

**Securities and Exchange Commission Historical Society**  
**Oral History**  
**Interview with Thomas Kim**  
**Conducted on October 11, 2016, by Kenneth Durr**

**KD:** This is an interview with Thomas Kim for the SEC Historical Society's virtual museum and archive of the history of financial regulation. I am Kenneth Durr. The date is October 11, 2016, and we are in Washington, DC. I want to talk a little bit about your background. I see that you're from Ohio.

**TK:** I'm really not from Ohio. I was born in Ohio. My father was a resident there, and then we moved to Pennsylvania when I was around two years old, and I grew up in the Lehigh Valley, and from there I went away to high school. I went to boarding school at the Lawrenceville School in New Jersey, I was in the last all-boys class, and from there I went to Yale undergrad for college and I was an English major there. Between college and law school, I was an editorial assistant at the *New York Review of Books*, and I worked for Bob Silvers and Barbara Epstein.

That was a really interesting year, because they stand at the pinnacle of publishing, they worked with all of the best writers in the world, and to interact in a very minor way with Joan Didion and Hugh Trevor-Roper and V.S. Naipaul – even just making calls to them – it was kind of neat. For English major, it was a really great experience. And then from there, I went to law school at Harvard.

**KD:** So you decided you didn't want to stay in the literature world?

**TK:** I didn't. You know, it's kind of a tough world to be in, because they pay you next to nothing, and a lot of the work at the beginning is very administrative, and it's hard to really have a productive career in publishing. And so like many English majors before me, I went to law school. But I have to say I was probably very unprepared for law school, because I hadn't taken much history in college, and I remember the first day or two of law school in which they were talking about the three branches of government, I thought, oh, the three branches of government. I forgot what they were, and of course it came back to me. But the point being, I wasn't engineered for law school like many of my fellow law students were.

**KD:** Did you develop an interest in securities law or corporate law relatively quickly through law school?

**TK:** The first year summer I worked for Debevoise & Plimpton in Washington, and I was hired to work on an insider trading book that Ralph Ferrara, who was then a partner there and a former general counsel of the SEC, was writing. I think the book is now called *Ferrara on Insider Trading*. And so as a first-year summer associate, all I did was work on this book and so I got to know the laws of insider trading very well. But in those days – this is '92 to '95 when I was at Harvard Law School – they had very few securities professors there. And in fact, they had Detlev Vagts, who was a very senior, who was actually an international law professor, and an assistant professor now, Lucian Bebchuk, who's now very well known for his work in corporate governance. So I never took

securities law, actually. It was that one summer where I studied the laws of insider trading, and then after that nothing until after I graduated. I clerked for a year in the US district court here in DC, and then I joined Sullivan & Cromwell in their DC office, and I started practicing securities law there.

**KD:** Did your DC district court experience get you into the regulatory agency area?

**TK:** We didn't actually have that many regulatory cases during my tenure. We had an IP trial. We had a lot of drug criminal cases. It was a very motley assortment of cases. Although I do remember one instance where we had a TRO, and the lawyer on the case was John Roberts. And I remember it because I remember at the time Judge Oberdorfer, for whom I clerked, said he was very careful about this case because he respected John Roberts so much, and I remembered that. So when he was nominated for the Supreme Court, it just brought back all of those memories.

**KD:** And then you went to GE after you were at Sullivan & Cromwell?

**TK:** No. So I was at S&C for a year, and a little bit more than a year. And this is in the days where there were no e-mails and no PDFs, and so as the junior associate on a transaction, you are assigned basically to handle the distributions to everybody else on the working group. And after a year of obsessing about the FedEx deadline and getting the distribution done and so on, I thought I'd had enough. Entertainment law had always appealed to me. I had an opportunity to be an entertainment lawyer, so I went to Beverly

Hills and I joined the firm of Gang, Tyre, Ramer & Brown, and for the next two years I did entertainment law. I found out that it basically is doing the same contract over and over again. It's an employment services contract, and so after two years of that I thought, well this is fun to do when I'm in my twenties, but I can't do this in my sixties. It's just not that interesting.

I moved back to the East Coast. I joined Latham & Watkins, and that's really when I began my securities career in earnest. My mentor there was John Huber, a former director of Corp Fin. He and I worked together very intensively. This was during the period in which SOX was enacted, I think in 2002, and he and I worked very extensively on Sarbanes-Oxley, and we put out one of the first comprehensive analyses of that statute. And you can still see it floating around the Internet today. But it was circulated quite widely. And then in 2003, I was recruited away from Latham to go to GE by my new boss, Mike McAlevey, who's a former deputy director of Corp Fin. I worked at GE for three years. Mike and I were really the only securities lawyers there, and we handled all of the corporate governance issues for GE, all of the SEC filings, all of the capital markets transactions.

And then, because I had worked for a former deputy director, and I had at Latham worked for a former director of Corp Fin, that around 2006 Chris Cox was nominated then confirmed as the chair of the SEC, and his general counsel was Brian Cartwright, a former Latham partner who was based in the LA office. And I remember, I was at the spring ABA meeting in 2006 and I saw John, and I brought him aside and we spoke

privately. I said, "I'm thinking about going to the SEC, but I don't really know what the Office of the General Counsel does, I'd rather be in Corp Fin," and I asked him what I should do and John said, "Well, the most important thing is to get in the door. Once you get into the door, you can maneuver and get lucky, but just get in the door." With that advice, I called up Brian and I interviewed with him, and I got the job as counsel to the General Counsel. It was on that basis that I moved from New York back to DC to be Brian's counsel, and that was in June 2006.

