

Securities and Exchange Commission Historical Society
Interview with Edward Fleischman
Conducted on April 7, 2015 by William Thomas

WT: This is an interview with Edward Fleischman for the SEC Historical Society's virtual museum and archive of the history of financial regulation. I am William Thomas. The date is April 7th, 2015, and we're in Franklin Lakes, New Jersey. So, thanks very much for agreeing to speak with us. I know we have a lot to cover, but could we begin with a little bit of biography, just so we know where you came from and how you ended up in law?

EF: I grew up in Brookline, Massachusetts, went to Harvard. During the Korean War I wasn't in Korea, I went the other way. I was sent to Europe to a military intelligence unit, came back and was admitted to Columbia Law School. I had taken the law apps on a kind of dare and did well in them, and that was what helped my wife and me make the decision that I go into law.

WT: Okay, and I was reading an interview with you that you're from a family of lawyers as well?

EF: My dad was a lawyer, but he really didn't practice very much.

WT: I see. So you then, after law school, ended up at Beekman & Bogue, is it?

EF: Yes. It was a wonderful old New York firm. It traced its origins back to Alexander Hamilton, Jr., I think. I never knew either Mr. Beekman or Mr. Bogue. They had died before I got there. I got there in 1959, which was a perfect time for a young lawyer who didn't realize that he was interested in securities law, because the first real IPO market was just about opening at that point in time.

WT: Could you tell me a little bit more, then, about how that developed, that market?

EF: Well, I can only tell it to you from my perspective. I didn't realize that it was something quite unusual. The Ford Motor offering hadn't been that long before, and I guess that was the beginning of that market. But we saw medium-size companies, not tiny ones yet, but medium size companies that were coming to what were then considered major but not the absolutely top underwriting houses. The law firm had longtime relationships with three or four of the underwriting firms, names that don't exist anymore: Paine Webber, Hemphill Noyes, A. G. Becker.

And so we were called to be the underwriters' lawyers in deals throughout late '59, '60, '61, and into '62. It was a very interesting time. I didn't realize it was different, but it was, and it was constant and it was speedy. I remember a night on which at about 5:00 in the morning I walked into the men's room, changed my shirt, washed my face, shaved, and went back to my desk. That was the pace that we were keeping. And then, suddenly, on Memorial Day of 1962 it ended.

WT: That was the market break, around that time?

EF: Well, it wasn't a market break so much. It was an end to the IPO market. By that time it had descended. The ability of companies to go public had dropped to encompass much smaller companies, and we were seeing some of that as well. But as with most of the then-securities firms, some of those new companies—although we were the underwriters' counsel—some of those new companies were coming to us to be their counsel after the offerings were made.

So from June of '62 to three or four years later, most of our work was on the corporate side. We did all the kinds of internal work that counsel to companies do, assisting the board of directors, assisting the management, what was not yet called "M&A" but was in fact M&A, pension work, all kinds of corporate counsel work.

WT: Did you develop your views about markets and regulation as part of that experience, or was that more through your work with the ABA?

EF: It was some combination of both. It wasn't really that I developed views at that stage in my career. I was too busy learning then and trying to execute transactions. The capacity to react to the way government, meaning the SEC, was functioning was of course part of the process, but I'm not sure I even thought about it. I will jump forward to the effort on the part of the Bar to come up with a federal securities reform—the Louis Loss securities code—because in '65 or so I had become a member of the ABA Federal Regulation of

Securities Committee, which at that time was by invitation. I applied but I was turned down, and eventually they took me. But, because I was a member of that committee, I was also part of the annual sessions that that committee held with Professor Loss as he developed the code. As I say, this was some years later.

I remember standing up and articulating the point of view that the discretion that Loss was proposing to give to the SEC was far too broad, and, to my horror, a voice came from the back of the room, saying in a very disciplinary tone, "Listen, young man, it's the best agency in Washington. You don't know what you're talking about." And that was Manny Cohen, whom I came to know after that. So I guess by that time, at least, I had attitudes that were more consonant with what my reputation later became.

WT: And I understand that you also had early experience with derivatives and futures in this work with the law firm?

EF: Yes. Well, I don't know at what stage it was. I remember the big matter was a matter before the CFTC, which came to a head when my family and I were on an airplane going to a ski trip in Utah, so it must have been somewhere around 1970. I was charged with essentially saying to the CFTC, "Your proposed prosecution is wrong, and you want to lay off." That was about 1970 so it was very much like the work that I had been doing for the brokerage and underwriting firms on the securities side, it was one of the same firms. It happened to have to do with what passed into history as a fiasco in the potato futures market.

WT: I see. Can I ask you a little bit more about your work with the American Bar Association? We talked about Professor Loss's code, but is there more to it that we should talk about before we get to your term at the SEC? It seems to have been very elemental to how you got involved with the SEC.

EF: Yes, it was. When Al Sommer became the head of the committee—not a Commissioner yet—he and Ray Garrett were still very active senior members of the Securities Regulation Committee. Al surprised me by asking whether I would take on the responsibilities as head of the broker-dealer subcommittee. I guess he did that because I had just been in the right place a couple of years earlier and had gotten tapped to lead the committee's response to what became Rule 144.

WT: So we're in the 1970s here?

EF: Very early '70s—'70-'73, that kind of timeframe. He asked me to be head of the broker-dealer subcommittee, which I did for the three, four, five years in which he was chair of the committee, and I came to a quick realization of how much I was learning in the committee sessions. Not only was the committee meeting on responses to SEC proposals, but it was very much involved with the Loss securities code, meeting two or three times a year to review new iterations of the code, the then-draft code, and so it became a very important additional source of understanding of what was going on.

First of all, I was meeting lawyers from all around the country, not just the individuals who happened to be across the table from Beekman & Bogue on deals or transactions, and I found that very enlightening and very helpful. There were a lot of people, like that instance with Manny Cohen, who were convinced that the SEC was the font of all wisdom in these areas. And some large part of that, it became clear to me, had to do with the fact that many of the people sitting on that committee were SEC alumni. There were a few of us who had not been at the SEC at all, the chap from Sullivan & Cromwell, a couple of other New Yorkers, and maybe some others.

