“FINANCIAL EXPERT”: A SUBTLE BLOW TO THE POOL AND CURRENT PIPELINE OF WOMEN ON CORPORATE BOARDS

SELETHA R. BUTLER*

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* Assistant Professor, Georgia Institute of Technology. J.D., Harvard Law School; M.B.A., Georgia Institute of Technology. The author gratefully acknowledges Catalyst, Inc.; Georgia Institute of Technology; National Center for Education Statistics, U.S. Department of Education; and National Science Foundation for assisting with data collection or providing access to certain of the data contained in this Article. The author further thanks attendees at the Wisconsin Journal of Law, Gender & Society’s 2012 Symposium on February 10, 2012 and participants of the Academy of Legal Studies in Business 87th Annual Conference in Kansas City, Missouri in August 2012 for helpful peer reviews and related comments. The views and recommendations expressed in this Article are those of the author and do not reflect those of any affiliated institution or person, and the author is solely responsible for any errors in the manuscript. © 2013, Seletha R. Butler.
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ABSTRACT

Governmental laws and regulations play critical roles and have impacting influences and consequences on corporations and their management and stakeholders as well as the public at large. Sometimes legislative initiatives and administrative actions have detrimental effects on groups of persons, which impacts may or may not be the intended consequences of the governmental protectionism. In the wake of the corporate scandals of the early 2000s, including Enron, WorldCom and Tyco International (the “Enron-type Scandals”), the President of the United States of America signed into law a bi-partisan initiative called the Sarbanes-Oxley Act of 2002 (“SOX”) in an attempt to restore investor confidence in the U.S. securities market following devastating corporate scandals that rocked the investment community and depleted worker savings. Section 407 is part of SOX (the “Expert Law”), which, in short, required the Securities and Exchange Commission (the “SEC”) to promulgate rules obligating certain security issuers to disclose if the applicable organization’s audit committee has at least one person who is a financial expert (as the term would be defined specifically by the SEC), and if no such person, the reason of such absence. The SEC met its regulatory obligation with Section 229.407(d)(5) of the Code of Federal Regulations (Item 407) (the “Expert Regulation”). However, the title and definition for the audit committee expert contain a gender bias and have negative inadvertent consequences against women on public company boards of directors. In this Article, “Financial Expert”: A Subtle Blow to the Pool and Current Pipeline of Women on Corporate Boards (this “Article”), the author addresses this bias and its negative inadvertent consequences, and provides proposals that may curtail the such bias and consequences, while achieving the goal of investor and public protection.
I. INTRODUCTION

There is only one difference between a bad economist and a good one: the bad economist confines himself to the visible effect; the good economist takes into account both the effect that can be seen and those effects that must be foreseen.\(^1\)

The legal and regulatory regime in the United States, like the rest of the world, is often reactionary. Legal and regulatory reform often occurs following a devastating event to protect those harmed or potentially harmed. Much debated is the notion that the majority sits back and relies on its elected officials and accompanying regulatory infrastructure to address and handle policymaking with no or minimum input from the people or forced accountability by the policymakers, who in many instances may not be completely, if at all, in touch with the true realities affecting their particular governed structure.

Laws and regulations play critical roles and have significant influences on corporations, their management and stakeholders, and the public at large. These legislative initiatives and administrative actions sometimes contain biases against groups of persons, resulting in negative inadvertent consequences of the governmental protectionism.

In response to corporate scandals of the early 2000s, including Enron, WorldCom and Tyco International (the “Enron-type Scandals”), and in order to restore investor confidence in the U.S. securities market, the U.S. Congress, in a bi-partisan initiative, enacted the Sarbanes-Oxley Act of 2002 (“SOX”).\(^2\) Section 407 of SOX (the “Expert Law”) instructs the Securities and Exchange Commission (the “SEC”) to issue rules obligating certain security issuers to disclose if the applicable organization’s audit committee has at least one person who is a financial expert (as defined by the SEC), and in the absence of such person, the reason for the absence. After months of work and calls for public comments on its regulatory charge to comply with Section 407 of SOX, the SEC finalized Section 229.407(d)(5) of the Code of Federal Regulations (the “Expert Regulation”). In the regulation, the SEC titled the name of the required expert for the public company audit committee the “audit committee financial expert”\(^3\) and defined the qualifications for said “audit committee financial expert.”

This Article contends that the SEC, by using the term “audit committee financial expert,” diluted the focus on accounting, auditing, and internal controls experience on the audit committee of public corporations, and turned the page back on the potential for a greater number of women serving on the audit

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1. Frédéric Bastiat (1801-850).
2. U.S. Senator Paul Sarbanes, a Democrat from Maryland, and U.S. Representative Michael G. Oxley, a Republican from Ohio, sponsored SOX.
3. Emphasis is added to the word “financial” because this Article focuses on the impact of the term on the advancement opportunities, or more specifically potential setback, of women on the boards of public companies.
committee and in such expert roles (and ultimately public company boards in general). This article addresses the gender bias of the limited title and expanded qualifications for the expert. Both the title and qualifications highlight finance, which is a predominantly male dominated field. The gender bias of the Expert Regulation results from the disparity between the progress of women in the accounting and audit fields versus in the finance arena. This Article argues that these Expert Regulation changes have a negative impact on the pool and current pipeline of women corporate board members, because the larger concentration of women professionals and entrants is in accounting and auditing as compared to finance. This Article also provides proposals for correcting the gender bias of the Expert Regulation and its negative inadvertent consequences, while achieving the goal of investor protection and public interest.

With respect to capital markets legislation, the lawmaking process sometimes overlooks gender bias against women. This oversight, whether intentional or unintentional, in many instances negatively impacts the advancement of women. This Article is particularly relevant, because it critically analyzes financial and business related legislation and regulation and their impact on women’s advancement in corporate America.

Part II of this Article provides background on the statutory and regulatory framework and discusses the Expert Law and Expert Regulation.4 In Part III, this Article examines the careers of women in accounting and finance in light of the title and definition of the “audit committee financial expert” and the intent of the Expert Law and Expert Regulation. In Parts IV and V, this Article discusses the state of women on public company boards of directors and the Expert Regulation’s impact on female public company directors. Finally, Part VI provides some proposals for correcting the gender bias in the Expert Regulation.

II. GOVERNMENTAL PROTECTIONISM THROUGH LAWS AND REGULATIONS

In order to understand, analyze, critique, and appreciate laws and regulations, one must understand the history of legislation and the legislative and regulatory process.

As the primary policymaking body at the federal level, the U.S. Congress mandates administrative agencies to implement legislation.5 Thus, the majority of U.S. federal regulations, including the Expert Regulation, are supplements to statutes under express instruction in the federal legislation for regulatory

4. References to public company means “an issuer (as defined in section 78c of [15 U.S.C. § 7201]), the securities of which are registered under section 781 of [15 U.S.C. § 7201], or that is required to file reports under section 78o(d) of [15 U.S.C. § 7201], or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and that it has not withdrawn.” 15 U.S.C. 7201(a)(7). Alternatively, in this Article, public companies may be referred to officially as Reporting Companies.

rulemaking and enforcement. Since federal administrative regulations serve to effectuate Congressional intent, this power is limited and unauthorized regulation may be found to be void. Other important U.S. federal regulations result from the exercise of the executive power.

In the 1930s, with the Securities Act of 1933 (the “33 Act”) and the Securities Exchange Act of 1934 (the “34 Act”), the federal government enacted protective laws to regulate the U.S. capital markets because the securities markets were inefficient and ineffective on two levels—(1) investors were not protected from stock price manipulation and fraud and (2) corporate transparency mechanisms were inadequate. Seeking to protect investors, Congress, through the 33 and 34 Acts, established a two-prong system—(a) disclosure and (b) regulation of the securities markets and industry. Congress gave the SEC the responsibility to establish and implement the corresponding regulation. As summarized by Professor Werner, “[t]he basic federal securities laws establish two types of investor protection. . . . [t]hey seek to provide investors with the information needed to trade intelligently in markets free of fraud and other abuse . . . [and] [t]hey attempt to ensure the effective and responsible operation both of those markets and of the securities industry.” The 33 Act required the disclosure of specific information by companies offering securities in order to inform potential investors when making investment decisions and prohibit fraudulent activities in and related to securities offerings (i.e. a registration based disclosure mechanism). The 34 Act focused on the disclosure by securities companies listed on the securities exchanges. Since the 1930s, states have also actively developed state

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7. Id. at 195. Fairlie stated that “[a]n executive regulation not authorized may be declared void; and a regulation interpreting a statutory provision may be overruled as erroneous. The power conferred to make regulations for carrying a statute into effect must be exercised within the powers authorized, that is it must be confined to provisions for regulating the mode of proceeding to carry into effect the law as it has been enacted; and it cannot be extended to amending or adding to the requirements of the statutes nor to subverting the statute.” Id. Appendix A contains a summary of the SEC rulemaking process.
8. Id. at 183.
9. Roberta Romano, Empowering Investors: A Market Approach to Securities Regulation, 107 Yale L.J. 2359, 2367 (1998) (discussing that a market-oriented approach of competitive federalism that expands (and not reduces) states’ rights in securities regulation is a better solution to frivolous litigation and forum shopping than the current legislative approach of federal preemption). See also Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law, 277 (1991) (explaining the antifraud rationale); Joel Seligman, The Historical Need for a Mandatory Corporate Disclosure System, 9 J. Corp. L. 1, 9 (1983) (discussing the optimal disclosure level rationale contending that federal antifraud laws were necessary because state securities laws could not address non-state securities issuers).
10. Walter Werner, Fifty Years of Federal Securities Regulation: Symposium on Contemporary Problems in Securities Regulation, 70 Va. L. Rev. 755, 755 (1984) (examining the activities of the regulatory functions under the SEC and the SEC’s willingness and ability to directly handle the Congressional authority provided to the SEC to address the regulatory side as well as the disclosure system entrusted to the SEC).
securities divisions for addressing interstate fraud.11

A. AN OVERVIEW: LAWS, REGULATIONS, AND THE SEC

The legal system in the U.S. consists of four sources: the Constitution, statutes, administrative regulations, and judge-made (or case) law. Federal Congressional actions—legislation—are mere statements of policy, with no content regarding the application of administering the law.12 The legislative branch allocates this administrative feature to the appropriate administrative agency, which the legislature specifies in the legislation. According to Professor Rubin, “policy formation has displaced the diffused and incremental operation of the common law as our primary means of social regulation, and agencies have displaced common law courts as the primary means by which that regulation is effectuated.”13 With respect to SOX, the SEC was the administrative agency tasked with implementation.

The SEC is a bi-partisan creature established to ensure that the U.S. equity markets are transparent, fair, and protective. The origin of the SEC traces to what is often cited as the most devastating stock market collapse in U.S. history (prior to the most recent financial crisis of the 2000s)—the Crash of 1929, which led to the Great Depression. According to reports of Amar Bhide, during the period September 1929 to July 1932, New York Stock Exchange equities lost 83% of their total value, with one-half of the $50 billion in new securities issued in the 1920s deemed worthless.14 In connection with Congress’ response to public outcry and demand to “fix” the U.S. capital markets, Congress established the SEC as the administrative agency charged with oversight of the 33 Act, the 34 Act and subsequent legislative initiatives to “protect” investors, such as the Investment Company Act of 1940.

