

Securities and Exchange Commission Historical Society
Interview with Elaine Greenberg
Conducted on July 17, 2014 by Will Thomas

WT: This is an interview with Elaine Greenberg for the SEC Historical Society's virtual museum and archive of the history of financial regulation. I'm William Thomas. The date is July 17, 2014, and we're in Washington D.C. Thanks very much for agreeing to participate in this project. We usually start with a little bit of personal background. I was looking at your bio, so I guess your roots in Philadelphia are pretty deep.

EG: Yes, indeed. I was born and raised in Philadelphia and lived in Philadelphia, or in the suburbs of Philadelphia, up until last year when I moved to Washington, D.C. So, I went to school there, to Temple University undergraduate, and Temple University Law School.

WT: What did you do for your undergraduate?

EG: I actually majored in anthropology.

WT: Did you know that you were going to do law while you were doing that?

EG: No. Initially I was thinking I could be another Margaret Mead, but the practical aspect of making a living came into play when I was a senior. At that point I thought that my skill set would be well suited to the practice of law, so that's when I decided to go to law school.

WT: So you got your BA, I see, in '82. Then did you go right on to law school after?

EG: Yes, I went on to law school. I started law school in '83.

WT: At Temple there.

EG: Yes.

WT: Tell me a little about that experience. Did you think about going into securities at that time?

EG: Not until the spring semester of my third year. So coming down the home stretch, I hadn't really found an area in particular that I would like to focus in on with respect to the law, until I took a course in securities regulation that was taught by Professor Jan Pillai. That was in the spring of '86, I believe, and at that point I was introduced to such wonderful statutes as Section 10(b) and Rule 10b-5 and Section 17(a), and I thought this is a really interesting area. I could see myself going into practice in securities regulation, in that field. That's where my interest got piqued in this whole securities industry.

WT: Did you have a notion of doing some sort of regulation all along, or doing something with the government sector, or were you pretty open?

EG: Well, I thought if I'm interested in securities regulation, the first place I should begin looking would be the Securities and Exchange Commission. And, as it so happened, there was an SEC office in Philadelphia, so I applied basically right out of law school and I got hired. It was as simple as that back in the mid-to-late '80s, so I was very fortunate to be hired, and that was my first choice, to go the SEC. So that is when my career began and I started as a staff attorney in the Philadelphia office of the SEC.

WT: I have to ask – I talked to Kit Addleman this past fall, did you know her there?

EG: I certainly did. We were both staff attorneys in the Philadelphia office, which was a very small office at the time. It consisted of just a couple of branches of staff attorneys, and we were all very friendly with each other because we were such a small group. At the time she was known as Katherine Smith, before she became Kit Addleman.

WT: Did you start out, then, doing enforcement work?

EG: That's exactly what I started out doing. And actually I was in the Division of Enforcement throughout my entire career at the SEC, so that was really my home.

WT: Tell me about some of the cases that you were working on and your role in building those cases.

EG: I started doing every sort of investigation that the SEC does, from investigating financial fraud, insider trading, market manipulation, broker-dealer fraud, investment advisor/investment company fraud – it really ran the full panoply of investigations that the SEC conducts with regard to the Enforcement Division.

WT: Were the cases put together by the whole team there in the Philadelphia office, or were they divided up?

EG: Typically each staff attorney had a docket of cases, and you were responsible for conducting the investigations, reviewing documents, taking testimony. Sometimes your branch chief would be there with you assisting you in testimony, but for the most part, as a staff attorney, you really were pretty autonomous in terms of conducting the investigations.

Ultimately, when it came time to determine what to do, whether or not to pursue an enforcement action, at that point you would begin to draft, what I'm sure you've heard about, the action memorandum, and that process would be more of a collaborative process together with your branch chief and others in the chain of command.

WT: Were you then given that responsibility right from the beginning, or was there a sort of breaking-in period?

EG: Yes, I really was given that responsibility. I remember a couple of the cases, it was essentially: here are boxes of documents, here's your conference room to go sit in to go through the documents and see what you think. It was great for me to just come in and to really conduct an investigation from the ground up.

Of course, if I had questions and did not understand something because I was new, there would be people there that I could consult with, both within the Philadelphia office as well as throughout the Commission. People were only a phone call away. Although, when I first started at the SEC I did have to share a phone with my office mate, so (laughter) it was a little bit of a technical challenge. But, for the most part, people were collegial and open to getting calls from those of us out in the regions.

WT: That sounds like a tremendous opportunity for quick learning.

EG: It was really an extraordinary opportunity to have that responsibility and to really try to understand and learn the securities laws.

WT: So where would the cases from the Philadelphia branch office specifically come from?

EG: They would come from any variety of sources, which is typical as of today. You can get a complaint from somebody from outside of the SEC; you could read something in the newspaper that could pique your interest. Also, each regional office has an examination program so there are examiners that go out and conduct exams of regulated entities,

broker-dealers, investment companies, investment advisors, for example, looking at their books and records. And sometimes there are problems that they uncover, and, if they're significant enough, they would refer those situations over to the Division of Enforcement, and we would then conduct an investigation as a result of a referral from the examination folks.

WT: Regionally, was it pretty much centered on Philadelphia?

EG: It was the mid-Atlantic region, which covers Pennsylvania, Delaware, Virginia, West Virginia, Maryland, as well as the District of Columbia, so there was some overlap between the jurisdiction of the Philadelphia regional office and the actual headquarters of the SEC.

WT: Was there much communication with the Division of Enforcement in D.C.?

