Securities and Exchange Commission Historical Society
Interview with Marc Fagel
Conducted on June 23, 2021 by Kenneth Durr

Ken Durr:

This is an interview with Marc Fagel for the SEC Historical Society's virtual museum and archive on the history of financial regulation. Today's June 23rd, 2021, and I'm Ken Durr. Marc, thanks for talking today.

Marc Fagel:

Thanks for chatting, Ken. Good to talk to you.

Ken Durr:

Yes, I've been looking forward to it. I'm studying the regional offices right now, and I think you have the opportunity to give us real good perspective on the regional offices out west there. But before we jump in, I want to get a little bit of background. You're from the Chicago area to begin with?

Marc Fagel:

That's right. I grew up outside Chicago, went to law school at University of Chicago, and then ended up in California, which I thought might last a year or two, and it's been about 30 years at this point.

Ken Durr:

You went to Princeton after that?

Marc Fagel:

That's right.

Ken Durr:

Did you know you wanted to be a lawyer?

Marc Fagel:

I did. I knew pretty young. I had gotten involved following some issues, some constitutional law issues in my youth and was fascinated. Had a very hard time shutting up. I liked to get into arguments, and law seemed like a good course to follow.

Ken Durr:

So, you went to Chicago, and of course that's the Chicago School. Did you have any influential professors? Did anything shape you there?

Marc Fagel:

I had some great professors, none that had anything to do with securities. I did take one securities law course. I think it was my lowest grade in law school. I didn't enjoy it. I had no intention of going into securities law. I had some great con law, had an administrative law professor who was fantastic, and that became a little more relevant later in life with the SEC and dealing with some ad law issues at the agency.

Ken Durr:

Okay. Did you just want to go to the West Coast? Is that how it worked? Or did the Morrison & Foerster post just open up?

Marc Fagel:

I ended up out here through the more traditional way of following a significant other. My wife was coming out to Stanford to get her MBA, and I had actually spent my summers as a summer associate in Chicago and New York. I thought I would end up in one of those two cities, and then she ended up getting into Stanford so I very quickly changed course. I did some law firm interviews out here and was hired by Morrison & Foerster in San Francisco, which ended up being an excellent firm. I got very fortunate to get that opportunity.

Ken Durr:

Tell me about the kind of work you did there. Did you get into securities pretty quickly?

Marc Fagel:

I did pretty much day one. It's funny, when I speak with young associates who are looking for some career advice, I really fell into it. It just happened that the day I got there, there was a securities class action that needed to be staffed. I was the brand new baby associate who walked in the door that day. I got put on a very large Silicon Valley securities class action. I didn't know what any of the terms meant. I didn't know what a class action really was. I didn't know anything about securities law and I learned very quickly and enjoyed it, and ended up doing that for six years.

Ken Durr:

What was it about the stuff that you could do it for six years? Why was class action a big thing at that point?

Marc Fagel:

Yes, it wasn't even so much the class action as it was the securities aspect and having tech clients. If you were out here, especially back in the early/mid '90s, Silicon Valley was really exploding. The internet was just starting off. So, we had some really interesting clients who were doing interesting work. The securities angle wasn't even so much securities law as the fraud aspect and dealing with some really smart, sophisticated people who sometimes made some mistakes, made some judgment errors, sometimes crossed some lines. It was very nuanced, very complex. I found the interplay between our clients and then plaintiff's counsel, and the SEC (because I had a few SEC investigations as well) very interesting.

Ken Durr:

This is a matter of sort of helping tech company management navigate the securities laws, that kind of thing.

Marc Fagel:

Yes. You'd be working with executives who were smart people, who started companies, who did amazing things with technology, really cutting edge work, but at the same time, we're out there in the markets raising money, and that was not necessarily their forte, and while they often had excellent attorneys and accountants, they would, at least allegedly, get involved in some conduct that probably was not in the best interest of their shareholders. So, watching that interplay between people who may have been fantastic at designing some new technology, maybe not understanding that there are limits in what they can or should be saying to the market was pretty interesting interplay.

Ken Durr:

This must have been a neat time, a lot of young people just getting into the business, a whole new business being sort of pioneered.

Marc Fagel:

I had worked on some cases where you get to see—I remember email was still a pretty new phenomenon. I remember probably the first SEC investigation I worked on, on the defense side. It was actually the San Francisco office and there was testimony being taken from people I would later work for. One of the things that still stands out in my mind is how some of these cases arise and get kind of messy. They were taking testimony of our client, who was the CEO and founder of a tech company, a company that's actually named after him, and they were showing him email after email where, I could see why the SEC would wonder, why did he not understand that some improprieties were taking place?

Marc Fagel:

Over and over he said, I didn't read that or I wasn't familiar, or I didn't understand that. And finally, the staff attorney's, "Look, why do you think everybody's sending you all this email if you're not taking the time to read it?" And I'll never forget his answer, he said, "They send me everything. My name is on the building." It was a really interesting insight into how you could be that smart, that successful, running that big a public company, and still have things happening that were just not on your radar screen.

Ken Durr:

That's interesting. You were actually working on the other side of the table with SEC people for a while.

Marc Fagel:

That's right.

Ken Durr:

Did that make you want to jump the fence? How did that happen?

Marc Fagel:

It certainly helped. Part of it was that MoFo, Morrison & Foerster, where I was working, became sort of a pipeline to the San Francisco office. There was an associate, maybe a year and a half before I came over to the SEC, who had gone there. He told some friends at MoFo, a couple of other attorneys I knew, I think I was the fourth in two years. By the time that an opening opened up, I had been at MoFo about six years. I was coming up on the partnership track.

Marc Fagel:

We had just had our first child, and I was interested in making some changes, getting some more hands-on opportunities, and I had all these friends at the SEC saying, this job is awesome. You really ought to come here. I went and interviewed and it just seemed a lot more interesting than what I was doing on the defense side. Actually, it was a pretty easy decision as much as I like being an associate of Morrison & Foerster.

Ken Durr:

Why was it more interesting?

Marc Fagel:

Some of it is, is the hands-on nature of it. Here's a story that I tell. Not that long after I went over to the SEC, I was taking testimony of the CFO of a public company who was represented by my old law firm, Morrison & Foerster, and sitting on the other side of the table was the partner that I had worked for, one of my mentors there, and an associate who was a classmate of mine, both at law school and at MoFo, so she was the same year I was. I'm sitting on one side of the table taking the testimony of the CEO of the company, and my counterpart's role, she was basically handing documents to the partner. That's what she was doing.

Marc Fagel:

It really made it very clear, the distinction between what you could be doing six years out of law school, either at a big law firm or at the SEC. I was running investigations, very important investigations, all hands-on. A lot of discretion. Even then, and now it's that much worse at big law, but even then, the opportunities for a mid-level associate or even a senior associate to be that involved in a case were really low. The partners were doing most of the important work and the associates were basically writing the memos and reviewing the documents. It was a great change to be able to go over to the government where I was running pretty major investigations right away.

Ken Durr:

Yes. That's a good illustration. I want to get a sense of the San Francisco, and it would have been district office, back in 1997. What it felt like, what was the culture there? How did people work together? Did people tell stories about the old days, that kind of thing?

Marc Fagel:

Yes, it was an interesting place. It was a very different office when I joined, most notably the size. I think there were probably 40 to 50, probably about 40, 45 employees of that office, that includes both enforcement and OCIE and support. So, it was a pretty small office. By the time I left, it was about 110. It had more than doubled during my years at the SEC. As a result, it was pretty intimate. Everyone was very friendly. It was actually a pretty young office. There had been some new administration, not long before I got there, David Bayless was the regional director, but he left soon thereafter.

Marc Fagel:

Helane Morrison had been associate or the assistant director for enforcement and then regional director, or I guess district administrator at the time. And Helane especially, really professionalized that office, I would say. It was a pretty sleepy office. It didn't have much of a presence in the Bay Area. I mentioned earlier, this associate who had gone there from Morrison & Foerster a year or two before I had—I still remember when he had gone there—the partners were really dismissive. Why would you do this to your career, go to the SEC?

