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Equal Employment In The Securities Industry:
Fact Or Fiction?

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Equal Employment In The Securities Industry:
Fact Or Fiction? 1/

Good morning, ladies and gentlemen. I am pleased to have the opportunity to address the SEC-Securities Industry Committee On Equal Employment Opportunity ("SEC-SIC on EEO"). Your committee plays a useful and necessary role, and is yet another example of the way in which the Commission and the industry work together to resolve significant problems. As you might expect, I wholeheartedly endorse the Committee's stated objective of promoting equal employment opportunities for women and minorities in the securities industry. I applaud the progress that has been made in this area. Nevertheless, by all accounts there is still much to be done.

In this bicentennial year of the Constitution, it is fitting to look back on the development of the concept of equal employment opportunity within our constitutional framework as a first step in gauging our progress. Moreover, it is frequently helpful to review where you started when trying to assess where you are going and how far you have come.

The Declaration of Independence stipulated as a self-evident truth that "all men are created equal," but the reality it envisioned was Orwellian in the sense that some were deemed to be created more equal than others. 2/ When the framers of our Constitution met in Philadelphia in 1787, they debated the issues and

1/ These remarks were prepared by Commissioner Peters with the assistance of Andrew Feldman, Counsel to the Commissioner.

2/ H. Abraham, FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES 348 (3d ed. 1977).

compromised to the extent necessary to achieve agreement on the fundamentals of our federal system. It is fair to say that assuring equal opportunity for women and non-Whites was not a priority for our founding fathers.

Practically speaking, the Constitution only provided White males with the full panoply of rights accorded citizens. Women, in effect, were accorded second class status, and Blacks were something less, approximately two-fifths less. As adopted, Article I, Section 2 of the Constitution explicitly countenanced the existence of slavery, providing that only "three-fifths of all other persons" were to be counted for purposes of representative apportionment and taxation. 3/

The concept of equal opportunity for all gradually evolved over the next 200 years. The Emancipation Proclamation signaled the intent of the federal government to abolish the institution of slavery. The Civil War was fought to attain that objective, and thereafter, the 13th, 14th, and 15th Amendments to the Constitution were ratified to cement these gains by providing federal protection for the civil rights of Blacks. The 13th Amendment abolished slavery, the 14th Amendment made non-Whites full citizens by guaranteeing them equal protection under the law, and the 15th Amendment ensured all citizens the right to vote. The Civil Rights Acts of 1866 and 1871 were designed to give force and effect to these amendments.

3/ Id. at 349.

The post-Civil War constitutional amendments and civil rights legislation in theory made discrimination unlawful. Nevertheless, women and non-Whites continued to be discriminated against. Our ancestors rapidly discovered that adoption of a law does not necessarily change attitudes or behavior patterns developed over generations and ingrained in a certain life style. The Civil Rights Acts of 1866 and 1871 offered limited means of redress for the first 100 years after their passage. Progress was hampered by the fact that the courts construed the state action requirement of the 14th and 15th Amendments in a manner to make the Civil Rights Acts inapplicable to private acts of discrimination. 4/ Furthermore, the courts tended even to uphold discriminatory state statutes. 5/

The Twentieth Century ushered in a new era in civil rights. Women were guaranteed the right to vote by the ratification of the 19th amendment in 1920, and thereby became full citizens in law as well as in name. In 1954, the watershed Supreme Court decision in Brown v. Board of Education 6/ focused attention on the issue of racial discrimination, and led to the passage, in 1957, of the first major piece of civil rights legislation since the Reconstruction. 7/ That was followed by the Civil Rights Act

4/ See B. Schlei & P. Grossman, EMPLOYMENT DISCRIMINATION LAW 669 (2d ed. 1983).

5/ See Abraham, supra note 2, at 356-362.

6/ 347 U.S. 483 (1954). See generally R. Kluger, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975).