EG: Yes. I would say that there was at a certain point in time in the stage of an investigation. As I said before, once you get to the point where you think you may want to pursue bringing an enforcement action, you begin drafting the action memorandum that would recommend enforcement action to the Commission itself. At that point, after our regional office would prepare an initial draft of the memo, it would then get sent to Washington to be reviewed by the various divisions who would have an interest in the subject matter, as well as the office of General Counsel. Then, from there it would go on

to various counsels for the commissioners, and ultimately would go to the Commission itself.

The highlights of any staff attorney's career at the SEC is that moment where the case that you've spent a couple of years investigating gets to the Commission itself for a vote. Because we were close to Washington, being in Philadelphia, we were able to, for the most part, take the train and travel to Washington and actually participate in the closed meeting session of the Commission where they would ask you questions about the enforcement recommendation, and hopefully at the end of the process they would vote in your favor and agree that an enforcement action was warranted.

WT: So, of course, the big things in the main Division of Enforcement when you arrived there were the big insider trading cases, Savings and Loan crisis as well. Did any of that have resonances in the Philadelphia office?

EG: Sure. Insider trading, there were those types of investigations at that time, and actually continuing throughout my entire tenure. The Philadelphia office pursued many insider trading investigations, and also financial type cases, financial fraud, various types of corporate disclosure problems. So they really were very varied in terms of the subject matter of the types of investigations that we conducted.

WT: As there was a switch at the top of the Enforcement Division from Gary Lynch to Bill McLucas, was there a difference in approach that you could sense at the regional office level?

EG: During my tenure at the SEC, I worked under, I believe, eight different enforcement directors and nine different SEC Chairmen, and certainly with regard to individual preferences and ideas, and also maybe what was going on generally in the industry at the time, there were objectives and priorities and goals that varied throughout the course of my entire tenure at the SEC. But, for the most part, if something came to our attention that was problematic and could be a possible violation of the federal securities laws, we would open an investigation and continue to investigate. During the course of my time, I would say that priorities and objectives did vary, but there was always a good mix of cases that I was able to investigate during those times.

WT: So, of course, this interview is being done as part of our series on municipal securities. Could you tell me how you first became involved with the muni world?

EG: Certainly. So, my first municipal securities investigation had to do with yield burning, and that was back in the late '90s. I was responsible for bringing the first settled yield burning action against a bank called Meridian Securities, which at the time was actually taken over by CoreStates Bank. It was the first settled yield burning case that the Commission had brought.

Yield burning, at the time, involved fraudulent conduct by broker-dealers who would excessively mark up Treasury securities in order to what was called “burn down the yield.” There are certain restrictions on the amount of arbitrage that can be earned with regard to municipal securities and investments, so that you can’t earn a higher yield on the investments than you would on the underlying bonds, and so these brokers excessively marked up Treasury securities in order to burn down the yield. That was illegal. It constituted a fraud.

This investigation was the result of a global investigation that was also being conducted by the Internal Revenue Service, as well as the U.S. Attorney’s Office for the Southern District of New York. There was a qui tam action that was filed in the Southern District of New York and the government intervened. So the global settlement that occurred at the time, back in 1998, was a global one that would settle all of the different government interests. CoreStates ended up paying several million dollars in order to settle and resolve that. And what’s interesting is, at the time, the U.S. Attorney for the Southern District of New York that worked on this matter was Mary Jo White, who’s the current Chair of the SEC – so an interesting bit of history.

WT: Did you become specialized in municipal securities enforcement issues at that time?

EG: At that time I would say it piqued my interest, and I thought that this area was one that I would like to continue to be involved in. And so I always looked for opportunities to have municipal securities cases as part of my overall docket of cases from that point

forward. I thought that this area was such a unique area. Municipal securities are very thinly regulated, unlike the other securities overseen by the SEC that are corporate securities. The SEC does not have direct regulatory authority over municipal securities. They're exempt from the registration and reporting provisions of the federal securities laws, and essentially the only tool that the SEC has is the anti-fraud provisions of the federal securities laws. But the SEC can indirectly regulate municipal securities through broker-dealers who sell municipal securities, or investment advisors that may be involved in municipal securities because the SEC does regulate those entities. But in terms of direct regulation over municipal issuers, the SEC does not have that.

WT: So, I was speaking with Paul Maco about some of these issues, and he of course mentioned your work, and he also said there was somebody you worked with named Mark Zehner, who's not on our list of people to talk to, unfortunately. Could you tell me a little bit about him?

EG: Sure. Well, Mark started at the SEC in Washington as an attorney fellow under Paul Maco. I first became introduced to Mark as a result of the yield burning cases, and that's when we first started to talk munis together. After his two-year stint was over in Washington, he wanted to transfer to the Philadelphia office. He's actually from Philadelphia, so during the two years that he was working in D.C. he actually commuted from Philadelphia to D.C. As an attorney fellow you have a two-year commitment, so after that he came to work for the Philadelphia office, and from that point forward we worked together and we brought municipal securities cases together. We looked to bring

cases that would have impact on the industry, and eventually that led to the formation of the specialized unit for municipal securities and public pensions.

WT: That was in 2010?

EG: Exactly.

WT: One of the other things that Paul was telling us is that they were trying to use enforcement cases to sort of tell a legal story, and I guess in a certain sense to clarify SEC's policy, especially on the applicability of the anti-fraud provisions. Was that something that was perceptible where you were coming from?

EG: Absolutely. That was the whole reason for pursuing enforcement action. Because the SEC had such limited authority, as I said, to regulate this industry, the vehicles through which the SEC's views on what was acceptable conduct in the markets many times were brought out through the enforcement actions.

