

committee members, or the audit committee member determined to be the expert, by requiring disclosure as to whether an audit committee financial expert serves on the audit committee. We also do not think that the requirement to name the audit committee financial expert should affect the expert's potential liability as an audit committee member.

Several commenters noted that a company may incur costs if it has to disclose that it does not have an audit committee financial expert on its audit committee. For example, a negative market reaction to this type of disclosure could hamper a company's ability to raise capital. In response to commenters' remarks, we have broadened the definition of the term "audit committee financial expert" so that more individuals will be able to qualify under the definition. For example, the final rules allow persons with experience preparing, auditing, analyzing or evaluating financial statements, or active supervision over those activities, to qualify. The proposals only permitted those with experience preparing or auditing financial statements to qualify as experts. Similarly, we have broadened the permissible means by which a person may acquire the requisite expertise. For example, we have added a clause that would permit a person to have acquired the attributes through experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements. We have also added a clause that allows a person to acquire the attributes through other relevant experience. While more companies will be able to disclose that they have an audit committee financial expert under the revised definition, we believe that definition still is consistent with the Act's objective to require an Exchange Act reporting company to disclose whether it has a person with a high level of financial expertise on its audit committee.

With respect to the code of ethics provisions, a number of commenters stated that the benefits of filing copies of the code of ethics do not justify the anticipated costs. They argued that some companies have long codes which would be expensive to file. Moreover, many details in those codes may not be material to investors. They argued that it should be sufficient for a company to disclose whether it has a code satisfying the definition of the term "code of ethics" in our rule. Recognizing that a number of companies currently post copies of their code of ethics on their

websites, we have revised the rule to provide two alternatives to the filing requirement. A company may either post its code of ethics on its website if it discloses that it intends to do so in its annual report or undertake in its annual report to provide investors with a copy of its code of ethics upon request. These alternatives should allow issuers to choose the most cost efficient method to meet the new requirements. We believe that these additional requirements benefit investors, impose minimal burden on companies, and are consistent with the objectives of the Sarbanes-Oxley Act.

#### **V. Effect on Efficiency, Competition and Capital Formation**

Section 23(a)(2)<sup>72</sup> of the Exchange Act requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Section 2(b)<sup>73</sup> of the Securities Act and Section 3(f)<sup>74</sup> of the Exchange Act require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. The purpose of the amendments is to increase transparency of certain aspects of a company's corporate governance. This should improve the ability of investors to make informed investment and voting decisions. Informed investor decisions generally promote market efficiency and capital formation. As noted above, however, the new disclosure items could have certain indirect consequences, which could adversely impact a company's ability to raise capital. The possibility of these effects and their magnitude if they were to occur are difficult to quantify.

Much of the new disclosure required by the final rules discussed in this release is explicitly mandated by the Sarbanes-Oxley Act. The new disclosure items are intended to increase transparency as to whether an audit committee financial expert serves on a company's audit committee and whether the company has a code of ethics that applies to its principal executive officer and senior financial

officers. We anticipate that these disclosures will enhance the proper functioning of the capital markets by giving investors greater insight into certain aspects of a company's corporate governance activities. These enhancements should, in turn, increase the competitiveness of companies participating in the U.S. capital markets. However, because only companies subject to the reporting requirements of Sections 13 and 15 of the Exchange Act must make the disclosures, competitors not subject to those reporting requirements potentially could gain an informational advantage.

We requested comment on whether the proposed amendments, if adopted, would impose a burden on competition or, conversely, promote efficiency, competition and capital formation. A number of commenters expressed concern that the definition of the term "audit committee financial expert" may have anti-competitive effects. Specifically, they were concerned that the definition was so narrow that it might cause some companies, desiring to have an expert on their board, to recruit persons associated with a competitor. In response to these comments, we have clarified that this provision does not require the audit committee financial expert to have experience with issuers in the same industry as the company, or that the person's experience must have been with a company subject to the Exchange Act reporting requirements. Rather, we have included this provision to focus on the level of sophistication of the accounting issues with which the person has had experience. We think that a company's board of directors will have to make the sophistication assessment based on particular facts and circumstances.

Other commenters expressed concern that the definition was so narrow that many companies would have trouble finding audit committee financial experts. They also feared that disclosure of the fact that a company does not have an audit committee financial expert could trigger an adverse market reaction. We have attempted to expand the definition of "audit committee financial expert" without sacrificing the quality of knowledge and experience required of such an expert. We believe that the revised definition, though expanded, is consistent with the purposes of the Act.

Commenters also expressed concern that requiring disclosure of the names of audit committee financial experts would further hamper their efforts to find qualified persons willing to serve on their audit committees as experts by

<sup>72</sup> 15 U.S.C. 78w(a)(2).

<sup>73</sup> 15 U.S.C. 77b(b).

<sup>74</sup> 15 U.S.C. 78c(f).