The mission of the SEC is multi-pronged. First, the SEC exists to protect investors.15 A second charge of the SEC is to sustain fair, orderly, and efficient capital markets.16 A final goal of the SEC is to facilitate capital formation.17 The SEC describes its function as a platform for ensuring an “active, efficient, and transparent capital market” by working with market participants,18 and many of its regulations are a mechanism for influencing the conduct of corporate

12. See Rubin, supra note 5, at 373.
13. Id. at 369
16. Id.
17. Id.
18. Id.
management and boards. A number of the provisions in the 34 Act and SOX are specifically substantive corporate governance mandates.

B. THE EXPERT LAW AND EXPERT REGULATION

Pursuant to Section 407 of SOX, codified in 15 U.S.C. § 7265, Congress instructed the SEC to adopt the Expert Regulation. The provision provides in part,

“[t]he Commission shall issue rules, as necessary or appropriate in the public interest and consistent with the protection of investors, to require each issuer, . . . to disclose whether or not, and if not, the reasons therefor, the audit committee of that issuer is comprised of at least 1 member who is a financial expert, as such term is defined by the Commission. . . . In defining the term “financial expert” for purposes of subsection (a), the Commission shall consider whether a person has, through education and experience as a public accountant or auditor or a principal financial officer, comptroller, or principal accounting officer of an issuer, or from a position involving the performance of similar functions—

19. Professor Renee M. Jones, in her arguments for “dynamic federalism,” which emphasizes the benefits of state and federal regulators working together, points out a dichotomy of federal securities law focusing on disclosure corporate governance and state corporate law addressing conduct corporate governance. Professor Jones further argues that it is “inexact and incomplete” to label all federal securities laws as disclosure regulations, but she does admit that “disclosure is the primary method relied upon under federal law to regulate the securities markets.” See generally Renee M. Jones, Does Federalism Matter? Its Perplexing Role in the Corporate Governance Debate, 41 WAKE FOREST L. REV. 879 (2006). See also Alan R. Palmiter, The CTS Gambit: Stanching the Federalization of Corporate Law, 69 WASH. U. L. REV. 445 (1991) (discussing that corporate law, meaning the relationship between managers and shareholders, is guided at the state level, but no support exists that the intent of federal securities laws was only for providing corporate disclosure requirements); Roberta S. Karmel, Realizing the Dream of William O. Douglas—The Securities and Exchange Commission Takes Charge of Corporate Governance, 30 DEL. J. CORP. L. 79 (2005). Four categories of required disclosure under the federal securities laws exist: (1) initial disclosure required by the 33 Act when an issuer issues new securities to the public; (2) the periodic reporting on the applicable forms required by the 34 Act for securities registration and annual and quarterly reporting; (3) annual proxy filings for the election of board members and other shareholder voting at the annual shareholders’ meeting; and (4) disclosure of extraordinary corporate events, including mergers, acquisitions, and tender offers. See Cynthia A. Williams, The Securities and Exchange Commission and Corporate Social Transparency, 112 HARV. L. REV. 1197, 1207 (1999) (arguing that the SEC should (and can through its power to promote the public interest and protect investors) require expanded social disclosure by public reporting companies, the social responsibility reporting features of which should include the company’s product offerings, countries of operation, supplier standards, legal and compliance structure and activities, political and charitable donations, and the domestic and international labor and environmental activities of the public reporting company; establishing a proposed disclosure structure for the SEC to promote great corporate social transparency similar to existing financial transparency under the SEC rules; laying out a multi-staged disclosure program, in an effort to place the U.S. as the leader in establishing socially transparent capital markets in line “with the American tradition of holding people in power accountable to the people from whom those powers are derived—. . . the investors in America’s public companies”). 20. See Romano, infra note 25, at 1540.
(1) an understanding of generally accepted accounting principles and financial statements;
(2) experience in—
   (A) the preparation or auditing of financial statements of generally comparable issuers; and
   (B) the application of such principles in connection with the accounting for estimates, accruals, and reserves;
(3) the experience with internal accounting controls; and
(4) an understanding of audit committee functions.21

On January 23, 2003, the SEC adopted rules pursuant to Section 407 of SOX requiring Reporting Companies22 to disclose whether they have at least one person on its audit committee who constitutes an “audit committee financial expert”23 in their Form 10-K annual filing or annual proxy statement. If the

22. See supra note 4.
23. Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 33-8177, Exchange Act Release No. 34-47235 (March 3, 2003). The listing requirements under the NYSE and the NASDAQ regarding the expert on the audit committee are not uniform with each other or the Expert Regulation. Under the NYSE listing requirements, NYSE listed companies’ audit committee must have no less than three members, with all audit committee members being independent as provided for in Section 303A.02 of the NYSE Listed Company Manual—a handbook of policies, practices, and procedures for NYSE listed companies. In the commentary and disclosure portions of Section 303A.07 of the NYSE Listed Company Manual, the financial literacy of the audit committee members is addressed, which provision provides in part that:

[e]ach member of the audit committee must be financially literate, as such qualification is interpreted by the listed company’s board in its business judgment, or must become financially literate within a reasonable period of time after his or her appointment to the audit committee. In addition, at least one member of the audit committee must have accounting or related financial management expertise, as the listed company’s board interprets such qualification in its business judgment. While the [NYSE] does not require that a listed company’s audit committee include a person who satisfies the definition of audit committee financial expert set out in Item 407(d)(5)(ii) of Regulation S-K, a board may presume that such a person has accounting or related financial management expertise. . . . If an audit committee member simultaneously serves on the audit committees of more than three public companies, the board must determine that such simultaneous service would not impair the ability of such member to effectively serve on the listed company’s audit committee and must disclose such determination either on or through the listed company’s website or in its annual proxy statement or, if the listed company does not file an annual proxy statement, in its annual report on Form 10-K filed with the SEC. If this disclosure is made on or through the listed company’s website, the listed company must disclose that fact in its annual proxy statement or annual report, as applicable, and provide the website address.

N.Y. Stock Exch., Listed Company Manual, §§ 303A.01, 303A.02, 303A.06, 303A.07, available at http://nysemanual.nyse.com/LCMTools/PlatformViewer.asp?selectednode=chp%5F1%5F4%5F3&manual=%2Flnm%2FSections%2Flnm%2Dsections%2F (last visited January 17, 2012). NASDAQ listed companies must have at least three members on the audit committee that are independent, and at least one member of the audit committee must have “past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background which results in the individual’s financial sophistication, including being or having been a chief executive officer, chief financial officer or other senior officer with financial oversight responsibili-
Reporting Company meets such criteria, it must name such expert and whether or not the expert is independent of the Reporting Company’s management (as defined by the applicable stock exchange listing company standards). However, if the Reporting Company fails to have such expert, it must disclose that fact and explain why the Reporting Company does not have an “audit committee financial expert.” In its explanation, the Reporting Company can explain what aspects of the expert definition various members of the audit committee possess.

With some exceptions, a Reporting Company is required to file the Expert Regulation disclosure in its annual report on Form 10-K, 10-KSB, 20-F or 40-F, as applicable, or pursuant to the option to incorporate by reference to the annual proxy statement, for each fiscal year commencing on July 15, 2003. Compliance by small business Reporting Companies commenced on December 15, 2003.

The board of directors of the Reporting Company has the authority to determine whether there is a “audit committee financial expert” meeting the Expert Regulation and who such individual is (although there can be multiple persons). In making the determination, the board of directors is protected by the business judgment rule. “Under the business judgment rule, courts do not delve into the content of evaluations the board makes in coming to business decisions. Rather, the courts defer to directors, expecting them to make business decisions after informed consideration.” The SEC, however, noted that in determining the “audit committee financial expert” the board of directors must name a person or persons that is of the highest standard of personal and professional integrity, and

24. Id.
25. Supra note 21. A Reporting Company does not meet the disclosure requirement by stating that it fails to make the determination and designation of the “audit committee financial expert” or by listing the qualifications of the audit committee members. See also, supra note 23; Roberta Romano, The Sarbanes-Oxley Act and the Making of Quack Corporate Governance, 114 YALE L.J. 1521, 1530 (2005) (“evaluating SOX’s substantive governance provisions and the political dynamics that produced them from the perspective of the substantial body of empirical accounting and finance literature related to those provisions” and whether “the SOX initiatives will improve corporate governance and performance”). The Expert Law and its accompanying regulation, the Expert Regulation, are disclosure provisions, which are in line with the traditional notions of the SEC implementing disclosure regulations.
27. See id.
28. Seletha R. Butler, All on Board! Strategies for Constructing Diverse Boards of Directors, 7 VA. L. & BUS. REV. 68 (examining the state of diversity of public company boards of directors and contends that board diversity is necessary for U.S. public companies to remain competitive in the borderless global marketplace, advocates for “true” board diversity, and provides practical solutions for constructing diverse boards of directors and creating a future pipeline of diverse board candidates).
thus, the board of directors should look at any disciplinary actions to which the candidate is or was a subject.

Congress’ purpose in enacting the Expert Law, in part, was to provide greater transparency by giving investors more information to evaluate the experience and knowledge of the applicable Reporting Company’s audit committee. Also, some evidence exists that the requirement under the Expert Law and Expert Regulation for an audit committee to have at least one audit committee expert results in improved performance. For example, at least one study has found that less earnings management, fewer restatements, a lower cost of debt, and a significant positive stock price result from the addition of an “audit committee financial expert” to the audit committee.

The rules also provide a safe harbor to protect the named “audit committee financial expert.” This safe harbor is an attempt to eliminate the fear that qualified audit committee expert candidates may be subject to increased exposure beyond the legal liability of the general board member. The safe harbor provision provides that “an audit committee financial expert will not be deemed an expert for any purposes, including without limitation, for section 11 of the 33 Act (15 U.S.C. 77(k)), as a result of being designated or identified as an audit committee financial expert . . . . The designation or identification of a person as an audit committee financial expert . . . does not impose on such person any duties, obligations or liability that are greater than the duties, obligations and liability imposed on such persons as a member of the audit committee and board of directors in the absence of such designation or identification.”


30. Joseph V. Carcello, et al., Audit Committee Financial Experts: A Closer Examination Using Firm Designations, 20 ACCOUNTING HORIZONS 351, 351-352 (2006) (for the first year period after the effectiveness of the Expert Regulation, examining the disclosures regarding the “audit committee financial experts,” determining, among other discoveries, that (a) most companies subject to the Expert Regulation disclosure make the disclosure but limited content disclosure exists causing minimum transparency on the qualifications and characteristics of the named “audit committee financial expert;” (b) “although compliance with the SEC’s financial expert disclosure rule is high (only 2 percent of companies [in the sample] were not in compliance), the quality of the disclosures is often lacking (only 5 percent provide a significant discussion concerning the financial expert)’’); and (c) some companies use more conservative or liberal interpretations of the Expert Regulation for different possible reasons, including as not to subject an audit committee member to more litigation risk.