But they were for the most part now verging on the elderly, because you're talking about people who had grown up in the late '30s, '40s, '50s. So most of them had been at the SEC, and many of the SEC people were gradually funneling out and becoming members of the committee. So I had a fairly active role on the committee and in the committee sessions all through the '60s, '70s, and I gradually expanded outward and became active in other committees as well, but allied in the corporate and futures areas.

WT: Let's talk a little bit about how you then were nominated to be on the Commission.

Again, I was reading the interview that you did, I think it was with the ABA, and you had mentioned that Ken Bialkin was kind of the key person there. Could you tell me a little bit more about that process?

EF: I think, Mr. Thomas, that that's a wonderful story. It's a very personal story. I don't think that anybody else who went through that process had anything like my story—and

when people asked me later on, when I was Honorable, “how do you get to be a Commissioner?” I would always tell them that each individual branch on that particular tree is going to be different from every other.

What happened to me was that I was sitting in a meeting one day. Ken Bialkin was at that point, I think, the chair of the Federal Securities Committee of the ABA, but I’m not sure that that was still true. He was a very well-known practitioner in New York and was engaged in many other activities, through which (although I didn’t know it at the time) he had quite an array of contacts with the White House, whoever happened to be the White House occupant at the time.

At any rate, we were sitting at a meeting and he looked at me and said very casually, because there was a vacancy, “Would you like to be a Commissioner?” And I said something to the effect of, “Kenny, I’d have to go home and talk to Joan about that.”

And I guess the next thing I knew, I wrote a letter. I was told to write to then-Chairman Shad—so this is very early 1985—and I wrote him a letter, putting my best foot forward. My experience at that point was fairly broad and it was twenty-five years long.

WT: And you had remained at Beekman & Bogue this whole time.

EF: This whole time. I got a telephone call one day and my secretary told me that the White House was calling. I didn’t really believe it and asked if I could call back, please. This had happened once before, at the beginning of the Carter Administration, a fellow I knew

reasonably well who had been appointed to the Treasury—not as Secretary of Treasury but as General Counsel, I think—called me up and asked me whether I’d be interested in coming down and working with him. So it wasn’t that I thought it was impossible that I’d be getting a call from the White House, but I really didn’t believe it. I was just skeptical. At any rate, I called back and confirmed that it was really John Shad’s secretary—so it wasn’t a White House call, it was an SEC call.

WT: So John Shad was really pretty deeply involved with this process then?

EF: Well, at that point I didn’t know that. I didn’t know that at all. I had met him once at a dinner at NYU. He was very active in the alumni, I think, of NYU Law School. The professor who had been most active in SEC matters from within the NYU faculty—Homer Kripke—had an occasional dinner to which he invited a number of us. I was included in this one, and so was John Shad, and he was apparently coming in from Washington for the day, so I had met John once. In the telephone call, his secretary said, “Chairman Shad would like to meet you.” And I said okay. She said, “He takes the 4:00 on Friday afternoon, the Eastern shuttle. The second row from the back only has two seats instead of three. Get on that plane and hold those two seats for you and Chairman Shad.” It sounds more like a spy caper than anything else.

At any rate, I got there in time for the 3:00 so that I could be first in line for the 4:00. In those days, that’s the way Eastern ran that shuttle. I think it was about twelve dollars to go one way to or from Washington. I got on, the plane filled up, and toward the very end

this ruffled figure in a kind of dirty raincoat came down the aisle. He didn't know me, but I knew who he was, so I greeted him and he sat down next to me and we spent that hour talking.

He was going into New York to his apartment. His wife had become ill just at the time he had been appointed, so they did that weekly routine, but they kept their apartment on Park Avenue. I asked him whether he'd like a ride in to the city and he said yes. I must have grabbed the nearest taxi cab and dropped John off on Park Avenue and came on out to New Jersey. I lived a couple of towns east of here at the time. And we hit it off.

And then it was very quiet. I had no idea what was going on. Somewhere in the spring I got another call and went down to Washington once or twice, and eventually was asked to have lunch with John Shad and with a person who subsequently became a Court of Appeals judge in the District of Columbia, and with the assistant to the President for personnel in this particular area of the administration. It was in a private club in Washington so that they could all come and nobody would ever know they had been there together, and nobody would ever know that they'd come to have lunch with each other. I'm not talking about with me because I wouldn't be recognizable anyway.

We sat down around a small table, about this size, in a private room, and naturally, as you would expect, somebody threw the ball to me, and I handled it as best as I could and threw it back again. And, as I remember, it never came back to me again. They were too interested in talking to one another. But, at any rate, they all left separately and I left, and

that was the end as far as I was concerned, except that there was an article in one of the Inside Washington magazines that said the Presidential personnel people meet on a Tuesday. So there was a Tuesday in June, I remember coming home and telling my wife, “Look, I have actually bought a bottle of champagne. I think we’re going to hear tonight, and I think it’s going to be favorable. I think we’re going to hear tonight.”

In fact, there was a telephone call, and the person at the other end of the phone call—I don’t remember who it was—said, “I’m trying to find out whether you’re home tonight.” And I said, “Yes, my wife and I will be home all evening.” And about midnight I took the bottle out of the refrigerator. I said, “Come on, Joan. Let’s go to bed.” And that was the end of that until an ABA meeting in the first week of July down in Washington. Bored to tears because it was so hot, I walked out of the room, called my office back in New York and my secretary said, “The White House is trying to reach you.” She put me through and we were told that I was to be at the White House about an hour from whenever it was at the time, in the old Executive Office Building to meet the person who was the Presidential assistant for securities and other financial matters.

I showered, changed, went to the White House, or the old Executive Office Building, and was told, “We’ve picked you. It’s going to be you. Congratulations. Now, you can’t tell anybody. When we’re ready to tell people, we will. You have no right to tell anybody anything.” Well, there am I with this meeting of all the securities lawyers that I know in the country. Many of the top securities lawyers from all the top firms in all the top cities, and I can’t tell them what the hell is happening. (Laughter)

What I did do was go to a telephone booth on 17th Street and call my wife to let her know, but that was as far as we let it be known, and we went off the next week on a long-planned trip behind the Iron Curtain with some friends. We picked up a new Saab in Sweden, and went down through East Germany to Czechoslovakia, Hungary, and then out. As we were pulling up to our hotel in Prague, there was a telegram waiting for me from my daughter-in-law-to-be saying, “They’ve announced it.” And there it was in *The New York Times*.

