

**Securities and Exchange Commission Historical Society
Interview with David Martin
Conducted on July 1, 2013 by Robert Colby**

RC: This is an interview with David Martin for the SEC Historical Society's virtual museum and archive of the history of financial regulation. I'm Robert Colby. Today is July 1st, 2013 and today's interview is taking place at the offices of Covington & Burling in Washington, D.C. Mr. Martin, thank you for being with us today.

DM: Thank you, good morning, Robert.

RC: So start with a little bit of your early life. Did you grow up with an interest in law?

DM: My dad was a lawyer. I probably didn't know that I was interested in law until later on. So I won't say it was from the womb or from the crib or anything, but eventually I came to law.

RC: Where are you from originally?

DM: I started outside of Boston, in Beverly, Massachusetts.

RC: You did your BA at Yale?

DM: I did.

RC: Were there any courses or mentors that particularly influenced you in your time there?

DM: I wouldn't say particularly. I was an intensive English major, and a professor by the name of Dewey Faulkner read my thesis and so I got to know Dewey kind of well.

RC: Were there things about that experience that encouraged you to go to law school?

DM: At that time I was more focused on what I was going to do about the Vietnam War and the military, and I hadn't really begun to think about graduate school at all. I was just thinking about what I was going to do after I graduated.

RC: I see that you went into the Navy.

DM: I did.

RC: Can you tell me about that experience?

DM: Well, there were two options for people in my age group. One was to protest or dodge, and another was to succumb and cave in. A number of people at Yale went into officer candidate school and that seemed like a good route, because if you did that you had an opportunity to choose a little bit about where you went and what you did. So I was lucky enough to get into the Navy's Officer Candidate School, which ironically was quite

competitive at that time, and that meant that right after graduation, a month later, I was going up to Newport, Rhode Island to be in a four-month officer candidate program.

RC: Were there things about that experience that you learned and you found useful later on?

DM: Yes, definitely. The wonderful thing about public service at a young age is that you get thrown pretty quickly into the water and you have to learn how to swim. The military is no exception, so within about six months after graduating from college, I was in charge of a division of about 50 men that understood the engineering plan of a U.S. destroyer a whole lot better than an English major from Yale did. That means that you quickly learn the fine art, or at least the art of trying to manage people, and to listen to what they're saying and pay attention to what they're doing and see if you can make a difference by helping them run the base paths or at least get the playbook right. I think that was a big learning experience for a young person out of college.

RC: And you did four years in the Navy.

DM: I did.

RC: What did you think you would do coming out?

DM: I still hadn't exactly figured it all out other than my general interests all seemed to come back to trying to figure out the way society worked, the way our legal system worked,

and it did seem as if law school was a very good next step for me. I wasn't so oriented towards business. I thought the law was a skeleton key to understanding the way we worked as a society. My father had been in and out of government a couple of times, and in and out of private practice, and worked at Yale University actually when I was there.

I'd always thought that his interest in his job and his perspective on, again, the way things worked was appealing, and so next step, getting out of the military in the summer with something to do in the fall, like going back to law school, seemed like a great idea. So when I was in the military I started boning up for the LSAT, and I applied and got into the University of Virginia.

RC: In your time there did you either focus on specific aspects of law, or have people who directed you in one way or the other?

DM: I would say no. I sort of just immersed myself in law school. Virginia's a very nice place to go to school, there's a lot of good feeling about the community, it's not very competitive, and I was a couple of years older than a lot of my classmates. There were others coming out of the military at the same time so interestingly we had a pretty good mix age-wise. But getting up and getting to a class at 8:00 in the morning was easy stuff if you had been working in the military for four years, and I found that the process of going back into a classroom and listening to smart people explain things was more appealing than not.

The community of Virginia was a good academic community, lots of good study but lots of good outdoor activities. I was married and we had our first child when I was there. So I kind of just did everything at law school. I was able to get on the *Law Review* and that meant that I spent a fair amount of time one year writing my note, and then I was on the managing board the last year so I spent a lot of time trying to keep the *Law Review* under control financially and make sure that we got articles and things were added in, etc.

After all that I didn't really have any particular specialty in mind other than what law school prepares you very well to do, which is to litigate. I'd written a note on a case so I was familiar with civil procedure and legal writing and brief writing. My summer jobs—of course as a lawyer you'll get a lot of work in litigation in the summers, so that was my natural leaning at that time.

RC: And you came out and started at Dunnells, Duvall, Bennett & Porter?

DM: Correct.

RC: What sort of things did you do there?

DM: That was a small firm that had spun off from larger firms here.

RC: Here being Washington?

DM: In Washington, D.C. The Bennett in that name is a gentleman by the name of Robert Bennett who is today a very well-known white-collar lawyer, and had developed a great reputation at that time. And of course I thought I was going to save the world as a litigator, and maybe even do white-collar litigation too, so I was attracted to the alternative route. Coming off of a *Law Review* out of a good school you do get an opportunity to work at big firms, but at the time it just seemed like it would be interesting to try a smaller firm where you could get into court quickly, have much more contact with the cases and the clients. And so I took a flyer and went with this up-and-coming spinoff small firm in D.C.

RC: Did you end up working primarily as a litigator?

DM: I did.

RC: Did you focus on particular kinds of litigation.

DM: Whatever came in the door, whatever I was asked to do, everything from going to small claims court to represent a parking authority that was having litigation, fender benders, to representing white-collar criminals.

RC: Okay, and then from there you went to Dickstein Shapiro?

DM: I did. It didn't take long to figure out that a small firm was a fun place to be, but only when it had work. And sometimes it didn't have work, and that was a little disarming for a younger attorney because you don't have the business yourself, so if the partners are having up and down in their work you're up and down. I had some friends that had gone to Dickstein, and an opportunity came up, and I thought I would try to go there where there was a little bit more work. I also found that I had had some brush with corporate and securities litigation, and I sort of enjoyed the issues. They seemed interesting, but it was pretty much, I would say, an instinctive move to a little bigger firm with perhaps more work.

RC: At Dickstein Shapiro, did you have more encounters with securities and corporate law?

DM: In a funny sort of way I did. Not in ways that I appreciated so much at the time. I would say at Dickstein I determined that I really just didn't want to litigate for the rest of my career, and I was in a litigation position that was going to have to keep going that way. When I was at Dickstein I worked with a fellow named Jim Treadway who ended up going on to be an SEC Commissioner, and Jim had some corporate work that I could help with, some securities work, small stuff, as well as the occasional piece of litigation that involved those issues.

But I was at Dickstein for such a short time I can't say that I necessarily tapped that line of work and worked that much with Jim, although it's just interesting that later he became a Commissioner. I kept up with him over the years and realized that I had appreciated his

practice and what he knew. And early on, as I look back, I was beginning to formulate some sense that this might be a zone that I'd like to get closer to.

RC: So with that in mind, how did you come to the SEC?