31. Corporate Governance, 17 CFR § 229.407(d)(5(iv)). However, the practical reality is that the expert for the audit committee likely will experience public scrutiny and be in the public eye when corporate misconduct in general or within that particular company specifically occurs or questions around such activity exist.
C. THE SARBANES-OXLEY ACT OF 2002 AND THE AUDIT COMMITTEE

SOX was enacted with the goal of shielding investors from the “bad” acts of insiders (management and the board) by helping investors make more informed business decisions through additional disclosure. Furthermore, SOX crossed into historically state law territory when it included regulatory action on board composition and structure. SOX required a number of reforms to increase corporate responsibility, improve transparency with greater disclosures, and curtail corporate and accounting fraud. The changes to the audit committee and its functions exemplify attempts to provide such SOX reforms. In short, SOX defines the audit committee as a committee established by the board of directors with the function of managing the accounting and financial reporting processes of an issuer and the audits of the issuer’s financial statements. In the case where no audit committee exists, the full board of directors handles the responsibilities that an audit committee would otherwise perform.

1. A Snapshot of SOX

Called by some politicians and regulators as the U.S.’s most important legislation affecting financial markets since the 33 and 34 Acts, SOX has changed the landscape of federal securities legislation by introducing a series of corporate governance provisions. Prior to SOX, much of the federal securities rules and regulations focused on disclosure requirements, with minimum corporate regulatory actions, and the individual states were primarily responsible for the corporate governance.

At the basic level, Congress intended SOX to “fix auditing of U.S. public companies, which is consistent with the official name of the law: the Public Company Accounting Reform and Investor Protection Act of 2002,” especially in light of substantial arguments that auditing of public companies was deficient.
SOX contains provisions designed to make a Reporting Company’s management responsible for financial reporting, provide transparency to investors, and increase the standards of internal controls and corporate auditing. \(^{38}\) Table 1 lists some of the mandates imposed by SOX. \(^{39}\)

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2. History, Purpose, and Function of the Audit Committee—Pre-SOX and Post-SOX

The concept and establishment of the audit committee dates back to the 1970s when, at the insistence of the SEC, the New York Stock Exchange (“NYSE”) intended beneficiaries of its work are ‘the board of directors, management, employees, investors, lenders, customers, and regulators,’ thereby signaling that it did not intend to make shareholder value the sole measure for accounting’s contributions”. \(\text{Id}\) at 1830.

\(^{38}\) Susan Perry Williams, \textit{Meet the Experts}, \textit{ACCOUNTING HORIZONS} 255, 255 (2005) (examining information in Reporting Companies’ proxy statements after March 2003 but during the first year of the Expert Regulation’s implementation, focuses on the Expert Regulation and concludes that, (a) contrary to a number of critiques of the Expert Regulation, the pool of qualified financial experts for Reporting Companies is sufficient; (b) even with the option of not disclosing an “audit committee financial expert” with an explanation of such failure to designate, Reporting Companies typically designate an “audit committee financial expert”; (c) the safe harbor provision reduced Reporting Companies’ fear of increased liability on the designated “audit committee financial expert”; and (d) by looking at the characteristics of the “audit committee financial experts” for the examined Reporting Companies, the effectiveness of the Expert Regulation is evaluated).

\(^{39}\) Coates, \textit{supra} note 37, at 97.
established the listing requirement that all U.S. companies under its regulatory authority must have an audit committee consisting of all independent directors.\textsuperscript{40} Under SOX, the audit committee is defined as “[a] committee (or equivalent body) established by and amongst the board of directors of an issuer for the purpose of overseeing the accounting and financial reporting processes of the issuer and audits of the financial statements of the issuer.”\textsuperscript{41} A practical function of the audit committee is to assist in establishing the “tone at the top” regarding the need to have high ethics, integrity, and accuracy in financial reporting standards for the public company.\textsuperscript{42}

Committees such as the audit committee are important for the effective functioning of the board of directors, because, if properly utilized, the audit committee allows for the effective utilization of board talent. When the board committees consist of board members with the appropriate expertise, committees serve as the platform for getting the “legwork” of corporate governance handled without spending hours engaging the full board on specialty issues.\textsuperscript{43} “These subgroups of directors are critical structures for the conduct of a board’s work since each is chartered with specific authorization, strategic, and oversight duties contributing to the board’s total corporate governance task.”\textsuperscript{44} Related thereto, Congress passed SOX, where certain provisions in SOX, along with their corresponding regulations, attempt to tighten the expertise of and oversight by the audit committee of Reporting Companies.\textsuperscript{45}

\begin{itemize}
\item \textsuperscript{40} New York Stock Exchange, Inc., Order Approving Proposed Rule Change, Exchange Act Release No. 13,346, 42 Fed. Reg. 14,793, 14,794 (Mar. 16, 1977); see also Sandra C. Vera-Muñoz, Corporate Governance Reforms: Redefined Expectations of Audit Committee Responsibilities and Effectiveness, 62 J. BUS. ETHICS 115, 116 (2005) ("discusses the new expectations of audit committee responsibilities and effectiveness in the wake of corporate governance reforms"). “Audit committees... were first recommended by the [NYSE] in 1939. The SEC first recommended that publicly held companies establish audit committees in 1972. The stock exchanges quickly followed by either requiring or recommending that companies establish audit committees. Initially, audit committees... were responsible for the oversight of the financial reporting process, selection of the independent auditor, and receipt of audit results. However, the responsibilities of the audit committees dramatically intensified with the release of two regulatory reforms impacting corporate governance: (1) the 1999 Blue Ribbon Committee’s (BRC) Report and Recommendations on Improving the Effectiveness of Corporate Audit Committees...; and (2) [SOX].” Id.
\item \textsuperscript{42} Vera-Muñoz, supra note 40, at 123.
\item \textsuperscript{43} Diana Bilimoria & Sandy Kristin Piderit, Board Committee Membership: Effects of Sex-Based Bias, 37 ACAD. MANAGE. J. 1453, 1454 (1994) (examination of Fortune 300 firms determined that a preference exists for men over women on compensation, executive, and finance committees, and a preference for women over men on public affairs committees).
\item \textsuperscript{44} Bilimoria, supra note 43, at 1454.
III. ACCOUNTING AND FINANCE

The title and the expanded definition for the audit committee financial expert contain a gender bias and have negative inadvertent consequences against women on public company boards of directors. A descriptive term such as “audit committee expert” or “audit committee accounting expert” could have opened the selection pool for more candidates to serve as the audit committee expert and increased the number of women on the audit committee given the larger percentage of women in accounting and auditing compared to finance. This section provides evidence of the gender bias by analyzing the data on the gender distribution in accounting and auditing as compared to finance.

This Article utilizes data from a variety of sources, including from the National Science Foundation. The National Science Foundation has data on the number of men and women graduating with a baccalaureate degree in “Accounting and Related Services” and “Finance and Financial Management Services.” Compared to the other categories listed in the National Science Foundation’s WebCASPAR database, these categories map most closely to traditional understandings of accounting and finance and to the characteristics discussed in the definition of the “audit committee financial expert.”

Using the number of finance and accounting graduates as a proxy, the data shows that there are more women available for entry into the accounting profession as compared to finance. In 2001 and 2002 (the period wherein the Expert Regulation was being finalized and came into effect), there was an upward move in the percentage of women graduates in accounting (60.61% to 61.77%) compared to a downward move in the percentage of women graduates in finance (36.29% to 36.09%). Figures 1, 2, and 3 illustrate the percentage of female baccalaureate degree recipients in accounting or finance compared to male baccalaureate degree recipients in accounting or finance. Looking at more current gender data, with respect to accounting, women accounted for 54.1% of...
bachelor’s degrees, 53.4% of master’s degrees, and 34.1% of PhD degrees, with men in accounting comprising 45.9% of bachelor’s degrees, 46.6% of master’s degrees, and 65.9% of PhD degrees.48

Also, data demonstrates that women have greater representation in the accounting and auditing profession than in the finance profession.49 Over the period 2005–2009, the number of females in the accounting/auditing profession hovered between approximately 60% and 62%, while the number of females in the traditionally male dominated markets of finance experienced an 8% decrease, moving from 39% in 2005 to 31% in 2009.50

**Academic Discipline - Women and Men With Baccalaureate Degree in Accounting or Finance**

<table>
<thead>
<tr>
<th>Year</th>
<th>% Women - Degree in Accounting</th>
<th>% Men - Degree in Accounting</th>
<th>% Women - Degree in Finance</th>
<th>% Men - Degree in Finance</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>60.39%</td>
<td>39.61%</td>
<td>63.96%</td>
<td>65.65%</td>
</tr>
<tr>
<td>2001</td>
<td>60.61%</td>
<td>39.39%</td>
<td>63.71%</td>
<td>66.94%</td>
</tr>
<tr>
<td>2002</td>
<td>61.77%</td>
<td>38.23%</td>
<td>63.19%</td>
<td>66.92%</td>
</tr>
<tr>
<td>2003</td>
<td>61.76%</td>
<td>38.24%</td>
<td>63.19%</td>
<td>64.02%</td>
</tr>
<tr>
<td>2004</td>
<td>60.72%</td>
<td>39.28%</td>
<td>64.01%</td>
<td>64.66%</td>
</tr>
<tr>
<td>2005</td>
<td>59.81%</td>
<td>40.19%</td>
<td>64.02%</td>
<td>64.66%</td>
</tr>
<tr>
<td>2006</td>
<td>59.18%</td>
<td>40.82%</td>
<td>64.01%</td>
<td>64.66%</td>
</tr>
<tr>
<td>2007</td>
<td>57.40%</td>
<td>42.60%</td>
<td>65.65%</td>
<td>66.94%</td>
</tr>
<tr>
<td>2008</td>
<td>56.29%</td>
<td>43.71%</td>
<td>66.94%</td>
<td>66.94%</td>
</tr>
<tr>
<td>2009</td>
<td>55.31%</td>
<td>44.69%</td>
<td>66.92%</td>
<td>66.92%</td>
</tr>
</tbody>
</table>

**FIGURE 1**


49. *Infra* Figure 4. With respect to the data used for the analysis of women and men in accounting or finance careers, the author used data from *Women in the Labor Force: A Databook* (the “Databook”), published by the United States Census Bureau for the United States Bureau of Labor Statistics. The Databook contains current labor force and earnings data for women and men from a national monthly survey of approximately 60,000 households, including annual averages from the Current Population Survey (“CPS”). The categories from the Databook used in this Article for background data are accountants and auditors, financial analysts, and chief executives, which appear to parallel best to the characteristics discussed in the definition of the “audit committee financial expert.” Although investment banker may be a closer professional category to such qualifications in the “audit committee financial expert” definition as it translates to finance experience, the Databook does not contain a category for “investment banker.” Figure 4 provides the relevant data.

50. *Id*.

51. As some colleges and universities provide a general business administration degree and allow students to concentrate in a certain business function area, such as accounting, finance, marketing, or
Academic Discipline - Women with Baccalaureate Degree in Accounting or Finance

![Graph showing percentage of women in accounting and finance degrees from 2000 to 2009.]

% Women - Degree in Accounting: 60.39%, 60.61%, 61.77%, 61.76%, 60.72%, 59.81%, 59.18%, 57.40%, 56.29%, 55.31%

% Women - Degree in Finance: 36.04%, 36.29%, 36.09%, 36.81%, 35.99%, 35.98%, 35.34%, 34.35%, 33.06%, 33.08%

FIGURE 2

Academic Discipline - Men with Baccalaureate Degree in Accounting or Finance

![Graph showing percentage of men in accounting and finance degrees from 2000 to 2009.]