7/ See Abraham, supra note 2, at 355, 387.

of 1964, which established the statutory framework under Title VII for our current body of employment discrimination law. Finally, in 1968, the Supreme Court dispensed with the state action requirement for causes of action under the Civil Rights Acts of 1866 and 1871. 8/

With the rights accorded to all men by the Declaration of Independence finally safeguarded for women and non-Whites after a 200 year delay, the question of how to remedy the ill-effects of past discrimination arose. Affirmative action programs developed in the 1960s as the most viable practical solution to the problem. A form of affirmative action had been tried once before -- shortly after the Emancipation Proclamation, the Freedmen's Bureau used federal funds to help Blacks obtain an education and find employment. While this early effort ended in the late 1870s, 9/ affirmative action is now widespread and is here to stay, at least for the foreseeable future. Personally, I would like to think that affirmative action programs will not be forever necessary. I sincerely hope that the efforts of groups like the SEC-SIC on EEO will succeed in eradicating employment discrimination long before we celebrate the tricentennial of our Constitution.

8/ See Jones v. Alfred Mayer & Co., 392 U.S. 409 (1968).

9/ Patterson, The Future Of Affirmative Action, Cal. Law., Feb. 1986, at 29, 29.

I view affirmative action as today's tool necessary to remedy yesterday's wrong and avoid tomorrow's problems. The fact is that the favor with which affirmative action is viewed varies from administration to administration. Therefore, its effectiveness as a tool to remedy discrimination is due largely to the general support of affirmative action by the Supreme Court. While that support has not been across-the-board, generally, the Court has upheld carefully tailored affirmative action plans designed to redress specific instances of past discrimination, even though the individuals who benefit from the resulting preferences did not suffer directly from that discrimination. The plans which have withstood challenge have provided preferences for hiring and promoting both non-Whites and women. 10/ In the current term, the Court has upheld promotional preferences for Black state troopers in Alabama 11/ and women transportation workers in Santa Clara County, California. 12/ In two recent decisions, however, the Court has drawn the line, and struck down protections for minorities against layoffs. 13/

10/ See id. at 29-31. See also Stewart, Affirmative Action Barely Upheld, A.B.A. J., Dec. 1, 1986, at 44, 44-46, 106.

11/ See United States v. Paradise, 55 U.S.L.W. 4211 (Feb. 25, 1987).

12/ See Johnson v. Transp. Agency, Santa Clara County, Cal., 55 U.S.L.W. 4379 (Mar. 25, 1987).

13/ See Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984); Wigant v. Jackson Board of Education, 106 S.Ct. 1842 (1986).

Against this background, the question of discriminatory employment practices in the securities industry was raised with the SEC in 1972. Although the SEC decided not to promulgate rules requiring securities firms and markets to adopt and file affirmative action plans, the SEC advised the industry to comply voluntarily with federal equal employment statutes and to eliminate discriminatory practices. 14/ As a step toward achieving that goal, the SEC-SIC on EEO was established in 1976. 15/

After a decade of experience, this may be an opportune time to evaluate the priorities of the SEC-SIC on EEO and assess likely avenues for future action. But first, we should try to determine the progress made since this organization was founded. Each of you probably has a much better sense of this than I. You no doubt have specific, nonpublic statistics on the number of women and non-Whites employed by your respective firms or markets and the capacities in which they are employed. Using the limited amount of publicly available information on this subject, let me attempt to give you my assessment. I will be curious to hear the extent to which my numbers correspond to with your own.

14/ See Securities Exchange Act Release No. 10597 (Jan. 14, 1974), 39 FR 2809.

15/ See Securities Industry Association, Human Resources Management Report, Nov./Dec. 1977, at 3.

The Equal Employment Opportunity Commission ("EEOC") compiles statistics on employment in the securities industry. These statistics show what percentage of jobs in several broadly defined categories are held by men, women, or members of a particular racial or ethnic group. I have examined the percentages derived from nationwide samples of broker-dealers for the years 1980 and 1985. 16/ As you know, the securities industry is an industry of professionals. Therefore, I have focused on white collar employment figures, as opposed to combined white and blue collar employment, because more than 95.0% of the jobs in the securities industry fall within that category. The EEOC statistics indicate that while Whites, Whites males in particular, continue to dominate the securities industry, the situation of women and non-Whites in the industry improved between 1980 and 1985.

