William & Mary Business Law Review

Volume 15 (2023-2024)
Issue 3

Article 6

4-2024

Achieving Gender Equality in Venture Capital: The Case for Federal Regulatory Intervention

Janhvi Patel

ACHIEVING GENDER EQUALITY IN VENTURE CAPITAL: THE CASE FOR FEDERAL REGULATORY INTERVENTION

JANHVI PATEL*

ABSTRACT

Gender inequality is a pervasive issue in venture capital financing, with studies consistently revealing the severe disadvantage female entrepreneurs face when raising private funds for their companies. Research has shown that female founders receive only a fraction of the total venture capital dollars invested each year, despite launching companies that outperform those founded by men. Gender bias among investors, a lack of diversity in decision-making teams, and regulatory inaction are major contributors to this inequality. The consequences of gender inequality in venture capital financing extend beyond the financial impact; such inequalities perpetuate systemic gender stereotypes and impede the full realization of female-founded startups. Federal regulatory action is required to resolve such inequities because federal agencies have the congressional authority, should enjoy judicial deference, and bring the subject matter expertise to enact relevant measures.

* JD Candidate, Class of 2024, William & Mary Law School. I would like to thank my family and friends for their endless love and support, especially my sister, Ishita, who has been my greatest cheerleader since day one. I would also like to thank my mentors and professors who have played an instrumental role in shaping the person I am today. Lastly, I would like to thank the *William & Mary Business Law Review* staff for their time and effort in preparing this Note for publication.

TABLE OF CONTENTS

INTRODUCTION

Gender inequality[1] in venture capital financing has a disproportionately adverse impact on female entrepreneurs. Female founding CEOs are often unfairly penalized depending on the industry their company serves.[2] Research shows that a "lack of fit" is often cited as a reason for the denial of investments, and "fit" is oftentimes a term based upon misleading gender stereotypes.[3] The disparity is especially evident for female-led ventures entering traditionally male-dominated industries such as the automobile, technology,[4] or construction industries; those startups receive significantly less funding than when the business is focused on a stereotypically female-dominated industry such as beauty, fashion, or home decor.[5] In turn, the valuations of ventures targeting traditionally male-dominated fields are substantially lower.[6] Despite recent progress by emerging female-led businesses operating in male-dominated industries such as utilities, construction, and information technology, there remains a wide gender gap in the treatment of men and women seeking venture capital investment.[7] Studies have found that products stereotypically identified as "male products," such as craft beer, are viewed more favorably when brought to market by men rather than women.[8] Conversely,

---

[1] The author acknowledges the complexities of gender identity, including the outdated notion of binary gender forms. The author also acknowledges that the assigned biological sex of an individual does not necessarily correlate with their gender identity. However, for the purposes of this Note, gender inequality will be analyzed in a binary context because most studies, surveys, and data have been collected and conducted under this context. As a result, words such as "women" or "female" will be used to refer to individuals that are biologically female, and words such as "men" or "male" will be used to refer to individuals that are biologically male.

[2] *See generally* Dana Kanze et al., *Evidence That Investors Penalize Female Founders for Lack of Industry Fit*, 6 SCI. ADVANCES no. 48, Nov. 2020.

[3] *Id.*

[4] Shanea Leven, *Raising money is catastrophically challenging for female founders*, TECHCRUNCH (Jan. 15, 2022, 9:49 AM), https://techcrunch.com/2022/01/15/raising-money-is-catastrophically-challenging-for-female-founders/ [https://perma.cc/7ABF-9EEP].

[5] Kanze et al., *supra* note 2, at 1.

[6] *Id.*

[7] *Id.*

[8] *Id.* (citing Elise Tak et al., *Gender Inequality in Product Markets: When and How Status Beliefs Transfer to Products*, 98 SOC. FORCES 548 (2019).

if a man were to produce and advertise stereotypically "female-type" products, such as makeup, there is less variation based on the gender of the marketer, both receiving similar evaluations.[9]

Many times, female-founded companies are not valued based on their financial performance, market share, or growth potential, but rather by the founder's gender and the superficial, stereotypical, preconceived biases that venture capitalists maintain when making investment decisions.[10] To address the gender inequality in venture capital financing, this Note advocates for a two-part solution: (1) that the Securities and Exchange Commission (SEC) mandate the Joint Standards for Assessing the Diversity Policies and Practices Regulated by the Agencies (Joint Standards); and (2) a requirement that venture capital firms report the percentage of portfolio companies with a female CEO or at least one woman in the founding team to the SEC. Part I delineates the five key stages of venture capital financing,[11] and Part II examines gender biases and the negative effects of such biases on women in the investment process.[12] Part III explains why seeking remedies through the judicial system is impractical,[13] and Part IV addresses the regulatory shortcomings of the SEC.[14] Finally, Part V proposes regulatory solutions, including the implementation of mandatory diversity initiatives and disclosure requirements for venture capital firms.[15]

I. VENTURE CAPITAL FINANCING AND ITS STAGES

To comprehend the gender inequalities plaguing the venture capital financing landscape, it is first imperative to have a clear understanding of the contours of this financing modality.

---

[9] *Id.*

[10] *See* Pip Wilson, *Sexism Runs So Deep in VC Culture Even Female Partners Believe It*, ENTREPRENEUR (Aug. 10, 2017), https://www.entrepreneur.com/money-finance/sexism-runs-so-deep-in-vc-culture-even-female-partners/298145 [https://perma.cc/TN9B-67BG].

[11] *See infra* Part I.

[12] *See infra* Part II.

[13] *See infra* Part III.

[14] *See infra* Part IV.

[15] *See infra* Part V.

Venture capital financing is a type of private equity funding, through which venture capital firms provide fledgling companies with a long-term growth stimulus to facilitate the companies' business expansion.[16] This funding can be in the form of monetary contributions or expert guidance related to management, growth mentorship, or market consultations.[17] This financing approach is primarily designed for companies that lack access to the stock market or do not have adequate cash flow to service debts.[18]

There are essentially five key stages to the venture capital financing process, including the pre-seed stage, seed stage, Series A stage (and beyond if necessary), Mezzanine stage, and exit stage.[19]

A. Pre-seed Stage

The pre-seed stage entails developing the business idea, obtaining relevant patents, copyrights, and trademarks, and creating a pitch deck.[20] A pitch deck is a comprehensive presentation containing pertinent information about the business plan, market research, company financials, and future growth potential.[21] This information is presented to prospective investors to apprise them of the startup's potential for success.[22] If the investors are favorably impressed, they can further pursue the investment opportunity, oftentimes by inviting the founder(s) for in-person meetings to gain a deeper understanding of the company and inform their evaluation, which may culminate in an investment offer.[23]

---

[16] Adam Hayes, *Venture Capital: What Is VC and How Does It Work?*, INVESTOPEDIA (Jan. 27, 2024), https://www.investopedia.com/terms/v/venturecapital.asp [https://perma.cc/SH3X-QL4N].

[17] *See* Darian M. Ibrahim, *Corporate Venture Capital*, 24 U. PA. J. BUS. L. 209, 215–16 (2021).

[18] *Id.* at 215.

[19] Anastasia, *The Stages of Venture Capital*, NEXEA (Feb. 17, 2023), https://www.nexea.co/the-stages-of-venture-capital/ [https://perma.cc/5PVK-87QV].

[20] *Id.*

[21] Healy Jones, *Top 11 Venture Capital Pitch Decks*, KRUZE CONSULTING (Jan. 30, 2024), https://kruzeconsulting.com/blog/top-5-venture-capital-pitch-decks/ [https://perma.cc/AR3N-ASWK].

[22] *Id.*

[23] QuickBooks Canada Team, *After a Successful Pitch Deck: A Guide to the VC Process*, QUICKBOOKSBLOG (Mar. 7, 2017), https://quickbooks.intuit.com

B. Seed Stage

This marks the initiation of the seed stage, in which the company creates the product or prototype, and begins fundraising through angel investors or early stage venture capitalists.[24] Angel investors are affluent, high-net-worth individuals seeking to provide financial support to small, early-stage startups in exchange for equity ownership in the company.[25] Most professional investors are accredited by the SEC, meaning they either have a net worth of at least $1,000,000 in assets (excluding their primary residence), have earned $200,000 in income for the past two years, or have a combined income of $300,000 for married couples.[26] Angel investors differ from venture capitalists in that they invest their personal funds instead of money placed in a strategically managed fund.[27] As such, venture capitalists typically become involved after angel investors, investing larger amounts of capital.[28] Overall, angel investors provided over $25 billion to early-stage companies in 2020, whereas the aggregate venture capital investment was $330 billion in 2021.[29]

C. Series A Stage

If a startup experiences sufficient sustained commercial growth in the seed stage, it may progress to the Series A phase.[30] During this stage, the startup focuses on commercializing its business idea by researching the industries and markets most

/ca/resources/funding/after-successful-pitch-deck-guide-vc-process/ [https://perma.cc/PW3U-AV43].

