices because I was dealing with people who really knew the business. We would have heated discussions, but they were great because they were substantive and they involved folks with great substantive experience.

WT: Now, inspections changed during your time, right, they went over to OCIE?

BB: Yes, if we could have rewritten history that would be the part that we would have rewritten. When I was first the division director, the Division of Investment Management director had responsibility for an exam staff, including an exam staff that operated out of the regional offices. So, when I was at the SEC, it sounds like a small number, but I had under my direction 300 people. It was a lot of people.

We faced at the time some concerns generally at the Commission about trying to review all registered investment advisers. We had, I think at the time we had 22,000, in my memory up to 22,000 investment advisers, and we in the exam staff could hardly see them. It would be, I think—I forget what the statistics were but it was something like every ten years, once every nine years, something like that we'd have a regular exam, and we all saw that as not being consistent with protecting investors.

So, we all tried to come up with ideas that would help better use our resources, and among the ideas was one to take the exam staff in Investment Management and the exam staff in Market Regulation, putting them together in one unit that was to operate independently of the divisions, including the Division of Enforcement, but that would be an exam office. That's what became the Office of Compliance Inspections and Examinations, OCIE. That was designed as a way to better use our resources.

We also supported legislation which came into effect in 1996 of splitting jurisdiction over investment advisers between the SEC at the federal level, and states, so that states would look at generally smaller advisers, we would look at bigger advisers at the SEC. We had a number of initiatives that were designed to try to deal with resource issues. We also tried to have measures passed by Congress for pay-as-you-go exams so that the industry would pay for examinations. We talked about having third-party examinations. Most of all the ideas that are talked about today, we too thought about variations of those ideas back in the 1990s. They didn't take place with the one exception of OCIE. I should say two exceptions, OCIE and the split of jurisdiction.

Why I said "if I could revise history" was I think that taking the exam staff out of the Division of Investment Management—and I had a very close working relationship with the head of OCIE, the first head of OCIE, Lori Richards, and the division and OCIE tried very hard to be in communication all the time—but what happened was, what was taken out of the Division of Investment Management were its eyes on what was going on in the industry. It had the ability, when we were all part of one division, to interact better with the people who were in the field and knew what was going on, and we lost that with the creation of OCIE. It wasn't quite the same. I think that was perceived to be an issue by the time of Dodd-Frank, because Dodd-Frank had a provision that gave to the Division of

Investment Management, its ability to have an exam staff. It's not the same, but I think it was addressing that kind of concern.

WT: Coming back to this point about the division of responsibilities between the SEC and the states, the Investment Advisers Supervision Coordination Act was in 1996, at the same time as NSMIA, which also of course dealt with federal versus state jurisdictions. I'm just curious if there was any relation at all between the processes of putting those together?

BB: I think the issues were different. On the mutual fund area, what you had was mutual funds being offered nationally and some of the states putting into place a substantive set of rules governing the operation of mutual funds. Some of those rules were not inherently bad. They were provisions that we may not have had authority to undertake to put into place at the national level, at the federal level, but because they were national you'd have funds that would have to operate one way or another because of substantive rules in one state or another state, and that was perceived as being a burden on essentially interstate commerce. That was the notion behind having the states be pre-empted in the area of regulation of mutual fund operations. It was thought to be too great an overlap and an unnecessary overlap from a policy perspective, whereas in the investment advisers' area, the resources of the SEC just weren't enough to keep up with the investment advisers so the idea was to split jurisdiction to decrease the resource burden on the SEC.

WT: Looking over at the industry side of this then, I'm wondering if it's possible to speak generally about compliance in the investment company area versus, say, in the broker-dealer area? I also saw on one of your speeches you talked about the effects of consolidation within the industry on compliance and how difficult it was to put different companies' compliance procedures together.

BB: It's still an issue that comes up. In the '90s we focused on compliance. We focused on compliance and wanted the industry to be involved more in compliance, largely because of resource considerations. It was a different era. The SEC budget these days I find phenomenal. It's billions. We didn't have that. We knew we had more and more investors in the mutual fund business, we had more and more involved in dealing with investment advisers and financial planners, and we wanted to focus more and more on compliance and try to push the industry to be more compliance-oriented. We pushed that in a lot of the speeches. We pushed that in a lot of initiatives.

We thought about—in the '90s it was an initiative to have a compliance rule, to require investment advisers that were registered in mutual funds to have chief compliance officers and have them put into place compliance programs. It was a different era, however, and the industry came forward with a proposal, but within the proposal was a notion that there would be liability protection. That just was an anathema to the SEC staff at the time to have this notion that the industry could never be challenged on its compliance initiatives. We didn't think that was workable. The Division of Enforcement didn't think it was workable. In the '90s, the environment was much more one of trying to reach a consensus, the regulator and industry. It was a different time and it was a different era, it was different politics at the time.