DM: Again, one of those funny closing-doors sort of situations. I was really struggling with the idea that I had done four years of litigation, didn't think I wanted to keep doing it, wasn't sure what to do next, and I was musing with a friend from college who said, "You should talk to the SEC." I thought that was kind of an odd suggestion. He went on to say, "A friend of mine from New York has come down there, a fellow that had been at Sullivan & Cromwell, and is now the deputy director of the Division of Corporation Finance. His name is Lee Spencer. Lee would love to talk with you."

I couldn't believe that, of course, but I just took a flyer and sent—probably called, actually—the office because we didn't have emails in those days, and Lee Spencer opened his arms and said, "Come on down, I'd love to talk to you about it." Lee effectively recruited me, not because I was so special. I think he was just looking to bring more people into the Commission. He had been in private practice, he was having a great time, he wanted to get anybody he could from outside. Something about the resume or something else he liked. I interviewed with him. He said come back, I interviewed with more people, and before I knew it I had a job at the SEC in the Division of Corporation Finance, doing nothing to do with enforcement, nothing to do with

litigation, and in effect I had turned the page and was starting a new chapter. At the time I didn't think of it quite that dramatically but that's what was happening.

RC: You started as a branch attorney.

DM: I did.

RC: What were your responsibilities in that role?

DM: You come into a new role and you do whatever you're told. A branch attorney in the Division of Corporation Finance, in those days we reviewed virtually every material filing that a company made. The ratio of staff at the Commission to filings and registrants was such that we actually were reviewing pretty much every filing that came in. So I sat in an office, shared an office with another examiner, and every day you come in and go to your inbox and you'd have a stack of filings, and your job was to read them and then decide whether comments needed to be issued, if so which ones, pass it up the line within the branch. A branch is just a division of the staff. It was like putting a fire hose to your mouth. I learned the rules quickly, because it's hard to review the filing and see if it's in compliance if you've not got the rule book on one side of you or the other, flipping pages to see if they've got all the sections filled in.

RC: And so as someone with not a great deal of experience in corporate law, how did you deal with the need to come up to speed very quickly?

DM: Interesting, securities law is not corporate law, it's just the understanding and application of the federal law of securities. It is very hard to be a good securities lawyer without knowing corporate law quite well, so some of that comes out of your law school. I had very good corporation teachers there, and took two years of it, or I took a first semester and then a second semester, two semesters, and some of it I'd learned on the fly at my two firms where occasionally you'd get a corporate assignment and you just learned the elements of it there.

And then you start picking it up, even at the SEC, because you read a description of the certificate of incorporation of a company, then you have to go and read the certificate of incorporation to see if the description is correct. You're not going to do that for every provision, but if there's a significant provision in the certificate that's being described in the filing, you need to read it. I would say on the job I picked up a lot about corporate law by reading securities filings and testing them against the corporate law that applied to that particular issue or registrant.

RC: Were you looking at particular kinds of filings?

DM: In the branch that I was in we allocated companies by industry and I had the oil and gas industry, so I did a lot of reviewing of oil and gas filings. And that was a busy time in the oil and gas world, so that was good. We had a lot of filings and a lot of interesting transactions. To be honest with you, I've forgotten the other industries we covered but

we had others. I just don't remember now. So I would have had a focus on the industries in my group, but that doesn't mean that you went to school in those industries in terms of going out and taking courses. It just meant that you were reading filings every day from companies from particular industries, and I did get more familiar with the oil and gas sector.

RC: From there, how did you come to move up within the division?

DM: You just sort of keep doing your job, and when positions open up within the division or on the staff you hear about them and the one that sounds interesting or that the people say it will be a good job you apply for. There is within the organization a feeling about different people and what their work styles are, supervisors, and so some people want to work in so-and-so's office or in someone else's office. Within the Division of Corporation Finance, the Chief Counsel's office was always sort of a plum position. You got to see all the legal issues, you weren't burdened by the review of filings as much; you handled a lot of questions from the outside.

Over time, whenever a position came up in the Chief Counsel's office it wasn't unusual for branch attorneys to sign up for one, and I did and got selected for one. So the next step for me was to move out of a branch reviewing filings into the Chief Counsel's office where you would handle questions from the branches about filings, plus calls from the outside asking you questions about the laws, plus no-action letters, requests for no-action, and then other issues that would tumble into the Chief Counsel's office.

RC: I've heard that working the phones is another great way to get up to speed on—

DM: I'll tell you what, there is no more frightening moment than when you're a branch attorney in the Division of Corporation Finance and you've read your first filing and you now have a comment to give to someone. You write them a letter and they call in to ask you about the comment letter you just sent. That's relatively frightening because you figure there's armies of people on the other line, they've researched the law, and your comment is terrible and you shouldn't have issued it. And you have to learn how to stand your ground, or relent if you're wrong and they're right.

So you got a little seasoning there, but when you're in the Chief Counsel's office and the calls were coming in—and I used to keep a log; this was before the computer, and so we've got these little three-ring reporter's notebooks, and a lot of us would just write them down. Fifty or sixty calls a day was not unusual. That was a high day, I would say, fifty or sixty was a high day but it wasn't unusual.

RC: Were there particular issues you found people calling about a lot?

DM: There were some areas, zones, where there were a lot of questions. Rule 144 was a complicated rule; you'd get a lot of questions there. The private placement rules were usually difficult for people, and you're dealing with practitioners in smaller firms that aren't doing registered deals. Typically the technical calls about the forms of registration

would go to the branches. Sometimes you'd get those or they would bubble up out of a group, and in any new area. So I worked on the adoption of Regulation D, and right after Regulation D was posted I was the fellow who was taking all the phone questions at that point because I had worked on the adopting release, and there were tons and tons of questions on Regulation D to start with because it was new.

RC: Can you tell me a little bit about Regulation D?

DM: It's a safe harbor for an exempt offering that's not public. It's the non-public offering exemption, and two other exemptions in there. It's now in the news because it's about to be revised as a result of the JOBS Act and the Dodd-Frank Act, so it's still with us as a regulation. It's been amended over the years in bits and pieces, but there's one very significant amendment that's on the table right now. So it's been a part of my legal career all along. It's not been a part of my practice as much because I've been at firms where exempt offerings are not the norm, but I've followed that rule from really the beginning until now.

RC: Were you involved in other rule makings as a special counsel?

DM: Well that was the one I spent the most time with because the Chief Counsel's office didn't do rule writing. We were in charge of looking at proposed rules and getting comments internally and then fielding questions on them later, but Regulation D was the one I was most intimately involved with. But the Shelf Rule was pretty big I would say,

for me at least. And the Integrated Disclosure System all were coming up at that point in time. So those were areas that I spent a lot of time on, I would say.

RC: Can you tell me a little bit about how you were viewing those or your perspective on those as they were coming through?

DM: Sure. It's hard to recapture this, but at that time Professor Louis Loss had finished a long attempt, more in the '70s than the '80s, to persuade Congress that there needed to be a major rewrite of the securities laws, the Federal Securities Code. Mr. Loss's securities code would basically have merged the 1933 Act and the 1934 Act. It would have gone from a transactional registration scheme to a company registration scheme.