[24] John F. Coyle, *Contractual Innovation in Venture Capital*, 66 HASTINGS L.J. 133, 144 (2014).

[25] *See* Kimberly A. Houser & Kathryn Kisska-Schulze, *Disrupting Venture Capital: Carrots, Sticks, and Artificial Intelligence*, 13 U.C. IRVINE L. REV. 901, 903 (2023).

[26] Akhilesh Ganti, *Angel Investor Definition and How It Works*, INVESTOPEDIA (June 18, 2023), https://www.investopedia.com/terms/a/angelinvestor.asp [https://perma.cc/KL2W-VRRU].

[27] Ibrahim, *supra* note 17, at 217.

[28] Anastasia, *supra* note 19.

[29] *What Are the Differences in Friends and Family, Angel Investors, and Venture Capital Funds?*, SEC (July 12, 2023), https://www.sec.gov/education/capitalraising/building-blocks/investor-types [https://perma.cc/23GV-MGKX].

[30] Anastasia, *supra* note 19.

suitable for product releases.[31] Then, the primary objective becomes generating revenue through sales.[32] Success among the target consumer base in this introductory market determines the startup's prospects for expansion.[33] At this stage, the startup has proven to be a viable investment and has attracted contributions from accelerators and super angel investors.[34] Accelerators are fixed-term programs that connect startups with investors, mentors, workspaces, and industry specialists to help accelerate growth.[35] If the company requires more funding, it may announce further rounds soliciting investment in the venture, including Series B, Series C, and so on.[36]

D. Mezzanine Stage

In this stage, the startup develops new products, expands into more markets, and ultimately strengthens its consumer base.[37] It is likely to receive funding from late-stage venture capitalists, private equity firms, hedge funds, and other interested banks.[38] Once the startup is fully viable and capable of sustaining independent growth and commercial maintenance, investors typically sell their shares for a significant return on their investment.[39] This leads the company into the final mezzanine stage, where it must determine how to finance independent growth and consider potential exit strategies, especially accounting for any major changes it may undergo in the future.[40] The options available at

---

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] Ian Hathaway, *What Startup Accelerators Really Do*, HARV. BUS. REV. (Mar. 1, 2016), https://hbr.org/2016/03/what-startup-accelerators-really-do [https://perma.cc/MBX2-T6W7].

[36] Nathan Reiff*, Series Funding: A, B, and C*, INVESTOPEDIA (July 15, 2023), https://www.investopedia.com/articles/personal-finance/102015/series-b-c-funding-what-it-all-means-and-how-it-works.asp [https://perma.cc/6RPY-ZFMA].

[37] Anastasia, *supra* note 19.

[38] George W. Dent, Jr., *Venture Capital and the Future of Corporate Finance*, 70 WASH. U. L.Q. 1029, 1032–35 (1992).

[39] *Id.*

[40] Adam Hayes, *Exit Strategy Definition for an Investment or Business*, INVESTOPEDIA (Mar. 20, 2023), https://www.investopedia.com/terms/e/exitstrategy.asp [https://perma.cc/FQ9P-3XGV].

this stage include merging with another company, acquisition by another company, or undergoing an initial public offering (IPO).[41] If the startup chooses to go public, there are many public reporting requirements that the entity would have to abide by.[42] However, if the startup remains a private entity, then it may be subject to fewer regulations.[43]

II. THE NEGATIVE EFFECTS ON FEMALE FOUNDERS

The ability to innovate and sustain growth is the American economy's greatest strength.[44] As a capitalist nation, the United States actively facilitates economic development, capital formation and business expansion.[45] However, systemic barriers to investment faced by female founders throughout the venture capital financing process hamper economic policy objectives.[46] A significant gender gap exists in the success rate of entrepreneurs able to secure funding.[47] Male founders raise almost fifty times more capital than their female counterparts.[48] In 2021, female founders secured a mere 2% of venture capital investments made in the United States, representing the smallest share since 2016,[49]

---

41 *See* Darian M. Ibrahim, *The New Exit In Venture Capital*, 65 VAND. L. REV. 1, 2, 27 (2012).

42 *See generally Chapter 4: Nuts & Bolts: The Basics of Public Company Periodic Reporting Obligations*, PERKINSCOIE, https://www.perkinscoie.com/en/pch-chapter-4.html [https://perma.cc/HMR2-SA7W].

43 Zoeanna Mayhook, *Privately-Held Companies: Legislation, Regulation, and Limited Dissemination of Financial Information*, DOCUMENTS TO THE PEOPLE (Winter 2019), https://journals.ala.org/index.php/dttp/article/view/7215/9854 [https://perma.cc/RK7L-BP45].

44 *See generally* DOMESTIC POL'Y COUNCIL, OFF. OF SCI. & TECH. POL'Y, AMERICAN COMPETITIVENESS INITIATIVE: LEADING THE WORLD IN INNOVATION (2006).

45 Alexander Kersten & Gabrielle Athanasia, *Addressing the Gender Imbalance in Venture Capital and Entrepreneurship*, CTR. FOR STRATEGIC & INT'L STUD. (Oct. 20, 2022), https://www.csis.org/analysis/addressing-gender-imbalance-venture-capital-and-entrepreneurship [https://perma.cc/3BFC-JLYP].

46 *Id.*

47 Michael Jetter & Kieran Stockley, *Gender Match and the Gender Gap in Venture Capital Financing: Evidence from Shark Tank*, IZA INST. LAB. ECON. (Jan. 2021), https://docs.iza.org/dp14069.pdf [https://perma.cc/WGU9-FG2V].

48 Lakshmi Balachandra, *How Gender Biases Drive Venture Capital Decision-Making: Exploring the Gender Funding Gap*, 35 GENDER IN MGMT. 261, 261 (2020).

49 Lizette Chapman, *Women Founders Raised Just 2% of Venture Capital Money in 2021*, BNN BLOOMBERG (Jan. 11, 2022), https://www.bnnbloomberg

despite women accounting for 28% of all founders[50] and owning 38% of all businesses in the country.[51]

This disparity persists throughout the various fundraising stages,[52] including at the pre-seed stage, and more specifically during pitch deck presentations.[53] Research shows that investors tend to prefer pitches presented by male entrepreneurs, even when the content of the pitch is identical to that presented by female entrepreneurs.[54] During pitches, men are consistently asked more promotion-oriented questions, while women are asked more prevention-oriented questions.[55] Promotion questions generally relate to achievements, goals, objectives, and growth. On the other hand, prevention questions are geared towards safety, stability, accountability, and responsibility.[56] At a TechCrunch competition that involved 180 entrepreneurs and 140 venture capitalists, female entrepreneurs were often asked questions relating to risk

.ca/women-founders-raised-just-2-of-venture-capital-money-in-2021-1.1706213 [https://perma.cc/Q5LZ-XHHH].

[50] Ximena Aleman, *Startup fundraising is the most tangible gender gap. How can we overcome it?*, TECHCRUNCH (Nov. 9, 2020, 3:36 PM), https://techcrunch.com/2020/11/09/startup-fundraising-is-the-most-tangible-gender-gap-how-can-we-overcome-it/ [https://perma.cc/FX5M-TW6B].

[51] Dana Kanze et al., *Male and Female Entrepreneurs Get Asked Different Questions by VCs—and It Affects How Much Funding They Get*, HARV. BUS. REV. (June 27, 2017) [hereinafter Kanze et al., *Male and Female Entrepreneurs*], https://hbr.org/2017/06/male-and-female-entrepreneurs-get-asked-different-questions-by-vcs-and-it-affects-how-much-funding-they-get [https://perma.cc/RBD7-9JQC].