% Men - Degree in Accounting: 39.61%, 39.39%, 38.23%, 38.24%, 39.28%, 40.19%, 40.82%, 42.60%, 43.71%, 44.69%

% Men - Degree in Finance: 63.96%, 63.71%, 63.91%, 63.19%, 64.01%, 64.02%, 64.66%, 65.65%, 66.94%, 66.92%

FIGURE 3

Percentage of Women Accountants and Auditors, Financial Analysts, or Chief Executive Officers

![Graph showing percentage of women in various roles from 2005 to 2009.]

Accountants and Auditors - Women: 61.9%, 60.2%, 61.9%, 61.1%, 61.8%

Financial Analysts - Women: 39.0%, 38.4%, 34.3%, 38.8%, 30.9%

Chief Executives - Women: 23.8%, 23.4%, 25.6%, 23.4%, 25.0%

FIGURE 4
Catalyst’s Report to Women in Capital Markets: Benchmarking 2008 (the “2008 Catalyst Capital Markets Report”) is of particular importance in looking at the number of women and men in the finance sphere. Despite the growth in number of line positions in Investment Dealers from the period 2000 to 2008, the representation of men in Investment Dealer line positions continued to outnumber women four to one with more women in that industry holding staff positions than line positions; further, a smaller pool of women likely will affect the advancement of women into senior Investment Dealer positions. More specifically, Table 2 contains the line positions’ numbers for the 2000 to 2008 period examined by Catalyst.

Table 2. Investment Dealers Line Positions, 2000–2008

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Line Positions</th>
<th>Percentage of Women</th>
<th>Percentage of Men</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>2,632</td>
<td>20%</td>
<td>80%</td>
</tr>
<tr>
<td>2002</td>
<td>2,646</td>
<td>20%</td>
<td>80%</td>
</tr>
<tr>
<td>2005</td>
<td>3,161</td>
<td>21%</td>
<td>79%</td>
</tr>
<tr>
<td>2008</td>
<td>3,362</td>
<td>20%</td>
<td>80%</td>
</tr>
</tbody>
</table>

Taken to greater detail, the figures in Table 3 are from the Catalyst data in the 2008 Catalyst Capital Markets Report, showing the breakdown of men and women in each segment of the Investment Dealers industry which depicts the substantial differences of men-held versus women-held positions in the finance space, with the largest percentage of women in both 2005 and 2008 falling in the general management, this discussion takes into account undergraduate students only and those majoring in or with a concentration in accounting or finance, as applicable.

52. Sylvia Apostolidis & Rhonda Ferguson, Catalyst’s Report to Women in Capital Markets: Benchmarking 2008, 1-4 (2009), available at http://www.catalyst.org/file/49/wcm_full_report.pdf. The data in the 2008 Catalyst Capital Markets Report is from research Catalyst conducted on the Canadian securities industry, focusing on particular business groups—Investment Dealers and Retail Private Client. For purposes of this Article, the author addresses and utilizes data regarding the Investment Dealers because such data is in line with the accounting or finance focus discussed in this Article. Investment Dealers are organizations involved in raising capital, including helping companies issue new securities and assist investors in buying and selling securities. Investment Dealers consist of four business sectors—Corporate and Investment Banking, which involves underwriting or advising as an agent for corporate and governmental entities on security issuances and capital market transactions such as mergers and acquisitions, private equity placements, and corporate restructuring; Institutional Equities, a sector that engages in selling and trading equity securities and tracking and analyzing stock performance; Capital Markets, the area that handles transactions of debt securities in specified markets such as money markets, derivatives, foreign exchange, and fixed income; and Middle Office, a section that is a function unit servicing the Corporate and Investment Banking, Institutional Equities, and Capital Markets divisions. Investment Dealers do not accept deposits or provide loans to individuals.

53. Id. at 3-6.

54. Id. at 6.
Middle Office—functional support—sector. Also, Table 4 and Figure 5 show the reduction in the percentage of women in Investment Dealers positions as seniority increases.

<table>
<thead>
<tr>
<th>Year</th>
<th>Area</th>
<th>Total Positions</th>
<th>Percentage of Women</th>
<th>Percentage of Men</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>Corporate and Investment Banking</td>
<td>1,174</td>
<td>19%</td>
<td>81%</td>
</tr>
<tr>
<td>2005</td>
<td>Institutional Equities</td>
<td>818</td>
<td>20%</td>
<td>80%</td>
</tr>
<tr>
<td>2005</td>
<td>Capital Markets</td>
<td>1,157</td>
<td>23%</td>
<td>77%</td>
</tr>
<tr>
<td>2005</td>
<td>Middle Office</td>
<td>703</td>
<td>49%</td>
<td>51%</td>
</tr>
<tr>
<td>2008</td>
<td>Corporate and Investment Banking</td>
<td>1,318</td>
<td>20%</td>
<td>80%</td>
</tr>
<tr>
<td>2008</td>
<td>Institutional Equities</td>
<td>801</td>
<td>20%</td>
<td>80%</td>
</tr>
<tr>
<td>2008</td>
<td>Capital Markets</td>
<td>1,230</td>
<td>21%</td>
<td>79%</td>
</tr>
<tr>
<td>2008</td>
<td>Middle Office</td>
<td>1,337</td>
<td>43%</td>
<td>57%</td>
</tr>
</tbody>
</table>

This data demonstrates that women typically have greater existing and future representation in the accounting/auditing fields compared to the financial arena. Thus, by labeling the audit committee expert as a *financial expert* and expanding the definition of who qualifies as the audit committee expert with a financial bias, the SEC’s actions result in a negative gender bias against women being nominated for the audit committee expert position and thus expanding female representation on public company boards.

Furthermore, given the large amount of emphasis placed on the auditing, financial accounting/financial reporting, and internal controls knowledge and the “financial literacy” of the audit committee members in general, it is astounding that most “audit committee financial experts” do not have an accounting or financial reporting background. Although no research in connection with this Article identified whether or not policymakers and their advisors examined or received comments related to the number of women and men in the market or entering the market for accounting and finance positions, the author questions and wonders if policymakers conducted due diligence on or received comments

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55. *Id.* at 8-9.
56. *Id.* at 11, 30. Professional means “staff who are not captured in the Vice President or Managing Director and Above categories, including Associates and Analysts . . . .” Vice President includes “Vice President and Director, Vice President, Associate Vice President, Assistant Vice President, Director, and Associate Director.” Managing Director and Above encompasses “CEO/Chair/President, Executive Managing Director, Executive Vice President, Senior Vice President, and Managing Director.”
57. CARCELLO, *supra* note 30, at 352, 353.
regarding the gender composition in the accounting and finance fields prior to deciding the title for the audit committee expert and expanding the qualifications of such expert. As discussed later in this Article, a gender-bias sensitivity analysis could have altered some of this gender insensitivity.

Table 4. Percentage of Women at the Levels in Investment Dealers Positions

<table>
<thead>
<tr>
<th>Year</th>
<th>Position</th>
<th>Percentage of Women</th>
<th>Percentage of Men</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>Professionals (low level)</td>
<td>26%</td>
<td>74%</td>
</tr>
<tr>
<td></td>
<td>Vice President (middle level)</td>
<td>19%</td>
<td>81%</td>
</tr>
<tr>
<td></td>
<td>Managing Directors and Above (high level)</td>
<td>9%</td>
<td>91%</td>
</tr>
<tr>
<td>2002</td>
<td>Professionals (low level)</td>
<td>27%</td>
<td>73%</td>
</tr>
<tr>
<td></td>
<td>Vice President (middle level)</td>
<td>20%</td>
<td>80%</td>
</tr>
<tr>
<td></td>
<td>Managing Directors and Above (high level)</td>
<td>9%</td>
<td>91%</td>
</tr>
<tr>
<td>2005</td>
<td>Professionals (low level)</td>
<td>27%</td>
<td>73%</td>
</tr>
<tr>
<td></td>
<td>Vice President (middle level)</td>
<td>21%</td>
<td>79%</td>
</tr>
<tr>
<td></td>
<td>Managing Directors and Above (high level)</td>
<td>9%</td>
<td>91%</td>
</tr>
<tr>
<td>2008</td>
<td>Professionals (low level)</td>
<td>25%</td>
<td>75%</td>
</tr>
<tr>
<td></td>
<td>Vice President (middle level)</td>
<td>22%</td>
<td>78%</td>
</tr>
<tr>
<td></td>
<td>Managing Directors and Above (high level)</td>
<td>9%</td>
<td>91%</td>
</tr>
</tbody>
</table>

Figure 5
A counterargument can be made that the title and expanded definition for the audit committee expert merely opens the position to more individuals to serve as the audit committee expert, including both men and women. However, in light of the data provided in this Article demonstrating that women are in or will enter the accounting and auditing positions as opposed to financial ones, the title and this expansion of the expert’s qualifications are biased against women. The author agrees that the expanded definition between the Expert Law and Expert Regulation opens the range for additional individuals to qualify as the audit committee expert, but this Article is primarily concerned with whether the opportunities available are evenly distributed between men and women. Thus, such expansion fits the argument that the openness negatively impacts women as the more closed pool likely would have set the stage for a better platform from which to obtain a greater number of women to serve in such expert capacity. Where limited to accounting and auditing typing characteristics, the relative pool of women candidates thus likely is greater than with the expansive characteristics including finance. Also, for the same reasons, the limited “finance designated” title causes the same gender bias.

IV. WOMEN ON PUBLIC COMPANY BOARDS OF DIRECTORS—THE NUMBERS, ARGUMENTS, AND CHALLENGES

Fortune 500 directors represent some of the most influential organizations in the world. Such influence results in a high level of power placed in the hands of a small group of individuals that is historically and still dominated by American, Caucasian men, despite years of tireless efforts to make these boards of directors more inclusive and reflective of the global society. Over the last several decades, a lot of work has gone into making public company boards of directors more inclusive. Despite these efforts—the numerous calls for increased diversity and studies on the benefit of diversity on public company boards—the results are dismal, although some small progress has occurred. It often appears from the back and forth on the progress of public company diversity that sensitivity for inclusive environments and consideration for all groups of qualified board candidates are on holiday. The discussion below takes a look at public company board inclusiveness from the perspective of the numbers, inclusiveness arguments, and the challenges with female public company board inclusiveness.

Based on data from the Fortune 100, there were 1,211 directorships with women holding 218 seats in 2010. The reference to “Caucasian” is as the term is used by the United States Census Bureau. See BUTLER, supra note 28, 63-64. Id. at 65-66. Id. at 65-66. Id.

Catalyst, The Prout Group, The Executive Leadership Council, the Hispanic Association on Corporate Responsibility & Leadership Education for Asian Pacifics, Inc., Missing Pieces: Women and
held by women among the Fortune 100 increased only 8%, but such increase does not reflect the increase in the number of total director seats from 2004 to 2010.