WT: Going back to the yield burning cases, were those primarily done out of your office, or were they out of Washington? How was that divvied up?

EG: The first yield burning case was brought out of the Philadelphia office. That was the settlement that I talked about with Meridian Securities/CoreStates. That case actually served as the model for global resolution of the yield burning cases that came after that.

After Meridian, there were several other yield burning actions that were brought, mostly coordinated out of Washington.

WT: How do you build a yield burning case? How do you establish – I guess that the markups were actually quite extraordinary. I suppose there was a fair amount of obviousness there, but maybe you could bring me through the process.

EG: Any of these sorts of cases require both the investigation of the facts to determine what happened – like any enforcement investigation, you look at documents, you take sworn testimony, you try to determine who knew what, who did what, and just get a baseline of what the facts are. Then you have to perform the legal analysis, apply the law to the facts, and try to make a determination whether or not the federal securities laws were in fact violated.

So with most of the municipal securities cases that I was involved in, most of them were cases of first impression. There were novel issues. They were situations where the SEC had never brought an action in this area before, so we were developing a lot of the case law, which was an extraordinary opportunity as a lawyer to be part of that effort, to develop the case law and to bring cases of first impression. Of course, they had to be legally sound and have a basis for applying the law to the facts.

But the anti-fraud provisions are fairly broad, intentionally. Materiality isn't defined, for example, and so there is latitude to be able to look at novel fact patterns, novel situations,

instances where there was really no precedent, and be able to apply a lawyerly analysis to determine that there were in fact violations of the federal securities laws.

WT: In establishing the facts of the case, was the legendary opacity of the muni market at all a barrier? Of course, the treasuries are the things that are being marked up, so maybe that doesn't apply, but I'll leave that to you to tell me.

EG: I think with regard to many of the investigations, not just the yield burning cases, because of the lack of transparency and the opacity of the market, we were in the position of trying to pierce through that to try to determine exactly how the mark-ups occurred, what exactly was the thinking behind it. Were these individuals intentionally committing fraud? What were the different markups and were they in fact excessive? And, looking at the full range of conduct, did it give rise to a violation of the federal securities laws? I would say it wasn't just the yield burning cases, but most of the cases that I ended up investigating in the municipal securities space – you had to really figure out what exactly was going on, try to uncover the facts, and determine, whether you have sufficient evidence to prove a violation of, typically, the anti-fraud provisions of the federal securities laws.

WT: How quickly did it become apparent that yield-burning was a fairly widespread practice within the industry?

EG: Well, it was interesting, because, as I said, there was a qui tam case that was filed by Michael Lissak who himself had engaged in the yield burning. And as part of his qui tam action, he was in the position of cooperating with the federal government to demonstrate that there was in fact a violation going on. That was part of his effort, working with the U.S. Attorney's Office, to demonstrate that this in fact was a widespread scandal that was occurring at the time.

WT: When it comes to the New York banks that were partaking of this, was that handled out of your office, or was the New York office or D.C.?

EG: I think D.C. was really the one that coordinated the effort with the other banks and the resolution that occurred thereafter. As we're talking about yield burning and the big banks – years later, yield burning II, as I like to refer to it, occurred where there were the bid rigging cases that were actually brought out of the Philadelphia office, as well as part of the effort of the unit that was formed. We can maybe talk about that when we get to the formation of the unit. But it's interesting to observe that the yield burning cases that were brought back in the late '90s – years later, there ended up being another scandal that entailed violations of Treasury regulations and bidding for securities in that context. In the later context, it involved guaranteed investment contracts, not Treasury securities, but it had to do with reinvestment of bond proceeds. So it was similar in that you're still dealing with , impermissible arbitrage and jeopardizing the tax-exempt status of the bonds.

WT: Tell me a little bit, at the SEC, how the Office of Municipal Securities and Division of Enforcement managed to build up this area.

EG: The Office of Municipal Securities was formed, with Paul Maco as the head of that Office, back in the late '90s. Arthur Levitt was the Chairman at the time. His priority was to investigate municipal securities cases, so the Office of Municipal Securities was created. . In Enforcement, we were trying to look for instances where we could be successful in bringing enforcement actions that would send a message to the market. So, over the course of the years, we identified situations where t message cases could be brought and the market would take note and appreciate that. Although municipal securities are under-regulated, and in fact not directly regulated by the SEC, the SEC still has an interest to ensure that investors of municipal securities are afforded whatever protections that can be had under the law and under the limitations of the law. Unlike corporate securities, which are directly regulated by the SEC, municipal securities are not, but yet if there's a fraud that's going on, the SEC can step in and hold those accountable who committed the fraud, thereby hopefully protecting the investors in the municipal securities.

WT: In terms of the enforcement cases that you were able to bring, what was the balance like between the dealer and the issuer end?

EG: I would say that, fast-forwarding into the future, given the SEC's mandate of investor protection, it's interesting because sometimes the municipal issuer is in the role of

investor, as it was with regard to the yield burning and the bid rigging cases because these are products that the issuers are buying, whether they're Treasury securities or GICs or some other reinvestment product. So, in that case, the municipality is in the role of investor and was victimized, essentially, as was the federal government because the IRS, or the Treasury Department was the victim there because the arbitrage rules were violated.

In other situations, the municipal issuers are the ones that are issuing securities, and they may make misstatements in their offering documents which are going to investors. The SEC obviously has an interest in protecting investors, whether or not they're retail investors, or whether or not they take the form of municipal entity investors, so I would say the mix was really split between the two. When you have dealers that are committing fraud, that can be against municipal entity or other investors. On the other hand, municipal issuers can also engage in fraudulent misconduct through offering documents that may be materially misleading to investors.