But the SEC didn't really cotton to that proposal. In part it was probably territorial, that the SEC would prefer to rewrite the securities laws rather than let Congress do it. Congress sometimes doesn't get it the same way the SEC would like to see it. So while the SEC had been opposing the Federal Securities Code throughout the '70s—and I wasn't there then so I'm probably overstating it, but that's my short take—the SEC was in a pragmatic way trying to effectively move to a company registration model where there was more synergy between the two acts.

So if you think about the Shelf Rule to allow continuous offerings, that was one major step that had to take place because, remember, before the Shelf Rule was changed in the early '80s you couldn't do continuous offerings. More or less, there were some

exceptions. But the other great change that John Huber and others were responsible for during that period was to say, you may use your '34 Act periodic reports as a way of fulfilling your obligations under the '33 Act, and you would do that through the simple and elegant device of "incorporation by reference."

You would write a '33 Act offering document in which you say, "We incorporate by reference to the material that we put in our '34 Act filing." So the twin peaks, if you will, of incorporation by reference integrated disclosure and the Shelf Rule really was the SEC's response I think to the whole Federal Securities Code movement and took most of the bite out of that proposed legislation. Because the SEC was able to say, "Well we don't need to do all of this because we've effectively done it on our own as an administrative matter."

RC: I see, okay. Also as special counsel in the Chief Counselor's office you were involved in the advisory committee on tender offers.

DM: Correct.

RC: Can you tell me a little bit about that?

DM: The chairman at the time, John Shad, was wrestling with lots of debate about the market for corporate control, and the SEC was getting pushed and prodded by the Hill to do something. And the real question was what would the something be, because you had

two very vocal advocates on both sides of the issue. There were some that were pressing for greater and greater freedom to be able to have corporate control pass quickly and efficiently without a lot of burdens of regulation, and then there was a whole other side of that debate that said, “We need to slow things down, shareholders need more time to consider,” etc.

And John Shad I think did what many chairmen have done over the years when there's a tough political challenge and debate, you appoint an advisory committee and you bring in a bunch of outsiders to study it and give you a report so that you can at least proceed on the basis of some independent and perhaps balancing kind of advice that you could get. So he appointed an advisory committee on tender offers. And it's one thing to appoint one, it's another thing to staff one, and the role of supporting the advisory committee on tender offers fell principally to one of my great mentors at the SEC, Linda Quinn, who went on to become a division director and have a wonderful career. Linda was made the secretary, or maybe she was called something else, it didn't matter, the titles were irrelevant, to be the staff person in charge of making sure that the advisory committee did everything correctly, met, got a report out, etc. John Shad was a no-nonsense chairman, so he said, “I don't want an advisory committee that goes on for three or four years and studies this to death. I want a report on my desk in”—I'm going to say—“nine months.” I don't really remember, it could have been a year but it was a pretty direct edict and Linda was in charge of making that happen.

And lucky for me Linda had reached into the Chief Counsel's office and asked me to help her, to be her sort of henchman, boy Friday, whatever. And so everything that Linda didn't do I did, and the two of us were able to follow that advisory committee along and help it get a report out, which is quite interesting. And I think you may know this, I want to say there were 18 members. I'm not sure I got that right. I do know that the chairs or the co-chairs of that committee were Bob Rubin, who became Secretary of Treasury, Marty Lipton, and Joe Flom, a star studded leadership of that group.

And then there were a lot of other very interesting members. Frank Easterbrook, I remember, was on it, and Arthur Goldberg, and I'm sure I'm leaving off quite a few others, but at least there was a very interesting cast of characters. And we had five or six meetings, two in New York as I recall, and the rest at the Commission. I think that was it in terms of out-of-town gigs. Comments were submitted, there were debates, there were papers, there were the usual advisory committee activities, and a report was issued. And at the end of that the Commission was able to sort of deal with some of the calls for action in the tender offer space with a little bit more of a base of independent wisdom as to what ought to be done.

Ironically very little was done. Ironically the system wasn't that broke. There were legitimate complaints on both sides, but, as is so often in the case with laws and regulations and public policy, it's getting the right balance, it's not getting the right answer, and the right balance was set. There were some interesting small changes in the margins made. Some of which I don't remember because they were quite technical, but,

more or less, after that the advisory committee said, "Okay, we have a system that basically, when you consider the pros and the cons on both sides, has the balance about right."

The Commission made a few rule changes, made a couple of recommendations to Congress, because some of the things that could have improved matters needed legislation. Congress did not act on any of those and life went on. But for a young attorney that was working his way through the system and up through the ranks, I met a lot of people, I did a lot of things that I wouldn't have done otherwise, and it still remains in my memory bank as a quite an interesting little interlude.

RC: The meetings must have been interesting with all those—

DM: Yes. And the personalities were interesting. They all had points of view and they were all very articulate. And remember, today these are legendary names. But, then, Joe Flom and Marty Lipton were entering the prime of their careers and they were quite charismatic figures, as was Bob Rubin. I remember him as being quite stunning intellectually.

RC: Were there other matters that you recall dealing with in your role of special counsel?

DM: I've talked about working on Regulation D, and this is all moving pretty quickly as I look back at history. At the time, the days seemed to be long. Now they pass when I blink.

But, after what seemed a good period of time, I ended up going to be a special counsel in the chairman's office, because Linda Quinn was asked by John Shad to be what today they would call his chief of staff -- basically his number one staff person. So, I worked in the chairman's office for a year and a half, and that was also a wonderful experience but there's no one thing that sticks out other than just seeing the Commission at work.

RC: So what were your responsibilities as special counsel to the chairman?

DM: Read, read, and read again, digest into short, pithy memos again and again. It was very redundant in that respect, but you learned a lot. You learned a lot. Remember, a high percentage of the Commission's calendar is enforcement cases, so you learn a lot about enforcement internally -- the process, how a case matures, how an investigation matures, Wells submissions -- and you see the commissioners in action at closed meetings where they're allowed to meet outside of the sunshine, where they can debate and discuss things and roll up their sleeves. That's a view of the Commission that few people have and it's an eye-opener and quite interesting.

At the time, John Shad was making a big statement about enforcement. Although he was a Republican he believed very much in a strong enforcement program. I think "hobnail boots" was a phrase in one of his speeches. He was no-nonsense, and so that was a very interesting aspect of it. Everything else I would say didn't take me far away from what I'd been doing apart from just seeing it from a different perspective.

RC: And you were working primarily for Linda Quinn and Chairman Shad?

DM: Yes.

RC: Not for the commissioners themselves?

DM: That's right. The chairman's office tends to set the pace and lead the agenda, so as a special counsel to a chairman you do have more interaction with the other counsels to the other commissioners, more interaction with the other commissioners, and more interaction with the senior staff of the divisions, because everybody wants to make sure that the chairman is comfortable, or wants to understand what the chairman wants to do so they can adjust accordingly. So it's nice, it's a center point to be in that position in that office. And there was a smaller office than it is today. I think there were two, maybe three special counsels. Yes, there were three special counsels, and then Linda, and that was it.

RC: So you worked pretty closely with Linda Quinn?

DM: Yes.

RC: Were there other people you remember working particularly closely with in your time at the SEC?