Marc Fagel:

By the time I went there, and again, it's only about a year and a half later, I didn't get that question. It was pretty obvious why someone from a big firm who was on partnership track would want to make that shift. It had really started to change in terms of its visibility, its professionalism. So, there had been a lot of hiring around the time I got there, all big law firm refugees with some experience, and very smart office, and the sort of cases that they started doing as the tech industry was coming under scrutiny.

Marc Fagel:

A lot of big Silicon Valley cases also helped their reputation. It was really in that state of evolution when I arrived between being this little backwoods government office to becoming a pretty prominent government office, both in San Francisco and in the SEC's National Program.

Ken Durr:

Yes. Speaking of backwoods, it would have been under the LA regional office at the time you came in.

Marc Fagel:

That's right.

Ken Durr:

Was there reporting? Did you report down to LA or how did that work?

Marc Fagel:

We did. You don't want to complain about it too much, but it was definitely one of the more frustrating aspects of the structure at the time. The concept of us being a district office that reported to the LA regional office was an extra bureaucratic hurdle. After any new case that was going to be filed, had been run through the levels of approval within San Francisco. Before we could go to Washington, we then have to get approval from LA. So, there was this whole extra level of review that really made no sense, like why would one other regional office have more insight and the ability to decide whether or not what San Francisco is doing was making sense? It was a very silly and unnecessarily bureaucratic structure.

Marc Fagel:

The other frustrating aspect is that, because we were a district within a region, the region controlled resource decisions. Any time Washington said, “well, we're going to give the LA region another one or two attorneys so they could grow,” LA would decide, well, are we going to keep these? Will we want San Francisco having one? Not surprisingly, LA kept most of the resources, so pretty much throughout my tenure, LA was almost, or more than twice the size of San Francisco.

Marc Fagel:

Historically, that might've made some sense, I think when LA was more of a financial center and the San Francisco business was more focused on traditional financial services, maybe that made sense. By the mid '90s, when Silicon Valley was in full bloom, when a significant part of the agenda for enforcement had to do with tech companies in the Bay Area, the fact that LA was still taking two new slots for every one that would go to San Francisco didn't make a lot of sense. There was a lot of frustration with the whole regional-district structure at the time, for sure.

Ken Durr:

You started out as an enforcement staff attorney, right?

Marc Fagel:

Right.

Ken Durr:

Are you reporting to the division of enforcement on a regular basis? How did you reconcile that sort of, you're in the regions, but you're also in enforcement?

Marc Fagel:

Yes. At the time we had some autonomy. So, for most of the course of a given investigation, the staff attorney and the branch chief would do the heavy lifting. We didn't have a lot of interplay with DC on most cases. There would be cases where there was some novel issue or some controversy that you would need to run up the flagpole to DC, and that's where senior management within the district, and sometimes the region, would get involved.

Marc Fagel:

Again, you would have these multiple layers of bureaucracy if you were doing something that was novel or potentially controversial, and we would take it up to Helane, and then David Bayless, and then we'd have to go to Los Angeles to check with them, and then we'd end up talking to the director of enforcement in Washington. So, it was bureaucratic. Once we became a region, at least we were able to remove that one step of talking to LA, but working with the home office was always something that had to happen on certain cases. As I became more senior within management, that increasingly was a larger part of my job.

Ken Durr:

I want to talk about some of those novel cases, but before we do, I want to talk about some of the less novel cases.

Marc Fagel:

Sure.

Ken Durr:

There was one that came across my screen, a classic pump and dump, but a couple managed to do it three times. This is a larger case of pump and dump. Tell me a little bit about that particular case.

Marc Fagel:

Yes, I think that's the M&A West case that came up towards the end of the '90s. I think I was a branch chief at that point, and that was after we had started this internet enforcement branch, so it was part of that. Pump and dumps, boiler room cases had always been out there. We hadn't done a lot of those in San Francisco. It wasn't a large part of the program. There just weren't a lot of those run out of the Bay Area. That changed in the internet era where that became part of the hook for these companies.

Marc Fagel:

In this particular case, this purported company was an internet incubator, and they started a number of smaller internet-related tech companies, all of them created through reverse mergers. It was your traditional pump and dump scenario where the principals of this whole operation own 90 percent of the stock. They would start up this company through a reverse merger. They would pump it up, and the other novelty was they pump it up primarily through the internet. So, this was still when this was fairly novel, but they were sending out email blasts with promotional materials.

Marc Fagel:

They were up on bulletin boards where people at the time were still getting a lot of information about small companies. That's how they were promoting the company and they would drive up the stock price through fraudulent statements, and then of course, dump all their shares on the market. It was pretty big. I think, through a series of these reverse mergers and all these little tech companies within their incubator, they raised about $20 million for the principles. These days, $20 million, certainly in a post Madoff world, doesn't sound like a lot of money, but for a largely internet-based operation, $20 million, back at the end of the '90s, was a pretty big pump and dump scheme.

Ken Durr:

Yes. What was novel about the way you went after this case?

Marc Fagel:

Some of it, because our tools were new, and the SEC was always behind private industry, we didn't have the most sophisticated tools. And we had a very savvy staff attorney who was working for me at the time. Great guy, really smart. He would see these emails, and you'd have to say, okay, who really sent this? And you'd get a subpoena out to the ISP. We were just kind of learning, how would you track this? Because obviously, it's a little bit different when there is a literal boiler room and you find out who was actually sitting in the room. Here, it's various anonymous actors and stock promoters, several layers removed over the internet.

Marc Fagel:

So, you'd have to track these emails, you'd have to track these bulletin board posts and figure out who was responsible. Eventually, it became a traditional investigation. Okay, how are those people compensated? You get the brokerage records, and you pretty quickly realize that all of the people who are responsible for this pump and dump were the same people who controlled all the shares and were making all the money, but at the time, we didn't really have the sophistication. It was very complicated to try to trace all of these statements and put those together with the people who were making money.

Ken Durr:

You were given leadership at the internet enforcement branch then.

Marc Fagel:

Right.

Ken Durr:

I take it, the idea here was to develop the expertise, to figure out how to keep up with these changes.

Marc Fagel:

That's right. It was a DC initiative. I give a lot of credit to John Stark. John was in enforcement at the time, and was sort of our, one of the more tech sophisticated people at the SEC, and I think had a lot to do with identifying this as a growing issue. Again, this is, we're talking late '90s. The internet, as you and I know it, really didn't get started until the mid '90s with browsers. So, we were only a couple of years into it and it was still fairly novel.

Marc Fagel:

Very quickly, of course, any new technology is going to be abused. Folks in DC realize that this was going to be a source of securities fraud. They had put together, centralized from DC, this initiative to create a branch. I'm not sure in every regional office, but a number of them, and certainly San Francisco, where there was so much tech in the sense that there would be a lot of internet related fraud. That was the impetus. So, we created this branch, I became the branch chief, and I think I had four staff attorneys at the time who didn't do exclusively internet related cases, but did a fair number in that. And we sort of develop that expertise in-house, with the help of DC, so that we'd be able to do more sophisticated cases that were being done at the time.

Ken Durr:

How did you develop the expertise though? Did you talk to people? Did you just get out there and mix it up?

Marc Fagel:

It was a little bit, because it's the SEC, everything was done sort of by the seat of our pants. The folks in DC would put together some trainings, would help show us the tools and how we would go about finding out who was responsible for sending out spam, who was responsible for bulletin board posts, and really teach you how these things worked, how to obtain that information. But a lot of it was just trial and error. We would get a referral in our office, or we would do some surveillance, we'd find something online that looked suspicious and it would pretty quickly turn into a traditional investigation.

Marc Fagel:

You're sending out subpoenas for documents, taking testimony. The real hook being that these were frauds that were being perpetrated online, which was pretty new at the time.