WT: And your name hadn’t been in the papers at all as a candidate before this? They had managed to keep it very tightly sealed?

EF: Yes. In fact, the name of a good friend of mine, whom you may know, Mike Halloran—who’s now in Washington but was then in San Francisco—had surfaced and had been publicized, and there had been some fairly favorable publicity because Mike was a very well known and admired venture capital and corporate securities lawyer, so the White House I think was congratulated on considering him. I’ve never talked to Mike about why, but in the last analysis his nomination did not go forward. There were also other people. There was at least one woman whom I heard about. But it was fairly quiet, and they announced both Joe Grundfest and me, I think, in mid-July of ’85.

WT: How much interest in the White House do you think there was in—how high up would it have gone as far as selecting who was going to be on the Commission? I mean, it doesn't sound like you met with the chief of staff or anyone of that sort.

EF: I think, Mr. Thomas, that it was a time when—this was '85—this was a little past the middle of President Reagan's second term, they were getting very concerned about legacy, and since government size and government function was of fair importance to the people in the Reagan White House, this was a subject that they were very concerned about. I don't think they were so concerned about the individuals as about the ideology of the people they were considering.

And I think, in honesty, I think Ken Bialkin had a consultant's role, had a voice, was called on, "What do you think, Ken?" in those late June and early July times when they were pulling the last straws. But I think it was really a question of: we've got a five-year and a two-year vacancy, so let's find some people who, when we are long gone from this White House, will carry the flame forward. I didn't meet anybody higher than the assistant to the President for these financial matters, and the fellow who later became a judge.

WT: It's very interesting: we did an interview with Commissioner Grundfest a couple years ago, and he was saying that as the Democratic nominee they were very interested in him because he was more market-oriented than a lot of Democratic people. So there was

clearly a lot of effort to get the people who, as you say, did have that sort of ideological orientation, even among the people who are Democratic appointees.

EF: It doesn't surprise me. Did Joe tell you his story about meeting Henry Kissinger?

WT: No, I don't believe so.

EF: His appointment had been announced, and he was walking down one of the big corridors in the Old Executive Office Building, and Mr. Kissinger was coming the other way. And the way Joe has told the story, I don't know if he still does, Mr. Kissinger said to him [impersonating Kissinger]: "Joe, you've been nominated to be a Commissioner of the SEC. Now, Joe, the staff will always give you two alternatives: their way and nuclear war. Your job is to avoid nuclear war." (Laughter) And there was a great deal of truth to that. The idea was you do what the staff wants you to do.

WT: Did it seem to be that there were a variety of opinions within the Reagan Administration on regulation and deregulation? It seems to me that there were people like James Baker, who are more kind of in George Bush, Sr.'s more moderate area, and then there were people like Donald Regan, who were viewed as being more zealous in the efforts to deregulate. Do you have any observations on that?

EF: All I can tell you about that is that it was a year or so earlier that George Bush, Sr. had put his name on that report, which was essentially a let's-get-deregulation-going report.

So I had no insight into the real White House, but I didn't have any impression that there was any disagreement on that side of things.

WT: So now let's talk about your experiences on the Commission. So of course you had said you had gotten along famously with John Shad during the selection process. How was it working on the Commission?

EF: I have the fondest memories of working with and for John Shad. It was a very good Commission. By the time I got there, it was January of '86. It was Shad, and Charles Cox, who was an economist, and Joe, and Aulana Peters from the West Coast (a former partner of William French Smith), and myself. Shortly thereafter, sometime in the winter-spring of '86, there was a matter, which had a fair amount of publicity, and involved a guy who had been a fairly high profile violator of SEC rules, I don't remember what now, and he had gone down for the count and he was petitioning to be allowed to come back into the securities business, as I remember it.

It would have been a very quick discussion, because the other four were quite firmly convinced that they didn't want him back in the securities business at all. Shad looked around that kind of half-round table and said, "We're going to pause for a minute because Ed thinks otherwise, and I'm going to give him a chance to try to convince you all." And he did, he let me have my say. I couldn't convince them, but that's what I remember best about John, is that he would give you your chance, and he treated each of his Commissioners—in whose appointment he had had a fairly deep hand, I expect—he

treated each of his Commissioners with a great deal of respect, and I thought that was great. I thought he was great.

I was very disappointed when he went off to be Ambassador to Holland. It was in June, before the October '87 break, and I've got to tell you he couldn't have been happier about an opportunity to be back together with his wife. My wife and I happened to go to Europe in the next few months after that, and he wanted so much to know what was going on. He had such strong views. He didn't agree with me at all about how I was getting there or what I wanted to do, but he very much wanted to know what was going on and very much missed having a hand in what was going on.

WT: Now, of course John Shad is known for having rather strong deregulatory views, as well as yourself. To what extent did you agree and to what extent did you disagree as to the course to take with respect to that? Of course, things like insider trading are going on at that time, and he was very vocally—

EF: Yes, but that was really later on in the year 1986-87. It's unfair to look back now and try to characterize, but I think we were pretty much on the same wavelength. There were lots of areas in which I was interested in changing course somewhat. I think the very first time I wrote something in my own name, it had to do with an accounting matter, and I thought that the Commission was being fairly heavy handed about the way it treated the accounting professionals, and John didn't see that one my way, by any means. But I think we more or less agreed in a general way on where, how the deregulatory course

should be pursued. It wasn't easy, he didn't have a clear majority by any means on the Commission at that time, but he was a leader and he could bring people around to his point of view one way or another.

WT: One thing that was very interesting, though, we did an interview some time ago with Dan Goelzer, who mentioned that he [Chairman Shad] wanted the General Counsel's Office to kind of take the devil's advocate position against certain positions that they would otherwise support. Do you have any recollection of that from the staff level, engaging them in that sort of process?

EF: My concern with Goelzer and the General Counsel's Office was the opposite; that they were partisans for the staff view, whatever the staff view was. I have an indistinct recollection that I had a big smile on my face the last day Dan was there as General Counsel, because suddenly he was taking a different position. He was taking the position that I had wanted him to take for a very long time.