The 1996 Act, NSMIA, for example, had provisions that were generally deemed to be consensus-oriented. It was made clear to us from Hill staff at the time that anything we supported had to be consensus-oriented, so it meant that we had to look at the kinds of initiatives that we would like, but look at a subset of them that we thought that we could say were consensus-oriented, and that became the legislative initiative.

So in the compliance area, we had an idea of a compliance rule but we seemed to end up at an impasse with the industry that we couldn't break, and the industry was somewhat intransigent. Later on, in the early 2000s, when you had the mutual fund market-timing crisis, the dynamic was different. The industry was on its heels and couldn't afford to be in a position where it was intransigent, and you ended up having the compliance rule which doesn't have liability protection.

WT: I know that from time to time one would see the idea bandied about of investment company SRO. Was there ever any seriousness to those discussions, or was it always just sort of a notion? I think Arthur Levitt mentioned it.

BB: Arthur Levitt used to mention it, and I think Arthur Levitt used it knowing that the industry was generally negative on the initiative. I think he used it as something of a club to say, look, we'll support going to Congress and see about a self-regulatory agency for the industry, but you can avoid that if you start looking at some of the initiatives we're talking about and give us an idea of how those can be made to go forward. So, essentially it was a club to get the industry to undertake, not negotiations, but to undertake a more consensus notion, and consensus initiative and not to be intransigent on some of the issues, some of the matters that we came up with.

WT: So you've spoken about Arthur Levitt, were there other commissioners who were particularly interested in working in this area?

BB: There were during my time. For a very short period of time at the start of my tenure Mary Schapiro was a commissioner. This was before she went to the CFTC and did some other things, but she was always interested. I can tell you that her interest in money funds and her wariness of money funds went back as early as the 1990s, because I remember having meetings with her where she expressed that.

Isaac Hunt, who was a commissioner when I was at the SEC, had a background in investment management areas and had staff that were interested in the area, so he became somebody who was interested in much of what the Division of Investment Management was working on. Then Steve Wallman was another who took a real interest in the area. He was interested in investment advisers, he was interested in ideas like proxy voting by investment advisers, I think he was interested in, I recall, compliance rules, so he was clearly interested. Rick Roberts was another one who was there for part of my tenure who was interested in the area.

WT: I actually spoke to Steve Wallman last year, and in fact some of the other people that you mentioned as well, but Wallman has his own company now, which is, I guess, indicative of his interest in the area.

BB: His view about mutual funds—I think he wanted to come up with a better type of vehicle than a mutual fund and that spurred him on to do what he's done in the industry.

WT: Right, so then you left in 1998. Was there anything that prompted you to move back here?

BB: Actually, I did not come back to Willkie Farr. I went to Shearman and Sterling. That's another part of my history. I was at Shearman and Sterling for seven years and then came back to Willkie Farr ten years ago. What prompted me? It was that my daughter in 1998 was nine. Her mother, now my ex, and I had concluded that we wanted her to go to private school, and the money was running out. And as much as I loved the SEC and the work I did—and that was without a doubt, I loved every day I was at the SEC.

Except for one, when one of my staff was killed, while running in the center of DC, she was hit by a turning bus, Martha Platt, who was one of my favorite staff attorneys and had worked with me. Although she was relatively junior, she worked with me as I first came into the SEC. I needed somebody to work on an initiative and she was just terrific. I got to know her, I got to know her husband, I got to know her child, and it was extremely difficult. That was a really hard day when that happened, that I think of as the only really bad day of my tenure over five years. But I loved the SEC. I loved working at the SEC. I loved the idea of representing the investing public.

But I think it was a practical situation where my daughter was getting older, and we weren't in a house that we owned at the time, we were renting a house, and I decided it would be fairer to my family for me to start working back on the outside. I think government salaries, particularly at the SEC, increased fairly dramatically after I left, so it wasn't really a situation where it was a close call in terms of dollars. I just thought it was time for me to go back to private practice, which I wasn't unhappy with.

WT: Unless I missed something that we should discuss, maybe I could just ask you for some sense of where the regulatory history has gone since you've left the SEC, and kind of your impressions of the key changes.

BB: I think the SEC has become more regulatory-oriented than it was when I was there. The SEC staff is willing to take more risk in terms of going out and trying to regulate more areas. It's been more willing to take risks in court cases and interpretations than it ever was during my time. I'm not sure all the regulation and all of those positions are necessarily in the best interest of the SEC. The SEC's loss in court, with respect to the mutual fund independent chair rule, I thought was unfortunate. I've always thought that that loss has hurt the SEC rulemaking over the course of time and has made the rulemaking much harder to operate.

WT: Particularly because of the cost-benefit basis on which it was overturned.

