

Kenmar Associates

Investor education and Protection

OBSI Governance Committee

May 28, 2012

c/o Tyler Fleming

401 Bay St. Suite 1505, P.O. Box 5

Toronto ON M5H 2Y4

Fax: 1-888-422-2865 Email: governance@obsi.ca

OBSI Governance Framework Consultation

OBSI's Board has kept its commitment to consult on governance reforms. We are pleased to respond to OBSI's Consultation request. Kenmar have tried to do our best in the short time slot provided.

For us, good governance means how OBSI is run to ensure accountability and independence and that the interests of all stakeholders are given proper consideration.

The related News Release states " *The proposed governance framework is guided by the following principles: the protection of the independence of the Ombudsman in fact and perception; the involvement and commitment of individuals with knowledge and or experience in consumer-related issues and the financial industry; and, the continued development and promotion of good governance.*" We believe that an obligation to comply with all applicable laws, regulations ,standards , assets and oversight of operations (including efficiency and cost management) and protection of OBSI must also be added to the principles.

In 2008 when RBC Banking unilaterally quit OBSI, a robust governance regime would have dealt with the issue immediately; instead ,in 2011 , an emboldened TD Banking pulled out causing irreparable reputational and financial distress to the organization. Similarly, relations with investment dealers were allowed to escalate so that a number of dirty laundry items became very public [<http://www.investoradvocates.ca/viewtopic.php?f=1&t=178&start=30>]. Good governance is required to prevent such occurrences which lead to financial consumer distrust and existential threat to OBSI.

We expect that the Board mandate would deal with such items as ethics/integrity, strategic planning, CEO position description, risk management, HR/Exec Compensation, succession planning, governance, financial controls, communications/disclosure, and Director development and education. OBSI's Bylaws currently require that the Independent Directors shall collectively be representative

of the Canadian population and known and respected in their own right or by virtue of their appointment or office. We believe they should be amended to be congruent with the consultation proposals . Specifically, we would not be supportive of quotas based on gender , minority or geography. The best Directors for this important job should be recruited.

We believe OBSI governance regime must also be responsive to external constraints such as the Joint Forum's Framework with Regulators and related Guidelines designed to ensure that third party dispute resolution systems, including the OmbudServices, fulfil the public interest objectives of complaint resolution described in Annex A of the Framework. When the Department of Finance issues its rules for contracted banking Ombuds Services , OBSI will need to be in compliance and the Board will need to ensure compliance through robust governance.

While a good deal of information has been provided ,the Board mandate/Charter has not been disclosed . Without this key document, our ability to competently comment on the governance reforms has been constrained.

In the consultation document, a Governance Checklist abruptly appears (pg 7) but it is not linked to any text so we're not sure what or how the Checklist is to be used or by whom.

The 2011 Independent Reviewer's Report suggested introducing seats for consumer/investor advocates (and a clear Board charter that obliges directors to act in the interests of the organization, not their constituents).We do not see in these proposals a seat for consumer/investor advocates. We add parenthetically that the Board should prepare a response matrix addressing each of the Reviewers recommendations especially those dealing with governance. This matrix should be publicly disclosed. When it becomes available , the process of assessing the governance framework can be examined in more detail.

OBSI's critical public service role makes it necessary that governance is set at the highest possible level. OBSI's current governance regime is delineated at <http://www.obsi.ca/UI/AboutUs/Governance.aspx> OBSI currently has 4 Committees, the most important one from a financial consumer viewpoint is the Standards Committee. The Standards Committee recommends and monitors OBSI's quality and performance standards, independent reviews and the Code of Conduct, as well as overseeing any revisions to the Terms of Reference (Neither its composition nor its Charter is publicly disclosed). It is not clear from the Consultation document by whom these tasks will now be performed.

The same is true for the Pension Committee – the Consultation is silent on its abandonment-how will its duties now be effected?

Additionally, we're not sure how the Chair or Committee Chairs are nominated/appointed or their service terms. This should be clarified in the final version of the document. We strongly recommend that the OBSI Chair and Chair of the Governance Committee be Independent Directors.

Although we think it is rare that directors of non-profits ever are sued, unless they are personally involved in malfeasance, Board members should understand their legal obligations including those under common law and statute and the potential liabilities for non-compliance in order to avoid problems for themselves and, just as importantly, to prevent OBSI from facing lawsuits, investigations or other embarrassing circumstances.

We were surprised to note the withdrawal of the Investment Funds Institute of Canada (IFIC) as a participating entity -we are unclear as to the impact , if any,of the withdrawal.