Ken Durr:

Okay. So, every time we talk about this, it comes back to things eventually turning into a traditional investigation. Did the idea of there being a special internet enforcement branch kind of go away after the novelty wore off?

Marc Fagel:

I think at some point, but we had enough to keep us busy for a few years. Just to show how the evolution was: I think the first real internet case we did was the first fraud that, I think, anywhere in the SEC had been identified that was conducted entirely over the internet. It was a case where the perpetrator of the fraud was outside of San Francisco and had set up a pretty nice website to raise money. It was just a straight offering fraud. It was a complete scam. It was a make-believe product. And he didn't raise a lot of money. I think it was maybe a $250,000 case, which is tiny.

Marc Fagel:

I think these days, the SEC wouldn't bother with something that small, but at the time, nothing had happened like that. There had never been a fraud that was perpetrated entirely online. It showed how people could be taken so easily, that by creating a pretty professional looking corporate website, a fair number of people said, “oh, that must be legitimate,” and sent money to a total stranger based entirely on a website. A couple years later, we did a case, another fraud that was conducted entirely over the internet, and that was a $60 million case. And this was just two years later.

Marc Fagel:

At the time, I think that was the largest internet scam. To go from $250,000 to $60 million in just a year or two, showed how quickly these scams were growing in size. All of a sudden, people sitting in a bedroom outside San Francisco could be raising money from around the world from complete strangers and taking $60 million. There was a lot of growth. And then, like you say, at a certain point, it just becomes integrated into the rest of the agency. The novelty wore off. I think people out there became a little more sophisticated.

Marc Fagel:

Then, of course, every case was an internet case at a certain point, where boiler rooms sort of ceased to exist. There may be some out there, but for the most part, all pump and dump schemes were conducted largely online and there was no novelty to that.

Ken Durr:

Okay. Any other cases from those early years that were formative for you or for the region?

Marc Fagel:

One of the ones that was, it was sort of entertaining. It wasn't really that technologically sophisticated, but it gives some insight into how easy it was for some period of time, probably still today, to cheat. It was something we called the Dr. Mitchell case. It was a fax that showed up around the country one day, people got a fax from an investment advisor addressed to Dr. Mitchell. And it was this little handwritten thing on the letterhead from a make-believe investment advisor who's like, "Dr. Mitchell, it's me your advisor. I'm sure you remember how well we did with Google. I've got another one for you. You really need to get into this penny stock today."

Marc Fagel:

It looked like it was a misdirected fax that showed up on people's fax machines, and a shocking number of people saw that, thought that they had just won the lottery, that this investment advisor sent them investment advice by accident, and they bought this penny stock. The guy raised a few million dollars overnight by doing this. Unfortunately for him, one of the fax machines he had sent it to was ours in the San Francisco office. So, we opened the investigation, were able to track him down eventually and brought the case, but it showed just how people, and I'm sure a lot of people out there were sophisticated enough to know this might be a scam, but why don't I send a thousand bucks just in case.

Marc Fagel:

It just shows how easy it can be to perpetrate a massive fraud with just a fax machine. That was colorful.

Ken Durr:

Toward the end of your time as a branch chief, I think before you moved up, the late trading and market timing starts to hit in 2003, 2004. Did you deal with that in the San Francisco region?

Marc Fagel:

I did. At that point, I was an assistant director, we didn't have an associate because we were still a district office. A woman named Pauline Calande and I were sort of co-assistant directors managing the enforcement program. We each had a number of these. We had a thousand or so of these late trading market timing mutual fund cases that were being conducted nationally across the SEC. So, we had a few in the Bay Area that the two of us split up it. It sort of set the framework for what would later be the stock option backdating cases, where there was this market wide phenomenon, and all of a sudden the entire division of enforcement, as well as OCIE in this case, that was very involved, all got involved in this nationwide initiative, found a ton of cases, had to sort of triage and say, which of these are we going to work on and bring to fruition? A large number of the staff were all of a sudden deployed onto this one series of cases.

Ken Durr:

It sounds like this was something that was directed from DC, from headquarters, then rather than from San Francisco.

Marc Fagel:

Well, it worked cooperatively. DC, I think set up the initiative, that this was a problem. Some of that came from the New York attorney general, let's be frank. Spitzer, I think, did more to break this open, and I've got mixed feelings about that. But the New York attorney general, I think, had sort of jumped on this. The SEC realized this was something we need to be doing. But DC doesn't have all the resources, so it was really directing it out to the regions where we have the OCIE staff. So, we've got the examiners going out to the registrants in our area to look for issues, and then enforcement gets involved as OCIE is helping to identify particular mutual fund complexes in our region who have late trading or market timing issues.

Ken Durr:

Okay. In your position, you're involved with enforcement primarily, but how much did you get involved with examiners? How much did you see of that other side of the shop?

Marc Fagel:

It varied from case to case. Obviously when I was a regional director, I had responsibility for both halves, but when I was on the enforcement side, we got a decent number of referrals from our exam staff of investment advisors and broker dealers. And we worked pretty well in San Francisco, partly because of our size, partly because we had a pretty open culture where you just walk down the hall and you're talking to examiners. It was less formal. My understanding from some other offices was that OCIE would work very independently. They would conduct their exam; they would find their deficiencies.

Marc Fagel:

At the tail end, they would give enforcement a referral and then enforcement would take over. That certainly happened sometimes in San Francisco, but more frequently, during the course of the exam, issues would be identified, and the examiners would speak to enforcement long before there was a formal referral to say, “do you think that this is something you might be interested in? How could we help put this together?” Package it up so that enforcement would be interested in it.

Marc Fagel:

As I became associate director and then regional director, that was something I tried to work on to make that happen increasingly, because one of the more frustrating things that I would find in enforcement was one that when I would get a complete referral, when OCIE would have completed their exam, written up their deficiency letters, sent it to the registrant, and then sent a referral to me, and I’m left with something where either it was clearly not enforcement worthy, and I'd feel terrible that the examiners had spent so much time packaging up something that we were just not going to investigate.

Marc Fagel:

Or it seemed interesting, but there were some gaps, some things that I would have liked to know that I thought the examiners would have done on the exam that were better equipped to do than we were in enforcement, and I wish they had spent more time on. So, it was always a priority for me in management to make sure that enforcement and exam were working together. If it was something that might turn into a referral, the examiners were conducting their exam in a way to make that happen.

Ken Durr:

About what percent of the time would you say you had that working together taking place, and how often would you come up with this case where they just hand you something that was maybe not all the way thought through?

Marc Fagel:

It's hard to put myself back there. It was probably an even split when I was first starting. There were a number of times when I was a staff attorney, and I would just be handed a referral from a completed exam. Over time, that changed. It was certainly a priority of mine, as I moved through management, to make that more of a fluid relationship. I think certainly, by the time I left, it would be pretty unusual for the exam staff to have a complete examination and just hand a referral to enforcement. I'd be surprised if that happened at all at that point.

Ken Durr:

Okay. Let's talk about your next step up the ladder then, moving up from the branch position.

Marc Fagel:

Rob Mitchell had been the head of enforcement. When Helane Morrison moved up to district administrator, Rob Mitchell became her head of enforcement, the assistant. Then Rob decided he wanted to get more involved in litigation, so he became a trial counsel, and Helane needed a new assistant district administrator to run the enforcement program. She decided, as our office was growing in size, that it would be a divided position.

Marc Fagel:

So I was promoted from branch chief to assistant, and then someone from the defense side Helane knew—I mentioned Pauline Calande came in from the outside. Pauline and I were the co assistant district administrators for a period of time. Eventually, Pauline moved to Washington, and I was the sole assistant and then associate director. So, we divided that position up, and each of us had a number of branch chiefs who were managing the staff attorneys.

Ken Durr:

Okay. Did you divide up enforcement and examinations or are you both doing enforcement?