WT: On the dealer end of course, there are more rules, but they're from the MSRB and those are mainly enforced by what was then NASD. Did you have a good view of those activities at the time and ability to judge how much enforcement was going on, on that side of things?

EG: I would say that the SEC and the former NASD, which became FINRA, those are the only two agencies that can enforce the MSRB rules, as you know. The MSRB is the rule-

making authority, and then the SEC or FINRA can enforce them. But the SEC has brought, and continues to bring cases based upon violations of the MSRB rules. In particular, I would say Rule G-37 is a rule that the SEC has brought enforcement actions over the years, and continues to have an interest in pursuing those actions. Also G-17, the SEC has brought numerous cases with regard to that provision.

I would say that it really wasn't only the NASD, now FINRA, that has pursued actions for violations of the MSRB rules. The SEC has also done that and really shares the concern, and that is a priority of the SEC as well. So it's not just the anti-fraud violations, it's also violations of the MSRB rules that the SEC pursues as well. Again, that's more of the direct regulation of the regulated entities, the dealers in this instance.

WT: What was the perception of how vigorously the MSRB rules were being enforced prior to – this may be a bit prior to your engagement with it – but prior to the SEC, really, and Arthur Levitt in particular, stepping up focus on this area?

EG: I would say that overall there wasn't much of a focus on it. I think that you had a few people that maybe were concerned about the area, but for the most part, people's priorities and focuses were elsewhere. I think it really had to come to light, the effect that municipal securities has really on investors in general, and I think over time there became more of an appreciation for who these investors were. It's heavily retail investor-based. Two-thirds of municipal securities are held by retail investors, a third directly by them, another third through mutual funds. So when you look at the SEC's mandate of investor

protection, you combine that with a heavy retail base in a particular type of security, you can see why over time the SEC, I believe, became concerned about what type of protection there was going to be for those investors in light of the regulatory framework and the limitations on the SEC's ability to directly regulate municipal securities.

WT: You mentioned G-37. Could we talk a little bit about how pay-to-play cases work?

EG: How pay-to-play cases work. Well, if you look at what the requirements of G-37 are, and there are certain limitations on political contributions and when you can obtain underwriting business, for example, it's really looking at and investigating whether or not you have situations where there were contributions being made and business was then obtained within a two-year time period.

An interesting case that was brought when I was chief of the Municipal Securities Unit was the case against Goldman Sachs, which was just a pure G-37 case. There was no allegation or finding of violations of the anti-fraud provisions, so it was just a pure G-37 case. That case involved a situation where there was a direct cash contribution, but there was a component that was indirect as well, and that case ended up being the first time that the SEC brought an action for non-cash, or what was called "in-kind", contributions, and that was found to also be a violation of G-37.

WT: What is it exactly that would trigger a violation of MSRB rules to go to the SEC rather than NASD?

EG: The SEC and FINRA do coordinate, and sometimes both can bring actions, both do have the authority, and it's really a situation such that there is a course of conduct so problematic that the SEC has an interest in bringing an enforcement action and sending a message through that. But FINRA brings many cases for violations of MSRB rules, and so I think it's a coordination effort, looking at which cases should FINRA bring, which cases should the SEC bring, and that's really how I think it works.

WT: Could you tell me a little bit about the development of the law concerning issuer disclosure and the vexed issue of exactly what constitutes proper disclosure.

EG: Sure. The SEC has an interest in ensuring that disclosure in primary offering documents is accurate and complete, and doesn't contain any misrepresentations or omissions that would be material to investors, but also that once municipal bonds are issued, these bonds could be out there for 30 years, and so the concept of continuing disclosure is really also very important to the SEC. As I said, because the SEC doesn't directly regulate municipal issuers, the basis for looking at whether or not disclosure is adequate is looking at what's contained in the official statements for the most part, and seeing whether or not there are any misrepresentations or omissions of material fact in those for primary offerings.

For continuing disclosure and secondary market disclosure, the SEC indirectly regulates that through Rule 15c2-12, which is a rule that requires underwriters to ensure that

municipal issuers are complying with continuing disclosure undertakings, which essentially is a contract that the municipal issuer enters into on behalf of investors to ensure that they provide up-to-date financial information, for example, on an annual basis. And so, in order for an underwriter to satisfy itself that the issuer has complied with these contractual continuing disclosure undertakings, it has to engage in due diligence and have a reasonable basis for ensuring that the issuer has, in fact, complied with those undertakings.

WT: This is again getting up close to the present, but the Harrisburg case I think introduced an interesting wrinkle into this whole area, didn't it?

EG: Yes. Well, the Harrisburg case was, again, another case of first impression. It was the first time that the SEC ever charged a municipality for misleading statements made outside of the securities disclosure documents. Harrisburg failed to comply with its contractual undertakings to provide continuing disclosure, so there was a dearth of information in the market regarding what the financial condition of Harrisburg was. So the SEC looked at various statements that it was making outside of its typical securities disclosure documents, such as its budget report, financial statements, as well as a State of the City address that its mayor was making. And in those documents the SEC determined that there were material misrepresentations and omissions being made about the financial condition of Harrisburg, such that they constituted violations of Section 10(b) and Rule 10b-5, and the SEC ended up bringing enforcement action against the City of Harrisburg.

There was also a companion 21(a) report that the SEC brought at the same time, which cautioned public officials to essentially be mindful and pay attention to their obligations under the federal securities laws, because they, too, could be the subject of an enforcement action if they don't understand, appreciate, or are involved in misrepresentations and omissions that could be material to investors.

