Securities and Exchange Commission Historical Society
Interview with Arthur Fleischer
Conducted on May 21, 2007, by Kenneth Durr

KD: This is an interview with Arthur Fleischer on May 21st, 2007 in New York City, by Kenneth Durr. Did you do Yale for undergraduate, as well as law school?

AF: Yes.

KD: Who did you study with at Yale Law School?

AF: Bill Cary. That is how I met him. He was teaching at Columbia - a seminar in corporate finance. Subsequently, I was writing a book with him on convertible securities when he was selected by President Kennedy to be the SEC Chairman.

KD: What kind of professor was he?

AF: Meaning—

KD: Was he a compelling professor? Lively? Did he engage the students?

AF: I don't know that Bill was compelling; he was not an entertainer. He was most importantly a wonderful man of great integrity. The class was a seminar, with an emphasis on interchange. Bill was most stimulating. He was quite extraordinary in many ways. Moreover, one of the ways that was important to me—more as a lesson, I like to think, than anything else—related to the first article we co-authored on taxation of convertible securities, that was published in the *Harvard Law Review,* Bill placed my name first, which is quite extraordinary for a senior professor to do.

KD: Were you still a student at this time?

AF: No, I think I was working at, then, Strasser Spiegelberg, now Fried Frank. I used to spend my holidays writing law review articles. Vacations were perhaps a little different then than they are now.

KD: Well that paid off, I guess, in getting in pretty close with Bill Cary.

AF: Yes.

KD: Now I looked through his record, and it appears that he was in the OSS back in World War II—

AF: I believe so. Right.

KD: —and he was a Marine. Was he the sort of fellow that you picture when you think Marine, OSS?

AF: No, because he had a gentleness to him. He was both gentle and a gentleman of the "old school," but he was also tough and resolute. When he went to the SEC, he did not talk to the press for months, because he didn't think he was ready to do that. It is a world that you can't even comprehend. He was just unique in many ways.

KD: Tell me a little bit about your decision to come along with him to the SEC.

AF: I can't quite recreate it. Sam Harris was then one of the senior partners at Fried, Frank, Harris. During my first two and a half years at the firm, I was doing both tax work, which I was interested in, and some SEC work. I was probably motivated more by the opportunity to work with Bill than anything else, I think, and the respect that everyone had for the SEC. I was somewhat unsure of what I wanted to do professionally, and this seemed like a great opportunity.

KD: It appears that you were planning to stay with the firm then, since you took a leave of absence.

AF: Did I? I don't remember.

KD: I guess that's not important now.

AF: I do not understand the concept of a "leave of absence" for an associate in a law firm, and what it meant. At one point, I was making more money in the government than I was making in New York so financial issues could not have been the burden.

KD: That's unusual.

AF: Remember that when I started practicing law in 1958, law firms were paying associates fifty-five hundred dollars a year. If you were a military veteran, as I was, you received sixty-five hundred. In the early '60s, the government was almost financially competitive. When I became the executive assistant to the Chairman, I was a "super grad" and received something like fifteen thousand dollars per year.

KD: Did you come right in as the executive assistant?

AF: No, first I was the legal assistant to the Chairman. There was no executive assistant.

KD: You were a legal assistant to Bill Cary.

AF: Right.

KD: What was your job description?

AF: It is hard to say because we were both new to the job. We kind of created the role. I suspect that now the office of the Chairman is accompanied by elaborate paraphernalia and an army of troops, but then there was myself and Bill. Eventually, when I became the executive assistant, Doug Martin became the legal assistant. In the beginning, we were defining the role; for example, I authored a review of Louis Loss's treatise on securities regulation. I also sat in on Commission meetings; a lot of the time there was spent in reviewing registration statements.

KD: I've heard the Commission had to actually sign off on those things.

AF: I think so; I am not sure that was the most beneficial use of one's time. We also focused upon legal opinions. For example, I helped Bill Cary with the *Cady, Roberts* opinion, which was the seminal decision on insider trading. Furthermore, there were certain

developments that were very important. One was the investigation of the American Stock Exchange, and the resulting change in structure, which was quite radical. We did an Investment Company Act study, and my dear friend, Bob Mundheim, came down and worked on that with Gordon Henderson. Then, of course, the major effort was the Special Study of the Securities Market. I functioned as the liaison between the Commission and the study group.

