



# At what point are we going overboard?

**T**he Ontario Securities Commission recently published proposed rules that would require publicly traded issuers to provide disclosure about the number of women holding board and executive positions, and the issuer's policies and objectives concerning gender diversity in its leadership roles. This is an issue that evokes passion among many in the corporate world, perhaps because it is a topical issue in the evolution of society at large. This makes it a useful topic for me, particularly for discussing with my children, who seem to think the only real-world application of my professional skills is spotting typos in menus.

Attention to this issue is doubtlessly long overdue. Women continue to be extraordinarily underrepresented in executive suites. There is a consistent chorus from politicians, regulators, commentators, significant institutional investors, and other market actors about the need to address the market's failures in this regard, with no audible dissent. Other jurisdictions are taking steps in this direction. And the disadvantages to issuers, and our economy, that result from the significant exclusion of women from these positions are clear.

The need to address the issue, therefore, is not very controversial. Men are from Mars, women are from Venus, and the entire galaxy should be represented in the boardroom. Exactly how to address the issue, however, is less straightforward (as is often the case). The range of regulatory approaches, as reflected in the comments received in response to the OSC's initial public consultation on the subject, sparks strong differences of opinion and, for me, highlights the tension around the principle of consistency.

Consistency is one of the paramount virtues in a system of laws. It underscores the fundamental concept of precedent, and carries with it elements of fairness and

predictability. Consistency is so core to the law it has been made into the punch line of Henry David Thoreau's shot at lawyers: "The lawyer's truth is not Truth, but consistency or a consistent expediency." Ouch. Maybe consistency numbs the artistic soul or serves as an easy crutch. Certainly most people like to make exceptions, and exceptions are sometimes warranted in special circumstances. The virtues of consistency and flexibility are always at odds when principles meet a given set of facts; this is the dynamic that comes into play in the field of gender diversity regulation.

Most of the current rules that resulted from the first round of SOX-like governance reforms in the last decade are built on a "comply or explain" principle. For example, a core concept from that initial round of reforms was independence. Though securities laws reflect the importance of this requirement, they do not require a majority of independent directors, or that a board chair be independent. Instead, the rules require issuers disclose whether they are complying with the regulators' recommended best practices and, if not, provide an explanation. The idea is to bring the issue to the attention of investors and other market actors and to let the market judge.

Many commentators argue an exception to the "comply or explain" principle should be made for gender diversity, advocating instead for quotas. The bases for these arguments often include skepticism that disclosure requirements will result in any meaningful change, pointing to the completely disproportionate under-representation of women in executive roles and the stagnant pace of progress. It may seem odd to assume the "comply or explain" approach will fail, especially when it can be quickly abandoned in favour of quotas if it does, but it is not unreasonable to expect the failure to achieve better diversity so far may have some inertia.

It is not as though there are no excep-

tions to the "comply or explain" approach (turns out that Thoreau guy wasn't so smart after all). For example, the audit committee members of senior exchange-listed public companies are generally required to be both independent of management and financially literate. But the exceptions are relatively few in number.

The question, then, is whether the objective of achieving gender diversity warrants an exception from the general approach. There are other very important objectives of governance rules, such as board independence (without intending here to start a debate as to whether diversity or independence is more important), for which there is no strict requirement. One factor to bear in mind is making exceptions creates costs in addition to weakening consistency. A good illustration of this is the proposal for director term limits, introduced together with the gender diversity proposals, which would force changes in boardrooms and executive suites. Given the glaring need for women executives, that may be a positive thing in general, but examples easily come to mind of companies that have greatly benefited from the long and diligent service of many of their board members.

Whether "comply or explain" will work, if adopted, or if stricter measures are required, certainly gender diversity is an issue that sorely needs a solution. I say this not only because it will promote the involvement in leadership roles for public issuers of members of a grossly underutilized talent pool, but because (selfishly) it may give me something to discuss with my children the next time I take them out for mouth-watering "crap cakes." ■

*Neill May is a partner at Goodmans LLP in Toronto focusing on securities law, with an emphasis on M&A and corporate finance. E-mail him at [nmay@goodmans.ca](mailto:nmay@goodmans.ca). The opinions expressed in this article are those of the author alone.*