WT: Well, tell me a little bit about the staff and your relations with them.

EF: Well, maybe the easiest way for me to do it is anecdotally. I remember a Friday afternoon in summer, on which three, four, five staff people came to my room, and the reason they came to my room was that all the other Commissioners were out of the building and they wanted to get authorization to bring a proceeding, and they wanted to get it now. So I was essentially duty officer, if you will, because I was the only

Commissioner there. It had to do with an Ohio matter in which an old Ohio company was changing its bylaws, or proposing to change its bylaws, and the proxy statement was fairly slim. The disclosure of the impact of the bylaw change or the reasons for it was just about what you could get away with.

The lawyer for the company was an old-time Ohio lawyer who had been chairman of the State Bar Corporations Committee or Securities Committee, so he was a man of some standing. He was offended, I think (as I tried to read between the lines), by the fact that the staff would question his thought-out conclusions, so that, for example, one of the few paragraphs said, "The staff requires us to say colon, quote." (Laughter)

At any rate, I asked them if they would please get me the proxy statement and not just their memorandum, and they came back up with the proxy statement. I pointed out to them that the old bylaw and the new bylaw, very succinctly described, were nevertheless, on facing pages, only about one and a half paragraphs, so that anybody could read and could see what the differences were. And I told them that I thought that that would go very much against their position when it went before a judge.

WT: The staff's position?

EF: Yes. The very fact that somebody could read the paragraph and a half right next to the paragraph and a half to replace it, I thought it would make their job very hard and I really wasn't happy about saying yes to their request. I don't remember that I actually said no,

but at any rate, they left and I didn't hear anything more on Friday, over the weekend, or Monday. Tuesday morning, I went downstairs for something else and went to the room of the person who was the branch chief for this particular company in Corp Fin. I didn't go into the Enforcement Division, I went to Corp Fin, and I said to this chap, "Whatever happened?" And he said, "Didn't they tell you?" And I said, "No, I haven't heard anything since you guys walked out of my room last Friday afternoon." And he said, "Well, they decided you may be right, and we really didn't want to go to a judge in that particular context."

WT: Of the layout of the statement?

EF: Of the proxy statement itself. As I was leaving, he said, "Commissioner? I want to tell you that in my twenty-eight years in this building, it's the first time a Commissioner has ever come down to talk to me."

There were occasions later when I knew that the senior staff people were saying to the White House, "If you're choosing a new Chairman, anybody but Ed." (Laughter) There were also situations subsequent to that in which what they said to each other, and the word got back to me, was, "Sorry, we should have taken Ed."

At any rate, I held them to the same standards that I would hold my partners in the law firm. I was critical, I was supportive, and I tried to help them get their job done the way I thought it should be done and not simply to say yes to what they wanted to have done.

The patron saint of the staff, you probably heard from many people, was Linda Quinn, who was John Shad's chief of staff and then head of the Corp Fin Division. Linda and I never got along. We were polite to one another, but we simply didn't get along.

Whereas Rick Ketchum, who is now head of FINRA, we had lots of times in which we clashed and clashed openly, but it was very respectful. I understood what he was trying to do, and I think he understood what I was trying to do. So, I think it's fair to say that the staff didn't like the way I went about doing things, for which I can't say, in retrospect, that I blame them, and they didn't agree with me, but I think they respected me.

WT: So let me ask you, then—that is a nice bridge into some of the talks that you gave to the ABA during your time as a Commissioner, and you asking the ABA lawyers to be in their own way advocates in bringing pressure on the Commission, keeping them honest, so to speak. Could you tell me a little bit about that? You mentioned again in that other interview that you gave that you thought that was a major part of your work as a Commissioner, being in contact with the ABA.

EF: To this day, I don't know any group of people who are more experienced or more knowledgeable, more insightful about the problems facing the SEC and the markets than the ABA's Federal Regulation of Securities Committee. I was concerned that the committee not be a lie-down-and-walk-over-me kind of group. I had seen in what I had done for the committee, before becoming a Commissioner that, the committee as a committee wouldn't puff itself up and make a big noise about things that were terribly important, but in the last analysis would simply, in my view, cave. Now, maybe they had

to. But I wanted them to be a conscience for the bar and for the marketplace, and I didn't know anybody who would do that job as well, who was as well positioned to do that job, as was the ABA Committee. I mean, there were of course the Los Angeles and New York City Bar Committees, but nobody has the stature, or had it at least at that point, of the ABA Securities Committee.

I tried to make clear to the committee that I thought that they—particularly where they included in their ranks so many of the likes of Manny Cohen and the greats of the prior decades from the staff—with one exception, Jim Sargent, there weren't any ex-Commissioners who were very active at the Bar in those years, as I remember. But I thought that the committee as a committee really had a role to play. So I preached, every couple of years they'd give me the opportunity and I'd preach. And I must say that there was a circumstance in which I really preached loud and got a standing ovation. Included among those who were standing was a person who subsequently wrote a public article that essentially said "Fleischman delendum est" [Latin: "Fleischman must be destroyed"]. I never understood or forgave the fact that that particular person stood up and applauded and then took exactly the opposite point of view when it came to the public press. Yes, I thought the Bar, the ABA Committee, was a very important player, and could be more important but was afraid to be.

WT: You use an expression with respect I think mainly to SEC enforcement, "grist for the daily mill," in talking about the SEC's perspective on what they did and how the ABA could act as kind of a counter to, I don't know if you'd call it mission creep or what,

through this grist for the daily mill. Could you expand on what you meant by that at the time?

EF: Well, no matter how much time, effort, understanding was expended by the defense lawyers individually, one thing I did come to understand was that, put all together, they didn't have the vision to see the extent of noncompliance. Each lawyer would see an occasional event of noncompliance or alleged noncompliance, but nobody got the picture that the Enforcement Division got of how much cheating, for lack of a better word, was actually going on out there. You didn't get that until you sat there in the SEC building and saw it day after day after day after day. If there were ten items on a week's agenda, eight and a half or nine of them would have to do with enforcement of different kinds.