[52] *See* Kamal Hassan et al., *How the VC Pitch Process Is Failing Female Entrepreneurs*, HARV. BUS. REV. (Jan. 13, 2020), https://hbr.org/2020/01/how-the-vc-pitch-process-is-failing-female-entrepreneurs [https://perma.cc/WG2K-WF4T].

[53] *Id.*

[54] A 2014 study used identical slides and scripts, voiced by men and women, with or without photos of the presenter, and then asked study participants to rate the investment. Pitches voiced by men significantly outperformed those voiced by women. *Id.*

[55] *Id.*

[56] Promotion based questions include: "How do you want to acquire customers?"; "How do you plan to monetize this?"; "Do you think that your target market is a growing one?"; and "What major milestones are you targeting for this year?" Prevention based questions include: "How long will it take you to break even?"; "Is it a defensible business wherein other people can't come into the space to take share?"; "How predictable are your future cash flows?"; and "Are you planning to Turing test this?" *See* Kanze et al., *Male and Female Entrepreneurs*, *supra* note 51.

mitigation or loss prevention, whereas male entrepreneurs were asked about potential gains and market growth.[57]

This dynamic poses a significant disadvantage for female founders, as addressing growth and expansion opportunities during pitches resulted in entrepreneurs securing six times more funding than when the presentations focused on corporate risks and barriers.[58] When comparing similar companies, entrepreneurs who answered mostly promotion questions raised an average of $16.8 million in aggregate funds for their startups through 2017, whereas those asked mostly prevention questions raised an average of $2.3 million.[59] This disparity translated to a $3.8 million loss per prevention question asked in the researchers' review of interactions during the TechCrunch competition.[60] Interestingly, even if women successfully answered the prevention questions with confidence and accuracy, they still received significantly less venture capital dollars than men.[61] Gender biases lead some venture capitalists to underestimate female founders and view their companies as less viable investments compared to those led by men.[62]

Even if some female entrepreneurs receive funding, their success is often limited to those startups which cater to traditionally "feminine" areas, such as children's products, fashion, or beauty.[63] The probability of securing funding for ventures in other industries is low due to firms' preferences for high-returns, which are more prevalent in the finance or technology sectors,[64]

---

[57] *Id.*

[58] Hassan et al., *supra* note 52.

[59] Kanze et al., *Male and Female Entrepreneurs*, *supra* note 51.

[60] This difference is measured in consideration with other factors such as measures of startups' capital needs, quality, age, and experience of the founders. *Id.*

[61] *See* Monisha Varadan et al., *Getting Rid of Gender Bias in Venture Capital*, INSEAD KNOWLEDGE (Aug. 12, 2019), https://knowledge.insead.edu/economics-finance/getting-rid-gender-bias-venture-capital [https://perma.cc/C3HS-FCCV].

[62] Lyda Bigelow et al., *Skirting the Issues: Experimental Evidence of Gender Bias in IPO Prospectus Evaluations*, 40 J. MANAGEMENT 1732 (2014) (demonstrating through an empirical experiment how reviews of simulated IPO prospectuses illustrated how gender biases might affect investment decisions and financing evaluations).

[63] Kersten & Athanasia, *supra* note 45.

[64] Jennifer S. Fan, *Nontraditional Investors*, 48 BYU L. REV. 463, 529 (2022).

where women are also severely under-represented.[65] Even if female venture capitalists seek out viable female-founded startups, official investment by her firm rarely follows.[66] This is because many partners, who are the ultimate decision makers and controllers of well-endowed checkbooks, are men blinded by outdated gender norms.[67] Although numerous venture capital firms have implemented bias training, current training methods fall short in addressing the issue effectively, as gender biases during the pitch phase are frequently subconscious.[68] And, the systemic exclusion of women from venture capital funding has become so common that it often leads to "venture bearding,"[69] where female founders resort to employing men as front persons to develop and convey a façade of male authority.[70] This practice highlights how

---

[65] *See* Michael Schallehn & Chris Johnson, *Why Venture Capitalists Are Doubling Down on Technology*, BAIN & CO. (Sept. 20, 2021), https://www.bain.com/insights/why-venture-capitalists-are-doubling-down-on-technology-tech-report-2021/ [https://perma.cc/CPY8-LUGZ]; Sarah Chandler, *Why Are So Few Women in Finance? It's Complicated*, INVESTOPEDIA (Nov. 7, 2022), https://www.investopedia.com/articles/investing/092315/why-are-so-few-women-finance-its-complicated.asp [https://perma.cc/8HCD-5AYL].

[66] *See* Sarah Kocianski, *How A Lack Of Senior Women In VC Hinders Female Founders*, FORBES (Sept. 6, 2022, 12:52 PM), https://www.forbes.com/sites/sarahkocianski/2022/09/06/how-a-lack-of-senior-women-in-vc-hinders-female-founders/?sh=6bba949da188 [https://perma.cc/8BTQ-7M9Q]. Nina Mohanty, founder of an ethical savings fintech company called Bloom Money, has often experienced that when she is approached by a female associate or principal who is interested in the company, there is usually a white male partner accompanying the interested female who does not share the same enthusiasm as the associate. However, each of the initial contacts often invested independently, using their personal funds because they believed it to be a good investment and viable enterprise. *Id.*

[67] *Id.*

[68] *Id.*

[69] Benjamin P. Edwards & Ann C. McGinley, *Venture Bearding*, 52 U.C. DAVIS L. REV. 1873, 1873 (2019).

[70] *Id.* at 1875–76 (elaborating on the experiences of female founders Penelope Gazin and Kate Dwyer who "discovered that developers, graphic designers, and other outsiders were often condescending and disrespectful. . . . To sidestep the constant conflict and secure better treatment, [they] presented their business with a masculine identity. . . . Developers responded to the imaginary man's messages more quickly and respectfully."). This illustrates how "venture bearding" operates to reduce the capital, social and transaction costs of doing business as a woman, while granting female founders the ability to commit additional time to growing their business, but ultimately sacrificing the virtue and value of presenting the venture as female-led. *Id.* at 1876–77.

the failure to address gender bias and inequality can lead many female founders to essentially perpetuate gender stereotypes against themselves and encourage setting the male perspective as the industry standard.

Venture bearding takes place when there are limited social networks for female founders,[71] fewer role models,[72] and a lack of women on investment teams in venture capital firms,[73] especially in positions with "check writing power."[74] According to the Center for Strategic and International Studies, the representation of women in venture capital firms is severely lacking.[75] A mere 8% of partners and 7% of board members at such firms are female,[76] despite research indicating that increasing female participation could lead to greater profitability.[77] For instance, a 10% increase in female partners could result in a 9.7% rise in profitable exits.[78] Yet, shockingly, fewer than 5% of all venture capital firms have any women on their executive teams, and only 2.7% have female CEOs.[79] Furthermore, over 65% of venture capital firms still do not have a single female partner.[80] These statistics reveal a glaring absence of female representation in the industry, with nearly 81% of firms having never hired a female employee or funded a female-led startup.[81] The lack of diversity in the industry has long been noted, with the industry sometimes being referred to as a "boy's club" that limits innovation through

---

[71] *Id*. at 1917.

[72] Kersten & Athanasia, *supra* note 45.

[73] Varadan et al., *supra* note 61.

[74] Kocianski, *supra* note 66. "Check writing power" generally refers to the authority of certain individuals at venture capital firms who can enter into a financial agreement without needing any supervisory consent. *Id.*

[75] Kersten & Athanasia, *supra* note 45.

[76] *Id.*

[77] *Id.*

[78] Paul Gompers & Silpa Kovvali, *The Other Diversity Dividend*, HARV. BUS. REV. (July–Aug. 2018), https://hbr.org/2018/07/the-other-diversity-dividend [https://perma.cc/684A-47RH].

[79] Kersten & Athanasia, *supra* note 45.

[80] Pam Kostka, *More Women Became VC Partners Than Ever Before In 2019 But 65% of Venture Firms Still Have Zero Female Partners*, MEDIUM (Feb. 7, 2020), https://medium.com/allraise/more-women-became-vc-partners-than-ever-before-in-2019-39cc6cb86955 [https://perma.cc/FWB6-LTJD].