WT: Are these oftentimes cases of recklessness versus intent to defraud? I'm not talking about Harrisburg in specific.

EG: It varies. The SEC takes the position that in order to meet its burden under Section 10(b), recklessness is sufficient, so either intentional or reckless conduct would be sufficient for establishing scienter for Section 10(b). Other cases – Harrisburg is not one of them, but in other situations the SEC has brought enforcement actions for violations of Section 17(a), specifically Section 17(a)(2) or (3), which only require a showing of negligence. So with regard to which anti-fraud provisions the SEC utilizes or has utilized over the past, it has used all of them. Whether or not the state of mind requirement is intent, reckless, or negligent, the SEC could pursue and has pursued actions with regard to all those provisions.

WT: It seems like something that would apply in particular to the muni market, given the variety of issuers that there are, and my knowledge of the cases isn't encyclopedic, but it seems to me that mainly the cases have been brought against larger issuers, cities, Miami, San Diego, Harrisburg, and so forth. Is that a misperception?

EG: I would say that it really does vary, and that the SEC has brought cases in the past against smaller issuers, and recently, since I've left the SEC, a case was brought against Wenatchee, which I think is a small issuer in the state of Washington. Other cases that the SEC has brought include one against Dauphin County. And even the city of Harrisburg, even though it is the capital city, it's not really that large of a city (laughter) So I would say over the years, it has varied in terms of the actions that were brought. It's really about getting the facts and having an indication of a violation, so that at some point it doesn't necessarily matter how large the issuer is. If, in fact, there is a violation of the federal securities laws and it's significant enough that it warrants an SEC action, then we would pursue it regardless of the size of the issuer.

WT: Let me ask you a little about the length of time that it can take to develop these cases. One of the things that I mentioned to Paul Maco is that I was startled, when I actually looked into it, how long the Miami case took to develop. I knew that the enforcement action came in 2003 or something like that.

EG: Well, there were two.

WT: Of course, there was the most recent one as well, Miami Part II, but it took over five years I think. And he said that actually Miami was the first one to fight back. I don't know if you had anything to do with that case or not.

EG: I didn't. I was not involved in the city of Miami case. But, just generally speaking, for the most part, these are complicated cases. Many investigations that the SEC brings, not only in the municipal securities area, are complex and it does take time to conduct investigations to make sure that we have it right. The SEC goes through a really rigorous process in order to make sure that we have all the facts that we need, both good and ones that maybe wouldn't be so good from an enforcement perspective, but it's important to know if there is a risk that the SEC wouldn't prevail. All of that needs to be explained to the Commission before it takes a vote on whether or not to pursue an enforcement action.

So the complex cases do take time, and it is a large effort and can be very, very difficult. With regard to the municipal securities area, again, because it's so lightly regulated, that can add, too, to the length of time as well. There are no requirements that municipalities have to maintain, for example, books, records, or anything, or that they comply with any disclosure standards, and with regard to financial statements there's no federally mandated accounting standards, for example, that municipalities have to comply with.

So, many times it's difficult to determine whether or not there's been an actual violation of the federal securities laws because it's not as simple as looking at a line item, for example, on a corporate financial statement and saying, "Oh, well, this item was inflated," or, "This didn't comply with GAAP," and so it's sometimes very difficult to sort through all of the facts and then to apply the analysis to make sure that there is, in fact, a violation of the federal securities laws.

WT: Let me come back to pay-to-play. Of course the original G-37 referred to the dealers, but in more recent years that's been applied to municipal advisors; of course, consultants were banned altogether. How has that developed from the enforcement side?

EG: Well, it's interesting. Today is actually the fourth anniversary of the passage of Dodd-Frank. I saw an announcement, a press release, today from Chair Mary Jo White, and she talks about today is the fourth anniversary of the Dodd-Frank Act, and one of the things that she notes is how the Act created a new regulatory framework for municipal advisors. So, the Dodd-Frank Act, even though it was four years ago, required that the SEC develop rules for municipal advisors, for their regulation and registration, and that rule went into effect on July 1st, sixteen days ago. So, basically, there's a fiduciary standard that municipal advisors have to comply with. They have to treat their municipal clients with the highest degree of care.

With regard to the application of MSRB rules, those are still a work in progress. Right now the MSRB is in the process of drafting MSRB rules that would apply to newly regulated municipal advisors. And so there are draft rules that are out there now for comment: one is on the fiduciary duty standard, another one is on supervision, the next one I believe that the MSRB is going to be putting forth in draft form will probably be the pay-to-play rule. So it's a work in progress, and municipal advisors are now subject to regulation. They never had been before, and so this is really a very significant step in terms of regulation of the market.

In the past, municipal advisors sometimes were the subject of investigations and even enforcement activity by the SEC, but they were unregulated and there was no standard to which they were held. And so now, with the passage of Dodd-Frank and the SEC having a rule in place, they now will be subject to regulation and oversight by the SEC. So it is a very significant development in the history of municipal securities.

WT: Let me ask about some of the products associated with municipal bonds. Kit Taylor was saying that, in his opinion, interest rate swaps were the real sequel, or the immediate sequel, to yield burning cases in terms of overpricing municipalities and that sort of thing. Of course, there's the auction rate securities as well, there's the whole issue around the regulation of derivatives, but I feel like I'm putting too many different things together so I'll just let you talk about it.