KD: Well, you just went through my outline here. So let's back up a little bit, and talk about priorities when Bill Cary came in. The AMEX scandal had shaken up the financial world and the securities world quite a bit.

AF: Right.

KD: Was this at the top of the list—dealing with the fall-out from that?

AF: I remember Bill was very concerned about the American Stock Exchange and the breakdown in discipline. If I remember correctly, the Commission brought a proceeding against Jerry Re. Bill thought it important that the Commission consider the case thoughtfully, but expeditiously, to communicate the message of a meaningful sanction for a breakdown in controls. Subsequently, the securities industry itself got involved to make sure that the Exchange got its bearings and became better focused.

KD: Well, let's go to the Special Study. That's clearly the high point. I've talked to a lot of the guys who were involved in that. They remember it fondly. A number of them point to the fact that you were there as an interface between them and the Commission, in a way.

AF: Right.

KD: Tell me a little bit about that role, and tell me a little bit about that team, and what it was like dealing with those guys.

AF: It was an extraordinary group. Milt Cohen is amazing, an extraordinary lawyer, both from the power of his intellect, his sense of integrity, and his efforts to be balanced and forward-looking. He was also imaginative. He had a very strong group with him - Ralph Saul, Dave Silver, Gene Rotberg and Fred Moss. They were a very talented group of people, with

a lot of enthusiasm. The Study Group conducted hearings, did investigations and produced an extraordinary report. I was a liaison with the Study and also helpful in formulating the Commission's responses to the Study Group recommendations. The Study had a major impact. It established a foundation for subsequent actions in securities regulation. Moreover, the very important 1964 Amendments to the federal securities laws were a product. This required considerable activity on Bill's part and that effort was a part of a book that he subsequently wrote.

KD: I get the sense that this was a pretty exuberant crowd, the Special Study people.

AF: Oh yes. I don't want to make this dichotomy, but it was like being in a private law firm. People worked all the time; they were very dedicated. There were deadlines that had to be met. After all, the Study was probably one of the most important examinations that had gone on since the SEC was established. Thirty years later, you are re-examining the fundamental foundations of what is regulated, how it is regulated and what the changes should be.

KD: Did they need to come to you, for resources, for funding?

AF: No, I did not get into that area.

KD: I know at the end, Congress wanted it so that the Commissioners were essentially supporting this report.

AF: Yes. The Commission supported many of the recommendations and indicated that others should be further explored. By the way, the Commission itself was a superb team - there was Bill Cary, Barney Woodside, who was also superb, just enormous strength; and Manny Cohen.

KD: Barney Woodside had been around almost from the beginning.

AF: And he was terrific, just sensible, smart and knew the history of everything. In sum, he was very good. I believe that Senator Frear was there and Jack Whitney. It was a strong group, very strong. One of the great strengths of the SEC is that it has always attracted, and it still does, very strong lawyers and people focused on public service. The SEC has been almost

totally free from any scandal. One of the things I find offensive now is embodied in all these procedural safeguards—you cannot have a Commission meeting without it being "open."

KD: The Sunshine Act.

AF: Yes. That type of legislation is overbearing. We never had those restrictions in the 1960s. When I came to the SEC, Congress did not seek to pressure the SEC. The notion of the independent agency was a very real concept. There was also no White House interference. I do recall one instance where there was a dispute between the SEC and the Comptroller of the Currency about who handled bank disclosures. We met in the White House to mediate the dispute. That was not political interference; that was a way of trying to bridge differences between two governmental agencies. In general, people were very sensitive about intruding in the independence of the regulatory agencies. We were also very careful about public disclosure of confidential matters. We did have a few leaks during the Special Study, with Eileen Shanahan, the lady from the *Times*.

KD: Did she get to some of the lawyers in the group?

AF: I guess so, yes.

KD: So the idea was to keep all of this secret until the—

AF: Yes, until the Study was complete. On the whole, confidentiality worked pretty well.

KD: Were people in the industry concerned when they heard that this was going on?

AF: The industry obviously had concerns about the scope of the Study. We were dealing with fundamental issues – fixed commissions, the role of the regional exchanges and the basic functioning of the markets.