DM: Certainly in the Division of Corporation Finance. I have just wonderful, wonderful fond, deep, abiding memories for many, many, many people in the Corporation Finance. Ed Greene was the division director when I came in. He endeared himself to me immediately because he asked me out to dinner with my wife and his wife, and here I was an entry level attorney. I thought that was pretty cool. And then Lee Spencer took over, Peter Romeo was the chief counsel, and I went to work at Hogan because of Peter Romeo. I'm getting ahead of myself I guess.

An office mate there, Alan Dye in the Chief Counsel's office (who went to Hogan too); Joe Connolly, who was head of the tender offer office in the Division and a wonderful guy (and he went to Hogan)—so all of those people—Mickey Beach, who ran Regulation D; Paul Belvin, who was head of the Small Business Policy Office then, and is now back as an associate director in Corporation Finance; these are all people that I remember. Bill Morley, chief counsel after Peter was a wonderful fellow whom I haven't seen recently. We all kept up with Mickey Beach, who passed away recently, and was doing Regulation D.

So all of the people in Corp Fin, there are many, many more I could mention; I won't. Certainly, around the building, Rick Ketchum. Rick and I used to run at lunch occasionally when he and I would both arrive at the same time at the locker room. He became the head of the Division of Market Regulation and then moved onto an illustrious career where he still is doing great things. John Fedders was the enforcement head, and

Gary Lynch followed him, these are all people whom I met and thought very well of. And some of the commissioners, Bevis Longstreth, I guess he was later but some of the commissioners who were there I remember meeting and I had a great time with many of them in the chairman's office job

RC: From there, what took you to Hogan Lovells?

DM: It was Hogan & Hartson then, and I went there because Peter Romeo had gone there and Peter had been a mentor in the Commission. No one ever thought he would leave the Commission and he went to Hogan, and I was beginning to think that it was time to look for something on the outside. I'd come to the Commission thinking I'd spend three years, and I'd been there five and pushing six, so I started looking, and Peter said Hogan might be interested. I sent them my resume and eventually got an offer and went there. We were followed by some others from the division. So I went there in a sense to work for my old boss.

RC: What did your practice primarily consist of at Hogan?

DM: At the beginning I did a lot of work with savings and loan conversions to stock form. That was a very popular transaction then, and Hogan had a former Chief Counsel of the Federal Home Loan Bank Board, Charlie Allen, and he had a very substantial practice helping mutual savings and loans convert to a stock form of ownership, which is an IPO. That was in the latter half of the '80s, and then of course we had a thing called the S&L

crisis and that slowed things down somewhat, but the market for corporate control was active and there were other transactions, proxy contests, and tender offers.

Then that merged into a period of time when I spent some time on corporate governance matters, and we can come back to that I guess. And then, really, moving into the '90s, it started ramping up, and we had the heydays of the '90s when there were a lot of IPOs, young companies getting started, and I did a lot of that. I would say for five or six years, my practice was, with a few interesting oddball exceptions, just a lot of startup companies: new companies going public, filing their first forms, keeping them on the straight and narrow with the SEC, doing secondary offerings, mergers, other transactions and generally a lot of corporate activity.

RC: So your experience at the Commission translated pretty directly?

DM: It did. I would say it did. Having served in the chief counsel's office you get to know most of the '33 Act and the '34 Act very well technically. I worked with a lot of filings at the Commission, certainly knew the registration forms. I had worked with the proxy rules enough, and by dint of some corporate governance work that I was doing during this period, I learned that better. And, certainly, all the work with the Tender Offer Advisory Committee, the tender offer rules, the 13(d) rules and the Williams Act was helpful. So yes, it was good, it all fit nicely.

RC: You said that you were starting to get a little more into governance in the late ‘80s, early ‘90s. Can you tell me a little about that?

DM: Sure. It started very innocently. A letter from CalPERS arrived on my desk, having been forwarded to me by a senior partner at Hogan, and he said, “Would you like to take a look at this?” And it was an RFP for outside securities counsel for CalPERS.

RC: And this is about—

DM: I’ll say 1987—1986 maybe, 1987—and I read it over, and I said, “Wow, this is pretty cool. They’re asking for proposals to be their outside securities counsel, and I know the shareholder proposal rule, and I know the proxy rules pretty well, and why shouldn’t we do this?” And the senior partner who had sent it to me, I think his attitude was probably that the rfp involved a bunch of administrative work, so we’ll give it to the low man on the totem pole and see what he or she can make of it. Well, fast forward, we applied and we got selected to go out and interview, and went out and interviewed, and we got hired to be CalPERS’s outside securities counsel. This was the first time they had ever done that.

CalPERS was beginning—along with the state of New York and people like Bob Monks and the Council of Institutional Investors, Sarah Teslik—they were beginning to answer the debate that had been generated by the battle for corporate control with a concerted effort to galvanize institutional investors to pay attention to the vote, not just to tick the

“yes” box and send their proxies in. And CalPERS had made a conscious decision—Dale Hanson was the CEO and Rich Koppes was the general counsel—and they had made a conscious decision to become part of a new movement of institutional investors that would perceive a fiduciary obligation to pay attention to the voting process.

They were holding stock in the name of all of their participants, all the state employees, and they could not just willy-nilly vote for management. They had to read the proxy statements, they had to figure out what was going on, and they had to decide from a fiduciary standpoint what the right thing to do was. And that whole movement was beginning then. You could say it was the greening of ERISA. ERISA started the process of holding shares in large collective funds, but then Bob Monks wrote the Avon letter in 1984, and later on the DOL came out with a more pronounced piece (I think in the late ‘80s, maybe 1989), which spoke to ERISA trustees—and that derivatively picked up the state public pension plans which tend to follow ERISA.

So in representing CalPERS as outside securities counsel, I would look for ways in which CalPERS could insert itself into the corporate governance dialogue, both generally, but also specifically at the SEC. And one of the ideas that Rich Koppes and myself and others had was that the SEC really had a grip on corporate governance through the shareholder proposal rule and through the proxy system, because the proxy system was the communication protocol for governance at a federal level. So, we ended up writing a long letter, which CalPERS sent to the SEC to try to initiate a rule making.

CalPERS wrote in with a bunch of suggestions, and before you knew it, a bunch of people were writing contrary letters, and a debate had started about whether the proxy rules needed to be updated and how they could better serve a new balance in corporate governance. From that point forward, I've had a sort of a minor, if you will, in corporate governance from the federal angle. It's important to understand that corporate governance at its essence is a state corporate law issue, which is very much rooted in self-ordering and what individual companies want to do with their governance opportunities.

But the federal government has different touch points here—some of which have been accentuated or maybe exaggerated in ways that aren't that helpful—but nonetheless there are federal touch points, one of which was the proxy system, another of which is the listing standards at the exchanges. So these areas became much more in play during this period.

RC: If the SEC looked at revising the proxy rules in response to what you were doing, can you comment on the changes that they ended up making?

