The Rooney rule: How the OSC could tackle diversity in Canada's boardrooms using NFL's playbook

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Dan Rooney, owner of the Pittsburgh Steelers and chairman of the NFL's diversity committee, developed a rule that the league adopted in December 2002, mandating that all teams be required to interview at least one minority candidate for any available head coaching or senior football operations position, including the general manager position. Al Bello/Getty Images

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22% of the head coaching positions were filled by minorities, up from 6% prior to the implementation of the Rooney Rule

The Ontario Securities Commission's proposal aimed at substantially increasing gender diversity on Canada's corporate boards, although a commendable endeavour, represents in its current form an unjustifiable questioning of business judgment, and therefore another example of regulatory interference with private enterprise.

The proposal would require companies listed on the TSX to disclose how many women they have on their boards and in their executive ranks, in addition to setting targets for the future. A corporation would have to explain its corporate policies related to the issue, and disclose the board or nominating committee's consideration of the representation of women in identifying and selecting directors.

If a corporation does not have any such policy, it would be required to explain why not and identify the risks and opportunity costs associated with the decision. Overall, this is known as a "comply or explain" disclosure model. The proposal is the result of pressure from the Ontario government to recommend ways to move forward with enhanced gender diversity.

Two of the problems with this proposal are an unnecessary questioning of business judgment and the likelihood that such an initiative will prove ineffective, as it has in Australia, Norway, and the United Kingdom.

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A company's decision to hire a particular individual for a directorship or executive position is essentially a business decision requiring the careful exercise of business judgment. The directors, nominating committee, and sometimes shareholders, make an important decision in appointing an individual that best meets the current needs and expectations of the company. When litigation is before the courts in matters concerning corporate transactions, judges are required to respect the business judgment of board members and executives when such decisions are within their authority, made in good faith, and undertaken with reasonable skill and prudence: This is known as the business judgment rule, with a long history in both American and Canadian jurisprudence.

If judges are required to respect the business judgment of boards and executives when it comes to corporate litigation, it is arguable that regulators and the government should respect this similar judgment when it applies to board and executive appointment decisions. Introducing a "comply or explain" model exposes a corporation to unnecessary criticism when it makes appointment decisions it feels is in its best interest, yet may not represent progress in increasing the representation of women on the board or executive suite. Furthermore, it requires a corporation to explain its business judgment; something it should not be required to do as long as such decisions are made in good faith, with reasonable skill and prudence.

Another problem with a "comply or explain" model is that it can easily be circumvented by a corporation. Officials at the Ontario Teachers' Pension Plan, who controversially proposed that a quota system be introduced, argued that simply encouraging companies to comply with suggested goals and allowing them to explain themselves when they do not has already proven ineffective in other jurisdictions, citing Norway and the United Kingdom as examples. It does not require much brainstorming to imagine how companies can explain their lack of progress with such an initiative, yet promise to try harder in the future!

Corporate Canada can look to the NFL, arguably the most competitive sports league in the world, to see how it addressed a similar problem while respecting the business (or sports) judgment of front office decision-makers. The NFL had the problem that a majority of its players were black, yet the head coaching and general manager positions throughout the league were predominately filled by whites. Team owners have a large say in such hiring decisions, and up until 2010, all NFL team owners were white.

Dan Rooney, owner of the Pittsburgh Steelers (one of the most respected NFL franchises from a management perspective, as reflected by their league-leading six Super Bowl Championships) felt this problem required addressing. Rooney, chairman of the league's diversity committee, developed a rule that the NFL adopted in December 2002, mandating that all teams be required to interview at least one minority candidate for any available head coaching or senior football operations position, including the general manager position.

There are provisions ensuring that the interview is a serious one, with the owner present and follow-up questioning with the candidate and people within the respective organization by the league. The NFL is quite cognizant of sham interviews that are simply set up in order to comply with the Rooney Rule. Furthermore, despite the often-claimed pressure to hire a head coach quickly, citing competition from other teams, the rule has been strictly enforced. In 2003, the Detroit Lions were fined $200,000 for not complying with the Rooney Rule; today the fine is much higher.

While the Rooney Rule is a form of affirmative action, it maintains the right of a football organization to ultimately select their preferred candidate, and therefore respects an organization's business judgment. The policy has been successful, with minority head coaches and general managers rising significantly throughout the NFL. At the start of the 2006 season, 22% of the head coaching positions were filled by minorities, up from 6% prior to the implementation of the Rooney Rule. Presently, the percentage is 15.6%. While the Rooney Rule is not perfect and there are calls for certain changes, it has been successful in addressing the need for diversity throughout the league.

Getting beyond the initial skepticism of looking towards the male bastion of the NFL for gender diversity guidance, the Rooney Rule could be adapted by the OSC to further increase the representation of women on corporate boards and executive ranks. Such a rule could require that at least one qualified woman be interviewed for every available directorship or executive position. The requirement could even be raised, if results of the initiative are initially disappointing, requiring that two, even three qualified women be interviewed for every position.

Howard Wetston, chair of the OSC, stated that the OSC proposal was about "[…] helping TSX-listed issuers tap into a pool of talented and capable resources currently under-represented on today's boards and senior management." A corporate version of the Rooney Rule could certainly bring more women to the table for serious consideration. However, as long as interviews are conducted seriously and in good faith, there should be no interference or required explanation from a corporation once appointment decisions are made: business judgment must be given deference. As the NFL's Rooney Rule has been successful in increasing the number of minority coaches and general managers, a gender diversity version of the Rooney Rule can significantly increase the number of women on corporate boards.

Financial Post editor Terence Corcoran has warned that the gender diversity issue could very well lead to further boardroom diversity initiatives based on age, ethnicity, and sexual orientation, as there are already calls that this should be done. Without debating the necessity for these initiatives right now, the Rooney Rule could accommodate such future initiatives if required, by bringing these under-represented groups to the interview table, yet leaving the ultimate hiring decision to the corporations. The OSC proposal to have issuers introduce term limits for directors or have their absence explained should increase the opportunity to recruit fresh and diverse talent into our boardrooms.

An adapted version of the Rooney Rule would be a more positive and arguably effective way to address gender diversity in corporate Canada. By forcing businesses to interview candidates that may otherwise be overlooked, the Rooney Rule fights unconscious bias and increases the chances of selecting the best candidate for the job, but does so with respect for business judgment and therefore private enterprise.

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