I worked with Brian for about three months until the fall of 2006, when Chris Cox named the new deputy chief of staff, and his name was Mike Halloran. Mike is the former general counsel of Bank of America, former partner at Pillsbury. Mike and I had worked together on two editions of the *Corporate Director's Guidebook* that's issued by the ABA's Committee on Corporate Laws. When Mike came to the Commission, I think in the fall around October, I met with him and I very quickly transitioned from the General Counsel's office to the Chair's office. I became counsel to Chris Cox, and that was the fall of 2006. My office was right opposite Mike Halloran's office, and he put me in charge of Corp Fin, OCA, and I did my share of enforcement. All the counselors did their share of enforcement work. The director of Corp Fin was John White, and the chief accountant was Con Hewitt. Together we had, I think over the next twelve, fifteen months, an extremely productive year.

If you look on the SEC website and you look at the adopted rules in that period, there was a tremendous amount that got done. I didn't realize it at the time, but we were lucky in

the sense that there was a very defined agenda that John White had, and more importantly, we had a Commission at that time that worked well together. It was Annette Nazareth, Roel Campos, Kathleen Casey, and Paul Atkins, and the chemistry was productive among the five of them and so they were able to get a number of things done. One of the most important things during that period was by that point, 2006, SOX had been in place for some years. Companies were complaining strenuously about the cost of complying with 404, which requires the audit of internal controls over financial reporting. One of Chairman Cox's main goals was to revise the audit standard that was driving costs and driving what many people viewed as unnecessary work.

I think the most important thing that I worked on during that period was what became Audit Standard No. 5. The effort had been ongoing for a number of months to try to redo the audit standard, but the chair was not happy with how it was going, and so Mike and I were brought in to basically push heads together and really make a significant change to that Audit Standard. And neither of us were experts in auditing, but we obviously could read the audit standard and think about what conduct the audit standard was requiring. That was a very intensive engagement with the PCAOB staff on right-sizing Audit Standard No. 2.

**KD:** Is this essentially the one that set a specific limit to the size of companies that needed to do internal control?

**TK:** No. This is the audit standard that companies had to follow and auditors applied in evaluating or auditing the internal controls over financial reporting. It didn't allow for much judgment. It was a very black-and-white audit standard, and it was interpreted by the audit firms in a very not punitive, but in a very rigorous way. Many companies felt that they were just doing paperwork for the purpose of paperwork, just for the purpose of complying with the standard, but to no real substantive benefit. That judgment was not allowed to be exercised, or permitted to be exercised.

And basically Audit Standard No. 5 allows companies to exercise judgment, promotes, quite frankly, the exercise of judgment for how audit firms can conduct their audits. And it, I think, led to a more efficient standard, and it really did, I think, effectively address the criticisms that had been made to date about Audit Standard No. 2 and about 404. So today, you don't hear people talk about repealing section 404 of SOX. We were able to right-size that audit standard. I think that, in my view, was one of the biggest achievements of the Cox chairmanship.

**KD:** Accountants talk about principles-based versus rules-based. Is this one of those?

**TK:** It was. It promoted more principles-based judgments on what was necessary for the audit. In addition to issuing the audit standard, the Commission also issued management guidance, because Audit Standard No. 5 is written for the audit firms. It's an auditing standard. Management guidance was drafted at the same time because, of course, management has to reach its own conclusions about the effectiveness of ICFR. It's that

conclusion that is then audited by the audit firm. So that, among the many things that happened during that twelve-month period, I do think that Audit Standard No. 5 and the corresponding managements guidance, when you look back on his chairmanship, I think is probably one of the most important things that he did.

**KD:** So that would have been one of the last things that sort of put SOX behind –

**TK:** I think so.

**KD:** Revisions to S-3 eligibility, is this a small business kind of a thing?

**TK:** Exactly.

**KD:** And this is before 2008.

**TK:** Yes. And you're right to focus on 2008, because between the period from 2006 to 2008 – and I left the Chairman's Office in November of 2007 – but there was just an enormous number of rulemakings that got done, including revising S-3 eligibility to allow companies with \$75 million in market cap to actually use S-3, reducing the holding period in Rule 134 from two years to one year, allowing companies to use electronic proxy as opposed to paper proxy statements. I think 12g3-2(b) for foreign private issuers, allowing them to not report was also adopted at that time. I think the change, the all holders best-price rule was adopted at that time.

It's interesting, within the Division of Corporation Finance, there is a draft of every possible rule proposal you could think of. At some point, somebody has thought of it, it was drafted then it was put on the shelf. It seems like during this period, many of these ongoing projects that had been outstanding were somehow able to be proposed and then able to be adopted. So there were just a lot of projects that had been outstanding, as I said, for a period of time. But it was under John's leadership a period where rules got adopted and changes got made that I think eased the regulation of capital markets and public companies.

**KD:** Was this the general focus on boosting capital formation under Cox? Was that the orientation?

**TK:** It was. It was promoting capital formation. I think these were also projects that the division had long thought about, but they needed a Chair of the SEC to support and push those through, and between Cox and John White, they were able to do that. Of course things changed after the financial crisis kicked into gear, but that was productive policy-making period.

**KD:** So you talked about the e-proxy as well. This is also something that happened in this period?

**TK:** That's right.

**KD:** And that's the shareholder...

**TK:** Yes, e-proxy is allowing companies to post their proxy materials online. They have to send out this one page or one card saying notice of the availability of Internet proxy materials, but other than that, they can use the Internet to cut down distribution, publication costs associated with paper proxy statements, and sort of take yet one more step towards the Internet age, when everything really is available on the Internet and relied on.

**KD:** That seems kind of late for that. So was it a no-brainer to make –

**TK:** I think so. In fact, thinking about it again, we probably could have done even more in terms of not even requiring the paper notice of Internet availability. You know, it's interesting the SEC has been in many ways a pioneer in terms of using the Internet. For example, they had EDGAR in the eighties, and EDGAR is now the most visited federal database and website. And they have always been aware of and anticipating the use of the Internet, but they've always had this hankering or notion that the paper should always be available. The e-proxy rule that you see from 2007 still carries with it that vestige of, but there should always be paper available. And it's interesting that in 2016, I think hardly anybody sees anything in paper anymore. But I think there still is the notion that the paper version should always be available upon request or something like that.