DM: The CalPERS letter, which I worked on—I don't want to claim credit, however. CalPERS gets all the credit because it had the courage to do it and it very much controlled what went in the piece. But it was an idea that Rich and I had had, and so I feel attached to it. I think one of the theses here was that we should throw a lot into the mix even if not very much needed to be done, in part because part of the game, if you will, was to ratchet up the level of the debate and discussion and people's understanding

and awareness. So, if there were fifty items in that letter, and I think there were, I'm not sure that more than five or six actually got done. Some, the SEC couldn't do anyways, which CalPERS and we knew. Some, really were sort of whining, and didn't really need to change so much as they were just to make sure that everybody understood that we didn't like it. But the one thing that was done, which I think was the most helpful—if you could scratch away everything else and say the one piece we really were hoping for—was that the Commission crafted a safe harbor for unregulated solicitations by shareholders when they weren't soliciting proxies, in effect dignifying in a rule what everybody always thought ought to be the right answer, which is if all you're doing is jawboning about your view on what's on the proxy statement anyway, there's a First Amendment principle here. Why shouldn't you be able to jawbone? So, the Commission's changing of 14a-2 to permit basically unregulated solicitations, I think freed the airwaves for the institutions at that time in a very helpful way.

RC: These are informal communications between shareholders?

DM: Yes. Remember, at the time the rules basically said that, if you solicited ten or fewer, that was okay. Otherwise a solicitation was any communication reasonably designed to lead to the giving, withholding, or revoking of a proxy, which meant you could talk to your client, CalPERS, and say, "You better not issue this press release that says you're really against what management is proposing." Why is that? Because it's a solicitation, it's a communication, it's reasonably designed to lead to people voting differently. Therefore you can't do that without filing a proxy statement. Well, you can imagine that

CalPERS and many other people at that time would have said, “This is crazy, this is just our view.”

And, while they maybe overstated their concerns to prove a point, I think the change that the Commission made in that rule was a very helpful improvement at that time. There were other, smaller things that eventually came into play—or, people acknowledged they were issues and they have been dealt with over time—but I would say that the biggest point of that letter was to state to the world that the institutional investors wanted to be a part of this debate, and they didn’t want to be shackled by really pointless regulation.

RC: Were there other things on that front that you saw as important or as significant changes during this time period?

DM: In governance?

RC: Yes, particularly with the institutional investor.

DM: While the SEC was edging out in the proxy rules in response to this, and probably didn’t mind being pushed a bit to do it, the SEC was shot down with its attempt to get one-share-one-vote. So, there was still, I would say the balance here was still, decidedly pro management, and not for shareholders. The governance movement was alive and well, and it was making hay with such issues as confidential voting and the beginnings of declassifying boards, but there was still quite a lot of opposition. And more or less I

think people were happy to cabin the sort of activist governance investors in a small area and keep them held in check.

And, remember, corporate governance advances, if you want to think of it this way—or at least corporate governance changes, I won't say advances—changes, get more traction when markets are going down. People are more upset. So, I would say you saw some major governance activities and debates then, particularly in the first part of the '90s when the market was soft. As the market recovered in the '90s, however, there wasn't a lot of forward movement after the few things that I said other than just more and more noise. More or less, a lot of shareholders were happy with the way things were going because the market was going.

RC: You said earlier that you did a lot of work on IPOs during that time. Can you comment a little bit on what that was like, because this was a real boom time for IPOs?

DM: It was a real boom time, and it was quite extraordinary when you look back at it. About the only thing the SEC could do was to hold on tight, because the market was just racing. The SEC was quite active, and I think helpfully so, on something as pedestrian as the plain English, and that at least started getting some of the disclosure documents more readable, etc. And there was some effort to manage the risk factors. But it was a runaway train and the SEC hardly had the resources to keep up with it. Most of its talent pool was being stolen by the outside. The market was so good, law practices were booming; it was very hard for the Commission to recruit and keep people. It was routine

for people to come in and leave after a couple of years, instead of staying, as the SEC would hope, for three years. So it was a tough time at the SEC, and the people who were there did a great job, I think, trying to keep up with it. Because the market was racing so much, the market was completely impatient with all the speed bumps which the regulations put in. And the Aircraft Carrier was the major proposal to change some of the offering rules. It was proposed but there was too much in it, it was too big, it was too big so it failed. I would say basically the Commission was holding on tight during this time to keep up with a hot market.

RC: What sort of things are the speed bumps that people are looking to jump over?

DM: The bigger story here is of course the computer and the Internet and electronic and digital information. I think the biggest issue overall, when you get right down to it, was the frustration that practitioners and issuers had with what was perceived to be the rigidity of the communication rules, the gun-jumping types of analyses, the integration type of analyses, where you're getting dinged for informal communications that are outside the prospectus. I think everybody was right here. The outside was right that the rules were getting clunky and slow and difficult in a new environment with emails and cell phones and all that sort of stuff.

But the Commission was right to be wary of just going whole hog into a new system in which you could say whatever you wanted in any type of medium, and do whatever you liked, because it doesn't matter and would all sort itself out. So there was some real

tension here and I think we're still playing that out. At the end of the day, if you were starting a regulatory system today, I'm not sure what you would come up with but you might not come up with the "you may not sell without having a prospectus that has all the information in it which is given to someone before they can buy." You might not start with that, because you might say, "Well, information is just oozing all over the place." It has to be a different way of thinking about it. But we're not there yet, and certainly we weren't even close to there in the '90s, so there was a lot of tension and wrestling.

RC: I should have asked earlier if you were involved in any of the EDGAR technological change when you were—

DM: I remember being around at the early going. I believe EDGAR was named in the early '80s. And Herb Scholl was in the Division of Corporation Finance, and he was in charge of all sorts of things involving the filings. Great guy, and knew a lot about that. His proposed name, EDGAR, won the SEC's naming competition. Herb got a small award, maybe even a monetary award, and we were all excited for Herb. I think at the time we thought it was a ...The staff likes the status quo, most people do, but John Shad was pushing this. John Shad, to his great credit, was talking, chain-smoking Camels at his desk, talking about a time when you would be able to go onto your computer, read what you wanted to read and place your stock order with your broker. I mean, he was a visionary in that respect. I don't think most of us thought EDGAR was going to—we thought EDGAR might fall under its own weight. It seemed so impractical at the time. It now seems old fashioned.

RC: Are there other things from your time at Hogan that you'd like to cover, other things you saw as significant before you headed back to the SEC?

DM: We've touched on most of them. I could probably go on and on. Other than as the '90s were winding to a close—and I think the Aircraft Carrier was the beginning of this—it was apparent to someone on the outside who had a practice that was often before the SEC... I continued to jog on the Mall with some SEC staffers , and it was quite apparent that the raging market, and the pressure that was putting on the staff, particularly the Division of Corporation Finance, was beginning to take its toll on the agency as a whole. I was aware that the morale was bad. The Aircraft Carrier, I think, had a damaging effect on morale, because it was a big effort that was still-born. And it could have been more and just wasn't, and it was no one's fault. There were a lot of factors, but that was demoralizing. The agency was beginning the early, early efforts to unionize the staff. I just mention that because I think we're going to get to the next chapter in my career which was to return to the SEC.

RC: With that in mind, what brought you back to the SEC?

