

January 31, 2023

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Re: OBSI Governance Review – Request for Public Comment

FAIR Canada is pleased to provide comments in response to the above-referenced consultation.

FAIR Canada is a national, independent charitable organization dedicated to being a catalyst for the advancement of the rights of investors and financial consumers in Canada. We advance our mission through outreach and education, public policy submissions to governments and regulators, and proactive identification of emerging issues. As part of our commitment to be a trusted, independent voice on issues that affect retail investors, we conduct research to hear directly from investors about their experiences and concerns. FAIR Canada has a reputation for independence, thoughtful public policy commentary, and repeatedly advancing the interests of retail investors and financial consumers.¹

A. General Comments and Overview

We appreciate OBSI's commitment to seek input from stakeholders and consult on ways to enhance its organizational governance. It reaffirms OBSI's practice of being a transparent and publicly accountable organization. And it further strengthens trust and confidence in OBSI's mandate of delivering fair and effective services to its members and consumers.

Independent reviews have consistently found that OBSI's board functions effectively and is governing appropriately. For example, the 2007 review found that "[b]y all accounts, the Board is functioning well."² In the 2016 evaluation, the reviewers agreed with a board member's statement that the board was characterized by "rigour and high standards" and that "the passion for living up to the mandate is exceptional".³ Similarly, the most recent

¹ Visit www.faircanada.ca for more information.

² Phil Khoury and Debra Russell, [Independent Review OBSI](#), September 2007, at p. 38 [Khoury and Russell].

³ Deborah Battell and Nikki Pender [Independent Evaluation of the Canadian OBSI Investment Mandate](#), May 2016, at p. 15 [Battell].

reviews in 2022 (the Puri Reports) found that the board adhered to principles of good governance, including strong decision-making processes and robust director nomination and board evaluation policies.⁴

Given these consistent findings, we do not see a need for significant change. We generally agree with the findings in the Puri Reports, and believe OBSI's governance could benefit from a few relatively straightforward enhancements. We make the following recommendations, which are discussed in more detail below:

1. Use an amended skills matrix to select directors.
2. Consider whether to continue to designate a consumer interest director.
3. Strengthen the definition of "community director."
4. Maintain the industry director and community director designations and numbers.
5. Discontinue the practice of specific industry organizations nominating industry directors.
6. Tailor how and when to use additional mechanisms, as appropriate, to gather stakeholder feedback in respect of the board's decision-making.

Taken as a whole, these enhancements will ensure the board continues to bring various stakeholder interests together in its processes as governors of the organization.

B. Amended Skills Matrix and Designations

Question #1 of OBSI's consultation focuses on whether OBSI should continue to have designated board positions for industry and/or consumer advocates, or whether it should move to a system that relies on an amended skills matrix without regard to designations.

1. Amended Skills Matrix

The Puri Reports recommend that OBSI transition towards appointing directors solely based on an amended skills matrix and without regard to specific categorical requirements for the number of industry and community directors. The Puri Reports argue this type of system would emphasize the importance of OBSI's impartiality and independence and remove any inference that directors might use their position to represent particular stakeholders. Further, relying solely on a skills matrix would allow for more flexibility in appointments and is in line with governance best practices.

We would not go as far as what the Puri Reports recommend. In our view, there is some merit in continuing the existing industry and community director designations, including the numerical requirements. Please see our response to question #2 below for more details.

⁴ Poonam Puri and Dina Milivojevic, [Independent Evaluation of the OBSI Investments Mandate](#), June 13, 2022, at p. 18 and [Independent Evaluation of the OBSI Banking Mandate](#), September 1, 2022, at p. 16.

FAIR Canada does agree, however, with using an enhanced skills matrix to recruit qualified directors. The skills matrix should include the various skills and attributes the board needs to provide effective strategic oversight of OBSI.

We believe it should include both experience in the industry, as well as experience working with consumers as an advocate or in connection with delivering community or public services. We also agree the matrix should include diversity in terms of geography, language, and backgrounds.

The Puri Reports also recommended the board consider other specific diversity metrics, such as Indigenous ancestry, membership in a visible minority community, and disability. This would align with emerging best practices as reflected in the *Canada Business Corporations Act*.

We believe it is important that the composition of OBSI's board reflects, as much as possible, the make-up of the various communities it serves. We therefore encourage the board to add these dimensions of diversity to its skills matrix.

2. Consider Whether to Maintain the Consumer Interest Designation

While we support the continuation of the industry and community designations, we question whether it would be necessary to maintain the consumer interest designation, particularly if OBSI implements our suggested governance enhancements.

In our view, appointing one director to represent the interests of consumers is a tall order for any individual. Furthermore, it suggests the responsibility for representing such interests lies with only one director. We believe all directors share the responsibility of considering the interests of consumers – one of OBSI's core stakeholder groups.