[81] Kersten & Athanasia, *supra* note 45.

homogeneity.[82] This uniformity propagates the exclusion of women and adversely affects their prospects for future leadership positions in the industry.[83] The absence of female partners can shape the perspectives of male associates; they may inadvertently reinforce gender biases as they advance into leadership positions.[84] Despite the percentage of female participation in venture capital and entrepreneurship rising from 7.16% in the early 1990s to 11% in 2010, much work remains to address the issue.[85]

The homophilic nature of the industry presents a significant barrier to diversity,[86] as investment decisions often prioritize minimizing risk by investing in familiar networks, which tend to be male-dominated.[87] This is a paradoxical state of affairs given that the industry is ostensibly dedicated to innovation and change.[88] Fundamentally, businesses thrive on a bedrock of trust, anchored by established reputations and enduring relationships built on successful prior engagements.[89] As such, in industries where male dominance has been the norm, it can prove exceedingly challenging for women to enter and build a personal network of trusted collaborators.[90] This is especially true in the venture capital industry, where 80% of female tech startup founders rely on their personal savings as the primary source of funding, which can limit the scope of their business connections and professional relationships.[91] Without significant pressure on venture capital firms to

---

[82] Michael Blanding, *Diversity Boosts Profits in Venture Capital Firms*, HARV. BUS. SCH. (Oct. 4, 2018), https://hbswk.hbs.edu/item/diversity-boosts-profits-in-venture-capital-firms [https://perma.cc/3M5T-JWN3].

[83] *Id.*

[84] *Cf.* Damon J. Phillips, *Organizational Genealogies and the Persistence of Gender Inequality: The Case of Silicon Valley Law Firms*, 50 ADMIN. SCI. Q. 440 (2005) (arguing that parent law firms with women in leadership positions in the firm's early years tend to result in progeny with more women in leadership positions).

[85] Paul A. Gompers & Sophie Q. Wang, *Diversity in Innovation* (Nat' Bureau of Econ. Rsch., Working Paper No. 23082, 2017).

[86] *See* Sophie Calder-Wang & Paul Gompers, *And the Children Shall Lead: Gender Diversity and Performance in Venture Capital*, 142 J. FIN. ECON. 1, 1–3 (2021).

[87] Kersten & Athanasia, *supra* note 45.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

take gender inequality seriously, the industry will continue to be male-dominated, potentially hindering the advancement of the American economy.

III. Judicial Remedies Limited by the Absence of Applicable Legislation

Judicial remedies to address gender inequality in this space are limited, as traditional anti-discrimination laws such as Title VII of the Civil Rights Act or the Equal Credit Opportunity Act do not encompass venture capital financing.[92]

A. Title VII of the Civil Rights Act

Title VII of the Civil Rights Act (Title VII) prohibits employment discrimination based on race, sex, color, religion, or national origin.[93] However, this statute does not apply to private venture capital financing, because venture capital firms establish a shareholder relationship with their portfolio companies rather than an employer-employee relationship.[94] Currently, no federal statute exists that prohibits gender discrimination in decisions of private funding and investment, especially as it relates to venture capital financing.[95]

Even if Title VII was expanded to include non-employer-based discrimination, a founder suing an investor would still face significant legal challenges under the Equal Protection Clause of the Fourteenth Amendment due to the strictly private nature of venture capital financing.[96] Despite the fact that gender discrimination cases receive heightened scrutiny by the courts,[97] purely private investments are generally outside of the scope of the

---

[92] *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2; Equal Credit Opportunity Act, 15 U.S.C. 1691; *see also* 12 C.F.R. § 1002.1.

[93] 42 U.S.C. § 2000e-2.

[94] *See* Reed Albergotti, *Black Start-Up Founders Say Venture Capitalists Are Racist, but the Law Protects Them*, WASH. POST (July 22, 2020 7:00 AM), https://www.washingtonpost.com/technology/2020/07/22/black-entrepreneurs-venture-capital/ [https://perma.cc/K33G-F3KL].

[95] *See* Ann M. Lipton, *Capital Discrimination*, 59 HOUS. L. REV. 843, 846–47, 883–85 (2021).

[96] *See* Shelley v. Kraemer, 334 U.S. 1, 13–14 (1948).

[97] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197–98, 204 (1976); United States v. Virginia, 518 U.S. 515, 533, 555 (1996).

Fourteenth Amendment.[98] Even if a plaintiff could prove sufficient state action, proving discriminatory motive would be near impossible, as the founder would have to prove that she would have received an investment offer if she was not a woman.[99] In such cases, the investor could easily point to standard considerations such as the business model's risk profile, the founder's industry-specific inexperience, or just the unlikability of the founder as sufficient bases for a denial of investment.[100] Any of these factors could establish a defense that would very easily negate a discriminatory motive argument, rendering Title VII inadequate as a legal remedy to address gender disparities in venture capital financing.

B. Equal Credit Opportunity Act

The Equal Credit Opportunity Act (ECOA) prohibits discrimination based on sex, race or color, national origin, religion, marital status, and age in all aspects of a credit transaction.[101] The ECOA applies to extensions of credit made to small businesses, corporations, partnerships, and trusts alike.[102] As a component of the Consumer Credit Protection Act (CCPA), the ECOA serves to safeguard ordinary consumers from misleading advertising, prejudicial conduct, and unfair lending practices.[103] However, the ECOA does not reference venture capital financing or private equity interest protection.[104] Few banks are willing to offer venture debt to seed-stage companies, because these companies usually do not have the traditional means of paying debt back.[105] While some banks may provide loan options for startups, establishing a discriminatory motive behind the decision to decline

---

[98] *See supra* text accompanying note 96.

[99] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251–52, 254 (1989).

[100] See Andy Rosen, *Venture Capitalists Oppose Plan to Bar Discrimination in Investments*, BOS. GLOBE (July 4, 2019, 7:04 PM), https://www.bostonglobe.com/business/2019/07/04/venture-capitalists-oppose-plan-bar-discrimination-investments/yawBDSjWAsLDCJu7xkiB2I/story.html [https://perma.cc/7BHE-J5GU].

[101] Equal Credit Opportunity Act, 15 U.S.C. § 1691.

[102] *Id.*

[103] Adam Hayes, *What Is the Consumer Credit Protection Act (CCPA)? Definition*, INVESTOPEDIA (June 30, 2022), https://www.investopedia.com/terms/c/consumer-credit-protection-act-of-1968.asp [https://perma.cc/4KMF-7VVP].

[104] *See* 15 U.S.C. § 1691.

[105] *See* Darian M. Ibrahim, *Debt As Venture Capital*, 2010 U. ILL. L. REV. 1169, 1170 (2010).

issuing that loan to a high-risk, early-stage venture would be nearly impossible.[106] Moreover, venture capital funds typically refrain from offering credit lines to their portfolio entities, opting instead to acquire equity stakes in those companies.[107] This equity ownership makes the venture capital fund a shareholder, not a lending entity.[108] Consequently, the ECOA would not be applicable in this context, leaving female founders void of its protection against gender discrimination in the venture financing process.

IV. THE SEC'S REGULATORY SHORTCOMINGS

A. The Voluntariness of the Joint Standards

Regulators historically played a limited role in the venture capital ecosystem to avoid impeding innovation and economic growth.[109] However, a lack of effective regulation can limit growth and has hindered the promotion of diversity, particularly the inclusion of women in the industry.[110]

Under section 342 of the Dodd-Frank Act, the SEC was required to establish an Office of Minority and Women Inclusion (OMWI) for the promotion of diversity in management, employment, and business activities.[111] Section 342(b)(2)(C) specifically required the OMWI Director to develop standards for evaluating

---

[106] Jessica Rawnsley, *How Does Venture Debt Work?,* SIFTED (Mar. 8, 2023), https://sifted.eu/articles/venture-debt-guide-charts-brnd [https://perma.cc/AF5M-ZFV4].

[107] *See* Houser & Kisska-Schulze, *supra* note 25.

[108] *See* Indeed Editorial Team, *Owning Equity: Definition and Examples*, INDEED (June 9, 2023), https://www.indeed.com/career-advice/career-development/owning-equity [https://perma.cc/4NBM-SAKK].

[109] *See* Chris Metinko, *Venture World Watches As SEC Moves To Regulate Industry*, CRUNCHBASE NEWS (Feb. 9, 2023), https://news.crunchbase.com/policy-regulation/venture-sec-regulations-web3-ftx/ [https://perma.cc/QAV8-5KXL].