Set down below are our more detailed questions , observations and recommendations:

POLICIES/CHARTERS

- ⤴ We recommend a Term limit for Directors and Chair of 4 years.
- ⤴ It should be cited in writing that all Board Directors have a fiduciary duty to OBSI and not to the nominating stakeholders.
- ⤴ We agree that a simple majority vote for resolutions, as described ,is appropriate.
- ⤴ Will a well funded Financial Consumer Advisory Council be integral to the governance regime?
- ⤴ Can we assume that the Governance Committee will review all legal forms used [e.g. Consent Form] and business practices followed?
- ⤴ Charters should be prepared for all Committees and publicly disclosed.
- ⤴ We see the use of OBSI's comprehensive national complaint database to recommend changes in business practices/ better regulations as a key supporting element of OBSI's Public interest mandate. The consultation proposals are silent on this matter. We would like to see OBSI more active in publicly challenging bad industry practices and publicly advocating for higher standards based on its experiences.
- ⤴ Contracts/Agreements with participating firms should be approved by the Board and should contain provisions that include fees, payment terms, rights of withdrawal , duties and responsibilities, cooperation with investigations,notice of termination and the like. The case of TD Bank's sudden withdrawal and the adverse financial and reputational impact this had on OBSI illustrates why good governance requires such contracts/agreements.
- ⤴ There should be a provision for the Board to seek and retain accounting, legal, consulting or other expert advice.

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- ⤴ In the discharge of its duties the Board should have free and unrestricted access to the CEO/Officers and to the relevant books, records and systems.

DIRECTORS/BOARD

- ⤴ The proposal is for the Canadian Bankers Association (CBA), the Investment Industry Regulatory Association of Canada (IIROC), and the Mutual Fund Dealers Association (MFDA) to each provide a shortlist of candidates. It is not unreasonable that one director will be selected from each shortlist. What about nominees from Scholarship Trust Assoc. and other non- SRO/CBA participants?
- ⤴ We surmise that a shortlist from a Trade Association would not be as robust as that from a Regulator. Accordingly, we believe it would make more sense for the FCAC or Ministry of Finance to provide a shortlist rather than the banking industry lobbyist , the CBA. At the same time this would bring banking in line with the protocol used by investment dealers and mutual fund dealers.
- ⤴ Under the proposed Director eligibility criteria, it is possible that the OBSI Board could end up composed entirely of former financial services industry participants (the 2-year rule). This is not appropriate . We recommend a carve out of at least one Director slot for individual(s) with no prior connection to the financial services industry or any of its service providers.
- ⤴ Under (iv) we recommend adding para g. is not a major service provider to a participating service provider e.g. the firm's auditor, legal counsel , PR firm etc.
- ⤴ ADD a requirement that an individual who has employment with or an appointment to an entity that may create or be perceived to create a conflict of interest with a Member will not be considered independent .
- ⤴ Add a requirement that no person of a Trade Association or registered lobbyist can be a OBSI Director.
- ⤴ It should be explicitly stated that no corporate entity should have 2 Directors . For greater clarity, if a Bank also owns a investment dealership , only one Rep can be on the Board.(before it's sudden departure last year, TD had a Director from its banking side and a Director from its investment side.)
- ⤴ The Board composition appears balanced but we suggest that the CEO be considered a part of the Board after due consideration of pros/cons.
- ⤴ The term " independence question" should be formally defined as should the term *Independent Director* (the current definition is somewhat awkward and oblique).
- ⤴ The Charter of the Governance, Human Resources and Compensation Committee is not provided. We assume it will include CEO performance goal setting/ measurement , executive compensation and Board compensation. We are glad to to see that the Governance Committee will include a Board Director with knowledge or experience in consumer and investor issues.
- ⤴ We are delighted to see OBSI's commitment to ongoing Director Education .i.e. ISO 10003 training, ICD courses. Every new board member should receive an orientation and a board binder with important documents of and background material on the organization.
- ⤴ We recommend Annual certification letters of Director Independence be required.
- ⤴ For greater clarity, change" The Board shall, at all times, consist of a majority of Directors as described in (iv) below. " to " The Board shall, at all times, consist of a majority of Independent Directors ."