I came to have a better understanding of a comment that Irv Pollack had made to me when I was pursuing a matter before the staff, long before I even thought of going down to Washington. Irv got very upset with me at the end of a long conference and picked himself up from the table and said, "If you work for crooks, you become a crook," and left the table. Well, it took me a long time at that SEC table to understand what he was really saying. There is a tremendous amount of noncompliance, deliberate noncompliance. There's also a tremendous amount of, from my perspective, people who are trying to comply but are falling short for one reason or another. Perhaps they don't even realize that they're falling short, or are seeing things with a very different pair of glasses on.

So it is grist for the mill at the SEC. You see the crooks, and you see the crooks every single day. No private lawyer gets to see the crooks every single day. Well, I shouldn't say "no private lawyer." I mean, there may be some folks whose practice is strictly enforcement but even they, for the most part, will be representing people who are at least saying that they want to comply with the law, whereas the Enforcement Division is facing people who, to a large extent, are saying, "We don't care about the goddamn law. We're going to go ahead and do this." It does inform their attitudes. They see the world in a very different way, and I suppose properly so.

WT: I'd like to get into a little bit more of some of the specific issues that you were dealing with at the time. Of course, it was a very active time in the securities regulation world, and the securities world in general.

EF: It was.

WT: Before we get into some of the big issues, I saw reference that you were interested specifically in corporate financing issues during your time on the Commission, but I didn't see any more specific references to that. I was wondering if that's your view, that that was something you took a specific interest in.

EF: Certainly before I got there that was my practice. People like John Huber will still refer to me as a '33 Act lawyer, for which I am not by any means unhappy. But that is intended to say it's the corporate finance piece that was uppermost in my mind. And when those

issues came up, like Rule 144A for example, those were issues in which I took a particular interest. But I hate to say that because it wasn't because I took lesser interest—especially as time went by and as I got more accustomed to swimming in those waters—it wasn't that I took a lesser interest in enforcement or even the '40 Act or the corporate reorganization issues.

WT: Were there particular issues in corporation finance at that time that were especially pressing or that came up again and again? Or was it more a matter of just interpreting the rules that you had on a case-by-case basis that you took the most interest in?

EF: The tension that arose around exempt offerings was something in which I had spent a great deal of time as a private practitioner, and remained quite interested in as a commissioner. But when I first got there, the big issue was tender offers. Shad had had a round table in the month or two immediately prior to my getting there. And I have the picture somewhere, there's a picture of me, and next to me is a shoulder with a pinstriped arm: that was Ivan Boesky. I didn't know Mr. Boesky. But it was tender offers, and then insider trading that occupied much of '86. Were there other issues? There must have been, but I don't remember offhand.

WT: Well, of course those were the big ones, so why don't we just jump in and talk about what the conversations were at the SEC at that time? It's my understanding that, especially with respect to tender offers, most of the Commissioners were of the opinion

that there really wasn't much in the way of legislation or rulemaking that ought to be done in response to all the hostile takeovers of that period.

EF: That was one consequence of deregulation. We let the market alone and let it function. On the other hand, the very first meeting I attended—I was sworn in on a Monday, and the Tuesday meeting, the next day or the day after, was devoted to the analysis and promulgation of the proposals for new tender offer rules. So, by the time I got there, the decision essentially had been made that there would be new rules governing tender offers, that the playing field would have to be rebalanced somehow. And, of course, the Congress had already acted on the Saturday Night Specials with legislation. Saturday Night Specials were those tender offers that were announced on Friday afternoon or Saturday and were scheduled to close very, very quickly so people didn't have the chance to do anything except say, "I'll take the money," or, "I'll take my chances."

The Williams Act in '68 to some extent put a stop to that, and it was under the Williams Act that these tender offer rules were being proposed. I was, as I remember, less anxious and less interested in intervening, on the one hand as a person who really believed that the market should take care of itself, on the other hand with the opposite impulse, that management should have some ability to defend itself and its governance of the particular company, whatever it was. Those two things pulled me in different directions.

I can't explain now why I felt that the SEC's rule, whenever it came up—it came up, what, a year later didn't it?—the rule enabling the stock exchanges to intervene in these

things, to put an end to that kind of hostile tender offer, I don't remember why I was one of the people who said, "Yes, this is the right thing for the SEC to be doing." But I did have that view at the time, and I defended it. I don't remember how I rationalized it, but I did think that the SEC was doing the right thing at that time.

WT: Now, it's my understanding—again kind of going to, I mentioned our previous interview with Joe Grundfest—that there were actually splits within each party, that there wasn't kind of a unified or partisan position, or separate pressure groups on this issue.

EF: There wasn't. The only time I remember there being any Congressional involvement, there was a matter that involved Texaco, and the SEC was weighing whether it would weigh in, and I got a telephone call from Capitol Hill seeking to influence my position on that issue. I think the chap on the other end of the telephone said to me, "If I'm stepping over the line, you have to tell me." And my response I think was, "It's not that you're stepping over the line. It's for me to say, 'You tell me whatever you want to tell me. I will or will not listen. That's my decision. I don't think you are responsible for policing that line, wherever it is. It's me. It's my responsibility.'" Well, there were two other times. Do you remember a woman by the name of Consuela Washington?

WT: I've heard of her.

EF: She was the chief counsel on John Dingell's committee or subcommittee, and Consuela was wonderful. At one ABA committee meeting, she read to us what would be in the

committee report on a particular bill that had to do with insider trading, I think, and it set forth a colloquy between Chairman Dingell and the testifying witness. And somebody said to her, it was not I but somebody said to her, “Consuela, how you can tell us that when the committee meeting isn’t until next Tuesday?” And she said, “Who do you think is going to write the committee report?” (Laughter) So she was very, very straightforward in that sense. She knew what Chairman Dingell wanted, or maybe she led Chairman Dingell to what he wanted. I don’t know.

And the only other time that I remember any Congressional involvement had to do with the very end of my time there, when the issue had to do with the proposed CFTC-SEC merger. I was asked to visit with Senator Paul Simon, the guy in the bowtie from Chicago. I had heard a good deal about him, but I had never met him. I had never met any of the people on the Hill. He said to me, “Okay, you want to know why you’re here?” I said yes. He said, “Well, I’m told that you have the only worthwhile arguments against this merger, so tell me what they are because I have to know them.”