**KD:** Who's carrying that on? Is that something that the Chairman pushes down through the Commission?

**TK:** I think it's just when you look at the data, the level of Internet penetration in our society is quite deep now in 2016. But there are still people who don't use the Internet. And many people who are older, they're senior citizens, they might not be as comfortable with computers, but they are investors. And obviously the Commission takes very seriously its investor protection mandate, and so it still has the concern, and it probably that concern may even be there for maybe another ten years, that there should always be paper available upon request. But certainly it's just a matter of time before even that vestige is no longer necessary.

**KD:** So we've talked a lot about some of the Corp Fin type of activities you undertook while you were counsel to Chairman Cox. You mentioned that you had some kind of enforcement role?

**TK:** Yes, all of the counselors on the tenth floor to the Commissioners and the Chair, everybody has their own share of enforcement cases where they review the memorandums submitted by Enforcement, and then they analyze the recommendation made by Enforcement, and then they make their own recommendation to the Chair. And so even though Enforcement lays that all out in a memo, at least for Chairman Cox, we wrote our own separate memo on top of that, evaluating Enforcement's recommendation.

And so given that there's a closed meeting at the Commission every week it seems, with twenty, twenty-five cases coming up for action, each person who's counseling a Commissioner or Chair is doing his or her share of enforcement cases.

**KD:** Are you doing legal research or trying to sort of give your imprimatur to this and say that they're following guidance?

**TK:** It's always laid out by the division. Of course, you can form your own point of view, and there are certain controversial cases, although not many, but there are some controversial cases that are real judgment calls, and in those particular circumstances you might meet with the Enforcement team to talk about the recommendation, and then you would summarize that in your memo to your boss, and that would be in the notebook that then the Chair or the Commissioner goes into the closed meeting room with. But yes, it was our job to vet those recommendations and to make sure that we were satisfied with the recommendations. Given the excellence of the Enforcement division, things were pretty much wrapped up in a lovely bow and present at the time it was even presented to the tenth floor, and so our job was more confirmatory than raising new issues that nobody had spotted before.

Because by the point in time it comes to the tenth floor, remember, it's been vetted not only by Enforcement, but counsel for the respondent has done all the negotiations that he or she can to settle the case. And so a lot of legal work has happened by the time it comes to the Commission.

**KD:** So in some respects, it's a formality.

**TK:** It is a formality, except in those cases where, and a very small percentage of cases, in which there really is an issue where you think, should this issue be addressed in enforcement question, or was there an open question of interpretation such that enforcement is not an appropriate way to resolve this issue? It should be done either through interpretive guidance or some sort of report by the Commission, but not through an enforcement proceeding. And those are few and far between, but they do come up, and that's sort of the job of counsel to identify those issues and make sure that those get properly vetted by the Chair and by the Commission.

**KD:** One other thing we talked about being during your time as counsel was Rule 144. And there are these themes that go throughout, and this appears to be another one of those capital formation initiatives.

**TK:** It was. I mean, look, we are talking about a Republican Chair of the SEC who was focused on facilitating capital formation. Rule 144 formerly had a two-year holding period before you could resell. That obviously is a disincentive to people purchasing in a private offering, because when you purchase in a private offering, you have restricted shares. If the company is not a reporting company and you have to hold those shares for two years before you can freely resell, that's something of a disincentive for anybody wanting to purchase in a private offering, and so one of the many revisions to 144 is that

it reduced the two-year holding period to a one-year holding period.

That same theme is making S-3 available to a smaller category of issuers. I think we also adopted smaller reporting company requirements during that same period of time to make compliance with the disclosure requirements easier for smaller companies. It's also about making it easier for foreign private issuers to get out of the reporting system by allowing them to stop reporting so long as they report in English, pursuant to their home country rules, and have those English reports available on their websites.

There were a lot of those types of accommodations made during that period, and they were typically adopted five-zero. So there was really no disagreement among the Commission about whether or not these were good things to do. It was just a matter of getting things done. John White is a very goal-oriented person, and he had a list of things that he wanted to get done, and he was very effective in moving that rule-making agenda along. You look at the adopted rules during that period, and most of them are Corp Fin rules. He was just a very efficient person.

**KD:** Clear one thing up for me. A very interesting thing going on here, and I think you mentioned it, was this idea of foreign issuers – is the word delisting or something like that, or deregistering – explain what's going on there exactly.

**TK:** Well once you become an Exchange Act-listed registered company it's hard to get out. We were concerned about foreign private issuers incurring the expense of Exchange Act

reporting, even though they weren't themselves listed here in the US. The issue was, how can we allow them to get out of Exchange Act reporting, but still make sure that investors have the information they need to make investment decisions about these foreign private issuers? 12g3-2(b) under the Exchange Act was adopted during this period that basically said, if you're a foreign private issuer, you can stop reporting so long as you continue to report in English, pursuant to the rules of your home country, and you have that English version available on your website.

This was a project that Paul Dudek, the former chair of the Office of International Corporate Finance, Paul left the SEC just about six months ago, but he had been the chief of that office for many years, and was widely respected as the person on foreign private issues. This was a project that he had been working on for, I think, a number of years, actually. As with these other projects, those projects were able to actually get proposed and adopted during this period.

Same thing with the all holders best-price rule, there was some concern that compensatory arrangements with the targets' management teams could somehow run afoul of the all holders best-price rule. The Office of M&A, led by Brian Breheny, had been working on that rule to sort of address that concern for some period of time, and that rule was able to be proposed and adopted during this period.