DM: Well, what brought me back is that Arthur Levitt called, or somebody in his office called, and asked if I would like to come down and talk with the chairman about possibly becoming the division director of Corporation Finance. It's not something I thought was coming; it's not something I had ever planned for. It certainly wasn't anything I was

politicking for, but it seemed interesting to me when the call came in. And in part I would say I felt very badly for the division and for the SEC generally. I loved working there, I loved the people there, I liked the mission, I liked the culture, and I felt badly for the environment. And I thought if I could bring an outside perspective, bring some energy, enthusiasm from the outside, maybe I could be part of something to help, I don't know, just improve the situation. So it was as simple as that.

I didn't have a clue that I would get picked, so I think the whole thing was sort of a lark at the time. But I went down and spoke with Arthur Levitt then—and, boy, I tell you what, if you want to be persuaded just talk to Arthur Levitt about anything. He's a very engaging, interesting, wonderful gentleman, I thought, and he charmed me. Evidently I didn't dis-charm him, and I was offered the job, so I puckered up and did it.

RC: You're coming back in on the tail end of the Aircraft Carrier and things like that. Did you have specific goals going into the position?

DM: Honestly, I didn't. Maybe I should have, but it happened pretty quickly. I hadn't even formulated a view about some of this stuff. I principally wanted to go back to the Division of Corporation Finance and walk the halls, get to know the people and try to improve the morale, try to fix up the management to try to see if I couldn't get the team back on track. Now, the issues that were on the table at the time—which were the Commission's position on the use of electronics or electronic communications in everything from proxies, but more principally offerings—were certainly there.

We were beginning to see the rumblings of auditor independence—not necessarily a Corp Fin issue, but I knew that was lurking around. Regulation FD was in the wind and was on the table, selective disclosure in other words. But Corp Fin was reviewing almost an IPO a day, and these people were working hard and they weren't getting very much credit. They were being criticized, and I thought more than anything else I wanted to go and, as best I could as division director, sit at the desk of an examiner and help that examiner do a better review, get a better comment letter out more quickly, and get credit for it.

My feeling was if the review process could be made to function well, and the people could feel good about it, that's the base that you want in Corporation Finance. Everything else is nice to have. All the support offices, all the no-action letters, the shareholder proposals: if everybody's whining at the Division because of the comment process, it's not going to work. So my ultimate objective was pretty, I would say, unambitious and low-level in the sense that I just wanted to go back and try help operations get back on its feet.

RC: With IPO reviews and comments—they are such a big part of what you are speaking to—can you talk a little about the process that the staff would go through in terms of reviewing an IPO?

DM: Well, when an IPO would come in, the first decision would have to be made as to whether we were to review it or not. It was pretty much a given that you reviewed every IPO, but there were some IPOs that in effect were repeats, particularly in the limited partnership space. One thing that we wanted to look carefully at is, was there a way of reducing the number that you should look at, because you had way too many IPOs and way too few people, so if you could reduce the number you were going to have to review that would help a little.

Another was just that I think the basic management structure within the Division needed to be clarified. There were probably some people in some positions that they weren't very good in, people had to be given more credit for what they were doing, and more focus and more attention had to be paid to them, because once you made the decision what to review you were going to delegate out these filings to younger-level attorneys and say, "We need comments in thirty days." So we would also want to look at this thirty days, which is not set in a rule anywhere, it's just an expectation you had set: is thirty days too much or too little?

Can you figure out a way of reviewing some filings—not the full review but a partial review—and therefore get to a shorter period of time with the filing, touching the filing? So we just looked at a lot of these metrics to try to figure out, if there is someone in the management structure that can be more effective, should we put someone else in a position of supervision where they could be more effective, should we clarify the expectations with respect to time and what you review, pretty basic stuff to tear down the

engine, lubricate the parts and put it back together again? And that's a lot of what was done.

I can't point to a speech or to a rule or anything other than to say it was a process. When I was in the Navy I was a department head for the engineering department eventually, because I worked up to that position, and we had the most elaborate set of—military, of course—elaborate set of instructions about how you maintained equipment. All of that called for routine maintenance and upkeep of the equipment, which meant once a quarter you have to unpack the evaporator, once every six months you have to lubricate the sump pump. I'm just making these up: the boilers have to be cleaned on a schedule.

Well, Corp Fin needed to have real preventive and upkeep maintenance done, and that meant really looking at every person and every function and rebuilding it internally without stopping everything. You have to stay underway, stay steaming across the ocean there. So a lot of that is what was going on, and people were so interested and eager to do this that it really was not hard work, it was fun. People were looking to get back to business and get it fixed.

RC: Now you talked about giving the people more credit also. Were there ways to do that?

DM: I don't know. As far as I'm concerned I started with something as simple as: I like it when someone says my first name to me when they say hello, and I think most people do. I certainly like knowing someone's name, so I'm able to do that, and generally when I

know their name I don't look away when they're coming, not make eye contact. I'll say, "I know this is Dick, say hello to him." Learning the names of everybody in the division was to me a small thing that I could do, trying to just make sure that they knew that I cared, and my view was that I worked for them, so I would get to know their name and say hello to them.

There were other small things. We had a little competition to pick a seal for the division. People submitted suggestions an award was given. If they had a party in someone's office, show up and say hello to people. But it couldn't have been done without a great senior staff. I mean it was just so heartwarming that everybody was eager to participate and do this, and it took about thirty seconds, and I thought that everybody got it and was really performing wonderfully well, and that we just needed to keep at it.

RC: You mean in terms of imparting this idea?

DM: Yes. If it was just me, just a wacky division director running around, goofy, calling everybody their name, that wouldn't have worked. Everybody in the senior staff really pulled their weight, and I just felt that there was a big collective effort to improve ourselves.

RC: Let's talk a little bit about some of the rule making and things you had. You talked about communications as an issue, and when I think of that, I think especially of Reg FD. Can you talk a little bit about the communications environment?

DM: Well, it was the big issue. We had no-action letters for electronic road shows that had been issued, we had an interpretive release before I got there... By the way, they issued an interpretive release while I was there on the Commission's views on the use of electronics, linking to someone else's website, the various scenarios in which electronics can be used in communicating in offers and how the Commission analyzed those various scenarios under the '33 Act. Regulation FD was another piece of the communications conundrum, questions and issues, and it had been proposed before I got there in a form that had been quite unpopular. It was also interesting in that Regulation FD was actually the brainchild, I believe, of Harvey Goldschmid as the general counsel, and the rule making seemed to be spearheaded as much by the General Counsel's as by any other Division. It was not a rule that was being written in Corporation Finance. I think that Corporation Finance was at the time probably not the favored division. I think the Aircraft Carrier had put it in some disrepute and the union efforts were being orchestrated by some people in Corporation Finance, so I'm not sure that Corporation Finance was everybody's favorite division at the time. In Corp Fin, we were following FD carefully and trying to guide it to a final rule that was more acceptable to our world, and that meant companies, basically.

So, we had a big role, I thought, in formulating the final rule, as it finally came out. And I think the rule—while it was very controversial, particularly as proposed—when it was finally adopted ended up in about the right place. The balance did get effectively set. And that was a pretty active period, a lot of internal meetings on various drafts of that,

and there was a tug of war between people who wanted it trimmed way, way back, probably Corp Fin, and Enforcement which really wanted it much, much broader. But that got sorted out and that got done.