[110] *See* Katie Abouzahr et al., *Why Women-Owned Startups Are a Better Bet*, BOS. CONSULTING GRP. (June 6, 2018), https://www.bcg.com/publications/2018/why-women-owned-startups-are-better-bet [https://perma.cc/97CV-MB3Y].

[111] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203 § 342 (codified as 12 U.S.C. § 5452); *Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Securities and Exchange Commission—Frequently Asked Questions*, SEC [hereinafter *SEC Standards for Assessing*], https://www.sec.gov/files/OMWI-DAR-FAQ.pdf [https://perma.cc/D7V8-H2G6].

the diversity policies and practices of entities regulated by the agency.[112] In accordance with this congressional requirement, the SEC issued a policy statement outlining the Joint Standards.[113] The policy statement emphasizes the importance of transparency and self-assessment of diversity and inclusion policy initiatives.[114] According to the SEC, the primary objective of section 342 and the Joint Standards is to ensure the fair inclusion and utilization of minorities, women, and minority-owned and women-owned businesses in all business and activities of regulated entities at all levels and in all types of contracts.[115] The Joint Standards encourage diversity and inclusion in regulated entities' organizational structure, workforce, employment practices, and procurement and business activities.[116]

Although the Joint Standards are a step in the right direction, the SEC and other joint entities regrettably made the Standards a voluntary suggestion for businesses rather than a regulatory obligation.[117] In this regard, diversity remains optional for regulated entities.[118] The reasoning behind this election remains unclear, as the information provided by the regulated entities is private, and not subject to public scrutiny.[119] The Joint

---

[112] 12 U.S.C. § 5452; *SEC Standards for Assessing*, *supra* note 111.

[113] *See* Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies, 80 Fed. Reg. 33016 (June 10, 2015) [hereinafter Joint Standards].

[114] *Id.*

[115] *Id.*

[116] *Id.* The Joint Standards provides five areas of focus for diversity and inclusion practices including: Organizational Commitment to Diversity and Inclusion; Workplace Profile and Employment Practices; Procurement and Business Practices; Practices to Promote Transparency and Organizational Diversity and Inclusion; and Self-Assessment. *Id.*

[117] Luis A. Aguilar, Comm'r, SEC, Dissenting Statement on the Final Interagency Policy Statement: Failing to Advance Diversity and Inclusion (June 9, 2015), https://www.sec.gov/news/statement/dissent-interagency-policy-statement-diversity/ [https://perma.cc/NC8W-7PGD].

[118] *Standards for Assessing Diversity Policies and Practices*, U.S. NAT'L CREDIT UNION ADMIN. (June 2015), https://www.ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/standards-assessing-diversity-policies-and-practices [https://perma.cc/S8T7-GE78].

[119] Anthony Sharett, *Dodd-Frank Section 342: An Analysis of an Emerging Regulation Impacting the Financial Services Industry*, BUS. L. TODAY 1, 3 (Sept. 2015), https://www.jstor.org/stable/businesslawtoday.2015.09.04 [https://perma.cc/MZ77-YRWZ].

Standards encourage a voluntary self-assessment of the regulated entity's diversity policies and practices;[120] as a result, entities are not compelled to prioritize diversity or to report their initiatives on the matter.[121] Although the SEC provides regulated entities with a Diversity Assessment Report form to facilitate self-assessments, entities have full discretion as to how much information to provide.[122] The voluntary nature of the Diversity Assessment Report and the Joint Standards makes it highly unlikely that regulated entities will disclose any information on their diversity initiatives.[123]

Additionally, the SEC's narrow definition of "regulated entities" excludes venture capital firms.[124] The definition encompasses investment advisers, investment companies, advisers to hedge funds, and business development companies, but not venture capital firms specifically.[125] Under the Investment Advisers Act of 1940 (Advisers Act), the SEC considers investment advisers to be any person or firm that engages in the business of providing advice to others or issuing reports or analyses relating to securities, and receives compensation for their advice.[126] This designation traditionally includes money managers, investment

---

[120] Joint Standards, *supra* note 113, at 33024.

[121] *See id.* at 33022.

[122] *Diversity Assessment Report for Entities Regulated by the SEC*, SEC [hereinafter *Diversity Assessment Report*], https://www.sec.gov/files/OMWI-DAR-FORM.pdf [https://perma.cc/QDH9-X9J5]. The Diversity Assessment Report form includes basic checkboxes to indicate whether the regulated entity has chosen to adopt and implement certain diversity initiatives such as having a written diversity and inclusion policy, including diversity and inclusion considerations as a part of its strategic plan for recruiting, hiring, retaining, and promoting employees, and taking proactive steps to promote a diverse pool of candidates when selecting executive and senior level officials or to the board of directors or other governing body at the entity. *See id.*

[123] *Cf.* Elizabeth Edwards, *Nothing to Hide: California's New VC Diversity Reporting Law*, FORBES (Oct. 10, 2023, 6:19 PM), https://www.forbes.com/sites/elizabethedwards/2023/10/10/nothing-to-hide-californias-new-vc-diversity-reporting-law/?sh=7b37eee31bbf [https://perma.cc/KX8E-BZB6] (explaining that the National Venture Capital Association, a VC-funded lobbying group, opposed a new California bill requiring VC firms to disclose the gender, race, disability, and veteran status of the founders of companies the firm invests in).

[124] *SEC Standards for Assessing*, *supra* note 111.

[125] *Id.*

[126] 15 U.S.C. § 80b-2(11); *see Regulation of Investment Advisers by the U.S. Securities and Exchange Commission*, SEC (Mar. 2013) [hereinafter *Regulation of Investment Advisers*], https://www.sec.gov/about/offices/oia/oia_investman/rplaze-042012.pdf [https://perma.cc/D46P-F689].

consultants, and financial planners.[127] The SEC's definition functionally excludes venture capital firms from the obligations of investment advisers,[128] even though many venture capital firms provide financial consultations as a part of their investment.[129] As a result, it is uncertain whether venture capital firms, many of whom are also registered as investment advisers, would be subject to the Joint Standards.[130] Furthermore, the SEC generally defines investment companies as business entities that issue securities and are primarily engaged in the business of investing in securities, such as open-end or closed-end companies.[131] While venture capital firms acquire equity from their investments, they are not in the business of securities transactions.[132] Consequently, venture capital firms, despite operating within the investment sphere, do not fall under the ambit of SEC policy statement, and therefore are not subject to the Joint Standards.

B. The Lack of "Diversity Reporting Requirements" by the SEC

It is widely recognized that women remain severely underrepresented in corporate leadership and board positions. A report by the Alliance for Board Diversity and Deloitte found that in 2020, women accounted for approximately 21% of the boardroom positions in Fortune 500 companies, marking an uptick from less

---

[127] *See Regulation of Investment Advisers*, *supra* note 126.

[128] Ethan W. Johnson & John J. O'Brien, *SEC Adopts Rules Exempting Venture Capital Fund Advisers From SEC Registration and Setting Forth Reporting Regime*, MORGAN LEWIS (July 7, 2011), https://www.morganlewis.com/pubs/2011/07/sec-adopts-rules-exempting-venture-capital-fund-advisers-from-sec-registration-and-setting-forth-reporting-regime [https://perma.cc/Z7V3-TMAT].

[129] David Horowitz, *Why VC firms Are Registering as Investment Advisers*, MEDIUM (Sept. 23, 2019), https://medium.com/touchdownvc/why-vc-firms-are-registering-as-investment-advisers-ea5041bda28d [https://perma.cc/BQ9Y-BLWN].