Marc Fagel:

This was still strictly enforcement. We had the two of us as assistant directors for the enforcement side, and then she had two assistant directors on the exam side, similarly managing branch chiefs and examiners.

Ken Durr:

Okay. I suppose, at this point, your involvement in actual cases starts to taper off a little bit and you're looking more broadly at things?

Marc Fagel:

That's right. I think the staff attorney, as I mentioned, the real appeal of that job is you are running the day-to-day investigations with an accountant sometimes. The branch chief was pretty hands-on in our office. So, most stages of an investigation, the branch chief would be very involved, most, for example, testimony, it would generally be two people in the room, and it's still generally two people in the room with the SEC. It'd be the staff attorney and the branch chief. When I became assistant director, and certainly later as associate, you are a level removed. You're not in the room for the day-to-day. You're not making the day-to-day decisions on who gets subpoenaed and who's brought in for testimony.

Marc Fagel:

It's more decision-making. Should we open this investigation? What are the charging decisions going to be at the tail end? Sometimes, in between obviously, you'll get involved for some discussions about how are things moving? How can we expedite it? Is it worth keeping this investigation open? Should we close it? But the assistant would get more involved towards the tail end when you're making charging decisions, who will or won't get sued, what sort of charges will be leveled here. Also, because we're the region, my role was to decide when things should happen in Washington, the non-obvious cases.

Marc Fagel:

Cases where there was some novel issue or some sort of controversy, something that was going to be potentially problematic. We would want to work with DC early on to make sure that they were in the loop to get their guidance to work with some of the rulemaking divisions. So, if we had a complicated market timing case, for example, we want to talk to investment management. What do you think about this? Is this viable? Is this not? And my role as an assistant was increasingly to work with Washington and help our staff attorney and branch chief put together an investigation that was going to go smoothly through the approval processes in DC.

Ken Durr:

Okay. Now, around this time is when the options backdating phenomenon starts to arise. I want to spend a little bit of time on this because you were right smack in the middle of it. This was headline stuff for a couple of years. Tell me when it first arose?

Marc Fagel:

I'm trying to think about it. We had one investigation ongoing, and this was, I think the first one that was brought involved in Brocade, which is a Bay Area tech company. I'm trying to remember. I'm pretty confident that case came in the door before options backdating as a phenomenon was known. It was before these academic and journalists' reports were put together. So, it started out as more traditional financial fraud investigation, where the staff was taking a look at a company where there was this allegation of backdating. It was one of those situations where it's really good to have smart people in the office.

Marc Fagel:

I credit the staff accountant that we had working on that investigation for elevating the issue. As somebody who was managing enforcement at the time, I think Pauline may have been gone, so I was probably the sole enforcement head in San Francisco. I had no clue what this was. It sounded like an arcane accounting issue. It didn't sound that interesting. It wasn't sort of blood on the floor theft of corporate assets. But I had a very smart and dedicated staff accountant working on that investigation. He's like, "Marc, this is real. This is a problem. And this may be more widespread." It was around the time that we were working that investigation, that we realized that these instincts were correct.

Marc Fagel:

You started to see these reports come out in *The Wall Street Journal*, and academics had put together some studies saying this was a pretty widespread phenomenon. Next thing you know, this becomes a nationwide initiative, and we had literally dozens of investigations in our relatively small office. We were working closely with Washington. Traditionally, in the region, you get a little upset because Washington starts poking their nose in your neighborhood to take on sexy investigations that you'd like to be handling in the region. This was one of the occasions where we were pretty desperate for help, and these cases were just being parsed out around the country because there was more in Silicon Valley than we could possibly staff out of San Francisco.

Ken Durr:

Why was that? What was it about these cases? Feel free to explain exactly, what the mechanism was here, what kind of fraud are we talking about?

Marc Fagel:

It was kind of colorful because it was pretty clear cheating. It was sort of a sophisticated accounting issue of, how do you account for the issuance of stock options? But when you get beyond the accounting issue, it's kind of clearly cheating. It’s like, if you give stock options at this price, you have to account for them. If you give them at a lower price so they're worth more money, there's an expense.

Marc Fagel:

All of a sudden, you realize all these companies don't want to report an expense. So, what they would do is just backdate documents to make it look like they were giving documents on a date that they didn't have to have an expense for them. It was just straight out cheating. You're falsifying documents to avoid reporting an expense. It comes down to that. Maybe I was naive. I was naïve. With market timing, I think that was the first time that within our office, and I personally, realized that something that seems like obvious cheating, was not just one firm but a lot of them. But it was really with backdating that it was so eye opening, that so many companies were involved in exactly the same scam, that it was so widespread.

Marc Fagel:

We never knew exactly why that was. We had some indications. One of the phenomena that we identified here was that there was a lot of movement in tech, where you would have both executives and board members and then line level people who were moving among the tech companies all the time. In law, we're used to having the same job for 10, 20 years or for a lifetime. In tech, if you work at the same company for four years, there's something wrong with you. What you'd see is that people would move from one company to another and basically take the scam with them.

Marc Fagel:

They would go to a new company and say, “well, at my old company, in order for them to give me stock options that are more valued, they would set back the issuance date. I would like you to do that for me.” And it just spread, and every company was doing this.

Ken Durr:

And options or stock options are a big form of compensation too.

Marc Fagel:

Exactly. Certainly back in the '90s and 2000s, that was a significant, and probably still today. It was a significant way for tech companies and younger startups that didn't have a lot of cash to compensate their executives, through a large stock option grant. Giving somebody an options package worth $10,000 versus $50,000 was a pretty significant difference. If you could give them $50,000 without having to tell the market you were doing that, that was a real coup for a company.

Ken Durr:

Was there a particular case that you felt was notable among these, that you were working on at this time?

Marc Fagel:

At a certain point, you become jaded because the phenomenon was the same over and over. I think there were a couple of pretty high-profile cases. Apple obviously was a very big deal for our office because Apple, you're dealing not just with a company that everybody has heard of, but where their executives are celebrities. So in that case and a few others, it got very complicated to make charging decisions where you didn't always know which executives knew which information. They did have the defense of: “How do I know, as somebody who started a computer company, how you're supposed to account for stock options? Nobody knows that. My accountants are taking care of it.” So, there were some real complications in proving scienter, for example, that stood out in just how complicated some of these were in terms of getting the liability up the chain to senior executives.

Marc Fagel:

The other thing that really stood out in a few of these cases was the involvement of lawyers. We had brought cases against lawyers in some of our cases in San Francisco, and pump and dump up cases often had a lawyer involved, but I think this was the first time where we had a lot of public companies where general counsel were involved, because stock option grants generally went through the general counsel's office. All of a sudden, we're investigating and bringing cases against some GCs, and pretty prominent names in the Bay Area.

Marc Fagel:

These were names that were known to us personally, and it adds an extra layer of challenge when you are investigating and possibly suing somebody who, maybe you or your friends knew or knew by reputation. You're throwing that into the mix. You've got complicated privilege issues, and “there but for the grace of God go I.” When you're evaluating the conduct of another attorney it's like, is this right? Is this wrong? Would I have done something like that were I in that position? Those cases were really touchy and tough.

Ken Durr:

These were mostly general counsels rather than outside counsels that you're looking at?

Marc Fagel:

Yes. The outside counsel, there were some allegations of their involvement in some of this. I mentioned before, how did the spread so far? And there was the perception that when you had some of the same, and I don't want to name particular firms, but some of the same law firms who were involved in setting up the programs at multiple companies. There was a sense that there may have been some common linkage there. We didn't end up bringing cases with the scienter and it certainly wasn't an outside counsel who was there physically changing documents to change the date of an options grant. That was generally the general counsel. We didn't get into bringing cases against outside counsel that I can recall, but that there was some involvement and outside counsel, and that made it even more complicated in terms of privilege issues.

Ken Durr:

Okay. Did the SEC have any preexisting tools that it could put to work on something like this, or was this kind of an out of the blue thing?