After it was adopted there was about a year's worth of people wringing their hands and bringing in questions to the Commission and asking for guidance, but it sorted itself out. And if you were to look at this at 40,000 feet, if you had gone to a practitioner in 1995 and said, "What's the general principle with respect to selective disclosure," that is passing out information to someone selectively, most practitioners would have articulated a principle that was very close to FD. They would have said, basically, "If you're giving material, non public information, to someone else who might trade, that's really risky. You shouldn't do that." And that's sort of what the rule says. It took what was a common law of insider trading up in the ether and reduced it to a specific rule that mandated certain behaviors. I think in the end , Regulation FD probably has served its purpose pretty well. I know there are critics still.

RC: You also said that there were rumblings of auditor independence. Can you talk a little bit about that?

DM: Well, sure, I mean the Commission—Lynn Turner, Arthur Levitt, among others—but the Commission, generally, were troubled by the speed, the rapidity... They were troubled by the financial statements and the audit process that attended some of the overnight IPOs that were happening in the dot-com era, particularly where you're talking about

companies that had virtually no revenues to speak of, and were really betting on the come. And I think they were also troubled by the large amounts of money that now were flowing to the big accounting firms through the non-audit services, i.e. consulting.

They got on a tear about this and probably were right to. This was an area in which you never get could anything done without overstating the problem and reaching too far with the solution. So there was a process like this then. And I was there when the SEC was negotiating an acceptable sort of middle ground. It didn't come through Corp Fin directly, but it was very hard not to be immeshed in it because the audit firms were at the Commission a lot, principally with the general counsel's office. There was no question that this was being run from the top, but it trickled down so we were very aware of that.

From a corporate governance standpoint, thinking back to the other issues that we were describing earlier, this really is the beginning, I think, of a whole next chapter in the corporate governance world at the federal level, because it was through the listing standards and the requirements for audit committees that people first developed the understanding of how powerful the listing standards could be from a governance standpoint. Because early on—if I'm not mistaken, I want to say the late '90s, but early on—it was only a listing standard that the audit committee be independent, not all the other committees. And so the whole question of imposing governance expectations through listing standards really, I think, developed then, and the beta site for that was the audit committee.

That was all in the run-up to the auditor independence. It started with requiring the the auditor to review the 10-Q. Companies don't have to have audited the quarterlies, but there was a new rule requiring the auditor to review the 10-Q. And, separately, the audit committee had to be independent under listing standards, which brought at the same time a focus on the independence of the auditor. And, in that area, I think everybody was comfortable with federal rules because they involved the financial statements. There seemed to be some general acceptacne that "We all know that's special, and it's the federal law that requires an independent auditor so there's an excuse here, we're not invading the state territory." But the tools of changing corporate governance at the federal level, I think were sharpened in the audit committee area, in the audit area, interestingly, for me at least.

RC: Were there other rulemakings or other issues that you dealt with in the early years of your time as director of the division that you saw as significant?

DM: Probably not. I think my period there was one of dealing with administrative, employment, union issues. I became sort of head of the senior staff outreach, or I was sort of the liaison between the union head who was organizing the SEC, and so I spent a fair amount of time preparing for meetings with him. We ended up eventually negotiating—although I didn't have to do this, but others did—negotiating a collective bargaining agreement. So that was going on. Remember, we're at the end of a Democrat administration and we're pointing towards another election, so rule making drops off quite a bit at the end of a term. Mostly, when I was there the question I got asked was,

“Are you going to do anything with the Aircraft Carrier?” And the appropriate answer, I learned, was “no.”

There was hardly an interest in too much rulemaking at this particular point in time, other than if you could go back to some of the good things in the Aircraft Carrier and work on communications rules and the IPO process. Well, suddenly IPOs fell off the table. They were stopped practically. While I was there I saw them going from forty per week to two per week, or something ridiculous. I don't have the numbers, but it was quite stark. So the need for rules ... everybody was delighted that we weren't doing any rules, to be honest with you, and there wasn't much call for rules.

We did a little something in the integration space with abandoned public and private offerings, and I was to try to deal with some of the problems of private placements being deemed public offerings or vice versa. But this was sort of old business that flowed out of the 144A and the Exxon Mobil exchange offers, so I would say that was sort of business as usual housekeeping. We were beginning to formulate some things that we wanted to do with Form 8-K. We had a wish list of things we were going to turn to.

The asset-backed space we knew was abysmal and needed to be worked on. We didn't have the people internally to do it. The outside had some very good ideas that they wanted us to take on. We would have taken that on if we had the right people. We had a hard time keeping people then even. The market didn't turn for attorneys while I was there really, even though the IPOs had stopped.

We had Regulation M-A. M&A was falling off but that was fine. It was good to get that done. So there were some helpful rules that were done and catching up, but more or less I would say it was a quiet period. We had no legislative requirements whatsoever. I mean, we couldn't have gotten Congress to tell us to do anything because they didn't want us to do anything.

RC: Was some of the fall off connected to the September 11th and things like that?

DM: Well certainly, as soon as that hit. Yes, exactly, and then of course then came—

RC: Right, and that's right at the end of your time. Can you tell me a little bit about dealing with the corporate accountabilities scandals?

DM: I left just before it all. I left in the first part of January 2002.

RC: So, right, before everything really picked up.

DM: Enron was in November I think, maybe it was October. I've said this many times, one of my happier days there was when I learned we had not reviewed the Enron 8-K. It's better to not have reviewed it than to have reviewed it and not issued the comment. No, it had not hit. All I can say is it was beginning to bubble. It was coming to a boil when I left.

RC: Okay. Because that's right before Congress starts its hearings.

DM: Yes, but you may have talked with Alan Beller, or someday will, but I think Alan Beller came to Corp Fin with a real hope that we could do offering reform right away. And, in fact, we had been working on offering reform rules and Alan ironically is someone who we had called to come in and just talk with us on the side to get his ideas. So we had put together a package for offering reform. At the time, it was just not going to happen right away.

RC: Because of the election or because—

DM: Everything, yes, just everything, and Enron and just everything, 9/11, everything, and a changing chairman: Harvey Pitt came in and he did want to do offering reform, and they ultimately did offering reform, but it just didn't happen right away. But I think Alan came in with hopes that he could do it the first thing, and it took him a while to get to it, because, first, you've got the analysts and Enron, and then WorldCom and Sarbanes-Oxley. It was really just completely hijacked. The agenda was hijacked at that point.

RC: Are there other things, anything else from your tenure as director that you'd like to cover?

DM: No. As I reflect back on it I realize that much of what you do in these positions is reactive. The best laid plans are just that. And I think many directors looking back say,

“We did what we did not because I planned it but because we reacted to the moment.”

Everyone has a private hope for something that they wanted done, and I know that we all sort of think of it that way, but your hand is played for you a lot in that position, and that’s typical of government in general. It was a terrific experience. I really admire the people I worked with and still do, and it’s been a great part of my career to have done it.