But there wasn’t a lot of contact between a Commissioner and the Hill in those days. I mean, I’m sure somebody like Lindy Marinaccio or Rick Roberts, who came from the Hill, had greater and much more frequent contacts than I did. But those are the only few instances where I had any real contact from the Hill, and they weren’t, as you can hear from them, they really weren’t efforts to influence a decision or a policy.

WT: And one could say the same for the executive branch, or not?

EF: I never heard anything from the executive branch. I didn't even get called for a second confirmation hearing, because I had been given the shorter of those two- and five-year terms that were available when I came down, so that about a year and a half later, I was back up for reappointment. We had taken an apartment, but only on an eighteen-month lease. I mean, it wasn't that the world was going to end at the end of those eighteen months. Somebody had assured me that, in fact, I would be re-nominated, but basically it was a, "We'll take a look at you in a year and we'll see." But nobody from the White House got in touch with me.

WT: With all of these issues in the news, I mean, we haven't even talked about October of 1987, really, how much in all the media attention—you mentioned that you hadn't talked all that much to people on the Hill, but how intense was the lobbying in general? One of the things that motivates the question is I know that when David Ruder became Chairman that he had been subjected to very intense resistance in his confirmation hearing, and that he wanted to show the SEC to be an effective regulator and that may have influenced him in some way. I mean, was that your perception? Was there a lot coming from industry?

EF: I had known Dave for many years on the ABA committee.

WT: I should note, I'll be talking to him in a few weeks, actually.

EF: Oh, I didn't know. He and I and my wife were decent friends before he came down. If I remember correctly, that was when Don Regan left the White House, and nobody was interested in my views as to what should happen next at the SEC, nor did anybody anticipate that there was going to be a market break on that Tuesday morning. What was the specific question that you asked me?

WT: Oh, just whether or not there were pressures that were felt from all of these.

EF: No. Not by me. Not by me at all. In fact, one of the things that I used to complain about was that my friends didn't call. The people I knew at the Bar didn't call. If I didn't call up somebody in Washington and say, "Would you like to have lunch?" I'd have lunch at my desk. I mean, there was a kind of a "we-don't-want-to-be-seen-as-trying-to-gain-influence-at-the-Commission" attitude, so no. Neither the Bar nor the security industry made overtures to me at all. There must have been some exceptions, but I don't remember any.

WT: Okay. Let's talk a little bit about internally at the SEC, when they were trying to work on all these high profile insider trading cases, and also in view of the Supreme Court decisions earlier in the decade, what the enforcement strategies were like.

EF: I don't know that I can really answer that question. The Supreme Court decisions earlier in the decade—I take it you're talking about *Dirks* and *Chiarella*—I know as much and no more than you know about *Chiarella*. *Dirks* I know something about. I represented

what was then called the Securities Industry Association on the brief for *Dirks*, and I had actually worked for Mr. Dirks on some matter prior to that time. I don't remember what it was, but I remember his padding around in his stocking feet in his office on lower Broadway.

John Shad was very, very much concerned about insider trading, and when the first cases came up he really wanted to bring them, whip down hard. Playing amateur psychiatrist, I think he felt betrayed by the Boeskys and Levines of the world that he knew well. I think he felt particularly betrayed by Mr. Milken. A very good friend of mine was one of Mr. Milken's top lawyers, and I did hear different versions of the story over drinks in Manhattan than I was hearing in Washington.

But at any rate, I have not been as whipped up about insider trading. I've been more impressed by the victimless crime arguments. It doesn't offend me as much as it should, let's put it that way. What's going on now is fascinating to me, the first efforts to draft a statute that might actually do the job. I think Joe Grundfest believes that a statute is appropriate, and I don't know how you write it. Not too broad, not too narrow, I really don't know how you go about that, and my own gut reaction is to allow the courts to go forward. I don't think that the recent Second Circuit decision is crazy. I think it hewed fairly closely to what the justices thought they were saying in the *Dirks* case.

WT: How much did the conversation change after the Insider Trading and Securities Fraud Enforcement Act?

EF: That was '91, wasn't it?

WT: I think that was '88?

EF: Yes, it has to be. Well, the SEC asked for a good deal more than I thought that it needed. The conversation itself didn't change. The capacity of the agency to police the markets changed. It became—and I don't attribute this to Dave Ruder particularly—it became much more the fact that if I've got the authority I'm going to use it, and if I don't have the authority I'm going to ask for it, and the more authority my agency has, the more authority I have.

WT: And so at this point they're able to start developing the misappropriation theory, is that correct?

EF: No, they'd done that already.

WT: They had done that already, before that?

EF: Done that already, yes.

WT: Successfully?

EF: It became apparent that the failure early on, that so-called “classic” insider trading was not going to get the SEC where it wanted to be, and the enforcement staff came up with the misappropriation theory fairly early on, as I remember. Then you had *The Wall Street Journal* guy, and all the questions that everybody had delighted in asking: “Well, if *The Wall Street Journal* said that he could use this information, would that make it okay?” Come on, these are discussions, these are angels dancing on the head of a pin.

It clearly would be cleaner if the Congress could find an articulation that made some sense, but I don’t know if it’s going to happen or not. If you talk to Joe again, I think you’ll find that he believes that that’s the way they ought to go.

WT: Right. We’ve talked quite a bit about John Shad and your relationship with him, and I know you’ve said in other contexts that things become less conversational under Chairmen Ruder and Breeden. I don’t want to go into the politics of it too deeply, but I’m wondering if you can give me your impressions of that shift.

EF: I’ve always thought that Dave kind of got hit from behind with what happened on that Friday, Monday, Tuesday, in an area that was not his forte. We ended up the following January, I think, in some Mexican town for an ABA meeting. Dave was carrying the flag for the SEC and what the SEC could have and should have done, and he and I simply didn’t agree. As your questions indicated, I had had some experience with the futures markets.

WT: Should we go back and talk about your experience with October of '87, just so we can put it all in order, or does it make sense to go this way?

EF: I'm not sure when we became aware of what was going on on that Monday, but it was well into the day. The agency did not have electronic equipment that was up to the job. Rick Ketchum had some kind of—there wasn't a ticker but some kind of machine that kept him up to date, but it wasn't even on the floor that the Commissioners were on, and of course David was out in Chicago. Well, he was away from Washington, wherever he was. It wasn't until Tuesday that we Commissioners really became aware of what the hell was going on, until we read the papers, the Monday's results.