So people look back and think of the Cox Chairmanship, and they look at the financial crisis, which obviously kind of overshadowed what had come before. But before the

financial crisis, it was a very productive period in terms of getting things adopted, which I think there was widespread agreement was appropriate, those changes were appropriate. It was promoting capital formation, and it was not harming investors. It was like a to-do list that I think was in somebody's dust that got pulled out and got adopted.

**KD:** So by the time you left, and you left in late '07 –

**TK:** November of 2007.

**KD:** Yes. Had all those items been accomplished?

**TK:** Most of them had. I think there were some that got done after I left the Chair's office. But John had already created the momentum. And when I say "we," so my role as counsel to the Chair meant that I oversaw the rule-making agenda in Corp Fin. I was part of every rule-making project in some sense more than the others. It was really, of course, the career people in Corp Fin who were really carrying the water. They were the ones who were really drafting it.

My job as counsel was to make sure just to oversee those projects and make sure that they were moving along, and that we were meeting deadlines. If I thought there was an issue that we needed to get involved in, then the Chair's office would get very involved on certain issues. But for the most part, it was more of oversight and just making sure that it was consistent with what we thought the chair wanted. But it really was the career

staff that was very much on the ground. They're the ones who are closest to the issues, and I certainly don't want to take any credit for the work that they'd been doing for many, many months if not years on these projects. But my role was simply to make sure that they were all getting proposed and adopted in a timely manner.

**KD:** Would you work chiefly with John White, or would you work with his people?

**TK:** I worked chiefly with John, and then the heads of the various teams that were actually working on the rule-making projects, but primarily with John.

**KD:** So you were pretty tuned into Corp Fin at this point?

**TK:** I was.

**KD:** So was this just a matter of you getting in the door and waiting until the –

**TK:** I think it was. I think by November, Dave Lynn, the prior chief counsel, had left, and they were posting for that job. I applied for it and I got the job, and so I left the Chair's office around Thanksgiving of 2007 and moved down to the staff.

**KD:** Why did you want to make that move? What was the attraction to get in the staff?

**TK:** I think because from the Chair's level, you're still not involved in the day-to-day work of the staff. You're overseeing the rule-making agenda, but I wanted a more engaged role in the work of the division. I'd always wanted to work at the division, and it was a great opportunity for me to move down. These jobs don't come open very often. And so even though I would have liked probably another six months in the Chair's office to finish what I had been working on, the opportunity was compelling and so I took it, and so I left. But you're right, it was hard to leave the energy of the tenth floor, the rule-making agenda, being part of Chairman Cox's office, and then to move down to the staff and then work on the day-to-day work of the Office of the Chief Counsel, which is involved with answering questions from the public about how the securities law should be interpreted and applied, and working on the interpretive work of the division.

So you're no longer really making rules, but you're really actively interpreting those rules. One of the assignments that John gave me when I became chief counsel was, he wanted to update all of the telephone interpretations that we had. That was my big project when I first came to the Chief Counsel's office, was taking all of the prior telephone interpretations over decades, reviewing all of them, seeing whether or not I agreed with them, and then revising them if I needed to, and then basically republishing all of those interps.

That was basically a two-, three-year process. But it was part of John's overall effort. He liked to say, you know, on the side of New York City police cars they have CPR: Courtesy, Professionalism and Respect, and that was his motto of how he wanted the

division to engage with the public. Part of his effort was, to promote compliance with the federal securities laws, you have to understand how those laws are interpreted. And that's why we would use the vehicle of these compliance and disclosure to interpretations, not only to get our interpretive positions out there, but also to promote compliance.

Before the Internet, insiders at the SEC had an advantage, and former insiders, alumni, had an advantage over private law firm practitioners who had never been at the SEC, because there had developed over the decades, this administrative common law of how the federal securities laws are interpreted by the staff. You didn't know that secret language of the secret interps unless you had actually been there. So that's why the staff started publishing telephone interps. It wasn't really in any kind of systematic way. This effort of updating all of the interpretive guidance in the division was his effort to really systematize and make sure that all of this learning that had built up over the years, all of that was now made available to the public.

**KD:** What's a telephone interpretation?

**TK:** A telephone interp is, there's actually a telephone number that you can call even today, and you leave a voice mail, and somebody will return your call. It could be some lawyer asking a question about S-3 eligibility, or how 144 works. What each counsel does is, they keep a log of all of the questions and answers that they've given, and then those questions and answers are then maintained, there's a log of those, so that the office can

keep track of its interpretations, so that there can be within the office consistency of interpretation. Every so often, the staff would have published those telephone interps, but it was not in any systematic way, and you never knew whether or not a telephone interp from ten years ago was still a good interp or not.

And oftentimes they were very fact-intensive, and so if you had a slightly different fact pattern, you wouldn't know whether or not you were still covered by the interp or not. Because there wasn't much explanation; it was just sort of, this was the fact pattern and this was our answer. The C&DIs were an attempt to take what had already been published and to see whether or not we could make them more generic, more general, because they'd be more useful that way. And we'd try to highlight the legal interpretation or principle at issue – what was relevant, what wasn't relevant. That was a two- or three-year project to really transform what had sort of been – it wasn't unorganized – but basically to update all of those interps.

**KD:** So this was like boiling millions of words down into thousands or something like that?

**TK:** Something like that, yes. It was a great project for me, because since I was new to the division – I wasn't new to the federal securities laws – but being new to the division, it was a great way for me to think about the division's interpretive positions, whether I agreed with them. If I didn't agree, why did I not agree? And then to figure out what was the right view. It was a great learning process for me, and I think it was good for everybody to really focus on, let's make sure that what we have out there is a valid

interpretation and can be relied on.