[130] *See id.*

[131] *Investment Companies*, SEC (July 9, 2013), https://www.sec.gov/answers/mfinvco.htm [https://perma.cc/3XF2-KZZ6]. There are three basic categories of investment companies: mutual funds (also known as open-end companies); closed-end funds (also known as closed-end companies); and UITs (also known as unit investment trusts). Across the different investment companies, there are also variations in the types of funds, such as stock funds, bond funds, money market funds, index funds, interval funds, and exchange-traded funds. *Id.*

[132] *Id.*

than 13% in 2010.[133] Although this progress is encouraging, it unfortunately has not been mirrored in the venture capital industry.[134] This stark disparity in minority representation between Fortune 500 companies and venture capital firms can be attributed, in part, to the limited reporting requirements imposed on venture capital firms by the SEC.[135]

For example, under Title IV of the Dodd-Frank Act, the exemption from registration of investment advisers with fewer than 15 clients was eliminated,[136] effectively requiring all hedge funds and private equity funds to register as investment advisers (RIA).[137] However, venture capital funds can still claim this exemption if they so wish.[138] The SEC justifies this exemption by recognizing the positive economic impact of venture capital activity on innovation and new company growth.[139] Congress believes that venture capital firms should be allocating their resources to increase capital and market growth of startups, rather than for unnecessary, irrelevant regulatory compliance.[140] As a result, venture capital funds can register as exempt reporting advisors (ERAs), which gives them the benefit of limited compliance obligations and greater flexibility regarding communication,

---

[133] Alisha Haridasani Gupta, *Surprise: Women and Minorities Are Still Underrepresented in Corporate Boardrooms*, N.Y. TIMES (Oct. 12, 2021), https://www.nytimes.com/2021/06/07/us/women-minorities-underrepresented-corporate-boardrooms.html [https://perma.cc/9HZD-9MEM]. In 2020, white women held roughly twenty-two percent of seats on Fortune 500 company boards and almost twenty-one percent of Fortune 100 companies, whereas Hispanic women made up one percent, Black women made up 3.1 percent and Asian women made up 1.5 percent of Fortune 500 company boards. *Id.*

[134] Kersten & Athanasia, *supra* note 45.

[135] See Allison Herren Lee, Comm'r, SEC, Diversity Matters, Disclosure Works, and the SEC Can Do More at the Council of Institutional Investors Fall 2020 Conference (Sept. 22, 2020), https://www.sec.gov/news/speech/lee-cii-2020-conference-20200922 [https://perma.cc/B6FD-4PVW].

[136] *SEC Adopts Dodd-Frank Act Amendments to Investment Advisers Act*, SEC (June 22, 2011), https://www.sec.gov/news/press/2011/2011-133.htm [https://perma.cc/C49Z-N6PV].

[137] *Modernizing the SEC's Definition of Venture Capital Fund*, NAT'L VENTURE CAP. ASS'N (Feb. 4, 2020) [hereinafter *Nat'l Venture Cap. Ass'n Presentation*], https://www.sec.gov/spotlight/sbcfac/2020-02-04-presentation-vc-fund-definition.pdf [https://perma.cc/8Z92-3624].

[138] *Id.*

[139] *Id.*

[140] *Id.*

custody, and bookkeeping rules.[141] These reduced compliance requirements give venture capital funds freedom to avoid accountability and disclosure measures meant to facilitate the diversification of their workforces.[142]

While this exemption concerns SEC registration requirements and not diversity disclosures, it highlights the federal government's flawed reasoning. Reports show that companies with diverse teams have almost ten percent higher earnings before interest and taxes.[143] Moreover, companies with two-dimensional diversity[144]—encompassing both inherent gender traits and acquired skills—are forty-five percent more likely to report a growth in market share over the prior year and seventy percent more likely to report capturing a new market, key metrics of venture capital success.[145] Venture capital firms and their portfolio companies stand at the innovation forefront, making it imperative for both to embrace diversity initiatives. When venture capital firms prioritize diversity within their own ranks and in their investment choices, they set a standard for inclusivity and challenge the homophilic tendencies that often constrain startups. Similarly, startups that proactively combat gender bias and cultivate a diverse core team are better positioned to innovate and scale effectively. This mutual commitment to diversity not only facilitates breaking away from entrenched biases but also enhances the overall innovation ecosystem and ensures equity. Changing the corporate work environment and employee bias becomes more difficult once the company has become successful

[141] *Id.* The reduced compliance costs include: limited form ADV filing; no form PF requirements; no routine audits; and no additional cost of RIA compliance program. *Id.*

[142] *Id.*

[143] Stuart Levine, *Diversity Confirmed To Boost Innovation And Financial Results*, FORBES (Jan. 15, 2020), https://www.forbes.com/sites/forbesinsights/2020/01/15/diversity-confirmed-to-boost-innovation-and-financial-results/?sh=6fae59ecc4a6 [https://perma.cc/KU8R-62F9].

[144] *Stretch Your Innovation Muscles through 2D Diversity*, BLUE FIRE LEADERSHIP, https://bluefireleadership.com/stretch-your-innovation-muscles-through-2d-diversity [https://perma.cc/NTB5-6C77] (last visited Apr. 8, 2024).

[145] Sylvia Ann Hewlett et al., *How Diversity Can Drive Innovation*, HARV. BUS. REV. (Dec. 2013), https://hbr.org/2013/12/how-diversity-can-drive-innovation [https://perma.cc/4EQ5-PA7H].

enough to function independently and is essentially "too big to change."[146] Therefore, the shift should be initiated early in the company's development, and firms should not be exempted from reporting.[147]

V. Mandatory Solutions and Agency Deference

A. Make the Joint Standards Mandatory for Venture Capital Firms

Regulated entities are hesitant to share information concerning their diversity initiatives, as it can open them up to public scrutiny.[148] OMWI was established to promote the inclusion of women in corporate sectors, and the voluntariness of the SEC policy statement is unlikely to facilitate the full realization of this objective.[149] To truly effectuate the intent of Congress, it is imperative that the SEC mandate disclosure of the Diversity Assessment Report and the implementation of the Joint Standards, and expand the scope of regulated entities to include venture capital firms registered as investment advisers.

Eight members of Congress, all of whom drafted section 342, argued that the provision requires mandatory assessments and disclosures.[150] Nothing in section 342 precludes the SEC from mandating the Joint Standards and the Diversity Assessment Report for regulated entities.[151] The SEC should also classify venture capital firms as regulated entities under section 342 due to their

---

[146] *Id.*

[147] Hayes, *supra* note 16.

[148] *See* Chris Marr & Khorri Atkinson, *More Pay Disclosure Laws Exposing Employees to Bias Suits*, BLOOMBERG L. (Sept. 7, 2022, 12:06 PM), https://news.bloomberglaw.com/daily-labor-report/spread-of-pay-disclosure-laws-exposes-employers-to-bias-suits [https://perma.cc/NVK2-ZYBP].

[149] Aguilar, *supra* note 117.

[150] Letter from Congresswoman Maxine Waters et al. to the CFPB, FDIC, Fed. Rsrv., NCUA, OCC & SEC, on the Proposed Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies and Request for Comment (Apr. 11, 2014), https://www.federalreserve.gov/SECRS/2014/May/20140509/OP-1465/OP-1465_041514_126311_475617696392_1.pdf [https://perma.cc/89CF-UML8].

[151] *Id.*

close association with investment and innovation.[152] Disclosure need not be public, as private entities are not generally required to divulge financial or demographic data to the public.[153] However, firms should still be mandated to report to the SEC.

Additionally, the Joint Standards should be mandatory for venture capital firms as well as the traditionally regulated entities. By including investment advisers (including advisers to hedge funds) and investment companies (including business development companies (BDC)), but not venture capital firms, the SEC negates its own argument. Venture capital firms are traditionally exempted from requirements because they are at the forefront of innovation and economic growth, but BDCs, which also engage in enterprise investment, are still subject to the Joint Standards.[154] In fact, BDCs are incredibly similar to venture capital funds.[155] According to the SEC, BDCs invest primarily in small or medium-sized private companies in their early stages of development.[156] These entities aggregate capital from a broad base of investors to allocate in portfolio companies.[157] Occasionally, BDCs also help manage the companies that they invest in.[158] Similarly, venture capital funds also invest in early stage private companies by pooling money from numerous investors.[159] Investments could also include management consultations similar to BDCs.[160] Given the operational similarities between these two entities and their nearly identical impact on innovation and the national economy, it is

---

[152] *Nat'l Venture Cap. Ass'n Presentation*, *supra* note 137.

[153] Evan Tarver, *Are Private Companies Required to Publish Financial Statements?*, INVESTOPEDIA (Oct. 30, 2022), https://www.investopedia.com/ask/answers/062415/private-company-required-disclose-financial-information-public.asp [https://perma.cc/9WAA-7NS5].

[154] *SEC Standards for Assessing*, *supra* note 111.