EG: What's interesting about the municipal securities marketplace is, because it's for the most part very lightly regulated, it has been fertile ground for the development of new financial products. So, many times you will see new financial products arising for the first time in the market as a result of coming out of the municipal marketplace, because it's more or less a testing ground for the market because it's not highly regulated. In terms of innovation for the market – and one of the SEC's other mandates is capital formation – if you look at it from that respect, (and I take off my enforcement hat), as encouraging innovation in the market by coming up with new products – I mean, all that is good, assuming that people play by the rules and that there is a level playing field, that's all a good thing. It's when folks take advantage of the lack of oversight, the lack of

regulation, and begin to do things that are, in the worst case scenario, out-and-out fraud, or, lesser so, things that really are not so much in the best interests of their customers or clients.

WT: It seems that most of the enforcement, again with a very outsider's view, that's come in the marketing of these sorts of products. That's certainly the case in auction rate securities.

EG: A lot of times I think what happens is that, especially with products that are more complex, you have brokers or dealers out there that are marketing these as investments to their customers without perhaps disclosing the risks entailed in these products. Sometimes the dealers or the brokers don't even understand them themselves. I was involved in investigations where the brokers who were selling these products didn't even really appreciate what they were, what the risks were, and really weren't even in a position to disclose anything to investors because they hadn't even conducted due diligence on their own behalf to figure out what these products entailed. So, a lot of the problems that have arisen in the past are a result of either brokers themselves not understanding the products, or understanding the products and then choosing not to disclose the risk to their customers because they just want to sell the products and get their commissions or fees on them.

WT: Could you tell me about the role of public pension funds in all of this? Of course, it's named specifically in the special unit that comes up, so there must be a back story here to be told.

EG: Do you want to talk about the formation of the specialized unit at this point?

WT: Whichever seems logical to do, if that's a good lead in.

EG: I think so. I think that the specialized unit was created in 2010, as well as four other units were created by the Division of Enforcement, in order to have units that were devoted to complex products or complexities that exist in the marketplace, and to better appreciate and understand what was going on. The Municipal Securities and Public Pensions Unit was created because, as we've been talking about, there's opacity in the market.

WT: Can I clarify straight off that I know, of course, this is around the same time that the Office of Municipal Securities is made independent again, and that had to do with Dodd-Frank. This is not related to that at all?

EG: No. I would say that in 2009 – so that's prior to Dodd-Frank – the SEC Division of Enforcement went through a self-assessment, went through a major restructuring, and among other things created specialized units, and also determined that there should be one less level of management – so the branch chief position was eliminated. The first supervisory position would be that of assistant director beginning at the end of 2009

going into 2010. The units were created to address, in some respect, some of the criticism that the SEC had been getting in the post-Madoff, post-financial crisis world, and it was a way for the Division of Enforcement to really have a self-assessment and figure out: is there a way that we can address these concerns and better position ourselves to be smarter about how we go about our business? These units were created with that in mind, and I was appointed as the first chief of the Municipal Securities and Public Pensions Unit.

And so the area of public pensions was one of concern, and it is related to municipal securities in that municipalities have one of their largest liabilities the funding of their public pensions. Because these represent huge liabilities for municipalities, the SEC has an interest in ensuring that when a municipality goes to market and conducts a bond offering, it's disclosing the degree of funding or under-funding of public pension funds. So, investors that are going to be investing in the bonds of a municipality and/or state, have a full appreciation of what the financials are with regards to these huge liabilities. That's why public pensions are part of the mandate of the unit, to ensure that these huge liabilities are being adequately disclosed to investors so that investors have full information. That's why public pensions is part of the title of Municipal Securities and Public Pensions Unit.

WT: I think we reserved our discussion of bid rigging until this particular moment, so shall we return to that?

EG: Oh, the bid rigging. I'll first talk more about the unit. For me, to go about forming this unit it was really, "Go forth and create a unit." Because many people in the SEC really didn't have any background or understanding of municipal securities, a lot of this was an educational and a training effort. My deputy, Mark Zehner and I, he became deputy of the unit, we travelled to every SEC office around the country to talk to the staff about municipal securities.

WT: And the unit was run out of Philadelphia.

EG: It was run out of Philadelphia because Mark and I were based in Philadelphia., but we ended up having staff in ten of the SEC offices, including in Washington. The first thing that we set about doing was to train everyone, and we had a muni boot camp that we held for everyone in Philadelphia. And, for the most part, the unit was composed of staff attorneys and assistant directors who were their supervisors, many of whom had never brought a case in the municipal securities area. So, we really had to have basic training for them.

In addition, we determined to hire specialists from the outside. That was really a critical part of the unit so that we could bring their expertise in-house. We ended up hiring a former investment banker, a former trader, and then later someone who was a former finance director of a major city who had extensive experience and knowledge with regard to governmental accounting standards, which is known as GASB, as opposed to FASB, which is what governs the corporate world. So, a totally different accounting

methodology and standards are at work with regard to municipal securities. We had to make sure that we had internal staff that were capable of assisting staff attorneys and supervisors, conducting investigations and fielding questions that they would have as issues would arise that were very substantive in nature.

WT: I know Elisse Walter, of course, is active in this area. Was it helpful to have her being a commissioner?

EG: Absolutely. She actually was an honorary guest at our boot camp, so yes. It was really tremendous that she had such an interest in municipal securities. In fact, the whole effort with the municipal securities field hearings that were conducted over the course of two years, from 2010 to 2012, ultimately resulted in a 150-page report on the municipal securities market. Our unit was involved with that effort, both in terms of participating in the various field hearings as well as drafting parts of that report. Commissioner Walter was the driving force behind that, so absolutely it was a very rewarding experience to be able to be involved with her leading the charge on the municipal securities front.

WT: Did we cover bid rigging to our satisfaction, or did we get distracted from that?