Marc Fagel:

I think we had some of those tools through the market timing, late trading cases, at least in terms of, how does the agency coordinate a nationwide enforcement initiative? But I think in terms of scale, this was even larger. It's a bureaucracy. I think a lot of it, we were generating on the fly creating a working group. The last thing you want to have is San Francisco drawing certain lines about what cases we would or wouldn't bring, and then Washington or New York doing something different. So, there was much greater national coordination.

Marc Fagel:

We had regular phone calls to share information about what were you seeing? How are you doing this? What are your decision-making processes here? Trying to be more consistent. That was something that was relatively new. We had to do that in market timing as well, but this was, I think, a larger scale where it was not just every regional office for itself until the day you bring the case and you're getting the Commission involved. This really was, from day one, coordinating nationally. So, we're trying to be consistent across the country.

Ken Durr:

Interesting. You'd think that would have had lasting effects, that it would have been a good thing generally to get a close working relationship like that started.

Marc Fagel:

It's certainly helpful. You would like to think, as an investor, that the regulator is being consistent, but realistically, that doesn't always happen, and I certainly experienced that when I returned to the private center and you would see dramatic differences among the regions and the home office and how they would do certain investigations and how they would make decisions. I think, just in a routine investigation, if you are a staff attorney in San Francisco, it's not necessary welcomed to have somebody in Washington tell you how to do your job. But in a situation like backdating, where there are 150 investigations nationally, it really does help to have that sort of centralized decision-making of how should we go about this? So that you're best using resources and not bringing cases that vary greatly from office to office.

Ken Durr:

Okay. In an issue like this, a big new issue is those tensions between leave us alone and let us do our job—these sort of get relaxed a little bit—and you're actually looking for help.

Marc Fagel:

You're a team, you want to be team players. There is always that tension between thinking you're a staff attorney, a supervisor in the region, you know how to do this, and then recognizing sometimes that this is bigger than my investigation. We want to act as an agency.

Ken Durr:

Right. Well, this is about the time that they flattened everything out. I'm putting my regional office hat on again. It's an organizational thing, but it's got to have some impact. Essentially you guys come out from underneath Los Angeles, all the districts get to be regions again, with the notable exception, which is Seattle which just goes away, right?

Marc Fagel:

Well, Seattle had been gone for some time. By the time I came into the office, they had already been gone. We had a few examiners who had started their careers in the Seattle office, but they had pretty much been phased out by the time I got there. The change to being a regional office was huge. I give the credit largely to my predecessor in that role, Helane Morrison, who had been pushing for that. I remember she and I, and Pauline, had done a lot of studies, and how are other agencies constructed? And really trying to push Washington to recognize why this bureaucratic structure of district office reporting and regions didn't make sense.

Marc Fagel:

It was a waste of resources. I think that there had been a perception by the chairman who had started that structure, Arthur Levitt, that he just didn't want so many direct reports from the regions so let's compress. We were helping Washington recognize that having multiple regional offices reporting can be managed, would not be an additional burden on Washington, but would free up resources that were wasted by having multiple districts report into regions and having this resource misallocation by having this structure.

Marc Fagel:

It was a huge change. It gave us a lot more autonomy. It made things go a little more quickly because we didn't have that extra bureaucratic hurdle. It also gave us more room to grow in San Francisco, because when Washington was making decisions about how to allocate new staff positions, that they could be a little more objective in parsing those out. So the San Francisco group grew dramatically, both in terms of enforcement and examination staff. We also put in an extra layer of management, which then was removed a couple of years later. It sort of did increase the bureaucracy a little bit within the office because we grew so quickly and had some added management. But it really was freeing, for the most part, to have to be a region and not be thought of as backwater under LA.

Ken Durr:

Right. It sounds like the Commission had probably been getting this kind of pressure from lots of the district offices?

Marc Fagel:

That's right. Yes.

Ken Durr:

Okay. And we can move into when you become regional director, but since we're talking about the structure here, I mean, you've got the San Francisco original office and you're covering Alaska, Idaho, Washington, how do you cover all that area?

Marc Fagel:

Yes, so we had six states, I believe. It was a very large geographic region in terms of population and registrants. Not surprisingly, the lion's share of our work was in San Francisco and Silicon Valley, both enforcement and examination, but it was always a priority to make sure that investors in the other states, and registrants and public companies in other states, recognized that there is a regulator involved here. There was always that balance between doing the work that's in our literal backyard and making sure that some registrant in Montana isn't feeling that they could get away with murder.

Marc Fagel:

There were a couple of things that we did. We did try to have regular meetings with state regulators throughout the region. So, we had annual meetings where we would get together with regulators throughout the region, talk about what everybody's doing, hear from them. What are they seeing locally?

And have them hear from us, what are our resources? What can we do to help? When should they be giving us a call to see if the SEC can be of assistance to the state regulators? We wanted to make sure we had that presence.

Marc Fagel:

For the most part, that worked. We would periodically have examinations from throughout the region. We would bring enforcement actions from throughout the region. And it was something we were certainly conscious of, making sure that, okay, maybe this case in Idaho is a little bit smaller than we would bring if it happened in Silicon Valley, but it's important to bring a case in Idaho so that investors know the SEC exists, so that people running pump and dump scams understand that they are at risk of being caught, the same as if they were in the middle of New York. It was a priority for us to make sure we had that region-wide touch.

Ken Durr:

If you had a mining case, would you call it Denver and say, hey, how do we deal with this?

Marc Fagel:

Yes. You always wanted to be respectful of the expertise within the agency and recognize that there are some cases other offices are better equipped to handle. There's that tension between wanting to do cases within your region, wanting to personally be involved in everything that's within the region, and recognizing that sometimes things aren't playing to your strengths. Those calls would certainly be made. And then sometimes the state regulators have relationships with the Denver office, for example, and would give them a call, would know who to go to for that sort of case, so it tended to work out.

Ken Durr:

Okay. Tell me about your step up to the regional director's position. Did this come shortly after that whole realignment that we were talking about?

Marc Fagel:

It was right around there. I had been appointed assistant and then associate in 2003. It was after about five years of running enforcement, in 2008, that I became regional director. Helane Morrison had returned to the private sector, and I was promoted from within by chairman Cox. I think it was shortly after we had become a regional office. So, I was appointed as regional director rather than district administrator. At the same time, the LA position had changed, so there was a new regional director, Roz Tyson, in Los Angeles. We were both appointed at the same time. So, we had a very good working relationship that helped.

Marc Fagel:

We were both kind of coming into that position at the same time. We could talk to each other about the sort of things that we were dealing with and work well together that way.

Ken Durr:

You've been there for a while, and you've worked your way up. You knew what the place looked like, but when you're in the director's office, what did you see that you said, "ah, so now this makes sense," or "oh geeze, now this makes sense?" What were some of the new things you saw that you maybe wanted to fix or that you wanted to do better or do more of?

Marc Fagel:

It's an interesting change, because throughout my career path, I had been enforcement. Regional director is no longer enforcement, it's basically three jobs. So, you're running enforcement, you're running the exam program, and you're running a physical office. You’re basically all of sudden wearing three hats. Enforcement I knew. I was comfortable, when questions came to me about enforcement, I was pretty comfortable making decisions, and I had an associate director, Michael Dicke, who took my old position as associate director, who I was very close with, who I was pretty confident could run that division very well.

Marc Fagel:

The exam program was new to me. I knew examinations through working alongside them as we've discussed earlier on referrals and the like, but to actually manage that division was new to me. So, I had to learn, not just the people in the office, which had grown significantly, but what they did, what their strengths were, where we could beef things up. Then you've got your third hat, which is running this office, hiring decisions and promotion decisions. Everything from working with the union in terms of office policy, to office space.