“Over the last decade, social activists, academics, government agencies, shareholder groups, and other investors have argued for greater diversity at many levels of U.S. businesses, including making public company boards of directors more heterogeneous.”63 A most recent surge of discussion on female directors or the lack of female directors on public company boards of directors shows that pressure still remains for such absence to change.64 The two main arguments to support board diversity are the (1) business rationale; and (2) social rationale.65 With respect to the business rationale, board diversity “increases the overall effectiveness of the board and hence the corporation, . . . and also enhances the corporation’s profitability,”66 and boards with gender diversity engage in better governance.67 Diverse boards enhance governance because with diversity the directors are more likely to engage in challenging discussions and the environment fosters more independent thinking and acting.68 Additionally, a recent Catalyst report indicates that companies with three women directors versus zero women directors for at least four of five years had an (1) 84% positive return on sales; (2) 60% positive return on invested capital; and (3) 46% positive return on equity.69

Three points justifying board diversity from a social rationale perspective are (1) “simple fairness”—corporate boards should reflect their customer and employee base; (2) “group think” diminishes with diversity; and (3) diversity prevents the phenomenon where the CEO “stacks” the board with his “clones.”70

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63. See Butler, supra note 28, at 63-64.
66. Fairfax, supra note 65, at 795.
70. Broome, supra note 65, at 763, 795; Irving L. Janis, Victims of Groupthink, 8-9 (1972); Butler, supra note 28, at 73-76.
V. Expert Regulation’s Impact on Female Public Company Directors

A. Lack of Diversity at the SEC

The lack of diversity at the top of the SEC likely impacted the decisions leading to the SEC’s establishment of the less inclusive name and broadened definition for the expert on the audit committee. As noted in recent SEC statistical information, the SEC, like public companies, also lacks diversity. Commissioner Luis A. Aguilar in a 2011 speech made the following statement about the then-current inclusiveness environment at the SEC:

I would be hiding the ball if I didn’t also point out the lack of diversity at the SEC. . . . the SEC’s senior officers [percentage] . . . is 69% male and 31% female. . . . Moreover, Section 342 of the Dodd-Frank Act requires that the SEC undertake significant efforts to recruit and promote employees from all backgrounds. In particular, Section 342 requires that the SEC, and all other financial regulators, establish a new Office of Minority and Women Inclusion. Many of our financial regulator counterparts, like the FDIC, the Federal Reserve, and the Department of the Treasury have already established this program and have the new office, director and staff in place. I look forward to the SEC establishing its office and quickly catching up to our counterparts. 71

Given that much of the implementation and enforcement of SOX resides with the SEC, the SEC’s and its employees’ outside influences, internal and external politics, individual beliefs, including conscience and unconscious biases, and other mix of inducers impact the development of the SEC’s regulatory obligations. 72

B. The Comments and Negative Unintended Consequences of the Expert Regulation

The SEC requests, accepts, and evaluates public comments to proposed regulatory initiatives. Regarding implementation of regulations for Sections 404, 406, and 407 of SOX, the SEC received over 200 comment letters from a wide variety of persons and organizations (including corporations, professional associations, accountants, lawyers at law firms, analysts, academics, and

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72. Donald C. Langevoort, The Social Construction of Sarbanes-Oxley, 105 Mich. L. Rev. 1817, 1818 (2007) (challenging the critics and supporters of SOX and highlights the social nature of SOX’s practical application, leaving to the reader the ability to make a judgment of the advantage or disadvantage of SOX and to which parties).
In response to some of the public comments, the SEC broadened the categories of experience that qualifies one as an “audit committee financial expert.” The SEC, in the Expert Regulation, also specified the methods by which someone can acquire the prerequisites to be an “audit committee financial expert.” Such category broadening widened the qualifications for those with a “quasi” or “tangential” accounting or financial reporting background, thus opening the door for inclusion of persons without experience “preparing or auditing” financial statements, but with more limited or general experience of “actively supervising” one or more persons engaged in preparing, auditing, “analyzing or evaluating” financial statements. On its face, the inclusion of these individuals with quasi accounting or financial reporting backgrounds does not appear to be the original intent in the Expert Law.

Congress indicated in the Expert Law that the definition of “financial expert” means a person who has, through education and experience as a public accountant or auditor or as a principal financial officer, controller, or principal accounting officer of an issuer, an understanding of generally accepted accounting principles (“GAAP”), experience preparing or auditing financial statements for “generally comparable issuers,” applying the principals of accounting for estimates, accruals, and reserves, and with internal controls, and an understanding of audit committee functions. Unlike the Expert Law, the Expert Regulation requires that the “audit committee financial expert” must have each of the below five traits:

1. an understanding of GAAP and financial statements
2. the ability to assess the general application of GAAP in connection with the accounting for estimates, accruals and reserves (but not necessarily experience in applying these principles);

73. *Supra* note 23.

74. 15 U.S.C.S § 7265. The SEC provided in the Expert Regulation that the potential “audit committee financial expert” must acquire the expertise through one or more of the listed ways: “education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor or experience in one or more positions that involve the performance of similar functions; experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions; experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements; or other relevant experience.” with education having to be complemented by experience. If relying on “other relevant experience” to establish the required expertise, the Reporting Company must include in the applicable SEC disclosure document a listing of the person’s experience, which can be connected to the director’s biographical information. See also Memorandum from Gardner Carton & Douglas LLC to Client on SEC Adopts Final Rules Under Sarbanes-Oxley: Audit Committee Financial Experts and Codes of Ethics 2 (Jan. 2003) (“Gardner Carton & Douglas client memorandum”), available at http://www.drinkerbiddle.com/files/Publication/18722d28-7287-4d1d-998a-65e296c242e4/ Presentation/PublicationAttachment/cuc6e074-ea41-4684-9c3e-48ede2e6dd31/SECAdoptsCalkins.pdf (last visited January 15, 2012).
(3) experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the company’s financial statements, or experience in actively supervising one or more persons engaged in such activities;

(4) an understanding of internal controls and procedures for financial reporting; and

(5) an understanding of audit committee functions. 75

Thus, the Expert Regulation broadened the definition of “audit committee financial expert” from the definition provided by Congress in the Expert Law. As visible in Section V.B., items 1—“an understanding of GAAP and financial statements”—and 5—“an understanding of audit committee functions”—above are as specified in the Expert Law. With respect to the Expert Law definition regarding the experience in the preparation or auditing of financial statements of generally comparable issuers, the Expert Regulation includes such direct preparation or auditing experience, but expands the experience acceptable to be an “audit committee financial expert” by, among other things,

(a) making it acceptable for the party being categorized as an “audit committee financial expert” to have indirect experience preparing or auditing financial statements as the Expert Regulation provides that the person for the audit committee expert position qualifies with “experience in actively supervising one or more persons engaged in [preparing, auditing, analyzing or evaluating financial statements];”

(b) including as acceptable to qualify as an “audit committee financial expert,” the simple analyzing or evaluating of financial statements rather than direct experience actually preparing or auditing the financial statements; and

75. Gardner Carton & Douglas client memorandum, supra note 74, at 2. In the SEC’s rule on “audit committee financial expert” definition, the person or persons needs experience preparing, auditing, analyzing, or evaluating financial statements, which characteristic may disqualify chief executive officers, academics, and parties on the Financial Accounting Standards Board from serving as the audit committee expert if such persons do not have the direct experience preparing financial statements or the other criteria that account for being qualified to serve as the audit committee expert. See also Cassell Bryan-Low, Defining Moment for SEC: Who’s a Financial Expert, WALL. ST. J., Dec. 9, 2002, at C1 (discussing the complexity in determining who is an “audit committee financial expert”). An SEC Reporting Company does not satisfy the SOX disclosure requirement regarding “audit committee financial expert” by stating that it failed to make a determination on who on the audit committee is the “audit committee financial expert” or by just disclosing the qualifications of all of its audit committee members. See supra note 23.
(c) setting the comparability concept regarding the range and complexity of accounting issues reasonably expected to be raised by the issuer rather than the company comparison set forth in the Expert Law.

For example, the language in the Expert Law says “generally comparable companies” and the verbiage in the Expert Regulation “present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the company’s financial statements.”76 Also, the Expert Law requires greater depth regarding internal accounting controls than the Expert Regulation as the Expert Regulation only requires “an understanding of internal controls” rather than “experience with internal accounting controls.”

Outside the scope of this Article is whether or not the SEC went too far in expanding the requirements needed to be an “audit committee financial expert,” although such analysis could be a future research opportunity. The purpose of making the comparison between the language in the Expert Law and the Expert Regulation is to demonstrate the expansive method the SEC took in defining “audit committee financial expert.” This method shows a link between the SEC (1) deviating some from the notion of auditing, accounting, internal controls system activities (or lack thereof) being the source of needed reform and monitoring (as exemplified in certain SOX and post-Enron commentaries) and thus needing an “expert” with such parallel experience to address such reform and monitoring issues going forward and (2) promulgating a final rule that enables a base of persons with a general financial knowledge to tackle such tough reform and monitoring issues.

76. Gardner Carton & Douglas client memorandum, at 2. The Gardner Carton & Douglas client memorandum explains that the SEC, in the applicable portion of its definition of “audit committee financial expert,” provides that the meaning of “generally comparable” does not box the potential “audit committee financial expert” into having previous experience in the same industry or with a company subject to the 34 Act reporting requirements. However, the role is for the board of directors to evaluate a person for the “audit committee financial expert” position based on the scope and degree of accounting issues for which he or she has experience, taking into account factors such as the size, operations, and difficulty of the financial statements and reporting of the company for which the potential “audit committee financial expert” has experience. Id. at 2. The memorandum goes further in explaining the meaning of “actively supervising,” stating that:

In the SEC’s view, “actively supervising” means more than a traditional hierarchical reporting relationship. Instead, the supervisor must participate in, and contribute to, the process of addressing the same general types of issues regarding preparation, auditing, analysis or evaluation of financial statements as those addressed by those being supervised. In addition, the supervisor should have experience that has contributed to the general expertise necessary to prepare, audit, analyze or evaluate financial statements that is at least comparable to the general expertise of those being supervised. The adopting release specifically states that a principal executive officer should not be presumed to qualify. For example, a principal executive officer with significant operations involvement, but little financial or accounting involvement, probably would not be exercising the necessary active supervision.
Regarding the title of the audit committee expert, although the SEC received extensive comments on the name for the audit committee expert, it settled on the more limiting term “audit committee financial expert,” rather than a more inclusive, descriptive term that encapsulates the scope and function of the Expert Law and the meaning of the audit committee expert. The table below—Table 5—sets forth several of the comments that the SEC received in connection with the title.77

The SEC did make a minor step in a positive direction towards being more inclusive with the term than that contained in the Expert Law, by changing the title of the audit committee expert from “financial expert” to “audit committee financial expert.” However, as discussed in this Article, the SEC did not go far enough to eliminate the negative female gender bias in the title for the “audit committee financial expert.” On its face, the term “financial” in the title likely signifies that the expert should be an investment banker, securities or other “Wall Street” type. Typically, “financial” references denote such career options.