As I was doing this, Wayne Carnall, who was the new Chief Accountant of the division, was undertaking a very similar project in putting together what is now the *Financial Reporting Manual*. I think it had already been there, it had already been published internally, but never externally. His effort was to take what had been an internal document and to have that published so that everybody could be aware of the staff's views on how various SX provisions were to be applied. So that was his corresponding effort on the SX side of things to make sure that the public understood the division's views about what financial statements were required and all of the variants that the *Financial Reporting Manual* addressed. But it was a division-wide effort in both of those two areas.

**KD:** Let's get to the certification of questions of law in the Delaware Court. That was intriguing to me. I had a really hard time getting to what exactly was going on there.

**TK:** So, in 2007 and 2008, during that time period, Brian Cartwright, the General Counsel, had lunch with the justices of the Delaware Supreme Court. As I recall him recounting to me, it was about, how can the Delaware Bar interact more productively with the SEC? I think Brian's thought was, well, if we ever have a question of state law, it would be great to actually get the views of the Delaware Supreme Court. I think the Supreme Court members took that back, and the Delaware general assembly actually amended the

constitution of Delaware to authorize the Supreme Court to certify questions of law submitted to it by the SEC.

**KD:** Did the SEC request that?

**TK:** Well it was, I think, a conversation that Brian had as the General Counsel of the Commission. His thought was, look, if there were to be state corporate law questions, and they typically are Delaware questions, it would be great to have the Delaware Supreme Court be able to hear those questions of law, because the SEC obviously is not authorized and has no expertise in how the Delaware general corporation law should be interpreted. So many public companies are Delaware companies, and increasingly the SEC is involved in issues of corporate governance.

The Delaware general assembly had amended the constitution, and Brian said to me, “Well, if there should ever be an opportunity, let’s use it.” I said fine, that’s interesting. I had a lot of friends in the Delaware Bar. Then shortly thereafter, I actually found the perfect opportunity, and that arose in a shareholder proposal submitted by the AFSCME pension plan to CA, Inc. I think it was formerly known as Computer Associates, Inc. The shareholder proposal proposed to amend the bylaws to require the board of directors to pay the cost of any successful proxy contest.

CA, represented by Sullivan & Cromwell, and Richards, Layton & Finger, said that the proposal should be excludable because it would cause CA to violate state law, and

therefore was excludable on that basis under 14a-8 – I think it’s I-2 or I-3, I forget which one is about violation of law. They accompanied their no-action request with an opinion by Richards, Layton & Finger, the well-known Delaware firm.

AFSCME, for its part, responded to the no-action request and said, “We disagree with you, and here’s the legal opinion by our law firm, Grant & Eisenhofer,” a well-known, highly respected, plaintiff’s firm based in Delaware. They opined that the subject matter of the proposal, which was to amend the bylaws to authorize, or rather require the board of directors to pay the expenses of any successful proxy contests, they said that it was a suitable matter for a bylaw, and that it would not cause the board of directors to violate the law, or the company to violate the law, if it was adopted.

Because we had competing legal opinions on a question of Delaware law, the company had not met its burden to persuade the staff to issue no-action relief. And so because we had these competing opinions, the question was, what should we do? I thought, let’s use the certification process. So I called the General Counsel’s office up and I said to Brian, “I think we actually have something,” and with their guidance, my deputy John Ingram and I worked over a weekend to put together our recommendation to the Commission to certify these questions to the Delaware Supreme Court. It had never been done before. The Commission received the recommendation from Corp Fin, and they approved it. And so they formally certified these questions to the Delaware Supreme Court.

**KD:** What does that mean, certify? They’re not bringing a case in the Supreme Court, right?

**TK:** Right. They're not bringing a case. It's just a pure question of law that the SEC has requested guidance on. So the Commission itself, the five members approved the request to certify these questions, and then in turn, because the Delaware general assembly had amended the constitution to authorize the Supreme Court to hear questions of law certified to it by the SEC, then of course it was up to Delaware Supreme Court to decide whether or not to accept the certification. They accepted the certification on July 1st.

I remember very clearly when they did that, I thought, I need to inform the parties of what I've done. In other words, here they thought that they were doing this typical no-action process, which is a typical low-cost process. It's purely administrative. They write the request and then the shareholder proponent responds, and usually that's the end of it. I had basically transformed it into a judicial proceeding. I called up counsel for both, and I was initially very concerned that they would say, "We're not going to play ball with this. All we wanted was a no-action request, and we hereby withdraw the request."

But it's funny, I was talking to David Harms, who is the lawyer at Sullivan & Cromwell, and I think he later told me that I caught him when he was in the car. But when I called him I said, "David, I have certified these questions to the Delaware Supreme Court, and so now you're going to have to brief and argue this case to the Supreme Court." He was very nonplussed about it, and he later told me that it wasn't until sometime afterwards that he thought, "What has happened?" When I called – I forget who I called at Grant &

Eisenhofer – was it Grant or Eisenhofer? But they too were very nonplussed about it.

And so they both accepted the change in form, so to speak, and I just reprinted the case and read the opinion again, just to remind myself of the dates. But the court accepted certification on July 1st, and it was briefed in a week, and the matter was argued on July 9th, almost eight days later. Then the Supreme Court acted and issued its opinion on July 17, eight days later. Everybody was acting on an expedited basis, because CA had to publish its proxy statement, and they had their annual meeting in a month and a half. We were working on their schedule, but we had acted very quickly. The Commission had acted quickly. The parties willingly met the briefing and argument schedule issued by the court. The court, in turn, issued its own opinion within two weeks.

**KD:** Amazing.

**TK:** It's amazingly quick, everybody acting very cooperatively. We have in the form of an opinion now by the Supreme Court their view on what an appropriate shareholder responsive bylaw is. And that's a question of law that we probably would not have been adjudicated had it not been for this very strange posture in which they're not applying the law to fact, there's no case or controversy, they're being asked to just focus on – there was a fact in that there is a specific proposal, but that's really all there is.