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- ⤴ It is our understanding that the Chair will be responsible for interfacing with the Joint Forum and/or the Ministry of Finance. Per the 2011 Independent Review report there was a recommendation that an annual regulatory oversight of funding/budget decisions should be established. Why was this not accepted?. Indeed, exactly who will be providing oversight of OBSI?
- ⤴ We agree with the definition of a Quorum.
- ⤴ We feel that the nomination , assessment/screening and endorsement process is fair to all stakeholders and will maintain reasonable OBSI independence. We must note however,that unlike investment dealers, banks can resign from OBSI at will and create their own Ombudsman under contract. This creates a “chilling effect” on OBSI that could lead to unhealthy compromises. In effect, there is some level of co-dependency between OBSI and the participating banks that can reduce the actual level of independence. This is precisely why we supported a legislation-enabled national financial Ombuds Service. Unfortunately, the Department of Finance has given banks the right to buy their own Ombuds services such as that provided by ADR Banking Ombudsman .Were a bank to leave, OBSI's financial resources would be strained.
- ⤴ We like the idea that the Board shall undertake a full evaluation of its own performance at a minimum of once every two years.
- ⤴ The 2011 Independent Reviewer's Report recommended : *Establish a joint industry/regulator standing advisory panel for OBSI to refer controversial technical matters in dispute (principle only, not individual cases),such as aspects of loss calculation.* It was argued that controversial or ‘grey’ areas would be best dealt with if they could be referred to an Expert panel that has the necessary industry technical expertise, but also sufficient public interest perspective to provide OBSI with credible independent advice. Panel expertise should include that of a qualified investor advocate and could possibly be chaired by (say) an independent academic. Ultimately , the Report believed it would still be the Board’s decision,acting on the advice of the panel. There is no mention of this panel in the consultation paper.
- ⤴ Do By-Laws permit the use of teleconferencing and videoconferencing as a means of Director “attendance”?
- ⤴ The Board should periodically hold “in camera” meetings where non-independent Directors are not present.

FINANCIAL

- ⤴ The proposals to approve the budget (and presumably amendments as the fiscal year progresses) are reasonable.
- ⤴ Will the Board approve the selection of the external financial auditor based on a recommendation of the Audit Committee? [OBSI's auditor is not disclosed in the Annual Report]
- ⤴ We assume that industry Directors are not compensated.
- ⤴ It is not clear to us as to which committee is responsible for employee benefits/pension.
- ⤴ We assume that the Chair of the Audit Committee will be required to be an independent Director. This should be spelled out.
- ⤴ Are appropriate financial and budgetary controls and fraud prevention mechanisms in place and working?

DISCLOSURE

- ⤴ Disclosure and transparency is especially important in order for OBSI users to feel comfortable with an industry -sponsored and financed entity .A written Disclosure policy is thus required .
- ⤴ An Annual Report of Operations and financial statements should be disclosed. The Annual Report should be approved by the full Board prior to release.
- ⤴ Disclosure metrics and continuous improvement e.g avg. \$ restitution, avg and max cycle time , % of OBSI recommendations rejected by complainants?..
- ⤴ The Results of the Independent Reviewer should be publicly disclosed
- ⤴ The Charters/Composition of all committees should be publicly disclosed
- ⤴ Will Board meeting minutes be published for public viewing?
- ⤴ Will the names of firms that do not accept OBSI recommendations be publicly disclosed via News Release? This was not done when the TD Bank issue arose.

STRATEGY/MISSION

- ⤴ A key duty of the Board is the preparation of a Strategic plan so we are glad to see that a full Board meeting has been set aside for this purpose.
- ⤴ We believe OBSI pro-activity in dealing with strategic issues e.g. Limitation periods, defective practices such as NAAF form , deficient SRO policies and rule changes is appropriate. [consumer advocates expect OBSI to publicly comment on these crucial issues before they are encapsulated into rules and regulations]
- ⤴ We believe that it is the public interest that OBSI deal with regulatory or legal constraints on fair dispute resolution -appearing before govt. Task forces , making pre-emptive submissions or even interventions to improve dispute resolution in Canada .

We have done our best to comment on the proposed Governance Framework in the limited time provided for comment. Missing documents such as the ones above noted have made it difficult to comment holistically on OBSI governance .

Nevertheless , we find, with the exceptions noted and the concerns expressed, the proposed changes to the governance regime to be a positive step forward. In fact , OBSI's governance regime is far more progressive and transparent than the vast majority of bank and other financial Ombuds services in Canada.

We expect that the By-Laws will need to be changed to reflect the new approach to governance.

If more details and time are provided we would be glad to effect a deeper commentary .

We would welcome an opportunity to meet with you and discuss this critical issue.

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Permission is granted for public posting of this letter.

Sincerely,

Ken Kivenko P.Eng.

President, Kenmar Associates

kenkiv@sympatico.ca

(416)-244-5803