Table 5. SEC Comments on Title of “Expert” for the Audit Committee

<table>
<thead>
<tr>
<th>Comments</th>
<th>SEC Accepted or Rejected</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do not use “financial expert” or “audit committee financial expert” because neither term accurately reflects the required experience and expertise of the type of expert contemplated by Section 407 and the proposed SEC rules.</td>
<td>☐ Accepted  ✓ Rejected</td>
</tr>
<tr>
<td>The term “audit committee accounting expert” is more appropriate given that many of the key characteristics in the SEC’s proposed definition address the expert’s accounting and auditing knowledge and experience.</td>
<td>☐ Accepted  ✓ Rejected</td>
</tr>
<tr>
<td>“Accounting expert” should be used.</td>
<td>☐ Accepted  ✓ Rejected</td>
</tr>
<tr>
<td>“Audit committee member financial lead” should be used.</td>
<td>☐ Accepted  ✓ Rejected</td>
</tr>
<tr>
<td>“Financially proficient director” should be used.</td>
<td>☐ Accepted  ✓ Rejected</td>
</tr>
</tbody>
</table>

The SEC expressed its concern that using “financial” in the title for the audit committee expert does not capture the content, scope and intent of Section 407 of

77. Supra note 23.
However, the result was that the SEC termed the required expert for the audit committee, “audit committee financial expert,” despite suggestions of a more function inclusive term—“audit committee accounting expert”—or developing another functionally encompassing term such as “audit committee expert” or “internal audit controls specialist.” Despite the range of other possibilities, the SEC went forward with using such a limiting term that has negative consequences on women.

Based on the legislative history and other discussions around the creation of SOX, a large focus was on the public and internal accounting and auditing operations associated with the Enron-type Scandals. For example, the huge damage attributed to the accounting and auditing functions (or lack of function) in these organizations and the need to reform and prevent such unacceptable behavior in the future led to the creation of the Public Company Accounting Oversight Board (“PCAOB”), a federal organization charged by regulation with regulating and monitoring the public accounting profession, with the PCAOB being described as “at the heart of the reforms embodied in SOX.” Structurally, the SEC is the public company overseer, while the PCAOB is the supervising agency for the public company auditors. Therefore, it appears to be somewhat of a deviation from the SOX legislative intent that the qualifying characteristics for the “audit committee financial expert” was not focused more exclusively on point with the accounting and audit functions.

An additional illustration that SOX was legislation focused on accounting, auditing, and internal controls rather than the expertise of those in the financial

78. The SEC made the following statement regarding the use of “financial” in the title for the “expert” on the audit committee.

We agree that the term “financial” may not completely capture the attributes referenced in Section 407, given the provision’s focus on accounting and auditing expertise and the fact that traditional “financial” matters extend to capital structure, valuation, cash flows, risk analysis and capital-raising techniques. Furthermore, several recent articles on the proposals have noted that many experienced investors and business leaders with considerable financial expertise would not necessarily qualify as financial experts under the proposed definition. Supra note 23.

79. Langevoort, supra note 72, at 1830.

80. Karmel supra note 19, at 80. See Coates, supra note 37. “Sarbanes-Oxley tasks the PCAOB with registering, setting standards for, inspecting, investigating, and disciplining audit firms for public companies. Two members of its five-member board must be auditors, a rule intended to assure that PCAOB has the necessary expertise. Three board members must be independent of the accounting profession, which is intended to constrain regulatory capture from the audit industry.” Id. at 98 (emphasis in original?). The author added emphasis to a sentence in the prior quote to demonstrate the tie between showing auditing expertise and an auditor type filling such expertise. The PCAOB has a combination of public and private features. From a public perspective, the SEC appoints the members of the PCAOB board, approves the PCAOB’s budget, litigation, and rules, and the SEC provided to the PCAOB certain powers reserved to governmental agencies, including certain privileges in private lawsuits and employee immunity in civil actions. However, the private aspect of the PCAOB includes, among other aspects, that the PCAOB is not subject to the open meetings requirement of certain public agencies. PCAOB employees are not governmental employees and subject to post-employment restrictions, and PCAOB can charge fees to audit firms under PCAOB’s purview. Id. at 99.
services is evident in the following statement made by Senator Sarbanes in an interview:

The Senate Banking Committee undertook a series of hearings on the problems in the markets that had led to a loss of hundreds and hundreds of billions, indeed trillions of dollars in market value. The hearings set out to lay the foundation for legislation. We scheduled 10 hearings over a six-week period, during which we brought in some of the best people in the country to testify. The lead panel included five former chairmen of the Securities and Exchange Commission (SEC), appointed by both Democratic and Republican presidents. The hearings continued with numerous other experts, former regulators, leading academics, and representatives from consumer and industry groups. All of the witnesses had long experience in both the private and public sectors. . . .

The hearings produced remarkable consensus on the nature of the problems: inadequate oversight of accountants, lack of auditor independence, weak corporate governance procedures, stock analysts’ conflict of interests, inadequate disclosure provisions, and grossly inadequate funding of the Securities and Exchange Commission.81

Thus, it is ironic that the SEC, despite the nature and purpose of SOX and the Expert Law, expanded the criteria and went with a descriptive term not tied to the nature and purpose of the Expert Law.

C. EXPERT REGULATION AND WOMEN AUDIT COMMITTEE EXPERTS

One should not presume that the SEC, although it works to implement the charge provided to it by Congress, never implements actions that have unintended consequences. “[I]t would be a profound mistake to presume that the SEC [always] gets things right.”82

The number of female “audit committee financial experts” are comparable to the miniscule number of female directors on public company boards of directors, even though women directors have the “qualities and experiences” required to serve on the audit committee.83 “Immediately following implementation of the SEC rules, few women directors were named by the firms as audit committee

82. See Romano, supra note 9, at 2378-80. To exemplify her point regarding not assuming that the SEC is one hundred percent correct, Roberta Romano discusses the situation where the SEC prohibited for decades the disclosure of projected earnings rather than supporting that financial forecasts are important content for investor decision-making as stock value is a function of future cash flows and not historical data.
financial experts.”84 However, by 2009, the number of female financial experts had grown dramatically, with the percentage of female experts approaching the overall percentage of female directors, but the increase of females on the audit committee is statistically insignificant.85 Professor Williams’ findings from the proxy statements of selected companies for the period during the first year of implementation after the Expert Regulation—after its March 2003 effective date—show the following data in Tables 6 and 7.86

Table 6. Gender of “Audit Committee Financial Expert”

<table>
<thead>
<tr>
<th></th>
<th>S&amp;P 500 Firms</th>
<th>Small Firms</th>
<th>Total Firms</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Women</td>
<td>82</td>
<td>12%</td>
<td>6</td>
</tr>
<tr>
<td>“Audit Committee</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Financial Experts”</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of Men</td>
<td>608</td>
<td>88%</td>
<td>125</td>
</tr>
<tr>
<td>“Audit Committee</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Financial Experts”</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total “Audit Committee</td>
<td>690</td>
<td></td>
<td>131</td>
</tr>
<tr>
<td>Financial Experts”</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 7. Professional Experience of “Audit Committee Financial Experts”

<table>
<thead>
<tr>
<th>Professional Experience Type</th>
<th>S&amp;P 500 Firms</th>
<th>Small Firms</th>
<th>Total Firms</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chief Executive Officer</td>
<td>51.1%</td>
<td>30.5%</td>
<td>47.9%</td>
</tr>
<tr>
<td>Chairman</td>
<td>51.7%</td>
<td>16.0%</td>
<td>46.0%</td>
</tr>
<tr>
<td>President</td>
<td>25.7%</td>
<td>45.8%</td>
<td>28.9%</td>
</tr>
<tr>
<td>Executive or Senior Vice</td>
<td>14.9%</td>
<td>17.6%</td>
<td>15.3%</td>
</tr>
<tr>
<td>President</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Chief Financial Officer</td>
<td>10.9%</td>
<td>26.0%</td>
<td>13.3%</td>
</tr>
<tr>
<td>Certified Public Accountant</td>
<td>13.8%</td>
<td>30.5%</td>
<td>16.4%</td>
</tr>
<tr>
<td>Chief Operating Officer</td>
<td>6.1%</td>
<td>12.2%</td>
<td>7.1%</td>
</tr>
<tr>
<td>Other *academics, venture</td>
<td>10.9%</td>
<td>22.9%</td>
<td>12.8%</td>
</tr>
<tr>
<td>capitalists, lawyers,</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>independent consultants,</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>and private investors</td>
<td></td>
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</tr>
</tbody>
</table>

Despite the push to address the criticism of the audit committee after Enron-type scandals and the corresponding SEC regulations that specifically call

84. Id.
85. Id.
86. See Williams, supra note 38, at 259-61. Professor Susan Williams collected proxy statements for the first annual meeting following the effective date of the required disclosures for all Standard & Poor’s 500 firms and a random sample of 125 smaller firms with assets of less than $400 million. However, given the timing of filings, Professor Susan Williams examined proxy statements for only 370 S&P 500 firms and 119 small firms.
for financial accounting/financial reporting, auditing and internal controls expertise on the audit committee, Spencer Stuart’s research pulled from the 2002 proxy season materials indicate that only 2% of audit committee members at Standard & Poor’s 500 companies are accountants and only 3% are chief financial officers.\(^8^7\) The title and the more expansive definition of the audit committee expert diluted the focus on accounting, auditing, and internal controls experience on the audit committee of public corporations, while at the same time limited the potential for a greater number of women serving on the audit committee and in such expert roles.

VI. CURTAILING THE GENDER BIAS OF THE EXPERT REGULATION

A. A CHANGE OF NAME: ALIGNING THE NAME WITH THE EXPERT CLASSIFICATION CRITERIA

The SEC should modify the Expert Regulation and make the title for the audit committee expert reflective of its function. The author recommends the title be “audit committee expert” or “audit committee accounting expert.” As noted in this Article, the existing name for the audit committee expert fails to capture the intent of the audit committee expert and on its face could lead one to believe that the skill set and function of the audit committee expert are more investment banking or other capital markets or raising experience and less accounting, auditing, or internal controls experience. Because between investment banking and accounting functions more women exist in the latter field, especially at the senior levels, such misconceptions have a negative impact on the greater likelihood of more women as the audit committee financial experts.

The author in this Article does not recommend modifying the definition and related explanation provisions for the “audit committee financial expert” articulated in the Expert Regulation. The original definition for the audit committee expert provided by Congress in the Expert Law however would have opened the door for more qualified females as potential public company board candidates while simultaneously achieving the need for audit committee expertise. First, given that the Expert Law’s definition focuses primarily on financial accounting and reporting, auditing, or internal controls experience—the functional area in which women have a greater presence compared to their male counterparts—the board nominating committee and CEO would have been required to examine a more gender equitable pool of qualified accountants and auditors. Additionally, bringing on board such qualified accountants or auditors appears to meet the original intent of Congress in crafting the Expert Law.\(^8^8\)

87. Countryman, supra note 45.
88. As a reminder, the Expert Law defines the audit committee expert as a person who has “through education and experience as a public accountant or auditor or principal financial officer, comptroller, or principal accounting officer of an issuer, or from a position involving the performance of similar functions—(1) an understanding of generally accepted accounting principles and financial statements;
Outside the scope of this Article is a discussion about a cost analysis of a small name modification of an existing SEC regulation. However, small modifications are common practice of the SEC, thus, the author does not, without research and analysis, anticipate such modification would be a costly burden to the SEC.