Over 10.0% more women were employed in white collar securities industry jobs in 1985 than in 1980; the percentage of all such jobs they held increased from 39.6% to 45.0%. 17/ The increases were particularly dramatic in several employment categories. Women registered a 70.0% gain in the Officials/Managers category (from 13.0% to 22.0% of all such jobs), and a 40.0% gain in the Professionals category (from 25.2% to 35.7%). These

16/ See EEOC Employment Analysis Report Program, EEO-1 REPORT SUMMARY OF NATIONWIDE INDUSTRIES, SIC-621 SECURITY BROKERS AND DEALERS, at 321 (1980) & 306 (1985).

17/ I should point out here that I realize the figures for women are slightly skewed for comparative purposes because they include non-Whites.

categories together account for approximately one-quarter of total brokerage firm positions. Women also registered nearly a 40.0% gain in the Sales category (from 11.8% to 15.7%), which provides another quarter of the jobs. Women marginally increased their representation in the Office/Clerical category (from 65.1% to 67.1%), which comprises roughly half the jobs in the industry, and is the only one in which women have been and continue to be the majority.

Total non-White employment in securities industry white collar positions similarly rose by 10.0% from 1980 to 1985. The minority share of all such jobs increased from 12.2% to 13.5% during that period. Minority representation increased by over 40.0% in the Officials/Managers category (from 5.0% to 7.2%), by 20.0% in the Sales category (from 3.0% to 3.6%), by about 12% in the Professionals category (from 5.6% to 6.3%), and by nearly 5.0% in the Office/Clerical category (from 20.1% to 21.5%). As was true for women, non-Whites are most heavily represented in the Office/clerical category.

To complete the picture, this securities industry specific information should be placed in the broader context of employment nationwide. In 1980 and 1985 respectively, women constituted 53.2% and 55.1% of the total white collar work force, and 42.4% and 44.1% of the overall work force. In the same two years respectively, non-Whites comprised 8.9% and 10.1% of white collar workers, and 11.4% and 12.5% of all workers. 18/

18/ See Bureau of Labor Statistics, CURRENT POPULATION SURVEY (1980 & 1985).

Based on these numbers, there is no question but that equal employment is on the upswing in the securities industry. The percentage of women employed by broker-dealers between 1980 and 1985 increased beyond that of women in the overall work force, although it does lag behind the percentage of women in all white collar jobs. The percentage of non-Whites in securities firms continued to exceed that for white collar jobs and the economy as a whole.

The picture is quite different, however, when the spotlight is placed on specific categories. Women still have a long way to go in order to be proportionately represented in the Officials/Managers and Sales categories, and a somewhat less, but still significant, gap to make up in the Professionals category. Minorities face similar, but more severe, problems in all these categories.

Numbers, particularly those that are as general as these, only tell part of the story. To see how severe the problems truly are, we need to understand the extent to which women and non-Whites have the same chance as others to rise to the top. The Commission's recent enforcement efforts in the area of insider trading have given us a rather perverse example of limited access. A recent news article, written by a woman, commented on the absence of females in the ranks of those highly placed securities professionals being investigated or prosecuted

for insider trading. 19/ After reading the first two sentences, I brightened at the thought that perhaps the author would conclude women were less venal, more ethical than men. By the end of the second paragraph, I was sadly bemused to read her conclusion that women were not among the big time law breakers because they are excluded from the ranks of those privy to significant inside information. This is one women's perspective of the question of whether equal employment opportunity in the industry is fact or fiction.

The real key to equal employment opportunity in the securities industry is providing women and minorities with equal access to those jobs which lead to positions of power in the long run. It is no secret that those who make their mark in a major profit center of a firm are the most likely to advance the farthest and the fastest. For women and non-Whites to shine, they must have the opportunity to work in those areas. 20/

I do not have any hard information on the extent to which this is occurring, but perhaps you do. I do know, however, that in the last ten years women have been coming into formerly male dominated areas, such as mergers and acquisitions and sales and

19/ See L. Evans & H. Evans, Why Women Are Outsiders to Insider Trading, N.Y. Times, Feb. 21, 1987, at 27.