**KD:** So this gives you something to build on in the future.

**TK:** Yes, it does, although I don't think – the process has not been used. If you think about it, how often is there a real state law issued that the Commission or its staff needs to deal with such that it would certify a question to the Delaware Supreme Court? Maybe it might come up maybe in an enforcement context, I suppose, but it's hard to see how those types of questions arise. It just so happened that soon after the Delaware constitution was amended, we did have this perfect fact pattern with these dueling state law opinions such that we could use this new certification process.

I think Delaware, for its part, was very open to this. After all, they were the ones who had amended their constitution. And so I don't think I had any real question that they would accept the questions, because they were very interesting questions, and they issued their opinion in a very expedited manner. So it was obviously novel for everybody, but I think at the end of the day, people would say it was a good process. In other words, that there was a question of state law, an open question that actually mattered, because it would result in whether or not CA had to include this proposal in its proxy statement or not. And the right body decided that question, the Delaware Supreme Court.

**KD:** How would Corp Fin have dealt with this if that door hadn't been opened?

**TK:** They would have denied the request for no-action relief. They would have said, "You haven't met your burden. Yes, you have a legal opinion from Richards, Layton & Finger, but I have in hand a legal opinion from Grant & Eisenhofer. And I have no way to decide which one is correct. And so therefore, you haven't met your burden, so you've got to

include the proposal in the proxy statement.” As I recall, it was not drafted in a precatory way, I don’t recall that it was, so if it had actually gotten more than 50 percent of the outstanding votes, it would become a bylaw provision in CA’s bylaws.

So I do think that it had a material impact, at least on that proposal. I think obviously the Supreme Court’s principal issue was the proposed bylaw as written did not allow directors to exercise their fiduciary duty. So probably the next year they just added a sentence allowing directors to exercise their fiduciary duty, and thereby it could be adopted. But in any event, it was material for that particular year’s proxy statement.

**KD:** What were you working on in Corp Fin in 2008 when the financial crisis started to hit?

**TK:** This was 2008. I was also working on the interpretive release on the use of company websites. When I was running the Chief Counsel’s office, I always liked to have a number of projects going on to really challenge ourselves. And so in addition to the day-to-day work of the office, answering questions from the public, we had this project to update all of our interpretations. I would get involved in certain rulemakings that I thought made sense for the office. We were also working on this interpretive release. This was initially a recommendation by the advisory committee CIFR, I think the Committee on Improving Financial Reporting.

They approved this recommendation, and I remember Amy Starr, who had been advising CIFR, came to me and said, “You’ve got to now write an interpretive release.” I said,

“What interpretive release?” She said, “We had to come up with a recommendation. We came up with this recommendation, they’ve approved it, and now we have to do it.” I just thought to myself, oh, what do we do now? So over the course of a weekend, I drafted the interpretive release.

It addressed how companies could use their websites to post information and have that information be viewed as having publicly disseminated for purposes of Regulation FD, and even for purposes of insider trading law. So it really explored the legal analysis for how we treat information posted on a company’s website to encourage companies to do that. A number of Commission rules to date had actually encouraged the use of websites, so the interpretive release analyzed the way the Commission had been using websites more or less as a supplement to EDGAR, but in one or two cases they did view a company’s website as a replacement to EDGAR. Like 12g3-2(b), the foreign private issuers. If they put something on their website, then they don’t have to file anything on EDGAR.

So, there’s a number of ways in which the Commission was supplementing its own database, EDGAR, with company websites. And today, I think many companies not only file their SEC filings, they’re actually required to put their SEC filings online, on their websites if they have one. There are a lot of ways in which information that would otherwise be required on EDGAR is now on a company’s website, like the audit committee charter, for example, your code of ethics, and whether or not you allow or have any waivers of the code of ethics. So over time there has been this supplementation

of EDGAR with company websites. This interpretive release was addressing that phenomenon and making some principles about how companies should think about it. And so that was the other thing.

But during the financial crisis it was primarily affecting trading and markets and other aspects of the Commission. Not Corp Fin so much. There was obviously a concern about the various issuers, and I was involved in thinking about what should happen in the event of X, Y, or Z, and how do we help these registrants if they were to be in distress. So as an alternative to bankruptcy, could we do a good bank/bad bank separation? People were trying to be creative, because you could see on the horizon what was happening. But it wasn't really a Corp Fin issue so much as it was the other division. So for my part, I kept my head down, and aside from advising on these particular proposed transactions, we just kept up with the work of the division.

**KD:** So we get to the proxy plumbing thing.

**TK:** The financial crisis happens in 2008, it really had crested in 2008, and when Mary Schapiro became Chair, proxy access had been on the table for any number of years. It's always been looked at, then put aside, then looked at, and she very much wanted to do proxy access. That was a priority for her and her leadership of the Commission. And so from 2008, 2009, 2010, the staff was very hard at work on a rule proposal and then a rule adoption on proxy access.

**KD:** John White once said that shareholder access was the elephant in the room. Why was that, exactly? You said that it had been an issue for a long time.

**TK:** When you think about the power of shareholders, it's really very limited. They have no ability to manage the company. Their one power is to elect directors. That power, that right to elect directors is circumscribed by who's actually been nominated for director, who are the nominees, and unless I have some choice of a nominee, then my election right is not that meaningful. And so yes, you can nominate directors, and many companies have bylaws that set forth how you can actually nominate somebody. But to have them be included in the proxy statement, that's actually where the action is. Because it's one thing to nominate somebody, but if that nomination can't be voted on by anybody else because it's not included in the proxy statement, then, what's the point?

The point has always been, how can shareholders get their nominees, if they have one, in the company's proxy statement? Yes, they could run their own proxy, they could have their own proxy statement, their own proxy card, run a competing proxy solicitation, but that does take money and time, but mostly money. And so it was seen as, well, why can't they include them in the company's proxy statement, and they just add on the proxy card, there's an extra square for the shareholders' nominee's name. Of course companies have been resisting this, because they are very focused or concerned about competing proxy statements. They're very focused on keeping control of the board, or making sure that they know who's going to be on the board. And they weren't going to just simply allow shareholders to put their own nominees on the company's proxy statement and proxy

card.