Marc Fagel:

One of the things that I had to deal with for a year or two was we did a massive physical office move. We ended up not doing a relocation, but we were potentially relocating. We did a massive rebuild. When you are a lawyer who doesn't know anything about real estate, and all of a sudden you're learning how to manage a massive real estate change, that was something new, and working closely with DC, and that was a new part of the job. How you're dealing with everything as arcane as, where do you put the printers so that the union isn't upset about people walking too far? That was a very new hat to be wearing.

Ken Durr:

I imagine you're talking with headquarters a lot more than you did before, too.

Marc Fagel:

That's right. I mentioned earlier, as you become a manager within enforcement, increasingly your role is to navigate through DC. For the regional director, that was almost my entire job on the enforcement side. Obviously, I would get involved in decisions on opening new matters or charging decisions, but most of my role within enforcement was working with Washington in terms of initiatives they might have or cases that we're working in San Francisco, where you foresaw complications and making sure that your team in San Francisco could do their jobs smoothly. So, spending a lot of time with Washington to vet those cases and work out issues and deal with sort of the internal politics of who would do what and what decisions would be made. That was a very big part of the role.

Ken Durr:

Any notable cases from this period when you're sort of working this other, this administrative angle that we should talk about?

Marc Fagel:

Yes, we still have the tail end of the backdating cases. So, we're winding some of those down. It's funny, what sticks out of my mind at that point, and partly it's because I was a little bit less involved with day to day, is really how much things changed. It wasn't that long after I became regional director that the whole Madoff scandal emerges, and that changed my job and my focus dramatically. That tends to stand out more than particular cases that were brought towards the end. We did do some interesting work. Again, we were trying to be cutting edge in San Francisco, dealing with new technology. So, there were issues of Reg FD, fair disclosure, for example, that were coming out in the internet context.

Marc Fagel:

One of the last things I dealt with as regional director is how do you deal with the issue of social media, for example, where public company executives are making statements on social media that were not being contained in press releases. Is that compliant with Reg FD? That was one of the stickier situations. The other thing that, now that you mention that, that I remember from the tail end of my tenure as regional director had to do with private resales of pre-IPO stock. After the 2008 financial crisis, IPOs were not flowing quite as freely, but you did have these unicorns.

Marc Fagel:

You had very large tech companies in Silicon Valley that were growing very quickly, and there was a market that was, that was coming up for their privately issued securities, securities that had been issued to employees and executives, and there was a marketplace for those before the company went public that was not specifically regulated and hadn't been dealt with by the SEC previously. So, we started bringing some enforcement actions where we had seen resales, secondary market resales of pre-IPO securities, and that was certainly something novel.

Ken Durr:

Again, is this a phenomenon of the tech company culture or the nature of the tech companies?

Marc Fagel:

Yes, I think it's not unique to tech companies, but it really was, if you think about, if you were to ask somebody to name the pre-IPO companies they've heard of, they're largely going to be tech companies at the time. You're going to be hearing about Facebook before they're public, and Uber and the like. It's the tech companies that are best known in the marketplace, and not surprisingly, those are the ones where there is this pent-up demand. People want to get stock in these companies, but it doesn't trade yet. There's been no IPO, so where there is demand for something, there is going to be a market for it, and that tended to be the pretty high profile technology companies in Silicon Valley.

Ken Durr:

Pre-IPO, that's people trying to acquire this stock before it's offered publicly, or how does that work?

Marc Fagel:

Exactly. Once there is an IPO, if you want to buy Google stock or Amazon stock, you call your broker or you just go online and you buy the stock. If you want to invest in Facebook stock, and Facebook is not traded publicly yet, how do you do that? Well, you have to ... You know this company is interesting, they're growing fast, and you think it's going to be worth, but there hasn't been an IPO. You can't just go to your Ameritrade account and buy the shares, but you want them, so what do you do? Well, you find people who work there who've been granted options and you say, is there a way you can purchase the shares that they have?

Marc Fagel:

The marketplace grew for these, sort of, secondary shares, which was very complicated. It wasn't being done out in the open. So, it was harder for the SEC to have visibility into whether there were violations of either registration provisions or anti-fraud provisions. It was much harder to police that area.

Ken Durr:

Okay. I mean, I guess first off you have to figure out where it exists. There's no formal market out there.

Marc Fagel:

It wasn't obvious, but then, not surprisingly people are innovative, so companies started to arise where they actually, that was their business model of basically brokering these shares from employees to third party investors who wanted them. Okay, what is their registration status? Are these companies properly registered with the SEC? So, we got involved in, primarily registration, but sometimes disclosure where again, whenever there's a market, there is going to be somebody abusing it. So, there would also be some fraud issues where people would be out there saying, “I can get you Uber shares,” and they couldn't, but they'd be taking money in the interim.

Ken Durr:

Okay. Well, you talked about Madoff and the effect of that. Let's just jump right into that. Tell me when the Madoff case first rippled over to the West Coast.

Marc Fagel:

Yes. I still remember there was a there was a meeting of senior management in DC. So, all the leadership was physically in Washington when the news first broke in the home office, that Madoff had self-reported this multi-billion-dollar scam. I had the luxury of not knowing who Madoff was. It wasn't really an entity known to the West Coast and we didn't touch it. So, it didn't involve us personally, but certainly, what it did to the agency in terms of reputational damage and the ripples, you felt that immediately. I can't overstate how much it changed everything about the agency, both in terms of leadership turnover…

Marc Fagel:

We got some changes there, and then completely rebuilding the agency to deal with what literally could have been the death knell. There were people in Congress saying let's just disband the SEC and start over because of this disaster. We were living with it every day for years.

Ken Durr:

You took an active part in this restructuring of enforcement, right?

Marc Fagel:

Yes. I wore a few hats. So, it really became my life as regional director. I was almost checked out from the day-to-day operations of San Francisco to some extent, because of so much what was going on. One of the things I did is, because of our physical lack of touch with what had happened, I was tasked with doing a sort of internal investigation of what had gone wrong in that investigation. The inspector general had been the one to take the lead in investigating the various Madoff inquiries over the years. That was then handed over to me to do sort of an internal review. I didn't go and take testimony, but reviewed all the testimony, transcripts of the testimony that had been taken of SEC staff, to decide, are there certain things that should flow from that?

Marc Fagel:

So, I was very involved in that review. Then, all of the regional directors were heavily involved in restructuring the enforcement division, and then later the examination division. That was very hands-on. That was all inclusive. We spent much more time as regional directors focusing on all these new initiatives and restructuring than we might've done a few years ago, when our focus was, what cases are we going to bring or what exams will we conduct?

Ken Durr:

Right. Hopefully the regions were running on their own pretty well so you could go off and do this other stuff.

Marc Fagel:

Yes. It helps to have some good leadership within your office. So, if you're in DC for a few weeks, redesigning some aspect of enforcement, you're not worried about, is something blowing up back at home?

Ken Durr:

Can you walk me through this process of sort of rebuilding enforcement? How did you start and who were you working with?

Marc Fagel:

Sure. Mary Schapiro, who was chair, brought in Rob Khuzami as the new enforcement director when Linda Thompson left. Rob was not an SEC person. He was a former assistant US attorney, but he did not know the SEC that intimately. His mission was basically, blow up the place. He was given marching orders that, the SEC is in trouble, everything is fair game, do everything you think is necessary. And he put together all the regional directors and other leadership to basically say, let's redesign everything. Sort of a bull in a China shop. You had mixed feelings about that. There were a lot of things we do well. We've got really smart people. San Francisco office, we've got smart staff attorneys, they do great investigations. We didn't mess this up.

Marc Fagel:

Why are you telling us we have to redo everything? There's some frustration. There are things that work, there are good people doing good things, and you're given this mission that no, everything you do is wrong, rebuild it. That was difficult. On the flip side, it's sort of freeing, because all of us who'd been there a long time had a wish list like, if I were rebuilding this agency, here's some things I would really want to fix, and we were given license to do that. So, there was that balancing act of Rob Khuzami coming in saying, "Let's redo everything."