BB: And to have lost that case—to my mind that was a case that the SEC didn't have to get involved with. I think the SEC at that point in time had most of the industry where it wanted, which is to say independent chairs were starting to become more prevalent, and I think the industry would have gotten there. It would have gotten there over a course of a greater number of years, but it would have gotten there, and the cost wouldn't have been the SEC rulemaking, which, as I say, I maintain to this day is weaker and hurts the SEC staff and hurts the investing public because of the loss in that case.

I know that there are people who are at the SEC who disagree. They're not going to convince me on that one. I think that the rulemaking process has never been the same, and it's caused the SEC to have to go down paths of rulemaking and getting the word out that are just not as strong in rulemaking. It's put the SEC staff under immense strain in doing its rulemaking and it's made rulemaking very difficult and I don't think it was necessary to get to what the SEC wanted as a result.

WT: Well, is there anything else that we have to discuss, or shall we wrap it up?

BB: I thought, as time was progressing, the only thing you weren't going to ask me about was OCIE's formation, and you weren't going to give me an opportunity to say that that was the one thing where I would go back and I would rewrite history. When I was leaving the

SEC in 1998, I went out to lunch with Chairman Levitt and he asked, “If you had something to do over, what would it be?” and I said “Blocking the formation of OCIE.” He said, “Well, we’re going to have to leave that for the future.” And I said, “I guess you’re right on that score.”

How do I look back on the five years? Extraordinarily fondly. I look back on the industry and the agency very fondly. I think the industry is a fundamentally good one. I think that there are certainly going to be parts of the industry that don’t act appropriately, and I think that’s the case with any industry. During my time at the SEC, the industry used to talk about how wonderful it was. I just never thought that was sustainable, because I knew that there were certainly great companies out there, but I thought there were also some companies that, for one reason or another, usually resources, cut corners.

WT: Did you have any notion that you were going to see the things that came up in 2003?

BB: I think we saw some of the seeds of mutual fund market-timing, but we didn’t recognize what was happening. I think the staff, after me, didn’t realize what was happening for a while either. We did a study of redemption patterns and mutual fund reactions to certain market conditions. We did a study in ’97 or ’98, and I think if you went back and you looked at that study you could see that there were parts of the industry that were facilitating market-timing. But it was different. I remember getting letters from Congress complaining that institutional investors, which later I came to understand were hedge funds, were making investments and trying to get out of mutual funds really quickly to try to arbitrage when evaluations were made and when they were changed.

The industry tried to react by doing an interim calculation of NAV so as to preclude the benefit, and I remember getting letters from congressmen saying this is outrageous, that these investors are not being able to get the benefit that they were trying to achieve. That was the logic, at least in some quarters, that there was nothing wrong with this. But I think we started to see some of that and some of that evidence. I think it was there as early as, probably, before '98. It's probably always been there one way or another, but it was starting to show itself in 1998. I left, and it took a couple more years and it came to the fore.

WT: The industry has certainly always been evolving. I mean, from well before you were at the SEC it was growing so substantially that I imagine that, as you were discussing with enforcement in the investment advisers' area, just the sheer growth of the area, and when you have that, there are bound to be changed practices as well.

BB: One of the truisms of the investment company industry in the United States is that the fundamental issues never change. Good, bad, or indifferent, I've looked at the legislative history of the '40 Act, and if you look at the issues that Congress was concerned about, they generally mirror the issues that the SEC's always concerned about. Redemption and dilution of long-term shareholder monies was an issue as far back as 1940. The variance of how dilution occurs change over time, the players that seek to take advantage of dilution change over time, but the issue of mutual fund valuation and the redeemable security, it's an inherent issue in open-end funds. It has been there from the beginning. The size of mutual funds, should they be capped, an issue thought about in the 1940s. We just saw articles where the Department of Justice is going to take a look at holdings by mutual funds asking whether there are any trust issues. It's the same basic notion, just viewed differently over the course of time.

But the industry operates in a certain way; the vehicle operates in a certain way, and raises certain kinds of concerns. Disclosure and whether it's too long—an issue from the beginning. The retail nature of investment companies—always been working out there. The relationship of funds and pensions has been a working issue for a long time. It never ceases to amaze me how the fundamental issues basically stay the same. It's just the facts, as to how they arise, change over the course of time.

The other question that I would ask was, so how would I judge my five years, and I would tell you it was a great five years. And comes the day when I decide it's time to get out of the law business and I put down a list of the ten most significant things that I ever experienced, the ten events, the ten accomplishments, I'm totally convinced that of the ten, at least fifty percent if not more will be events that occurred back from 1993 to 1998.

WT: That seems like a terrific place to wind up, if it's fine with you?

BB: Works for me.

WT: All right. Thank you very much.

[End of interview]