[155] James Chen, *Business Development Company (BDC): Definition and How to Invest*, INVESTOPEDIA (Aug. 11, 2020), https://www.investopedia.com/terms/b/bdc.asp [https://perma.cc/RPQ3-MQCK].

[156] SEC Office of Investor Education and Advocacy, *Investor Bulletin: Publicly Traded Business Development Companies (BDCs)*, SEC (Oct. 8, 2020), https://www.sec.gov/oiea/investor-alerts-and-bulletins/investor-bulletin-publicly-traded-business-development-companies [https://perma.cc/95XU-L8YY].

[157] *Id.*

[158] *Id.*

[159] Hayes, *supra* note 16.

[160] *Id.*

concerning to see the SEC exclude venture capital firms from its policy statement.

Critics of this proposal may draw comparisons between these measures and the push for affirmative action, positing that women would receive funding due to their under-represented status rather than on their merit. Nonetheless, while affirmative action was rightly designed to open doors for individuals historically subject to racial discrimination, this proposal aims to proactively prevent future instances of gender discrimination and stereotyping.[161] Women account for over 40% of the student body in the top U.S. business schools[162] and represent over 34% of management consultants.[163] They earned nearly 58% of all post-secondary degrees during the 2019–2020 academic year[164] and are almost at parity with men in science and engineering degrees.[165] The fact remains that significantly more women possess the qualifications to not only establish successful startups but to also excel as venture capitalists, yet they are routinely undervalued.[166]

B. Mandate Venture Capital Funds to Disclose Diversity Statistics to Investors

To promote transparency and encourage venture capital firms to enhance their diversity initiatives, the SEC must enforce two additional reporting requirements. First, firms should

---

[161] *See* Regents of Univ. of California v. Bakke, 438 U.S. 265, 363 (1978) (Brennan, J., concurring).

[162] Katie Riley, *A Record Number of Women Are Enrolled in Top Business Schools, But Men Still Dominate MBA Programs*, TIME (Nov. 12, 2021, 12:01 AM), https://time.com/6116802/women-business-school-record/ [https://perma.cc/HY4C-ZD3S].

[163] *Management Consultant Demographics and Statistics in the US*, ZIPPIA, https://www.zippia.com/management-consultant-jobs/demographics/ [https://perma.cc/4UUL-QKHG] (last visited Apr. 8, 2024).

[164] Jessica Bryant, *Women Continue to Outnumber Men in College Completion*, BESTCOLLEGES (July 8, 2022), https://www.bestcolleges.com/news/analysis/2021/11/19/women-complete-college-more-than-men/ [https://perma.cc/9UZT-QRAD].

[165] Prathi Seneviratne, *Are Women Reaching Parity with Men in STEM?*, ECONOFACT (Apr. 15, 2022), https://econofact.org/are-women-reaching-parity-with-men-in-stem [https://perma.cc/YF4J-GXD3].

[166] Calder-Wang & Gompers, *supra* note 86.

be mandated to disclose the self-identified gender of their associates and partners, in an anonymized format, to their investors. The SEC should also require firms that do not have at least two female partners to explain why. This transparency requirement would pressure firms to hire more women, which would help reduce the gender gap in financing because female venture capitalists are twice as likely to invest in female founding teams.[167]

In fact, the SEC recently approved a similar rule proposed by Nasdaq, which requires Nasdaq-listed companies to disclose to their shareholders the diversity statistics of their board members, specifically their race, gender, and LGBTQ+ status.[168] Should the company fail to have at least two diverse directors, then they must explain why that is to their shareholders.[169] Similarly, the SEC should require venture capital firms, that are already given considerable freedom, to disclose the diversity statistics of their firm to their investors. As ESG standards put increasing pressure on institutions to promote diversity, investors could use this information to make investment decisions and capital allocations in line with their preferences and business judgment.[170]

Second, the SEC should require venture capital firms to privately report to the commission the percentage of their portfolio companies with a female CEO or at least one woman in the founding team. The SEC can leverage this data to generate a generalized report that is made available to the public without disclosing confidential information about any specific entity. In fact, some companies have already voluntarily started doing so through an "inclusion clause" in their term sheets.[171] This measure

---

[167] Collin West & Gopinath Sundaramurthy, *Women VCs Invest in Up to 2x More Female Founders*, KAUFFMAN FELLOWS (Mar. 25, 2020), https://www.kauffmanfellows.org/journal_posts/women-vcs-invest-in-up-to-2x-more-female-founders [https://perma.cc/239N-GG25].

[168] Mark Feller, *SEC Greenlights New Director Diversity Disclosure Requirements for Nasdaq-Listed Companies*, MORGAN LEWIS (Aug. 16, 2021), https://www.morganlewis.com/pubs/2021/08/sec-greenlights-new-director-diversity-disclosure-requirements-for-nasdaq-listed-companies [https://perma.cc/YYM4-ZYS7].

[169] *Id.*

[170] Julie Segal, *The Pressure Is on Private Equity To Take ESG Seriously*, INSTITUTIONAL INV. (Feb. 1, 2021), https://www.institutionalinvestor.com/article/2bswsehs8fc0t133gub5s/portfolio/the-pressure-is-on-private-equity-to-take-esg-seriously [https://perma.cc/562Y-DVFG].

[171] *See* Agnieszka Skonieczna & Letizia Castellano, *Gender Smart Financing Investing In & With Women: Opportunities for Europe*, EUR. COMM'N DIR.-GEN.

is seemingly authorized by the interagency policy statement announcing the Joint Standards.[172] According to the policy statement, the Diversity Assessment Report would take an average of ten hours per response.[173] Therefore, it should be fairly manageable for regulated entities with more than 100 employees to complete an annual form on crucial social initiatives, especially given the numerous administrative requirements they already follow.

The reporting requirements will also incentivize investors to consider the diversity, equity, and inclusion efforts in their investments.[174] These measures will enact valuable change in the industry and address the problem of gender inequality in venture capital financing.

C. Deference to Agency Rulemaking: Chevron *and the Major Questions Doctrine*

These regulatory solutions should receive deference from the Supreme Court because it is clear from the language of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) that Congress delegated the authority to establish diversity requirements and initiatives to the SEC. Therefore, the regulatory solutions proposed above should receive deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* and the major questions doctrine that followed.

In *Chevron*, the Supreme Court established a two-part test for evaluating an agency's interpretation of a congressional statute.[175] The first inquiry in this analysis requires a court to ascertain whether congressional intent is clear and unambiguous

---

FOR ECON. & FIN. AFFS. (July 2020), https://economy-finance.ec.europa.eu/system/files/2020-07/dp129_en.pdf [https://perma.cc/S3QJ-8YHU].

[172] *Diversity Assessment Report*, *supra* note 122 (stating clearly that agencies may publish information shared with them by a regulated entity as long as the disclosure does not identify the business or include any confidential information).

[173] *Diversity Assessment Report*, *supra* note 122 (including time for reviewing the instructions, searching for existing data sources, gathering and maintaining the necessary data, and finally completing and reviewing the report).

[174] *See generally 2022 Diversity Annual Report*, GOOGLE, https://about.google/belonging/diversity-annual-report/2022/ [https://perma.cc/L9DC-SHP4] (last visited Apr. 8, 2024).

[175] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

from the language of the statute.[176] If it is so, then both the court and the agency must construe the statute accordingly.[177] In the absence of clear congressional intent, however, the court must determine whether the agency's interpretation is reasonable and therefore a permissible construction of the statute.[178] The agency's interpretation will be considered permissible as long as it is not arbitrary and capricious, or manifestly contrary to the intent of the statute, even if a court finds a different conclusion to be more appropriate.[179]

Relating back to this Note, the Dodd-Frank Act empowers the SEC to enhance regulatory oversight, improve transparency and accountability, facilitate capital formation, bolster investor protection, and reform the derivatives market.[180] Section 342 specifically charges the agency with the responsibility of assessing the diversity policies and practices of the entities regulated by the SEC.[181] Section 342(b)(2)(C) of the Dodd-Frank Act specifically requires the OMWI Director to develop standards for assessing the diversity policies and practices of entities regulated by the agency.[182] This section clearly gives the agency broad discretion to ensure proper diversity practices by the regulated entities. And while Congress did not grant the SEC the power to mandate fair lending practices of regulated entities,[183] Congress did grant the SEC the power to regulate investment activity through various acts.[184] Venture capital financing is primarily considered an investment, not a loan, therefore the OMWI Director

---

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.* at 844.