But with Mary Schapiro's Chairmanship of the SEC, she thought that it was important as a governance mechanism that this be able to occur. Meredith Cross, who is her division director, and a rule-writing team quite frankly had actually worked on this for, something like ten years. They were finally employed – finally we're going to do proxy access. Brian Breheny, the deputy director, and I worked on the rule in some parts. We also had hired during this period Larry Hamermesh as an attorney fellow. Larry is one of the experts of Delaware corporation law. He's a professor in Delaware. We engaged him to be an attorney fellow, and Larry spent a lot of time working on proxy access and thinking about it from a Delaware standpoint. We made sure that we had that aspect vetted.

It was a highly controversial rule, even when it was adopted in 2010 it was then challenged by the Chamber of Commerce, and it was successfully challenged. I think a year or two later, that rule was vacated by the DC Circuit. But as we were focusing on proxy access, there were many issues during that rulemaking process in which people said you can't have proxy access, because there are so many problems about the proxy process. Such that, please don't introduce what many people thought would be highly disturbing without first fixing all of the things that had been identified as being problematic in terms of the proxy mechanics process.

**KD:** Is this within the SEC, then?

**TK:** No, it was within the SEC, but it was more that in order to have a final rule, you need a rule proposal. When you looked at the comment letters that were written in response to the proxy access proposal, a lot of those comment letters pointed out all these issues having to do with the proxy mechanics that, in their view, had to be resolved first, before proxy access. The Commission's view was, well look, we're not going to postpone proxy access to address all these so-called problems, but what we will do is address what commenters have said in this concept release. Rather than have these comments be issued in the context of a different rule proposal on proxy access, we will squarely pose the questions to the public. We've heard all of these issues about proxy mechanics and proxy advisory firms and empty voting and so on, give us your views.

I was responsible for that concept release on the proxy mechanics. It tagged alongside proxy access, and quite frankly, it was part of the justification for why the Commission could adopt proxy access, because it had already prior to that point issued the concept release so it was going to get public feedback on the issues identified during the comment process.

**KD:** Where did the term "proxy plumbing" come from?

**TK:** You know, I don't recall, because the release itself doesn't talk about proxy plumbing. Maybe insiders just sort of used that, because it really is kind of convoluted in terms of how the broker dealers deal with Broadridge, and how votes get cast, and where do they get cast and so on. So it is a convoluted process. But I don't think the release itself uses

that term. But what's interesting is, we posed all these questions, and yet the comments were really very much of a mixed bag. You haven't seen any kind of project built on the proxy mechanics concept release.

I think the most the staff has done is that, after I left there were a couple of interps issued with respect to investment advisors and whether or not they're legally obligated to vote on every matter – if they were obligated to vote on every agenda item of public company proxy statements. So basically this interp said no, that it was consistent with their fiduciary duty not to vote on every matter contained in the public company's agenda. I think it also addressed conflicts of interest by proxy advisory firms. So that's really the only thing that I can point to that is an outgrowth of that concept release.

The other thing that was a hot button issue in addition to how do we regulate proxy advisory firms, was the printing of proxy statements by Broadridge. They more or less have a monopoly on that, and there are a lot of industry participants that did not want Broadridge to have that monopoly, or near monopoly. And so there's a lot of focus on Broadridge's role as proxy distributor and publisher, and whether or not that should be changed.

A lot of questions were raised. But it turned out that no change was made, and I think shortly after I left, the Division of Trading and Markets approved the NYSE new fare card in terms of proxy fees. And so today in 2016, life is the same as it was back in 2010. But for a time, there was a period in which the staff had put open and had placed open for

public comment, should we be making changes to the system? But basically the feedback from investors was, it's not broken, so don't fix it.

**KD:** It's complicated.

**TK:** It's complicated, but it's not broken. There's no problem. The people who really don't like it are the competitors of Broadridge. Well, that's really not whom this whole system is designed to benefit. It's for the benefit of investors, and it seemed to be working pretty well. And so it came down basically to a whimper, but on the other hand, I do think that in the process of doing the concept release, the staff did make outreach efforts to the proxy advisory firms, also to Broadridge, and I think they have continued those relationships. So even if there's no actual regulation going on, there's a version of soft regulation. When they reach out and they call the proxy advisory firm, or they call Broadridge, there were some instances in which the staff would actually call Broadridge and say, "We've heard this complaint; please deal with it." Or a company would complain to the staff about a particular report or recommendation made by the proxy advisory firm. In some instances, we thought they might have a point, and so we called up the proxy advisory firms and said, "You know, you need to be responsive to these issues. You just simply can't say, 'Pound sand,' or we'll need to regulate you more if you don't show more responsiveness." They're not telling the advisory firms what to do as a substantive matter, but they're saying, "You need to be more responsive to the public company constituency." So if that's all that comes out of the concept release, then so be it.

**KD:** I want to touch on a couple more things before we run out of time here. Dodd-Frank has gone through now; this is later.

**TK:** This is 2010, exactly, now we have the Dodd-Frank rulemaking project.

**KD:** So you're working on a listing standards rule. Listing standards are for the exchanges to make, right?

**TK:** Right, but it starts with the statutory directive that the Commission adopt a rule, and that the rule then directs the exchanges to modify their listing standards to comply with the statutory directive. I was involved in many of the Dodd-Frank issues, but I steered clear of conflict minerals and mining and so on because I just did not view those as being core to what Corp Fin does. But compensation is something core to what the division does. And in fact, my office was responsible for executive compensation rulemaking. In part because we had the expertise in the office, Anne Krauskopf who is a senior special counsel who's highly respected and is terrific, and she really handles a lot of these exec comp matters. So we did that rulemaking within our office, but I tried to keep the Chief Counsel's office out of much of Dodd-Frank, because I didn't view it as being very relevant to the work of the division. And so unfortunately, the rulemaking teams were quite small, the ones who shouldered the burden of doing conflict minerals and resource extraction and so on, and they really had a terrific burden to carry. But they did it very well, but not my office.