Marc Fagel:

Some of them made sense. Some of them were a little harder, and helping him restructure, what's going to work, what's not going to work. Recognizing that everything is fair game, and you really have this, let's save the SEC mission.

Ken Durr:

Do you remember any of the things that were on your list as far as reinvention?

Marc Fagel:

Sure. One of the things that I was probably most involved, and it’s sort of inside baseball, but it had to do with formal orders. One of the many things on the wish list was okay, how do we make investigations move more quickly? One of the frustrations for all of us who had grown up at the agency was the difficulty of just getting a formal order. You could do an investigation without a formal order. You could pick up the phone and call witnesses and ask for documents. But if you wanted subpoenas, if you want it to compel the people to produce documents or show up for testimony, you needed a formal order, which meant you'd have to write a memo.

Marc Fagel:

You'd have to send it to Washington. The five commissioners would have to vote. There had been a loose process where one commissioner could be delegated the authority from the commission to make that approval, but still, there was this bureaucratic process, and it could take a month or two just to get a formal order so you could send out a subpoena. It made no sense. It's not like the commissioners ever said, “no, you can't have a formal order.” We always got a formal order. The commissioners would never say, “no, we don't want you sending subpoenas out.” It was just this nonsensical hurdle.

Marc Fagel:

One of the things that was put in front Khuzami is, let's get rid of that process and make it quicker. This is something where I give Khuzami a lot of credit—and Mary Schapiro, because when we were proposing this, I'm like, this is never going to happen. The commissioners will never give up their ability to decide and see every case before it becomes formal and make that decision. And Rob's like, no, let's propose it, make it happen. I worked very closely with Joan McKown, who was in the chief counsel's office, and the two of us really put together all the procedures.

Marc Fagel:

How would this work? How would you delegate this authority to the regional directors and the director of enforcement, Rob Khuzami? Each of us literally had a rubber stamp. So, if a staff attorney came into my office in the morning and said, “we need to send subpoenas out, we're getting stiffed by somebody,” or we need it from an internet service provider where you needed to have a subpoena to get documents, rather than say, “okay, write up a memo and in two months we'll have a formal order,” that afternoon I could literally stamp their formal order request and we'd have subpoenas out the next day.

Marc Fagel:

We wrote up all the procedures and Rob got that in front of the Commission, and they approved it. We got this delegated authority, and all of a sudden, formal orders would happen overnight rather than in two months. That was a huge coup.

Ken Durr:

Was that on a pilot basis to start with?

Marc Fagel:

Originally, it was. Ultimately, it was kept in place because there were people, there was this parade of horribles saying, oh, you'll have staff run amok and sending subpoenas to their neighbor because they're pissed off about something, which was silly. There's still oversight and you're still not going to be sending subpoenas where you shouldn't be. One of the silly things about it is, even under the prior regime, when you had to get a formal order from the commission, it's not like there was oversight of subpoenas. Yes, you'd wait two months, but then you'd have subpoena authority, and you could do it. The staff wasn't told who they could or couldn't subpoena.

Marc Fagel:

The thought that this would somehow free people up to run amok was really nonsense. Likewise, there was some concern, that there needs to be some oversight from the commission early in the investigation to know what the staff is doing. Again, it didn't make a lot of sense for those of us who would work there. When we sent out formal orders previously, the commission didn't get involved. They wouldn't say, why are you doing this investigation? Or who are you going to subpoena? They generally see our memo, they knew what we were doing, and it would be rubber stamped. It didn't really change things dramatically. All it did is make investigations go more quickly.

Marc Fagel:

It survived, it thrived. I think it helped the staff immensely. It was something that was later reversed, and I think in the new administration, they've gone back. There was a period during the Clayton administration where enforcement lost delegated authority for formal orders, and now I believe it's back.

Ken Durr:

Okay. It's just really a matter of making the regions, and enforcement in general, more nimble, more able to move more quickly.

Marc Fagel:

Yes. Which most people would think is a good thing, but it is a large bureaucracy, and to ask people to cede some control is always a challenge, but that was one of the upsides of Madoff, is I think there was a recognition that you need to have a more nimble enforcement staff.

Ken Durr:

Okay. Now, the interesting thing is your involvement with examinations and OCIE, I guess was fairly limited early on. Clearly, you had to get involved when you were regional director. But you did something in terms of the national exam program, and I'd like to talk a little bit about that.

Marc Fagel:

Yes. Like enforcement, there was some restructuring that went on. One of the issues that had come up with Rob Khuzami in enforcement is some greater centralization and specialization. That was something some of us chafed with. We all have our own feelings on specialization, on these specialized units, but that was one of the initiatives that a lot of us, as much as I had concerns about that—and I wasn't crazy about having these units created—when Rob said, “we're going to do this,” then I worked with a couple of my fellow regional directors, and we put together the units, we made it happen. That was a big part of my job for a while.

Marc Fagel:

Towards the tail end of that, we had Carlo di Florio come in on the exam side, like Rob, wanting to blow the place up. It was a similar thing where, okay, how do we centralize so that we're having a little more management and oversight of what's going on? And how do we specialize to make sure we, in the exam program, are able to work more complex, more sophisticated cases? It was a similar process of tweaking the management structure and coming up with ways to be more sophisticated and specialized. It was a sort of a parallel change in both of those programs.

Ken Durr:

Are you going to the level of looking for consistency on the exams? I mean, making sure that everybody's asking exactly the same questions at exactly the same time?

Marc Fagel:

There was some of that. I had not seen that as much of a problem or an issue on the exam side, because I think with the exams, the home office had always had some involvement in setting priorities and standards. So, it wasn't as dramatic a change, but there was a change to the nature of the registrants, and this happened right around the same time. It had nothing to do with Madoff. It was more the financial crisis and Dodd-Frank, where all of a sudden, hedge funds were a much larger part of the exam portfolio. A lot of our examiners—and we had very sharp, very experienced examiners in San Francisco—but there's a big difference between examining registrants you've seen for 20 years, or mom and pop shops, and having some pretty sophisticated hedge funds and private equity funds that are all of a sudden part of our domain for examinations.

Marc Fagel:

That's where DC started to play a bigger role, both in terms of having more training, more centralized management of, here are the issues that we want you to look at if you're going to examine a hedge fund and also providing more resources. So we were able to do a lot more hiring in the regions of people who had worked at hedge funds. Most of our examiners didn't have that personal experience in the private sector, and we were able to hire people who said, this is how these firms operate. We brought in someone with quantitative experience, which we didn't have in-house. So, if you're examining a registrant which has a quantitative trading model, we had somebody who could evaluate that. Does this make sense? Is it consistent with disclosures they're making to their clients? A lot of that, again, was DC managing our resources so that we would be equipped in the regions to do a much different sort of exam than we had historically done.

Ken Durr:

I would assume that there's a little bit of gratitude here. It would be daunting to just go straight into some of these big hedge funds for the first time, so they would have appreciated DC's help.

Marc Fagel:

Everyone had mixed feelings. One of the things I had to navigate as regional director is that tension between people who are used to operating without as much central oversight and now being given marching orders, both in enforcement and exam. I'd like to think that our local exam staff appreciated both the opportunity to do much more interesting and novel examinations than they had historically done, and also being given the tools to do so. But obviously, there are some growing pains, because people who may have viewed themselves as the expert in the region are realizing that expertise is not necessarily relevant to what we are now being asked to do.

Ken Durr:

How long were you in this post-Madoff mode of taking things apart and putting them back together again?

Marc Fagel:

It was my last few years at the agency. Again, I had become regional director in 2008. I don't remember exactly when Madoff blew up, but it was not that long after that, and I left in 2013. So, it was really my last few years. There were both building a new SEC and then managing a new SEC. My role, even after the reorganization and recreation of enforcement and exams had been completed, my role changed as regional director. Sometimes for the better, sometimes not so much. The role of regional director became much less interesting to me and satisfying, and that had a lot to do with my ultimate decision to leave the agency.