B. TRAINING AND GROWTH TO ENHANCE THE FEMALE PIPELINE

Public company boards historically consisted of many current or retired CEOs of other public companies. Given the few women, currently and historically, in such top positions, the pool of women public company directors should not come from such shallow pool. Thus, it is imperative that nominating committees of public companies look to other qualified board candidates. Public company stakeholders must demand and keep consistent pressure on the nominating committee and other internal board composition decisionmakers to expand their pool of director candidates—including not only public company C-suite candidates but qualified persons from the vice president prong (or such equivalent) within corporations. Nominating committees should look among other qualified professionals such as senior attorneys, academics, consultants, nonprofit executives, accountants and auditors. Stakeholder pressure to look to qualified accountants and auditors in light of the Expert Law could have ignited the inclusiveness effort by filling more public company board positions in a more gender equitable way.

Additionally, top management in corporations and professional service firms, such as Big Four and boutique accounting firms, and international law firms should be proactive in training and advancing talented women and reaching into the pipeline to expose women to the advancement track for such fields and in such platforms. As part of such talent grooming, corporations and professional service firms can expose and connect the talent to non-profit and smaller for-profit corporations’ boards where women can get early experience in order to build the skills helpful for advancement to public company boards. Just as importantly, identified female talent need sponsors and mentors, internal and external to the organization, in order to develop and navigate through the curves of institutional politics. Therefore, top management must insure that such resources are available to and working for such female talent.

Finally, women need to gain the skills needed for successful opportunities in quantitative areas, such as accounting, finance, and mathematics earlier in life,

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(2) experience in—(a) the preparation or auditing of financial statements of generally comparable issuers; and (b) the application of such principles in connection with the accounting for estimates, accruals, and reserves; (3) the experience with internal controls; and (4) an understanding of audit committee functions.” 15 U.S.C.S § 7265. The author brings particular note to the wording—experience as a public accountant or auditor or principal financial officer, comptroller, or principal accounting officer—which descriptions are the function area typically dominated by women even around 2001 and 2002 before and when the Expert Law became effective and 2002 and 2003 when the SEC worked on and finalized the Expert Regulation.
especially because quantitative skills require years of development.\textsuperscript{89} Public companies and other organizations should start programs to expose and train the education community to better prepare women for corporate advancement.\textsuperscript{90} For example, programs on “financial literacy,” including financial accounting, financial reporting, auditing, internal controls methodology, corporate finance, and risk management could greatly improve opportunities for women.\textsuperscript{91}

C. A CRITICAL MASS AND BEYOND

A critical mass of women on public company boards of directors is important to curtailing the negative efforts of the Expert Regulation. Some scholarship exists on what constitutes critical mass for public company board diversity.\textsuperscript{92} However, such analysis is outside the scope of this Article. Another research opportunity can explore what constitutes a critical mass on the board of directors of a public company, including the tipping point number or other measurements, and the benefits that such a critical mass brings the board of directors, the public company, and its stakeholders. The author suggests however that neither one director nor two women directors are adequate to curtail the effect of the Expert Regulation and to get women on the audit committee and in the audit committee expert role and such trigger for critical mass evolves.

D. “OUT OF THE BOX” ANALYSIS ON THE EFFECTS OF ACTIONS ON UNDERREPRESENTED GROUPS

Legislative bodies, their committees, and regulatory agencies must be aware of the effects of legislation or regulation on groups, particularly groups of persons underrepresented in the halls, chambers, and offices of the lawmakers and regulatory actors. Specifically engaging in gender-bias, sensitivity analysis exercises prior to finalizing legislation and regulation is one method to evaluate potential harm to groups of persons. Appendix B contains a model for use in engaging in gender-bias, sensitivity analysis, applicable for use in legislative and regulatory governmental initiatives as well as non-profit and for-profit policies and programs.

If we operated in a more heterogeneous platform, reflecting persons with experience and backgrounds of the different aspects of the global economy, a

\textsuperscript{89} See Butler, supra note 28, at 83-85.
\textsuperscript{90} Id.
\textsuperscript{91} See Aguilar, supra note 71.
more “check-the-box” or gender-bias, sensitivity analysis may not be as critical. However, until such day comes—which the author hopes is occurring soon—then the legislative and regulatory platforms owe the stakeholders an evaluation of the impact of laws and regulations on the unrepresented or underrepresented groups in the process.

Given that the substance and intent of the Expert Law are better accounting and internal controls at publicly traded companies, the requirement of an expert on the audit committee should have been an opportunity to increase the diversity of public company boards of directors, given the large number of women that meet the qualifications and experience, especially from the financial accounting/financial reporting, auditing, or internal controls perspective.93

VII. CONCLUSION

There is and probably will be continuous debate on the usefulness of the Expert Law and Expert Regulation, and specifically the appropriateness of the term “audit committee financial expert” in meeting the means and ends of the provision’s purpose.

The SEC should replace the name “audit committee financial expert” with “audit committee expert” or “audit committee accounting expert” because “audit committee financial expert” is not descriptive of the audit committee expert’s function and the purpose of SOX and the Expert Law, and it enhances gender bias against women. First, “audit committee expert” is a more appropriate term because it is more general than “audit committee financial expert” and does not contain a flawed connotation on the desired skill set for the expert. The title “audit committee expert” does not establish an “on the face” exclusion of a group of qualified persons meeting the intent and purpose for an audit committee expert. For example, reading “audit committee expert” does not lead one initially to believe that the skill set required is “finance” as with “audit committee financial expert.” Secondly, “audit committee accounting expert” is a more appropriate term than “audit committee financial expert” because (a) the former

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I think also you are seeing some people who maybe would not have been considered in the past that do have the qualifications. I was just out in Chicago talking to a board that wanted me to come on. I could not do it because I am kind of [full] right now. But there was a young lady there who is the CFO of a major corporation, and she was describing the two or three companies that she had been asked to come on the board to be the financial expert. And she is highly qualified. She was a partner with a big firm. She is CFO of a major company. And I think sometimes in the past that she would not have been given those opportunities.

So, I think there is a broadening now of looking at the talent base, and the search firms are very much more involved now, in other words, trying to find quality directors and everything like that. And I think that is healthy. I really do.
term is the conceptual and functional basis of the audit committee expert since
the audit committee is to manage the accounting and financial reporting
processes of a company, including auditing its financial statements, and (b) a
purpose of the Expert Law is to provide investors with transparency to evaluate
such abilities of those serving on the audit committee. Finally, both proposed
terms are more descriptive of the legislative intent of SOX, generally, and the
Expert Law, particularly. Thus, the SEC should have paralleled the title for the
audit committee expert with the purpose of SOX rather than focusing on the
“financial” aspect of the capital market system’s investment area, which at the
time, was not the true focus of SOX. As demonstrated by SOX’s official
name—the Public Company Accounting Reform and Investor Protection Act of
2002—a principle goal of SOX is to improve the auditing quality, function, and
enforcement features for public companies, while reducing fraud and theft.

Also, due diligence on the data regarding women in the accounting and finance
related fields could have curtailed the negative unintended consequences
resulting from the title and expanded definition of the “audit committee financial
expert” which hinders the advancement of gender diversity and inclusion on
public company boards of directors.

Despite the points in this Article regarding the negative inadvertent conse-
quences on the number of women and the pool of women for public company
boards and their audit committees, this Article in no way refutes the importance
of having such an expert on the audit committee, as research shows an inverse
relationship between organizations with an audit committee expert and financial
reporting restatements or fraud.94

The solutions for curtailing the female gender bias around the Expert
Regulation involve building a pipeline of women who can serve on corporate
boards of directors, in general, and as the audit committee expert, specifically;
creating a more understanding and tolerant corporate environment that fosters
inclusiveness on public company boards of directors, especially with respect to
women on such boards; and having legislative and regulatory bodies engage in
sensitivity analysis to understand effects of policymaking.

As the U.S. rules and regulations arguably are seen globally as the most
comprehensive, developed, fair, and well enforced in the world, administrative
agencies such as the SEC must be careful to look at and beyond the four corners
of regulatory operations to make sure negative unintended consequences or
impacts are not thrust upon a group of persons integral to the (a) true scope and
intent of the purposes for which the regulation and underlying law were
established to address and (b) advancement of society as a whole. “The visible is
a shadow cast by the invisible.”95 Thus, the populist must engage in and make

94. Vera-Munoz, supra note 40, at 119.
95. Martin Luther King, Jr., “The Three Dimensions of a Complete Life,” Sermon Delivered at the
Unitarian Church of Germantown (Dec. 11, 1960) (referring to Plato’s allegory of the cave, from The
Republic: “The truth would be literally nothing but the shadows of the images”).
sure that they are aware of what the SEC is doing, including making public comments and even going to their Congressional representatives to make sure that all sides of the spectrum are being considered and fully evaluated before the establishment of a long-standing regulation.

In expanding the qualifications for directors to serve on a Reporting Company’s audit committee, the SEC may have slowed the progress of more women being on corporate boards in general and the audit committee, specifically. Given the number of women with “auditing,” “accounting,” or the “internal controls” direct experience that Congress desired for the audit committee expert when passing the Expert Law, this opportunity was prime for increasing the pool of qualified women for public company boards who could bring the desired and needed experience to the difficult, influential, important, and scrutinized public company audit committee. However, with the limiting name “audit committee financial expert” and expanded definition for the audit committee expert, the SEC turned the page back on the potential for a greater number of women serving on the audit committee and in such expert roles (and ultimately public company boards in general).

When looking at regulatory development, regulators must evaluate and scrutinize actions with a broad brush, keen eye, and open mind. They must look for and at potential consequences of rules and regulations to ensure that they are not only beneficial to the protected class, but they should be a display of equality and recognition of the full consumer base with equal global societal advancement in mind, while achieving the goal of investor and public protection.

**APPENDIX A: SUMMARY OF THE SEC RULEMAKING PROCESS**

The federal legislation, passed by Congress and signed into law by the President, is broad and establishes the basic principles and objectives for the SEC to utilize in preparing the corresponding regulation. However, in formulating and establishing the regulation, the SEC must carry out the intent of Congress, and the SEC rulemaking process may involve multiple steps.

**Concept Release:** The rulemaking process usually begins with a rule proposal, but sometimes an issue is so unique [or] complicated that the Commission seeks out public input on which, if any, regulatory approach is appropriate. A concept release is issued describing the area of interest and the Commission’s concerns and usually identifying different approaches to addressing the problem, followed by a series of questions that seek the views of the public on the issue. The public’s feedback is taken into consideration as the Commission decides which approach, if any, is appropriate.

**Rule Release:** The Commission publishes a detailed formal rule proposal for public comment. Unlike a concept release, a rule proposal advances specific objectives and methods for achieving them. Typi-
cally, the Commission provides between 30 and 60 days for review and comment. Just as with a concept release, the public comment is considered vital to the formulation of a final rule.