**KD:** It was not a lot of gray area in there; you're just figuring out how to implement what.

**TK:** Correct, exactly. There were some policy decisions in terms of the listing companies, but no, I think in those rulemaking projects, there were a number of decisions that they had to make. I think there were really complex rulemakings, actually. I know Meredith Cross, who was director at the time, spent a tremendous amount of time having to implement those two directives, or those directives that seemed unrelated to the business of corporation finance.

But then the JOBS Act, which was adopted and enacted in 2012, we were much more involved in. We had actually been thinking about those issues for some time, the idea of the prohibition on general solicitation in private offerings. I think we all recognized by 2012, that in the day and age of the Internet and Twitter and so on, when it's so easy for information to be made public, that to have a prohibition against general solicitation in private offerings, that's just not a very tenable requirement. And increasingly so, given how easy it is for anybody to make a general solicitation. I think when the Securities Act was enacted back in the thirties, obviously to make a general solicitation, it required significant effort. You'd have to get on the radio or publish something in the newspaper, whereas today it's so easy.

We had already been working on a concept release about getting rid of the prohibition on general solicitation, but then our efforts were preempted by Congress and the JOBS Act.

They were acting on recommendations made by this Advisory Committee to the Treasury. The JOBS Act directed the SEC to eliminate the prohibition on general solicitation in Rule 506, and so I converted the concept release that I was working on into a proposing release. We started off as an interim final rule release. When I met with the General Counsel's office and I spoke to David Fredrickson, who has now since become my successor as Chief Counsel, he was assigned to Corp Fin, and we were talking about, well how do we do this rulemaking, and he said, "Given how simple it is to implement this, we simply strike out this sentence, why don't we simply start with an interim final rule?" It would go immediately effective. Of course there would be a period of time in which it would – after publication in the federal register – become effective, and we would have a corresponding notice and comment period even while it was effective.

And so that's what we were working on for a number of months. We would go straight to interim final, and the Republican commissioners loved that idea, and it somehow got out that we were working on an interim final rule. And the other reason why we were focusing on interim final was I think we had something like ninety days to do this. It was a completely unrealistic time period, and so we could try to accomplish that through interim final. But I think various investor advocates got wind of what we were doing, and put significant pressure on Chair Schapiro to actually have a proposing release and then an adopting release that those efforts got forestalled, and then it was converted into a proposing release.

But that whole transition from interim final to proposing was highly controversial. I

think there were actually hearings in Congress about it. The Republicans in the House were very upset about that. The Republican Commissioners tend to be more focused on promoting capital formation than the Democratic Commissioners. I think they were also very upset because they didn't think it was such a big deal to simply do what we were proposing to do.

So anyway, I'm saying this all because I do think it is part of why, when it was finally adopted in 2013 in July, it didn't come out with the fanfare that you would have expected, in part because there was all this baggage around it, in part created by the fact that we wanted to do interim final. It then really kind of provoked in the comment period a lot of very angry, negative comments by various state commissioners and investor advocates that said the sky's going to fall if we're going to allow general solicitation. We're going to have private offerings advertised on the radio and on TV, and we're all going to be defrauded. And so that whole process led to the issuance of a proposing release on the same day that we adopted the 506 release. The proposing release to amend 506 further contained in it all of the ideas, comments that had been raised by commenters, the mandatory form D filings, eliminate the ability to rely on 506 if you didn't file the form D, and all of these things were designed to make 506 more onerous than it otherwise was. I think the combination of all of this controversy, plus the proposing release, and of course the bad actor release was also adopted on that date, I think the bar just kind of looked at 506-C and said, "We're not interested." Not seeing the requirement to verify that purchasers are credit investors, we like things the way it was before. And so that's why you have not seen, with respect to what I thought was the

centerpiece of the JOBS Act, which was this change in 506, it has not become the dominant method of raising capital that we otherwise thought was going to happen. I think in large part it was attributable to this history of the rulemaking process, and not the negative feelings – not that they were negative feelings, but it just fed into a negative perception that it was much more burdensome to do than life before the amendment.

Since I left, they've adopted the other JOBS Act directives, but those other directives, whatever it's regulation crowd funding or regulation A-plus, they are more heavily regulated than 506-C, which simply allows you to do a private placement, and you can use general advertising so long as you take reasonable steps to verify that the purchasers are in fact accredited investors. So it'll be interesting to see in terms of five or ten years from now what offering method becomes dominant in terms of outside of the registered process.

**KD:** Had 506 gone through by the time you decided to leave?

**TK:** Yes, in fact, I stayed on as long as I did to see it through. So it was adopted. The meeting was July of 2013, and then I left in August of 2013.

**KD:** Tell me a little bit about the decision to leave.

**TK:** I had gone to the SEC not intending to stay as long as I did, but I had a great opportunity when I became Chief Counsel and I was there for six years. At some point I thought,

there was another change in the directorship, now Keith Higgins was on board, and I thought, well, do I want to keep doing this? I think I was around forty-three at the time and I thought, I either make a change now or this is my career, and so I decided to make the change. So it's really not more interesting than that. It's a life decision that everybody makes, and at some point you realize, I'm getting older, and I only have so much runway left, and so what do you want to do for the remaining fifteen years or something like that?

**KD:** Well terrific. I think this covers everything that was on my agenda, and I really appreciate your time.

**TK:** Thank you very much for taking the time to interview me.

**KD:** All right.

[End of Interview]