I have a recollection that I got Dan Goelzer to join a room in which the Commissioners were watching something or talking about something, so that if there were violations of the Sunshine Act, the General Counsel would be there to be able to say, "Stop." What I know, really, is retrospective. Was it Monday that David got off a plane and made some comment that the press took and—

WT: I'm not sure if it was Monday or Tuesday.

EF: I think it was Monday.

WT: Yes. That they might have to close the market.

EF: Yes, something like that. Subsequently, I was willing to say to him, “David, you closed the market from Friday night until Monday morning. Wasn’t that bad enough?”

(Laughter) Not that he had deliberately closed the market, but that’s what had happened. Look, I wrote an article in ’97 I think, or maybe later than that, in which I told a story that had been told to me afterwards. It’s all retrospective. We weren’t doing anything at that very moment. What the White House was doing and what the Chairman was doing, I don’t know.

There was a futures contract in Chicago, on twenty stocks I think, because they weren’t allowed to do the Dow thirty, so they had made up a kind of a mock large stock index contract. And on Tuesday morning, it was like molasses, nothing was moving. Very few stocks had opened in New York. Somewhere about 10:30, if my memory serves, 10:30 New York time, which would have been earlier in Chicago, there was a buy, there was a trade on that twenty-stock contract that went up on the lights on the machines. A few minutes later there was another, and people began looking around, “What’s happening? Why?” And it was like a Mack truck very, very slowly going into first gear, and then second gear. That’s what I was told by people on the floor, and I was also told by somebody who was in a position to know that a very large retirement fund had basically said, “If nobody else is going to do it, we’re going to do it. Put in some bids, slowly, one after another. I don’t want this to be able to be traced back to us.”

But in a sense it was a manipulation, and it was necessary to get that truck into gear, and then it took off, of course, a short time later. There was a large portion of the press that

blamed the futures markets and the “portfolio insurance” trades, offsetting trades in the futures and stock market.

WT: We’re not talking about intermarket trading?

EF: At any rate, the question was where do you lay the blame for this? Clearly we’ve got to have blame someplace, so where do you lay the blame for this? And the blame was laid on that trading strategy that said that you could offset and you could limit your downside. But it didn’t seem to me that the blame lay in Chicago, particularly. If there was to be blame—and I didn’t know why there had to be blame, that was a political issue rather than a market issue—the guys in Chicago, it seemed to me, were the ones who should be thanked for getting things back going on. Because once trading picked up in Chicago, once there was some indication in New York that those people in Chicago were actually trading again, then it just ramped up very, very quickly. Five hundred points or so on the Dow when the Dow was at 2,200 was a lot.

WT: Yes.

EF: But the economy wasn’t affected. The market itself, within just two or three months, was rallying back again. I thought then and think now that it was more, as I say, a political issue than a market issue, and certainly it wasn’t anything that the SEC could do anything about. I remember saying to Dave Ruder one day, “It lies within the jurisdiction of this

agency to fix this problem, just a short 10b rule that says it shall be unlawful to sell a stock for less than what you bought it for.” (Laughter)

It became a battle over jurisdiction, so the people on 20th Street or the people on 6th Street have the final say, and should it be the CFTC or the SEC that runs the markets? And actually, I wondered whether it should be either one of them? I mean, isn't it an executive branch matter, really, rather than one of these so-called independent agencies that should be making policy in areas like this? By that time I had become fairly critical of the notion of the independent agencies, the so-called fourth branch of government.

WT: So let's talk then about, in general, the relations between the CFTC and the SEC, since this is returning to be a big issue. Of course, you'd had the Shad-Johnson Accord in '82, but then I believe both Chairmen Ruder and Breeden put forward proposals to unify the agencies, that you disagreed with. How serious were these discussions? I mean, was there a sense that this might go somewhere?

EF: If you want to believe, you'll believe. That's why Senator Simon wanted to see me. By that time, it must have been '90, I don't know when, but it wasn't so much a question of could the agencies agree; it was a question of whether the congressional committees were going to give up their jurisdiction, and the answer to that was clearly no. It hasn't happened to this day. There had to be better things to spend your time on than trying to acquire more bureaucratic turf. At least, that was the way I felt at the time, and still do.

WT: How difficult were the issues with things like intermarket trading and these hybrid instruments that blur the boundaries of the accord that had been put in place? Was that something that was very serious that needed to be worked out, in your mind, or was that something that there was overreaction to?

EF: Well, the people whose bulls were going to be gored had a very strong overreaction. And on the other hand, they were not questions that were simply to be discussed; they had to be thought about. Would anybody have set up our present system of FDIC, CFTC, SEC, et cetera? No, nobody in his right mind. But once you get into a situation where that's where it is and that's how it's running, taking it apart and changing the players becomes very, very expensive, at least to some of the participants. And in being expensive and in being inefficient, there are costs to the marketplace, but the mere process of changing it from one to another also adds cost to the marketplace.

There wasn't any Sam Rayburn to really lead the Congress, or I don't know who it was in the White House in '33, '34. I myself think that the separation of functions in these agencies does more good than harm, but that's because my concern, my real fear, is for the agglomeration of authority in one place—that's a kind of '85-'86 Reagan White House ideology.

WT: We were talking earlier about how you felt that David Ruder had, in a sense, been blindsided by October 1987. Do you think that caused him, then, difficulties throughout?

I mean, especially when he resigned and Chairman Breeden came in, was that something that Bush, Sr.'s team wanted? Or what was your perspective on that?

EF: I don't know that I had a perspective, or have to this day. Dave Ruder had—infuriated is too strong a word—but alienated the Bush White House. I didn't know it then, I didn't know what the relationship was between them, but they had been fairly nasty to him. The last appointment that was made while he was Chairman—I think it was the last—was the appointment of a person whom he really didn't know and literally wanted not to know. And he took it as a personal slap, and I think had I been he, I would have too. But that was what was going on between the Chairman's office and the White House at the time.

It was a thorny relationship, but I was not part of it. Dave was quoted at some point as saying, "Look, I don't care whom you pick, just don't pick Ed." (Laughter) But he didn't have to do that, because Richard Breeden was a longtime assistant to the new President, and was the guy who was credited with awakening every morning and saying, "How can I get FIRREA one step further down the road to passage in the Congress?" And that was very important to the President. So the appointment of Richard as Chairman of the SEC was kind of a –

WT: It was the selection they wanted.