KD: Where did Cary come down on all of this? Did he have any particular interest? Did he see any of those structural issues as being somehow more important than others?

AF: I'm not avoiding it; I just don't remember that he had a passion for one particular issue or another.

KD: I'm just trying to get a sense of whether he had an agenda, something he wanted to accomplish as Chairman?

AF: His focus was on raising standards and maintaining integrity in the securities markets.

KD: You said he waited a while before he talked to the press.

AF: Right.

KD: When he finally did, and when he started talking to the industry, would he evangelize?

AF: Yes, I think so, in the best sense of the term. Don't forget, Bill wrote that famous article about Delaware being the lowest common denominator for corporate law. He was not timid about trying to set a goal of higher standards.

KD: You talked about *Cady, Roberts*, too. Insider trading is just starting to come out with that decision.

AF: Right.

KD: My understanding was that was about '61 or so?

AF: I do not recall the date. You should refer to an issue of the *Columbia Law Review* that was dedicated to Bill. There were various articles in the issue; one article was on *Cady, Roberts* and it was a reasonably accurate description of what transpired.

KD: Yes, I think I've seen that. My sense is, though, that that's a milestone; but then there's a while when nothing really happened. Was there a sense that things had been settled with *Cady, Roberts*?

AF: No. I think the next big case was *Texas Gulf Sulphur*; I had left the Commission by then. The decision must have been '65 or '66.

KD: '68 is when it really—

AF: Was it '68? I am confident there was always insider trading. It became an epidemic with the takeover business because then there is "quick money" to be made. *Cady, Roberts* involved a dividend when everybody implicitly knew that dividend news was very sensitive. *Texas Gulf* was like a law school hypothetical, because it was about a mineral discovery. The acquisition binge had not commenced. There was no common theme to the insider trading cases in the early period. An enforcement theme appeared when Stan Sporkin focused on sensitive payments.

KD: The '70s.

AF: With the takeover era, the Commission began focusing on insider trading and had properly continued to do so. In the recent past, the emphasis has been on accounting fraud, such as Enron and WorldCom. Lately, option backdating has become a modest epidemic.

KD: You also mentioned the Investment Company Study.

AF: Yes.

KD: Tell me a little bit about that.

AF: Gordon Henderson and Bob Mundheim led a structure study of the industry, dealing with fundamental issues such as fee levels, conflicts of industry and sales commissions.

KD: So it sounds like if there's a theme—you were talking about the themes, the insider trading, the options—if there's a theme here, it sounds like it was structure, looking at the structure of the market.

AF: Yes.

KD: Which probably sells fewer newspapers.

AF: That is probably right. Perhaps less dramatic or interesting, but critical.

KD: What was your day-to-day like, working with Cary? I imagine that was kind of a hothouse environment.

AF: There was an extraordinary amount of activity that accelerated as time went by. I was engaged in all aspects of Bill's activities, except budget issues. I focused on testimony, opinions and speeches – activities in which Bill was personally involved. I was involved in all key activities of the Commission, from rule-making to the Special Study.

KD: So you prepped him, then, to go in front of Congress.

AF: Yes, I would work with him on testimony and legislative presentations, including the 1964 Amendments. I would also edit, or correct, testimony.

KD: That's a euphemism then, the correction part.

AF: Well, you wouldn't "correct" it, necessarily. Editing is to make the testimony more fluent, to fill in blanks and correct omissions and errors.

KD: Who else did you work closely with during these years?

AF: Phil Loomis, for example, was a really critical, intellectual bulwark for the SEC. He had a lot of experience and a splendid mind.

KD: Was he Market Reg?

AF: I believe that is correct; if I recall, he also was General Counsel for awhile.

KD: Did you see staff people come and make a case in front of the Commission at any point?

AF: Yes, on a regular basis, and with all of the Divisions and Offices.

KD: Why did you decide to leave the Commission?

AF: President Kennedy died; Bill resigned, as you do when a new President takes office. Manny Cohen, the new Chairman, asked me to stay on, but I decided that I would go back into private practice.

KD: Had the Commission changed significantly during those years? Was there a before and after that you saw?

AF: Bill was preceded by Ned Gadsby, who was a decent fellow. There was not the same level of excitement that Bill brought. These were also the glamorous Kennedy years, a time of all the "bright young men" who were coming to Washington. When Bill and I came to the SEC, there were very strong people on staff, and the staff was strong when we left.