A careful read of successive independent reviews of OBSI shows that the calls to appoint a formal consumer representative were based on the perception of undue industry influence and concerns that the board was not considering consumer matters. However, this was not in fact the case. For example, in the 2007 assessment, the reviewers found no evidence of undue industry influence and stated that independent directors were “bringing the consumer perspective to the table.”⁵ Similarly, the 2011 review found that although there was no overtly consumer-focused director, there was no absence of knowledge of consumer interests at the board level.⁶ In 2016, the reviewers found that OBSI “has an effective governance structure that generally provides for fair and meaningful representation on its board... and allows OBSI to manage conflicts of interest.”⁷

Nonetheless, a consumer interest director designation was ultimately created because of consumer and investor advocacy groups' strong concerns about the lack of consumer or investor advocacy representation on OBSI's board. In this regard, the evaluators in 2016

⁵ Khoury and Russell, *supra* note 2 at p. 37.

⁶ Phil Khoury, [OBSI 2011 Independent Review](#), 2011, at p. 25.

⁷ Battell, *supra* note 3 at p. 7.

specifically stated that reserving a community director position for someone nominated by consumer advocacy groups “would enhance the *perception* of balanced representation.”⁸ (Emphasis added).

We believe the concerns at the time were heightened, in part, because of the highly contentious atmosphere that existed back then. They were also amplified by the unfairness of having a special nomination process for industry directors, but no corollary process for nominating consumer-focused directors. If OBSI discontinues the special industry nomination process as we suggest, the board should reflect on whether it should maintain the consumer interest director as it is.

An alternative to designating a consumer interest director is to ensure the skills matrix includes consumer advocacy and public or community service as important skills to consider when recruiting directors. As described in OBSI’s by-laws, the board should, in addition to appointing directors with industry experience, ensure that it appoints individuals with “a particular interest in, access to, and competencies with the interests and perspectives of the types of consumers which the OBSI serves.”⁹

This approach would ensure consumer interest expertise would continue to be reflected in the board’s composition. It would also remove the burden on one individual director to represent the consumer interest. Replacing this designation approach with the enhanced skills matrix approach would encourage the board to look more broadly for consumer-focused experience and expertise when recruiting community directors.

Alternatively, should the board maintain the designation, we would recommend that there be an equal number of consumer interest directors and industry directors. This would establish a better balance and reassure consumer and investor advocates that their concerns are being given equal weight in terms of representation on the board.

3. Strengthen the Definition of “Community Director”

We recommend the board strengthen the definition of “community director” in OBSI’s by-laws to better reflect one of OBSI’s key constituents: the average consumer.

Currently, the by-laws define “community director” in negative terms – that is, who is excluded from being considered a community director.¹⁰ In our view, it is equally important to highlight factors the board considers important when recruiting community directors. For example, the by-laws could require community directors to include individuals with experience working in community-focused non-governmental organizations, charities and public services. This should capture, for example, those working with and/or advocating for consumers, vulnerable groups, or new immigrants.

⁸ Ibid.

⁹ [Consolidation of By-Law No. 1 and By-Law No. 2 of OBSI](#), s. 6.5(b)(iii).

¹⁰ Ibid. at s. 6.6.

We also recommend that, for those that previously worked in the securities or banking industry, the cooling off period to become eligible as a community director be increased from two to three years. This recommendation is consistent with the bylaws of the New Self-Regulatory Organization of Canada (New SRO), which require a three-year cooling off period to be considered an independent director.¹¹ It also aligns with the cooling off period in *National Instrument 52-110 - Audit Committees* to qualify as an independent audit committee member.¹² Finally, a three-year period is in line with the International Network of Financial Services Ombudsman Schemes' definition of an independent director.¹³ We believe the longer cooling off period would help to address any ongoing perception of undue industry influence at the board level.

C. Proportion of Industry and Community Directors

Question #2 asks about the appropriate composition of OBSI's board with respect to the proportion of positions designated for those with industry expertise, consumer expertise, or who are independent.

OBSI's by-laws provide for two main director designations – industry director and community director. Further, at least one community director must be designated as the consumer interest director. The by-laws require three industry directors and mandate that community directors must at all times outnumber industry directors.

Again, we would not go as far as the Puri Reports and eliminate the numerical requirements for industry and community directors. We believe these numerical requirements have served the board well and we see no reason to change them.

In our view, concerns regarding OBSI's independence are best addressed by ending the practice of preferential industry nomination rights, rather than discontinuing the practice of designating board positions or specifying the number of industry and community directors. While we would expect the skills matrix to capture the different skill sets and experience of each group, we believe there is still merit in maintaining these two designations with the community directors being in the majority at all times.

Numerical requirements provide an important safeguard: they ensure that the industry will not be overrepresented on the board at the expense of community directors who reflect OBSI's broader constituents. They reassure each group they will be represented and remove concerns that the board may, over time, become stacked with one type of director over the other. Rather than leave it solely to future boards to determine, we recommend maintaining these two basic designations and numbers.

¹¹ [By-law No. 1 of New SRO](#), s. 1.3 [New SRO By-law].

¹² [National Instrument 52-110 - Audit Committees](#), s. 1.4.

¹³ International Network of Financial Services Ombudsman Schemes, [Guide to Setting Up a Financial Ombudsman Services Scheme](#), March 2018, at p. 23.