EF: Yes. And Dave had overstayed his welcome; it was as easy as that. But he had different notions. He was and is much more an SEC traditionalist, and that's understandable.

WT: We're kind of running to the end of our time, but I want to make sure that if you have other things that you want to talk about. Of course I've written other things down that we could talk about, but it's probably more than we necessarily want to get to. We've alluded to the savings and loan crisis. I don't know if that's something that particularly exercises you. Or there's also your very long reply to the Bush Administration's memorandum, which is very interesting. I'd be interested to hear the background of that. But whatever you want to talk about is fine at this point of the interview.

EF: Richard Breeden and I were pretty much on the same track when he was appointed. We were never close as friends, but we diverged because he felt that, at least I thought he felt, that the power to be accorded to the SEC, the authority to be accorded to the SEC, was appropriate and should be expanded and expanded and expanded, and I didn't see it that way.

WT: What area was he most interested in expanding SEC's power in?

EF: Well, it was enforcement, and it was jurisdiction. That's a good lawyer's term for what I want to suggest, and that's relevant today, as far as that's concerned. I noticed in the Sunday paper –

WT: Yes, I saw it. "Victims Need More Muscle From SEC."

EF: Yes. Well, Ms. Morgenstern and her predecessor have long taken that view. You know, to turn the focus just a little bit, investor confidence, that's the phrase that you hear time and time again coming out of the SEC. Maybe it's because I'm an old man, but I feel, and did when I was there, that if the market goes up, investors will have confidence, and if the market goes down, no matter how clean the market is, you won't have confidence from investors. None of this has to do with the markets or what the market will do. The market will recognize new technologies and new management styles and new this, that, and the other thing and will react.

I quite understand that you can't allow institutions, without naming any particularly, to abuse the marketplace, and that is one of the primary functions of the regulators, whatever regulator it be, Treasury, whoever. But it's very hard for me to understand that any individual or group of individuals sitting in a government building in Washington can better understand the dynamics of the marketplace than people who are actually there and in it. I think John Shad was an excellent choice, and another John Shad would be very helpful.

WT: Not least because of his background as an executive?

EF: Yes, as an executive, and I think for the Chairman, yes. For the other Commissioners, I think the background of partnership is very important. I'll blow my own horn. I remember a time when I walked into that public meeting room with one of my colleagues and said to him, "You're very unhappy about this proposal, aren't you?" And he said

yes. I said, "But you can't vote against it because you know I'm going to do that, and there are only four of us at the time, so the Chairman will lose if you vote against it." And he said, "It's true." And I said, "Listen, this is not important to me. I will simply abstain, and then you'll be able to speak your own mind in your own way, plus there won't be any adverse consequences."

People should do that, but people don't do that. It's a different context in government, and I don't mean a quid pro quo by any means. What I mean is, there should be something of a partnership at that table so that people understand and respect the needs and desires of the others at the table. Like John Shad saying, "Ed feels differently, and we'll give him his chance to persuade you."

WT: A lot of the people who we've interviewed who are on the Commission talk about the Sunshine Act as something that really is inhibiting of that. You don't feel that way?

EF: No, I haven't felt that way. I know Roberta Karmel feels that way. The Commissioners' counsels speak to one another. And at the last public meeting I participated in I caused a bit of a ruckus, because Chairman Breeden had said, "We can't consider these proposals that come right from the table. They have to be on paper and distributed to the Commissioners so they can understand them," and so on and so forth. And I came to that public meeting with a stack of written-out proposals in very straightforward, simple language that could easily be read and understood and considered, and it had never been done before. And the meeting broke and people just walked down from the podium, and

Richard and his general counsel were standing in one place and the reporters were right there listening to their conversation, “What do we do about this troublemaker?”

(Laughter)

If you want to make things public, and there is a good reason for wanting to make things public, for getting sunshine into the process, then you can do so, and you can do so without losing the benefit of talking one-to-two or one-to three. You’ve just got to talk one-on-one or something like that. I think that’s an overblown issue. It was a curious thing to be “Honorable.” I call myself “formerly honorable.”

WT: (Laughter) This may or may not be a ridiculous question, but I know that Richard Breeden was a young guy when he was appointed as Chairman, and there are a lot of other young people on the Commission. Politics aside, do you think that affects the way the Commission operated, what they thought they could accomplish, what they should do? Or do you think that that wasn’t a factor?

EF: No, I think Joe Grundfest was thirty-six or something like that, but Mary Schapiro was thirty-three and I don’t think it applied in her case. I just don’t know. I was never that close to her. Youth and vitality are very important factors in the interaction of any small group of people. Experience is an equally important factor, which may imply age. I don’t know that it does, necessarily. I didn’t think of myself as old. How old was I, fifty-two or fifty-three, something like that. There have been very few really elderly

people who have been Commissioners. It's a very strange animal, this independent regulatory commission. It really is.

And it is, although it doesn't come up that much in this conversation, it really is run by the staff. It's a corporate pyramid that reports up to the Chairman, and then there are four outside directors and they make of their job what they can during the time that they're there. But it's neither fish nor fowl. I think the quasi-judicial function is a fascinating one, but it, too, can be abused. I mean, there have been circumstances in which simply the procedural rules have been manipulated to the advantage of one side or the other because somebody had a reason for doing so.

But the people who have occupied the positions, I may disagree with some of them on many issues, but they've been, for the most part, honestly convinced of what they believed. Take Commissioner Aguilar, he's really a public defender, a defender of the public. That was what Mr. Justice Douglas anticipated, I think. I don't know. We haven't come up with anything better. I mean, I don't know that the Department of Agriculture or the Department of Energy works better, the same as, or worse than these independent agencies. But they certainly have a peculiar place in the constitutional structure. (Laughter)

WT: That seems like a good summary if we would like to leave it there, or if there's anything else you want to talk about, about your time afterwards, we can speak about it briefly, but that's fine to leave it there if you like.

EF: That's fine.

WT: All right. Well, thank you very much. This has been a good conversation, and will be a good addition to the collections.

[End of Interview]