20/ See Fraker, Why Women Aren't Getting To The Top, Fortune, Apr. 16, 1984, at 40, 40-41; Jones, Black Managers: The Dream Deferred, Harv. Bus. Rev., May-June 1986, at 84, 89.

trading, as associates and are moving up the ladder. While there are only a handful of women managing directors at the major Wall Street houses, about one-third of the younger professionals are now females. 21/ I have no comparable statistics for non-Whites in general, and Blacks in particular. From personal observations, I have to conclude that non-Whites are most remarkable by their absence from the ranks of professionals and managers, notwithstanding the statistical increase in numbers. Improving entry-level and mid-level numbers should not be the ultimate goal. Creating opportunity to reach the very top rungs of the industry's corporate structure should be your target.

The SEC-SIC on EEO thus must redouble its efforts to make equal employment opportunity a fact in the securities industry. Let me suggest several courses of action.

Affirmative action continues to be a viable tool to correct racial imbalances. However, more is needed to make equal opportunity a fact in the securities industry. Affirmative action will not work over the long run without a change in attitude. Only a change in attitude eliminates the kind of bias and prejudice that impede otherwise qualified women and minorities from advancing. The kind of attitudes to which I refer were reflected in the results of a 1982 survey of Ivy League graduates of the class of 1957, many of whom no doubt have been promoted to, or

21/ See Castro, More And More, She's The Boss: Women Executives Are On The Move And Taking Charge, Time, Dec. 2, 1985, at 64, 65. See also Taking A Shot At Another Male Bastion: Investment Banking, Bus. Wk., Aug. 27, 1984, at 28, 28.

soon will be promoted to, senior management. When most of these people thought of Blacks, the word "dumb" came to mind. Only 36% of the Princeton class, 47% at Yale, and 55% at Harvard agreed with the statement, "Blacks are as intelligent as Whites." 22/ These attitudes, and others, are discussed in an excellent article published in the Harvard Business Review on the problems that Black managers face in trying to move up the corporate ladder. The article appropriately is entitled, "Black Managers: The Dream Deferred." 23/ I commend it to you, and suggest that it also would be a valuable piece for your Chief Executive Officers to read.

The first step towards equal employment in the securities industry is admitting that the barriers created by these attitudes exist, and then overcoming them. Women and non-Whites know they exist. Once the powers that be begin to deal with race, color, and sex with candor, they may be able to manage behavior, if not change attitudes.

Affirmative action will not work over the long term to change even behavior patterns, let alone attitudes, without a true commitment from senior management. Personnel and employee relations officers are vital links in the chain, and their persistent efforts are necessary in order to redress the aforementioned

22/ See Jones, supra note 21, at 88.

23/ See id.

inequalities. For women and non-Whites to reach the executive level, however, the CEO must have a commitment to the affirmative action concept. Your presence here evinces a certain degree of commitment on the part of your respective firms and securities markets, but that is not enough if it goes no further. For example, a 1983 survey of 785 business opinion leaders ranked affirmative action for non-Whites and women as twenty-third out of 25 human resource priorities. 24/ That is not a reassuring statistic. It is necessary for your CEO to proclaim frequently, and insistently, the need for equal employment in the industry at all levels, but even that is not enough.

[M]ore than sincerity is needed from the board of directors down through the management structure: commitment, example, and follow-through. Unless the CEO influences the corporate culture to counter the buddy system by compelling all managers to focus on competence and performance rather than comfort and fit, the in-place majority will merely perpetuate itself and the culture will continue to default to traditional racial etiquette and attitudes. 25/

Finally, supervisors should not treat women and minorities differently from their other employees. They too need feedback, whether it is positive or negative. Without constructive criticism (which includes helpful praise), women and non-Whites will be deprived of the opportunity to improve their job performances, and climb the ladder of success. Opportunity includes the chance to fail as well as succeed.

24/ Id. at 84.

25/ Id. at 93.

In conclusion, I would emphasize that a commitment to affirmative action does not mean a rejection of quality or a lowering of standards. It does mean providing an opportunity to one to whom you might not be ordinarily inclined to offer one. The cream will rise to the top, in the absence of impediment, even if it is chocolate or mocha-flavored.

Where do you go from here? The choice is yours. A suggested direction is well-articulated in the Harvard Business Review Article to which I have referred you.

The answer lies in our vision for America: whether we want a land of opportunity for all Americans based on individual dignity and respect. . . . Whether we want a nation where competence and character will be the criteria for leadership, or whether color will ordain that Americans stay in a place determined in the minds and by the values of others. . . . 26/