EG: I would just say bid rigging was one of a number of cases that we brought in the unit. It was, as I viewed it as, yield burning II. We ended up bringing settled enforcement actions against five major financial institutions for their roles in what were these very complex, wide-ranging, bid-rigging schemes, which involved the reinvestment of bond

proceeds in such investments as guaranteed investment contracts and other products.

Collectively, as a result of those settled actions, I think the total settlement – between the SEC, the IRS, the Department of Justice’s Antitrust Division, and a coalition of twenty-six different state attorneys general offices, resulted in settlements along the lines of \$745 million, all of which, or most of which, was distributed back to the municipalities that were harmed as a result of these schemes.

WT: When we talk about these schemes, yield burning, the bid rigging or anything else, how much of a bank is typically involved in that sort of thing, for example? Is it a small group of people? Would it be an entire muni desk? Would it be more systematic? How does that work?

EG: Clearly it would be from the municipal securities desk, and it really depended on the bank in terms of how widespread it was, but certainly enough so that it really impacted how they were engaging in the business and engaging in bid rigging with other banks, with the bidding agents, et cetera, so I think it really varied. But it was for the most part, I would say, housed within the muni desks of these various banks.

WT: I had the opportunity to interview David Clapp of Goldman Sachs. Of course he retired in 1994, and I was struck that he didn’t – whether sincerely or not, I don’t know – didn’t seem to have much knowledge of the practice of yield burning, so I was kind of curious. I won’t ask you to comment on that particular one. You wouldn’t know about those earlier – well, you might.

EG: For the earlier cases?

WT: For the earlier yield burning cases.

EG: No.

WT: I was looking, actually, at the statement that the SEC released when you left the SEC last year, and of course they listed a number of cases that you were able to bring as part of this special unit. So, maybe you could talk about what you view as the key accomplishments during your three, four years as the head of that unit.

EG: Yes. We talked about the bid rigging cases, that was a significant accomplishment. We talked about Harrisburg, that was a case of first impression. Also, I think the case against the State of New Jersey that had to do with misrepresentations and omissions in connection with the sale of over \$26 billion worth of municipal bonds, where the SEC found that New Jersey fraudulently misrepresented and omitted to disclose material information regarding its underfunding of two of its main pension funds. And so that was the first time that the SEC ever brought an enforcement action against any state for anything, so that was really a case of first impression in terms of looking at the history of the SEC and how the SEC had never before sued a state for any sort of misconduct. That, I think, was a very significant action that we brought.

Then that was followed on by action against the State of Illinois, again for misrepresenting the adequacy of its plan to fund its pensions. That was brought in March of 2013 and was also a very significant case as well. Again, as I said before, the area of public pensions and the funding or not funding of public pensions is one where not only the SEC has an interest, but others have also been focused on that particular problem.

I remember being involved in the FSOC, the Financial Stability Oversight Council report back in 2013. Their annual report actually highlighted the case that the SEC brought against the State of Illinois as being something that should be looked at and considered in terms of a systemic risk, that other states or municipalities out there can be the subject of significant financial stress as a result of pension fund liabilities that they have. And witness the city of Detroit, which filed for bankruptcy, in part because of huge pension liabilities that were outstanding that it owed to pensioners.

So the whole area of pension fund liabilities, what is owed to pension funds, what is owed to pensioners, how they get funded and what is ultimately disclosed to investors, which is what the SEC cares about, is really an area that has garnered widespread concern and attention both within the SEC and outside the SEC.

WT: We've been talking about municipal securities for quite some time, and I don't want to give the impression that that was necessarily all that you were doing over this entire period, so maybe you could tell a little bit about the balance between this specialty and the rest of your work.

EG: During at least the last three and a half years that I was serving as chief of the Municipal Securities and Public Pensions Unit, I was also serving in another senior officer role as being Associate Director for Enforcement for the Philadelphia office, and my time was split fifty-fifty between both roles. As Associate Director, I was overseeing the enforcement program for the mid-Atlantic region of the SEC and brought numerous cases in the area of corporate issuer disclosure, financial and accounting fraud.

One of the last cases that I ended up bringing in the area of corporate issuer disclosure was a case that we brought against BP back in November of 2012. The SEC pursued an action against this global oil and gas company and charged it with fraudulently misleading investors while its Deepwater Horizon rig was spilling oil into the Gulf of Mexico by significantly understating the flow rate in various reports that were filed with the SEC. So, that was a fairly significant action that I supervised and resulted in, I believe, the payment of the third largest penalty, at \$525 million, in SEC history. There was also a parallel action brought by the Department of Justice's Deepwater Horizon Task Force, so that was a fairly significant action that was brought in that area.

WT: How did that come to the Philadelphia office?

EG: It was just something that we looked into and determined to open an investigation on.

WT: Was BP in America situated in that area?

EG: Nope, it wasn't. What I'll have to say about my work at the SEC over the years is that it evolved from being work that was maybe focused in on a regional basis to one that was really more of a national practice, and I think it was a result of looking at who at the SEC, say in the Division of Enforcement, had the expertise, had the specialization, really understood the issues, that you could really pursue any investigation no matter where it would be based. For example, there were many insider trading cases that we brought that were not based in Philadelphia but were based in California or in New York. So, BP obviously is not headquartered in Philadelphia. But, over time, we brought cases that were not based within the four corners of the regional office's mid-Atlantic area. I think that was something that grew over time, and that the office really became one that had a national practice, I would say, versus just a strictly regional practice.

WT: Are there any overarching trends in enforcement that you could point us to that are of particular interest, whether in enforcement policy or in things that you have to enforce against?