KD: Well it sounds like the Special Study was—

AF: The Special Study attracted very bright people who wanted to do something special and over a limited period of time.

KD: What did the rest of the Commission—the other members of the staff—think about this thing going on?

AF: Don't forget that a number of the members of the Special Study had come from the staff. Tension was not evident, because people like Gene Rotberg, Fred Moss, Dave Silver and Arthur Rothkopf came from the staff.

KD: Did you come straight back to Fried Frank then?

AF: Yes.

KD: Thus the leave of absence—

AF: Again, there wasn't a leave of absence. I talked to a couple of other firms after leaving the SEC.

KD: Were you at all specializing in mergers and acquisitions before?

AF: No.

KD: How soon after you came back did you get into that?

AF: In large measure, it was a function of the nature of the firm's practice. The firm in the late '60s represented [Meshulam J.] Riklis, of Rapid American [Corp.], and also Gulf and Western; they were both serial acquirers. Although I did not spend a lot of time working with them, I worked with Loeb Rhodes and Lazard, who were active in that business. At one point I wrote an article with Bob Mundheim on acquisitions by tender offer, and I was asked to testify before a Senate committee when the Williams Act was passed. The turning point was the representation of Goldman Sachs in the Gerber defense, then work with Morgan Stanley. Fried Frank became one of the three dominant firms in the takeover area.

KD: You mentioned Gulf and Western being a serial acquirer. Was it the conglomerate movement that was pushing a lot of this?

AF: Yes. There was ITT, Gulf and Western and Rapid American—these companies were classic conglomerates.

KD: So you were representing Gulf and Western?

AF: Yes. I didn't do that much work with Gulf and Western, but Gulf and Western was a client of the firm, and so was Rapid American. Lazard and Loeb Rhodes were both active in that business.

KD: Now, the Williams Act. That was around '68—late '60s.

AF: Right. '68, I think.

KD: And the SEC, of course, is going to be heavily involved in that.

AF: Right.

KD: Do you remember what was going on at that point? Did you talk to people at the SEC about what was happening?

AF: I was on the SEC Advisory Committee on Corporate Disclosure. I was also a member of an NASD committee on new issues. I worked on the American Law Institute project on securities regulation, led by Louis Loss, and I was on the board of the American Stock Exchange.

KD: How did you land that spot on the SEC advisory committee?

AF: I don't know. I was asked a couple of times to go back to the SEC as a Commissioner, near the end of the Nixon years, and when Ray Garrett was the Chairman, but I didn't want to do that. I was interacting with the staff, in handling disclosure documents and interpreting new rules that were dealing with the takeover phenomenon.

KD: Some folks have portrayed the SEC as being slow in that area, showing a strange lack of interest. Was there any sense at that point that—

AF: I am not clear what they should have been doing. The Commission promulgated many regulations, set up a special branch to deal with tender offers and utilized enforcement efforts when thought appropriate. Chairman Shad set up an advisory committee to focus on appropriate regulatory concepts.

KD: Well, let's talk about that corporate disclosure advisory committee a little bit. You don't know how you got named for it; but what was your mandate?

AF: Al Sommer chaired the committee. The focus was on integrating disclosure requirements so we would have a more continuous disclosure stream. Milt Cohen was a pioneer, and wrote a famous article on the subject. Continuous disclosure is what the Commission has been working on for almost forty years. We are getting closer, for example, by reducing the burden on offerings for seasoned issuers.

KD: I was just wondering if you had any recollections of the meetings, what the tenor was at that point.

AF: No, I don't have any specific recollection. I think Marty Lipton was on the committee with me, as well as Warren Buffet.

KD: And at the same time, you're doing mergers and acquisitions.

AF: Right.

KD: Did it taper off in the late '70s?

AF: No. It didn't really taper off until the late '80s.

KD: It sure didn't taper off in the early '80s.

AF: No, no. It was the late '80s, early '90s, it had a downward trend.

KD: Well the disturbing thing about M&A in the early '80s—mid-eighties, of course—is how it's being financed, with junk bonds, and things like that.

AF: Why was that disturbing? That is what is going on now. No one now finds it too disturbing.