Ken Durr:

Because of more centralization going on, is that why it became less interesting?

Marc Fagel:

Yes, I would say there were two factors. One is centralization, and one is the specialized units. In terms of centralization, my favorite part of being regional director when I first came up, besides managing San Francisco—I loved the people in San Francisco. We had terrific people. We'd grown up together, being able to grow that program was great. But the other thing I liked most about being regional director was the relationship with the other regional directors. We had sort of grown up together within the agency. We were very close on a personal level. My best friends at the agency were some of the other regional directors.

Marc Fagel:

There was sort of this trial by fire at the time of Madoff of all working together, huddling up and rebuilding. But we also had an understanding of the regions that Washington didn't. The head of enforcement and the head of the exam program, basically each of them assumed that you worked for them. So, the head of enforcement assumed the regional director was an enforcement employee, and the head of exams assumed that the regional director was an exam employee. They didn't understand that you were actually doing both of those things, and this third, that of actually having to manage an office. The director of enforcement and exams, they didn't have to manage a physical building.

Marc Fagel:

Dealing with growing the office space, making sure the trainings were running on time, there wasn’t a lot of sympathy for that. Whereas the other regional directors, we all spoke the same language. We were all confronting personnel issues and administrative issues. We had someone in DC named Jim Clarkson who has passed away sadly, but Jim was a hero to us. Jim was one of the greatest guys I've ever known, smartest guys. And his role in DC was helping the regions coordinate and deal with these other issues beyond just enforcement and exam, but actually managing an operation of 110 people on a day-to-day basis.

Marc Fagel:

That dissipated. That sort of role as a regional director managing this group became much less relevant than working for the DC, in this new centralized outfit. So centralization really did change that collegiality and that sense that the regions were doing something different than what was happening in Washington. That was a change, but the other was specialization. I mentioned the mixed feelings we had. The units, it was clearly the right thing to do. Again, I give Rob Khuzami a lot of credit for realizing, if the SEC is going to do more sophisticated, more complicated meaningful work, we needed the ability to handle emerging areas. That took more specialization.

Marc Fagel:

Some of us chafed against that. My favorite part of being a staff attorney and then a branch chief was that I could work on everything and be a generalist. And this concept that you could do nothing but FCPA cases was foreign to me. But it was the right thing to do. I helped him put it together. I was one of the culprits who made the agency into these groups of specialized units, but it also meant that I ceded management in the region. All of a sudden, this enforcement staff that reported to me where I oversaw the investigations, the most interesting and innovative investigations in the office are now being managed by a unit head.

Marc Fagel:

I understood why that had to happen, I helped design it, but it also made my job much less interesting when the most interesting cases in my office are no longer coming to me for decisions, they're going to a unit director. That made the job much less satisfying.

Ken Durr:

That's really interesting because one of the baffling things about the whole regional setup is, for years, there's the two masters, the people in exams are working for OSI, or before that, they were working for trading and markets, and people that enforcement are working for enforcement, but also for the regional office. It sounds like this is the point where that kind of had its inevitable outcome.

Marc Fagel:

Yes. Because there was always part of it. Yes, of course, even when I was a staff attorney, if I'm going to do something or suggest something that's off the beaten path, obviously the director of the division of enforcement is going to be the decision maker. There's no question, when Steve Cutler was the director of enforcement, that Steve Cutler was going to be the ultimate decision maker. It wasn't going to be me. It wasn't going to be Helane Morrison who was running enforcement in San Francisco. That was always there. You knew who was ultimately in charge of that program, but at the same time, Steve Cutler wasn't calling me all the time and saying, let's check in every week on how things are going.

Marc Fagel:

I worked for San Francisco. I felt that pride in being part of the San Francisco regional office and having that autonomy on a day-to-day basis. By the tail end, there was much less of that. You were working for a unit director in another office, you were working for the division of enforcement or the division of examinations. That's a very different feeling. At the end of the day, you're doing the same thing. You're trying to do with the best investigation or best examination you can.

Marc Fagel:

You're all working for a team where you want to be consistent nationally, but there is that sense that ultimately you are working for people far afield from you. That really does change the atmosphere of it.

Ken Durr:

Okay. You took off in 2013, right?

Marc Fagel:

Right.

Ken Durr:

Was it the same firm, or did you go back to a different firm?

Marc Fagel:

I started my career at Morrison & Foerster. I then went to Gibson Dunn as a partner in 2013. But yes, I think one of the things, I see all this criticism of the revolving door, and people complain about the revolving door, and does that create conflict? I'm a fan of the revolving door. When I was in San Francisco, I hired almost exclusively from the large firms on the enforcement side certainly. I thought it was healthy to bring people in and I thought it was healthy to have people then go back out to big firms.

Marc Fagel:

I thought it gave a sort of objectivity and fair handedness, even handedness, to have been on both sides. I'm a fan of that. I always thought at some point I would be going back out to big law on the defense side. And then, after about almost 16 years at the SEC, some of which was I had done everything I could do. I rose through the ranks, and I had tried everything, and short of moving to DC and becoming a political appointee, there was nothing new to do. Some of it was a little bit of burnout after Madoff and the reorg, and some of it was just personally, I've learned so much about SEC investigations and the securities law.

Marc Fagel:

It would feel really nice to be able to help people who are in trouble with my knowledge. I always felt that there was something healthy in going back out and taking that experience to the private sector and was very happy to do that.

Ken Durr:

Okay. At this point, you've managed to become semiretired, right?

Marc Fagel:

I have. After leaving, I spent six years at Gibson Dunn, basically on the opposite side of the SEC. I had a blast. I had some great clients. I had some really interesting cases, and there was something fascinating about sitting on the opposite side of the table from the SEC, and often from the people that I had hired in San Francisco. So, I enjoyed that, but big law has its tolls and practicing on the defense side emotionally is tough. After six years of that, I've been practicing securities law almost 30 years. As we said up front, I fell into that just because that was the case that I was handed my first day as an associate. After 30 years of this career, I decided, I'm going to take a break, and decided to just leave the law entirely.

Ken Durr:

Okay. Is there anything else in that 30 years that we haven't talked about that we should, any memorable cases, people, stories?

Marc Fagel:

A lot of it is the people. Yes, so at the end of the day, you want to do good work, you want to bring good cases. You want to have an exam that you feel that you've really helped uncover improprieties or help a registrant operate better. You feel great pride in that, but what made the job great, the reason I stayed 16 years—when Helane Morrison hired me, I gave her a three-year commitment, and I thought, okay, three years and I'll go back to MoFo. The reason I stayed 16 years was largely the people. San Francisco, in particular in hires, has the luxury of really being the only game in town.

Marc Fagel:

If you are in the regulated entity industry or you are in big law practicing securities law and you want to do something in the public interest, you want to wear the white hat, you want to go to the government, the SEC is it. If you're in DC, there are a lot of government opportunities. If you're in New York, there's a lot of jobs for you. If you're in San Francisco, the SEC, and certainly increasingly over my years there, really became the place to go, and therefore it had the luxury of hiring just phenomenal people. That made it exciting every day, made it fun every day, to go and be surrounded by passionate people, really smart people.

Marc Fagel:

The same in other offices. The regional directors that I got to know in other offices were a terrific resource for me when we were going through difficult issues, whether it's dealing with the union, which was increasingly part of our docket. Dealing with the reorg. It helped to have passionate leaders in other offices that I felt very close with. Then in DC, and the DC relationship can be a thorny one. It's a big bureaucracy, and you're trying to get your work approved by various factions with different ideologies in Washington. That's tough, but you're dealing with people who are really smart, and who are experts. Whatever perceptions people may have about government, the SEC has just some of the best people, the smartest people, and that that made it a fantastic job.

Ken Durr:

Well, terrific. This has been a fantastic interview. I've had a lot of fun talking taking.

Marc Fagel:

Thanks for taking the time today.

Marc Fagel:

Absolutely, appreciate your time.