Additionally, fixing the number of industry and independent directors is a common and well-accepted governance practice, particularly for organizations that serve a larger public purpose. For example, the New SRO includes numerical requirements for directors: its bylaws mandate eight independent directors and six non-independent directors.¹⁴ Moreover, financial ombuds services in other jurisdictions, such as New Zealand's Insurance & Financial Services Ombudsman Scheme¹⁵ and Ireland's Financial Services and Pensions Ombudsman¹⁶, have numerical requirements for the members of their governing body.

D. Discontinue the Industry Nomination Process

Question #3 asks whether specific industry organizations should continue to nominate industry directors, or whether OBSI should transition to a system of more general nomination for industry directors.

FAIR Canada believes OBSI should discontinue the practice of specific industry organizations nominating industry directors. Under this approach, the Investment Industry Regulatory Organization of Canada (IIROC), the Mutual Fund Dealers Association of Canada (MFDA),¹⁷ and the Canadian Bankers Association would no longer have the right to nominate candidates to the board. Our recommendation is consistent with the Puri Reports.

Preferential nomination rights are problematic for several reasons. First, they create the perception that some dealers and the banking industry have special rights regarding OBSI's governance. In short, they discriminate against other groups, and are unfair to those who believe they should also be allowed to nominate their own representatives to the board. This creates an unhelpful dynamic and needless tension among OBSI's stakeholders, which undermines public confidence in OBSI.

Second, they create a false impression that industry directors act as representatives of the organizations that nominated them during board meetings, as opposed to discharging their fiduciary duty to OBSI. We understand from repeated independent reviews that industry directors do, in fact, conduct themselves as directors, as opposed to advocates or representatives of industry. In short, they adhere to OBSI's Director Code of Conduct,¹⁸ under which all directors are fiduciaries and must act honestly and in good faith with a view to the best interests of the organization.

Third, preferential nomination rights may put industry directors in a difficult position if their actions as a fiduciary to OBSI conflict with the interests of their nominating organization.

¹⁴ New SRO By-law, *supra* note 11, s. 5.2.

¹⁵ [Constitution](#) of the Insurance & Financial Services Ombudsman Scheme, July 2015, s.3.1.

¹⁶ [Financial Services and Pensions Ombudsman Act 2017](#), s.37(1).

¹⁷ As of January 1, 2023, the MFDA and IIROC have joined together as the New SRO.

¹⁸ [OBSI Board of Directors' Code of Conduct](#), s. 3.1.

Finally, the elimination of preferential nomination rights is consistent with the principle that the board should control its own governance processes. After all, the board is in the best position to determine what mix of skills and experience it needs in aggregate to discharge its duties. Special nomination rights may therefore call into question whether external organizations are fettering the proper exercise of the board's judgement and responsibility.

For these reasons, we recommend that OBSI end the practice of preferential nomination rights. Instead, it should institute an open, transparent and consistent process for recruiting all directors. The process should seek nominations through public advertisements and from both industry stakeholders and consumer advocacy groups. We believe this would make the recruitment process fairer and would increase public confidence in OBSI's governance practices.

E. Incorporating Stakeholder Experience and Interests

Question #5 in the consultation paper asks how OBSI should ensure the interests and expertise of industry and consumer stakeholders are incorporated into the organization's decision-making process, beyond designated board representation.

FAIR Canada believes that consulting with stakeholders is important for promoting understanding, and for improving the efficiency, transparency and effectiveness of decision-making. We therefore support OBSI's ongoing efforts to engage with key stakeholders when appropriate.

The consultation paper highlights several existing mechanisms and practices for doing so. We generally support them, and see them as different tools that can be used in different circumstances. Any changes to them, however, will need to be considered against the totality of the other governance changes adopted following this consultation. The most important objective should be identifying and selecting the best tool to support the board's decision-making process when needed, as opposed to committing to using them on a routine basis.

We also agree that it is important to clarify the role and responsibility of the Consumer and Investor Advisory Council (CIAC), which should be focused on advising the board on issues and challenges consumers and investors face in dealing with OBSI and the complaints process. Since its inception, CIAC has provided valuable feedback to OBSI, helping the board better understand the consumer's perspective and challenges when navigating the complaints process.

The consultation paper also proposes several alternative mechanisms, including round tables, focus groups, task forces, roadshows, and public forums. We support these alternative mechanisms as well. We would also suggest the use of online surveys or special board committees where appropriate.

In our view, the more important question is when to use these different engagement mechanisms. We expect that these additional sources of feedback would chiefly be used when input is needed beyond what board members can provide. Ultimately, the board is in the best position to determine when and how to gather input when discharging its oversight responsibilities.

Thank you for considering our comments on OBSI’s governance. We welcome any further opportunities to assist your review and consultation on OBSI’s governance. We intend to post our submission on the FAIR Canada website and have no concerns with OBSI publishing it on its website. We would be pleased to discuss our submission with you. Please contact Jean-Paul Bureaud, Executive Director, at jp.bureaud@faircanada.ca or Tasmin Waley, Policy Counsel, at tasmin.waley@faircanada.ca.

Sincerely,



Jean-Paul Bureaud
President, CEO and Executive Director
FAIR Canada | Canadian Foundation for Advancement of Investor Rights