KD: It was a relatively new phenomenon at that time.

AF: It was. Using leverage is not a new phenomenon, but using it in the scale, scope and purpose was new. But it's now embedded in our financial system and somewhat more disciplined right now than in the past. However, danger signs are cropping up.

KD: There was a little bit of new interest from the SEC at this point, with John Shad setting up a group to examine takeovers. Do you remember any sense that this was going to change something, kind of like with the Special Study—the idea that, 'Oh well, they're looking at the industry now. You know, will things somehow be different once they're done?'

AF: I did not think that there would be radical changes in the structure. The financial area is very fast-moving, populated by imaginative individuals. Sometimes the latest developments—derivatives, tender offers or hedge funds— have to settle in before the government can begin to first understand, evaluate, and determine whether to and how to regulate. In the takeover area, in general, the essence of what the SEC is focused on has been, as always, disclosure—to make sure that the material information, whether it is a cash

bid or a stock bid, is available. At the same time, the Commission has interjected itself into substantive areas more than it has in other areas of corporate activity, for example, by specifying the time period that a tender offer has to be open, by restricting market activity during the time a tender offer is going on, and by requiring uniform pricing in the offer.

KD: Are these in the form of rules?

AF: Yes. These are all rules that the SEC has adopted over time. In my view, this activity is understandable and has not impeded activity. Some rules had unintended consequences; an example is the so-called best price rule which essentially requires a bidder to pay the best price for all shares during the tender offer. Acquirers were inhibited from utilizing tender offers because of fears, prompted by a few court decisions, that compensation payments to executives could be payments for stock. The SEC, through rule-making, has essentially alleviated this problem. As a result, tender offers are on the rise again. Basically, the SEC has not interfered with the acquisition movement.

KD: Why do you think that is?

AF: Acquisitions are a vehicle for people to monetize their investments, as an alternative to going public. Regulation should not intervene so long as certain basic rules of investor protection and fairness are being adhered to.

KD: One place the SEC has gotten a little bit involved is something I think I'd like you to clarify—is this idea of one share, one vote; and having rules as to different classes of shares.

AF: Right. The SEC has not eliminated disparate voting. The Commission has placed limitations on the circumstances under which it can be done. The results were achieved by putting pressure on the exchanges to adopt restrictive rules.

KD: So in some sense, the SEC did put some pressure on.

AF: Yes. However, multiple voting is not an acquisition activity so much as a fundamental governance issue. Here, the Commission is obviously very involved through the proxy rules, through disclosure and through jaw-boning. Generally, the SEC influences corporate

conduct indirectly: take executive compensation. The SEC's new rules are designed to provide more, and more meaningful, information on executive compensation. "Sunlight" can have a restraining effect. We are in a different environment now, where the "activists" are trying to effect structural changes such as shareholder access or majority voting.

KD: I have one big question I want to ask you, by way of closing out. It's fairly common, the pattern of folks working for the SEC early in their career, and then going on and doing something else—maybe coming back, maybe not—

AF: Right.

KD: Looking back on it, how did your experience—at a fairly young age, working so close to the top of the Commission—how did that affect the way your career went, and the way you look at the work you do now?

AF: Being at the Commission was an extraordinary opportunity to work at an agency for which I have enormous respect, and at a level of responsibility and interest that was truly gratifying. The staff was terrific and the camaraderie at a high level. We were not subject to the skepticism and distrust that now prevails among government officials. That distrust – expressed in terms of requiring open SEC meetings – was not warranted in the case of the SEC. I look back with fondness and pride that I was a part of an institution that I think functioned with the primary goal of working in the public interest.

KD: Did you stay in touch with Bill Cary?

AF: Yes

KD: Did he go back into practice?

AF: No. He continued to teach at Columbia. He did become of counsel at Patterson Belknap. I taught some classes with him in corporate law.

KD: Did you ever talk about old times with him, at the SEC?

AF: I don't know that I did that, but I still see Katherine, his wife, periodically.

KD: Is there anything that we haven't talked about that you recall, that stands out in your memory about your time there?

AF: It was challenging and exciting, and very enjoyable to be part of a group of committed individuals who were really balanced and focused.

KD: Well thanks a lot for talking to me.

AF: My pleasure.