EG: I do think that the whole specialization effort was really key to how the Enforcement Division goes about its work, and, again, it's in line with what I was saying about looking at people's expertise and capabilities as opposed to just being locked into where they are in the country and that certain cases should be brought in certain particular offices because that's where the conduct is. That still happens, obviously. It still could be looked at as the bread and butter of a lot of the regional offices, but sometimes in the

more complex cases you're going to look at people who have the expertise, the understanding, to actually be successful in pursuing these types of enforcement actions. So I think that was all part of the view of specialization, to go and develop expertise in these areas, and then you're going to be better able to successfully pursue these investigations which are often complex and you need to really understand what the issues and the complexities are.

WT: Did your work track some of the other trends that were happening in enforcement, such as all the corporate cases after 2002, Enron, of course, et cetera?

EG: We had our range of cases that we brought. There were financial fraud cases, there were, again, insider trading cases. We had our referrals from our examination program, so those were regulated entity cases against broker-dealers, investment advisors and/or investment companies. So, as I would say, it really ran the full gamut of the types of investigations that you would contemplate the SEC conducting.

WT: There wasn't really a waxing and waning of certain kinds of cases over time?

EG: It's interesting. I would say, when I look through the history of the cases that I've brought, there were certain times that happened. For example, you mentioned auction rate securities., and yes, people were focused in on bringing the auction rate securities cases during a limited period of time. But I think for the most part, looking at broker-dealer practices, investment advisor practices, insider trading, corporate disclosure and

fraud, over the years, there were some of all those types of cases within the full docket of what we were investigating. Also, not to forget market manipulation – that was also a large part.

I would say it was interesting, just as an observation, with regard to the post-Madoff world – after that occurred there were a lot of Ponzi scheme cases, for example, that we worked on. I think a lot of it was fallout from Madoff in that people, investors, unfortunately, were being victimized by Ponzi schemes, and started to ask more questions of the promoters of these schemes and maybe were asking to get their money out, and that exposed a lot more Ponzi schemes. So, depending on what was going on at that moment in time in the country with regard to the markets and whatever schemes were going on, I think sometimes did affect the types of cases that we would be investigating. That's one example. We had a plethora of Ponzi schemes in 2008 and 2009, after the Madoff case.

WT: So are we missing anything big?

EG: Missing anything big?

WT: Or small?

EG: Or small. I think that you covered, for the most part, the highlights at least of my tenure at the SEC. I will say that the creation of the Municipal Securities and Public Pensions

Unit, for me, was really an extraordinary opportunity. When I set out to create the unit, we really wanted to pursue cases that would impact market behavior. I thought that was an important point to be made with regard to the unit – given the under-regulated nature of municipal securities, given the highly retail nature of the investor base – that in order to have an impact out there in the market you want to bring cases as an enforcement lawyer that will cause people to take notice and to hopefully change their behavior for the good. For example, you bring cases against a state like the State of New Jersey or the State of Illinois, hopefully the message that will send to other states, or other municipalities, will be to take notice because they don't want to be the next one to be sued by the SEC. All of that will, hopefully, serve as a deterrent to them, which in my view would be beneficial obviously to investors, because what it will do for the most part, is require is an enhancement of the disclosure.

The SEC is a disclosure-based agency, so many times if an issuer of municipal securities, for example, discloses all material information, the good, and the bad, that will typically satisfy the SEC in terms of assuring the SEC that there's no omission of a material fact, or there's no misrepresentation of material fact. So that is part of the effort. When you're in enforcement, you bring these cases, you want to have a high impact on the market, you want to try to affect market behavior, and I believe that's what I attempted to, and hopefully did achieve as the inaugural chief of that unit.

WT: So tell me, then, a little bit about leaving the SEC after 25 years, more than.

EG: Yes, after 25 years, I determined to look for other opportunities in private practice. I had never been in private practice, never worked at a law firm or any other place but the SEC, and I thought after 25 years it was time to hand the reins over to my successors to continue with the Municipal Securities Unit – which they’ve done admirably since I’ve left – as well as to be in charge of the Philadelphia office enforcement program.

So here I am at Orrick, which I started last September, as a partner, and it’s just a tremendous opportunity for me to see things from the other side and to help clients both achieve compliance with the securities laws, and assist them in any sort of regulatory cases that might come their way, to help defend them. So , for me, it’s important to be able to be on the other side as a lawyer. You do look at problems from all different angles, and in some respects it’s really just looking at the other side of the same coin, to be able to argue the other side as opposed to being the prosecutor. It’s been a rewarding experience for me being here in private practice. Obviously being at the SEC for 25 years was a tremendous opportunity for me, and I was fortunate to have been involved in bringing some great cases, which I believe served to impact the market in a positive way, and I’m looking forward to this next phase of my career..

WT: Are municipal securities the focus of your practice here?

EG: So far it has been, but of course my practice is broader than that because I did continue to bring all sorts of enforcement actions up until the end of my tenure at the SEC. The municipal securities area has been keeping me quite busy. My former unit has been very

active in pursuing various muni matters, and so that has been keeping me quite busy so far.

WT: Legally, it's a very interesting time in the area, I suppose.

EG: It is indeed.

WT: Well, if there's nothing else that seems like a good place to wrap up.

EG: Thank you so much. I really appreciate the opportunity to be part of this, and the development of municipal securities regulation is one that is continuing and will continue, and I think there are still many more things to come and it'll be interesting to see what happens over the next several years.

WT: Thank you very much for your time. We appreciate it.

EG: My pleasure.

[End]