**Rule Adoption:** [T]he Commissioners consider what they have learned from the public exposure of the proposed rule, and seek to agree on the specifics of a final rule. If a final measure is then adopted by vote of the full Commission, it becomes part of the official rules that govern the securities industry.\(^6\)

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\(^7\) The author drafts the Gender-Bias, Sensitivity Analysis Model from the perspective of examining initiatives and their impact on women. With or without any adjustments to fit the particular analysis, this Gender-Bias, Sensitivity Analysis may be useable for other segments of the population involved with or impacted, directly or indirectly, currently or in the future, or absolutely or potentially, by the initiative at issue or under consideration.
### Diverse Analysis Team

If possible, from within the organization, committee, or applicable platform, form a team of diverse persons who can serve as a committee to evaluate and vet any topics related to the gender-bias, sensitivity analysis.

If a diverse group of persons are not within the organization, committee, or applicable platform, within the legal, ethical, and administrative parameters, fill the gaps with outside consultants or volunteers fitting the missing specifications.

### Initiative Impact

Examining from each Analysis Stage, identify and list the group of women directly impacted by the initiative and such impact.

Understanding that some initiatives on their face may be void of gender impacts, the Diverse Analysis Team should engage in multiple “open and outside the box” thinking and “deep dive” sessions to determine if there are other groups of women directly or indirectly impacted by the initiative, and if so, list such groups and the impact, taking into account the Analysis Stages.

To be neutral and balanced between the genders, determine how the impacts on women differ from the impacts on men.

### Analysis Stages

When analyzing the initiatives, look at the situation from a time—short term and long term perspective; scope—surface, image, or operational effect; and application—actual and potential impact.

### Qualitative and Quantitative Analysis

Determine how to measure qualitatively the gender impact on the identified group of women.

Determine how to measure quantitatively the gender impact on the identified group of women.

### Outside Influencers

Determine and identify if there are outside groups or academics that can be a resource in the analysis, including those that may have helpful study data or backgrounds or research in the area.

Evaluate how to involve the stakeholders in the development of the initiative to provide valuable comments, concerns, or feedback before and after the final draft and implementation (i.e. the public if a legislative or administrative action).

Engage in post-effectiveness review of the initiative, considering many of the same points discussed in the Gender-Bias, Sensitivity Analysis Model.
### Table 1


<table>
<thead>
<tr>
<th>Academic Discipline, 4-digit Classification of Instructional Program (CIP)</th>
<th>Gender</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
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<tbody>
<tr>
<td>52.03 Accounting and Related Services</td>
<td>Female</td>
<td>22,112</td>
<td>20,569</td>
<td>20,821</td>
<td>21,822</td>
<td>22,822</td>
<td>23,845</td>
<td>25,091</td>
<td>25,774</td>
<td>26,115</td>
<td>27,241</td>
</tr>
<tr>
<td>52.03 Accounting and Related Services</td>
<td>Male</td>
<td>14,502</td>
<td>13,369</td>
<td>12,887</td>
<td>13,512</td>
<td>14,762</td>
<td>16,026</td>
<td>17,307</td>
<td>19,127</td>
<td>20,278</td>
<td>22,011</td>
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<tr>
<td><strong>Total</strong></td>
<td></td>
<td>36,614</td>
<td>33,938</td>
<td>33,708</td>
<td>35,334</td>
<td>37,584</td>
<td>39,871</td>
<td>42,398</td>
<td>44,901</td>
<td>46,393</td>
<td>49,252</td>
</tr>
<tr>
<td><strong>Percentage of Women</strong></td>
<td></td>
<td>60.39%</td>
<td>60.61%</td>
<td>61.77%</td>
<td>61.76%</td>
<td>60.72%</td>
<td>59.81%</td>
<td>59.18%</td>
<td>57.40%</td>
<td>56.29%</td>
<td>55.31%</td>
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<tr>
<td><strong>Percentage of Men</strong></td>
<td></td>
<td>39.61%</td>
<td>39.39%</td>
<td>38.23%</td>
<td>38.24%</td>
<td>39.28%</td>
<td>40.19%</td>
<td>40.82%</td>
<td>42.60%</td>
<td>43.71%</td>
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<td>Year</td>
<td>2000</td>
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<td>2002</td>
<td>2003</td>
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<td>2006</td>
<td>2007</td>
<td>2008</td>
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</tr>
<tr>
<td>Degrees/Awards Conferred (NCES population of institutions) (Sum)</td>
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<tr>
<td>Academic Discipline, 4-digit Classification of Instructional Program (CIP)</td>
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<tr>
<td>Gender: All values</td>
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<tr>
<td>Level of Degree or Other Award: Bachelor's Degrees</td>
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</tr>
<tr>
<td>52.08 Finance and Financial Management Services</td>
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<td></td>
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<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Female</td>
<td>9,045</td>
<td>9,495</td>
<td>10,688</td>
<td>10,737</td>
<td>10,627</td>
<td>10,687</td>
<td>10,612</td>
<td>10,786</td>
<td>11,690</td>
<td></td>
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</tr>
<tr>
<td>Male</td>
<td>16,054</td>
<td>16,339</td>
<td>17,632</td>
<td>18,349</td>
<td>19,182</td>
<td>19,169</td>
<td>19,418</td>
<td>20,351</td>
<td>21,979</td>
<td>23,648</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>25,099</td>
<td>25,644</td>
<td>27,588</td>
<td>29,037</td>
<td>29,969</td>
<td>29,841</td>
<td>30,030</td>
<td>30,997</td>
<td>32,833</td>
<td>35,338</td>
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</tr>
<tr>
<td>Percentage of Women</td>
<td>36.04%</td>
<td>36.29%</td>
<td>36.09%</td>
<td>36.19%</td>
<td>35.99%</td>
<td>35.98%</td>
<td>35.34%</td>
<td>34.35%</td>
<td>33.06%</td>
<td>33.08%</td>
<td></td>
</tr>
<tr>
<td>Percentage of Men</td>
<td>63.96%</td>
<td>63.71%</td>
<td>63.91%</td>
<td>63.81%</td>
<td>64.01%</td>
<td>64.02%</td>
<td>64.66%</td>
<td>65.65%</td>
<td>66.94%</td>
<td>66.92%</td>
<td></td>
</tr>
</tbody>
</table>

1 Academic Classifications from National Science Foundation's WebCASPAR database: 52.01 Business/Commerce, General, 52.02 Business Administration, Management and Operations, 52.03 Accounting and Related Services, 52.04 Business Operations Support and Assistant Services, 52.05 Business/Corporate Communications, 52.06 Business/Managerial Economics, 52.07 Entrepreneurial and Small Business Operations, 52.08 Finance and Financial Management Services, 52.09 Hospitality Administration/Management, 52.10 Human Resources Management and Services, 52.11 International Business, 52.12 Management Information Systems and Services, 52.13 Management Sciences and Quantitative Methods, 52.14 Marketing, 52.15 Real Estate, 52.16 Taxation, 52.17 Insurance, 52.18 General Sales, Merchandising, and Related Marketing Operations, 52.19 Specialized Sales, Merchandising, and Related Support Services. See WebCASPAR Integrated Science and Engineering Resources Data Systems, available at http://webcaspar.nsf.gov.
### Table 2

<table>
<thead>
<tr>
<th>Academic Year</th>
<th>Men’s Accounting Bachelor’s Completions</th>
<th>Women Accounting Bachelor’s Completions</th>
<th>Men Finance Bachelor’s Completions</th>
<th>Women Finance Bachelor’s Completions</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009–2010</td>
<td>24,324</td>
<td>29,045</td>
<td>23,576</td>
<td>11,226</td>
</tr>
<tr>
<td>2008–2009</td>
<td>22,009</td>
<td>26,095</td>
<td>23,654</td>
<td>10,849</td>
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<tr>
<td>2007–2008</td>
<td>20,269</td>
<td>27,239</td>
<td>21,977</td>
<td>11,690</td>
</tr>
<tr>
<td>2006–2007</td>
<td>17,293</td>
<td>25,709</td>
<td>20,361</td>
<td>10,648</td>
</tr>
<tr>
<td>2004–2005</td>
<td>16,002</td>
<td>23,764</td>
<td>19,185</td>
<td>10,780</td>
</tr>
<tr>
<td>2003–2004</td>
<td>14,748</td>
<td>22,740</td>
<td>19,195</td>
<td>10,779</td>
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<tr>
<td>2002–2003</td>
<td>13,471</td>
<td>21,643</td>
<td>18,343</td>
<td>10,637</td>
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<tr>
<td>2001–2002</td>
<td>12,875</td>
<td>20,625</td>
<td>18,028</td>
<td>10,253</td>
</tr>
<tr>
<td>2000–2001</td>
<td>13,294</td>
<td>20,332</td>
<td>16,707</td>
<td>9,582</td>
</tr>
<tr>
<td>1999–2000</td>
<td>14,354</td>
<td>21,733</td>
<td>16,370</td>
<td>9,273</td>
</tr>
<tr>
<td>1998–1999</td>
<td>15,987</td>
<td>22,352</td>
<td>15,831</td>
<td>8,528</td>
</tr>
<tr>
<td>1997–1998</td>
<td>16,585</td>
<td>22,206</td>
<td>14,901</td>
<td>7,878</td>
</tr>
<tr>
<td>1996–1997</td>
<td>17,965</td>
<td>23,317</td>
<td>14,421</td>
<td>7,267</td>
</tr>
<tr>
<td>1995–1996</td>
<td>18,742</td>
<td>24,248</td>
<td>14,273</td>
<td>7,277</td>
</tr>
<tr>
<td>1993–1994</td>
<td>21,856</td>
<td>26,796</td>
<td>15,585</td>
<td>7,521</td>
</tr>
<tr>
<td>1992–1993</td>
<td>22,793</td>
<td>27,131</td>
<td>16,577</td>
<td>8,008</td>
</tr>
</tbody>
</table>


Note: Completions data are an unduplicated count of degrees awarded, rather than an unduplicated headcount of graduates.
### APPENDIX D: DATA ON PERCENTAGE OF WOMEN ACCOUNTANTS AND AUDITORS, FINANCIAL ANALYSTS, OR CHIEF EXECUTIVE OFFICERS

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Percentage of Women Accountants and Auditors, Financial Analysts, or Chief Executive Officers</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accountants and Auditors—Women</td>
<td>59.4%</td>
<td>60.5%</td>
<td>61.9%</td>
<td>60.2%</td>
<td>61.9%</td>
<td>61.1%</td>
</tr>
<tr>
<td>Financial Analysts—Women</td>
<td>*</td>
<td>*</td>
<td>39.0%</td>
<td>38.4%</td>
<td>34.3%</td>
<td>38.8%</td>
</tr>
<tr>
<td>Chief Executives—Women</td>
<td>*</td>
<td>23.3%</td>
<td>23.8%</td>
<td>23.4%</td>
<td>25.6%</td>
<td>23.4%</td>
</tr>
</tbody>
</table>

Data taken from *Women in the Labor Force: A Databook*. The Databook represents historical and current labor force and earnings data for women and men from the Current Population Survey ("CPS"), which is a national monthly survey of approximately 60,000 households conducted by the U.S. Census Bureau for the U.S. Bureau of Labor Statistics ("BLS") and provides information on the labor force, employment, and unemployment. The data contained in the Databook, and thus in this chart, are annual averages from the CPS. The data is from a survey using a scientifically selected national sample with coverage in the 50 States and the District of Columbia. The data fails to contain a listing for investment banking category. Based on a disclosure in the Databook, the data is subject to sampling and nonsampling error.

*Category not included for that year.*