RC: Okay. Can you tell me a little bit about coming to Covington & Burling?

DM: Yes. I left to come here and have a wonderful practice here heading up the securities group, and what better time to come out of the SEC and to be working in the securities area when you have two major statutes that mandate—actually, three if you think of the JOBS Act—three major statutes that have messed around with the securities laws and a lot else. And while it can be frustrating to an old timer because the old stuff is always better than the new stuff, it keeps you young. It’s been very challenging intellectually to keep it all straight, and to help clients understand it, and to fit it in, and at the same time step back and see where this is all leading, which I don’t know, of course. But I can’t think of a more exciting time to have been a securities attorney, actually, from a public policy standpoint. From a public policy standpoint I think deal-making has been much more complicated and much less active than in the ‘90s, but that just means that it’s different. It’s been interesting.

RC: I'm interested to hear some of your perspective on those changes, on Sarbanes-Oxley, on Dodd-Frank, on the JOBS Act, just in watching them from the private practice, especially since you came out right as for example SOX was ramping up.

DM: Legislation is always tricky. It's good to look at the good part of it. You look at the glass half full. You need legislation to make major changes. For instance Sarbanes-Oxley, a lot of moving parts, a lot of stuff that probably doesn't matter that much, maybe tips the balance a little bit here or there. But I think the enhancements in the audit area were significant. I'm not sure that without all of the problems that led up to that we would have ever gotten there. I think it was time to have something like an SRO over the audit profession, and getting the PCAOB for me is what makes Sarbanes-Oxley terrific. I think emphasizing internal control over financial reporting has been a good thing. It's been expensive, but I think it's brought an additional discipline to the process and more accountability to the process, so I would say the PCAOB creation and the emphasis on internal control on financial reporting were terrific. Some of the other stuff I think is interesting, but it's kind of window dressing, in my space.

Dodd-Frank, ironically it's more about what it didn't do to the SEC than what it did to the securities laws. It didn't put the SEC out of business. I think Dodd-Frank has had some very good things for financial regulation generally, hard things, maybe things that are unworkable and impractical. It was not an elegant act. It really, in a way, outsourced policy setting to the agencies, and they're still struggling with that. It didn't have a wide

majority, therefore there was no wide mandate for it, and we're still seeing the fact that some of the major areas that haven't been implemented yet because the agencies are having such a tough time doing it. I think in the securities space it did nice things for the SEC. It did a couple of things that were completely not nice, specialized disclosures are disasters. It's an awful thing to do to the securities laws. It's probably helpful to have had the emphasis on some of the rating agency changes, the asset-backed financings, it didn't put the agency out of business and it did some good things for the agency. So, in that respect, Dodd-Frank is probably okay for the SEC. But it's not okay with some major problems that they're still struggling with that are just irritants. The Conflict Minerals Rule is a lot of work. It's a major irritant and it's not a good thing for the securities laws.

The JOBS Act I think is actually in a curious way more significant than Dodd-Frank for securities laws. I'm not sure that the JOBS Act is all great but some of it is quite interesting. It could be quite good, and I don't think the story is finished there. So what do I mean by that? I think the nature of being a public company in the capital markets in this country is changing. How we want to regulate offerings and disclosures by public companies is changing, and I think the JOBS Act is a transitional step in that change. I don't know how it will all settle out. I don't think, for instance, that the concept of emerging growth companies is finished. The question is whether it's the right class of companies. It could be too big, it could be too small, and my guess is that we're going to end up with a system which is not the current system of well-known seasoned issuers and accelerated filers and emerging growth companies. It's too complex.

What we're trying to say, I think, is that there needs to be two or three tiers of companies that have associated tiers of regulation that are based on their classifications, and that we're sorting out what those tiers are going to look like. We've sort of had that all along, but we're now changing the titles and changing the metrics, and the JOBS Act is part of that and it's just not over. It's very interesting to see where the dust will settle. I think there will be more rule making and more legislation in the next ten years to smooth out all the rough spots that are there. I don't think crowdfunding will be around in the future. I do think that there will be more ways of raising money on a non-public basis, and I think there will be different thresholds for differing levels of disclosure, but that's all to be sorted out.

RC: That's interesting. In between these, on the governance front, they touched on some of the things you were working on in the early '90s, in terms of proxy, assets, and things for the shareholders. Could you talk a little bit about what these acts have meant for shareholders?

DM: Whether these acts or rules had come into existence or not, to me it seems clear that with at least two major downturns in the economy, and two major black eyes to the capital markets and regulators and financial regulation in general, that governance has had an uptick that has given shareholders, either through their trustees or directly, more time at the podium. And the rules have moved along to keep pace to some degree. I don't know

that any of the rules—I think we'd have just the same dynamics going on in corporate governance without any of the rule changes.

Do rule really move the needle or are they just kind of ancillary? Are they keeping pace or running behind the parade? I don't know what metaphor you want to use, but I think say-on-pay is quite interesting as a concept, but I don't think it's going to change executive compensation practices much. And, in fact, it may in a backhanded sort of way not help, because if every year some very high percentage of shareholders approve pay in a general sense—and, by the way, they're not voting on anything specific; it's just kind of pay as disclosed, it creates the illusion that everything's fine. And it costs a lot of time and money to write the proposals up, to answer the claims and the false claims, and the good claims and the bad claims. It's stirring the pot a lot.

Now the proponents would say it's enhanced or increased engagement by shareholders, and that maybe is the right answer, but I wonder over time whether something as permanent as a every one, two, or three years say-on-pay is a good thing from a governance standpoint. I don't think we needed it. I think there would have been the same agitation about compensation with or without it. You can go through some of the SEC's disclosures and wonder whether shareholders are really better off, because they have what effectively is boilerplate disclosure by company after company about how pay is set or how the compensation committee views this or views that.

So we've got a lot more governance disclosure, but I'm not sure that it's really enhanced *governance* that much. With that all said, we have the disclosure because everybody's talking about it and it's important to everybody and I guess the short answer here is that the last ten years has been a period of full-throated corporate governance, if nothing else. And the fact that the rules have some changes in them, I guess, reflects that more than has caused it.

RC: That's everything that I could think of. Are there other things that you'd like to cover or mention?

DM: No. I think I've alluded to this, and I guess as I'm getting in the latter part of my career I must say I'm as interested by the securities laws and by our human efforts to try to rationalize and regulate and make it all work. It's a big challenge. We get some things right, we get some things wrong, and it's exciting to me to see that the process is still as vital and hotly debated as it is. I'd rather it be that way than this be an area that no one cares about. And I think the story of how communications changes, and basically the information revolution, the story of how that ends, is interesting to me.

I assume it never ends, but right now I don't think we've figured out exactly a stable resting place. I think we're still reacting to new technologies, trying to figure out how to regulate in a way that doesn't stand in the way but at the same time doesn't allow people to go off the reservation, and that really is an eternal story in a sense. It never ends, but

it's exciting to see it now. It's a pretty vital period and so it's been a great time to be a securities lawyer.

RC: Well, great. I appreciate you taking the time to talk to me.

DM: Well, thank you very much. It's been fun. I appreciate it.

[End of Interview]