[180] *Wall Street Reform: Assessing and Enhancing the Financial Regulatory System Before the S. Comm. on Banking, Hous., & Urb. Affs.*, 113th Cong. (2014) 72–86 (statement of Mary Jo White, Chair, SEC).

[181] *Id.*; 12 U.S.C. § 5452.

[182] *SEC Standards for Assessing*, *supra* note 111.

[183] Patrice Alexander Ficklin, *The CFPB's 2022 Fair Lending Annual Report to Congress*, CFPB (June 29, 2023), https://www.consumerfinance.gov/about-us/blog/the-cfpbs-2022-fair-lending-annual-report-to-congress/ [https://perma.cc/X5D4-CATK].

[184] *See The Laws That Govern the Securities Industry*, SEC (Oct. 1, 2013), https://www.sec.gov/about/about-securities-laws [https://perma.cc/TU4G-64MZ].

is afforded board discretion to ensure that proper diversity practices are adopted by regulated entities.[185] Denying the SEC this authority would undermine Congress's delegation and pose a significant separation of powers issue.[186] As long as the regulatory solutions are in line with their authority, the SEC should receive deference from the courts.

The SEC's expertise and informed judgment makes it better positioned than Congress to accurately execute equity initiatives concerning gender inequality in venture capital financing. Congress lacks the specialized knowledge and expertise to micromanage the venture capital space.[187] High-risk investments, due diligence norms, and innovative technologies[188] can be somewhat of a foreign concept to the legislative body. In fact, Congress directed the SEC to define the term "venture capital" because the agency is better fit to do so.[189] The legislative process is also famously slow.[190] When combined with the fact that the venture capital industry is projected to reach $708.6 billion by 2028,[191] it is clear that Congress is ill-suited to regulate such a fast-growing industry. Therefore, any viable resolution must come from the regulatory realm, via the SEC effectuating reforms to counter gender inequality in venture capital financing.

---

185 *SEC Standards for Assessing*, *supra* note 111.

186 TODD GARVEY & SEAN M. STIFF, CONG. RSCH. SERV., R45442, CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES (2023).

187 See Maya Kornberg, *Congress Is Woefully Unprepared to Regulate Tech*, BRENNAN CTR. FOR JUST. (July 5, 2023), https://www.brennancenter.org/our-work/analysis-opinion/congress-woefully-unprepared-regulate-tech [https://perma.cc/2JRY-JHFH].

188 *Id.*

189 *Nat'l Venture Cap. Ass'n Presentation*, *supra* note 137.

190 Drew Desilver, *Congress Is Off to a Slow Start in 2021, Much as It Has Been in Previous Years*, PEW RSCH. CTR. (Aug. 13, 2021), https://www.pewresearch.org/short-reads/2021/08/13/congress-is-off-to-a-slow-start-in-2021-much-as-it-has-been-in-previous-years/ [https://perma.cc/E3VS-YTTQ].

191 Laura Wood, *$708.6 Billion Global Venture Capital Investment Market Report 2023: Industry Trends, Share, Size, Growth, Opportunities and Forecasts*, RSRCH. AND MARKETS (Mar. 14, 2023), https://www.globenewswire.com/en/news-release/2023/03/14/2627020/28124/en/708-6-Billion-Global-Venture-Capital-Investment-Market-Report-2023-Industry-Trends-Share-Size-Growth-Opportunities-and-Forecasts.html [https://perma.cc/7UTH-HZQX].

It is also important to note the current Supreme Court's reluctance to rely on its *Chevron* precedent in recent agency deference cases, opting instead to rely on the major questions doctrine. In *West Virginia v. Environmental Protection Agency*, the Supreme Court applied the major questions doctrine and stated that in extraordinary cases, the courts must require clear congressional authorization to show Congress's intent of delegation to the agency for the particular matter.[192] The Court also held that agency interpretations of ambiguous statutes concerning questions of "vast economic and political significance" should not receive judicial deference.[193] In that case, the Environmental Protection Agency (EPA) promulgated rules concerning climate change and carbon dioxide emissions, which the Supreme Court considered of great political significance and economic impact.[194]

This Note focuses on gender inequality in venture capital financing. A topic that, while certainly important, has not commonly been the topic of Congressional debates. Unlike the agency action in *West Virginia v. EPA*, here, the SEC is not seeking to regulate "a significant percentage of the national economy" or require "billions in spending" by private parties.[195] The cost of additional disclosures or adopting standards to promote gender diversity would not require most venture capital firms to spend millions. In fact, the original Joint Standards only apply to entities that employ more than 100 individuals, therefore such entities are likely have the necessary resources to handle disclosure requirements.[196] Such disclosures also would not intrude into an area traditionally governed by state law[197] because regulating investments is the job of the federal government and the SEC specifically.[198]

Critics of this proposal may express concerns that the SEC disclosure requirements encroach upon other agencies' traditional

---

[192] West Virginia v. EPA, 597 U.S. 697, 724–26 (2022).

[193] *Id.* at 716.

[194] *Id.* at 707.

[195] *See id.* at 744 (Gorsuch, J., concurring).

[196] *See* Joint Standards, *supra* note 113.

[197] *See* Kornberg, *supra* note 187.

[198] *Division of Investment Management*, SEC (Feb. 27, 2024), https://www.sec.gov/investment-management [https://perma.cc/6VDY-2RUJ].

scope of power by dictating hiring practices, but this would be a flawed interpretation.[199] While the disclosure requirements may influence the hiring practices of venture capital firms, the requirements themselves are not hiring mandates.[200] Influence does not equal regulation. The SEC has an immense influence on industries and practices outside of its traditional areas of regulation, however that does not make the agency a regulator of all industries.[201] The SEC has broad authority to require disclosures of pertinent information that is of interest to investors.[202] As diversity initiatives demonstrably impact both businesses and investors, the SEC is justified in requiring these disclosures. The proposed disclosure requirements are within the regulatory scope of the SEC and should receive deference from the courts. As such, gender inequality in venture capital financing should not be considered a major question under *West Virginia v. EPA*, and the proposed mandatory standards and disclosure should receive *Chevron* deference.

Conclusion

The phenomenon of gender inequality in venture capital financing disproportionately harms female entrepreneurs, leading to unjustified discrimination. Research shows that gender stereotypes and a "lack of fit", rather than market strength or business ideas, are cited as reasons to deny investments, leading to lesser funding and lower valuations for female-led ventures in male-dominated industries such as technology, construction, and automobiles. Although progress has been made in recent years for female-led businesses operating in emerging male-dominated industries such as utilities, construction, and information technology,

---

199 *See* Samantha M. Mariani, Note, *Environmental, Social, and Governance (ESG) Matters: Can the SEC Mandate Disclosure? Should the SEC Mandate Disclosure?*, 37 NOTRE DAME J.L. ETHICS & PUB. POL'Y 369, 385 (2023).

200 *See, e.g.*, Hester M. Peirce, Comm'r, SEC, We are Not the Securities and Environment Commission—At Least Not Yet (Mar. 21, 2022), https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321 [https://perma.cc/NC47-NQME].

201 *See* West Virginia v. EPA, 597 U.S. 697, 754 (2022) (Kagan, J., dissenting).

202 *See id.*

a gender gap persists in the treatment of women seeking venture capital investment.

To address this issue, this Note recommends that the SEC mandate the Joint Standards for venture capital firms and also require them to disclose their diversity statistics to their investors. This Note's earlier sections analyzed the stages of venture capital financing, the negative effects of gender biases on women during the investment process, and the impracticalities of seeking judicial remedies. It also addressed regulatory shortcomings, particularly by the SEC, and proposed regulatory solutions, including mandatory diversity initiatives and disclosure requirements for venture capital firms. Addressing gender inequity in venture capital financing is not only a matter of fairness but also a crucial undertaking to foster innovation, drive economic growth, and cultivate a more inclusive and prosperous entrepreneurial landscape for all. True innovation demands a fair playing field, where ideas are evaluated based on their merit, free from subconscious biases and prejudiced misconceptions. While the proposed SEC resolutions may not provide a complete remedy, they would represent a notable step in the right direction, marking a progressive move towards positive change.