

June 1, 2012

OBSI Governance Committee
c/o Tyler Fleming
401 Bay Street
Suite 1505, P.O. Box 5
Toronto, ON M5H 2S6
Email: governance@obsi.ca

Dear Mr. Fleming:

Re: Consultation on the Framework for Reforming the Board of Directors of OBSI

FAIR Canada is pleased to offer comments on the OBSI's proposed new governance framework set out in its consultation document dated May 14, 2012 (the "Consultation"). The Consultation follows OBSI's announcement in mid-February 2012 that, in light of the report by the independent reviewer of OBSI released in 2011 (The Navigator Company of Australia) (the "Khoury Report"), its Board will undertake broad-based reform of its governance structure.

FAIR Canada is a national, non-profit organization dedicated to putting investors first. As a voice of Canadian investors, FAIR Canada is committed to advocating for stronger investment protections in regulation. Visit www.faircanada.ca for more information.

FAIR Canada is pleased that OBSI is moving forward with the implementation of the strategic recommendations set out in the Khoury Report, and accordingly, is reforming its governance structure. We provide our comments on the Consultation below.

1. Unitary Board

- 1.1. **FAIR Canada strongly endorses the proposed reform to have all directors involved in all Board decisions.** The Khoury Report made eight strategic recommendations to improve OBSI's important role as the external dispute resolution provider for investments in the Canadian financial sector. Recommendation 6 was: "That the OBSI Board be restructured to include an independent Chair, a consumer voice and to involve all Directors in all decisions." We believe that the current two-tier board structure, where certain decisions are made by the independent (non-industry) directors, creates a fractured Board and has proven itself to be problematic. We believe that industry directors should not be treated as second class directors. They have a duty to act in the best interests of OBSI and should not be excluded from participating in decisions that are being taken by the Board unless they have a clear conflict, such as a matter involving the financial institution that employs them.
- 1.2. We recommend that the duty of directors to act in the best interest of OBSI (including its public interest mandate) must be made clear. This could be accomplished by adding this duty explicitly to the Board's charter.

2. Industry Nominees

- 2.1. We have no objection to the proposed change in process from having (a) the Canadian Bankers Association (“CBA”), Investment Industry Regulatory Organization of Canada (“IIROC”), and Mutual Fund Dealers Association of Canada (“MFDA”) appoint an industry director to (b) these organizations providing a shortlist of candidates from which the Board will choose one director. **Given the fact that IIROC, the CBA and the MFDA already carefully vet their nominees, we are not convinced that it will result in better directors being chosen. However, it will give the Board the ability to choose directors which result in the best competencies matrix for the Board as a whole.**
- 2.2. We suggest that the process include the Board nominations committee assessing the competencies matrix, at the given point in time, and communicating the desired knowledge, experience and skills to the relevant industry group (CBA, IIROC or MFDA).

3. Consumer Nominees

- 3.1. The Khoury Report recommended a consumer voice at the Board level through the introduction of seats for consumer/investor advocates. FAIR Canada notes that the Consultation does not include such a proposal beyond the competencies matrix for the Board (as a whole) including as one of its twelve criteria, knowledge and experience in “consumer and investor issues”. **We believe that more emphasis needs to be given to knowledge and experience in “consumer and investor issues” and recommend that OBSI have at least three representatives from consumer or investor representatives on its Board.** If it does not adopt this recommendation, we urge OBSI to provide an explanation as to why not.

4. Community Nominees

- 4.1. The Khoury Report also recommended that there be three community directors who would be ‘non-aligned’. Again, OBSI’s Consultation does not include this specific proposal. In substance, “community directors” may not be substantively different from “independent directors” but we recommend that OBSI should make this point clear.

5. Term Limits for Directors

- 5.1. The proposal is for directors to be appointed for two year terms, up to a maximum of six years in aggregate. Currently, directors are appointed for an initial term of three years with no term limit on their reappointment. FAIR Canada recommends, if it has not yet done so, benchmarking to determine what are best practices for not-for-profit and representative boards regarding appropriate terms for directors, including appropriate aggregate term limits.
- 5.2. We are not convinced that a six year term limit is in the best interests of OBSI as it will result in a mandatory turnover of 33% of directors every two years and with people changing jobs, moving and so on, it may result in a much higher turnover rate. **If term limits are to be introduced we suggest that a minimum of eight years be the maximum term limit.**

6. Definition of “Director”

6.1. The definition of Director is awkwardly drafted and we recommend that it be revised. We suggest that the directors described in (iv) be defined as “independent directors” with the overarching principle of independence articulated. OBSI could look to the Canadian Securities Administrators definition of independence set out in section 1.4 of National Instrument 52-110 or another definition used by comparable organizations to OBSI. **The overarching test for independence should be set out and sub-paragraphs (a) to (f) should be “prima facie” indicators of non-independence but should not be determinative.**

6.2. Specific points to note:

- (a) In subsection (iv), (a), the application of the exclusion of any “employee” of a Financial Service Provider or Industry Entity is very broad and would include support staff and people with no role in the management or in the sale of financial products. If you combine (a) with (f), OBSI would not be able to appoint an otherwise highly qualified director because their son or daughter is employed as a bank teller.
- (b) The two-year cooling off period in order to be qualified as an “independent director” in (iv)(e) is not long enough for those who have spent their career in the financial services industry. We agree with Kenmar Associates that the manner in which the definition of Director is drafted would allow the OBSI Board to be composed entirely of former financial services industry participants, which would not be appropriate. Having Consumer Nominees, as discussed above, may help address this concern. **Alternatively, the two year cooling off period should be lengthened to at least five years for persons who have been involved in the financial services industry in a managerial or sales position.**
- (c) The current definition of a “non-independent” director does not include professional service providers (e.g. lawyers and accountants) to a Financial Service Provider or Industry Entity whose occupation may have been to serve a financial institution and who would, as a result, have a conflict of interest. **We recommend that professional service providers to a Financial Service Provider or Industry Entity be prima facie considered not to be independent.**

7. Competencies Matrix

7.1. The Consultation states that “... the Board of Directors, as a whole, should possess a strong mix and balance of skills, knowledge and experience while reflecting the diversity of Canadians.” **We agree that diversity should be a factor taken into consideration, given that OBSI is a pan-Canadian organization.**

8. Committees

- 8.1. The Board will have two standing committees: (1) Finance and Audit; and (2) Governance, Human Resources, and Compensation. The Consultation does not include any discussion of the current committee structure. We would like to know whether the Pensions Committee, or the Standards Committee (which presently 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) will continue to operate on an *ad hoc* basis or not.
- 8.2. We recommend that the mandate of each Committee be publically disclosed and its membership also be disclosed, in order for the process to be as transparent as possible.

9. Candidate Selection Process

- 9.1. We believe that the composition of OBSI's Governance Committee should be disclosed and that it should be comprised of independent directors. We believe that there should be disclosure of the process by which the Board's Governance Committee will identify candidates for the Board and for Committees.
- 9.2. In the interest of transparency, we recommend that the Board disclose the origin of candidate appointments - whether the candidate came from the Governance Committee's process, from a stakeholder (MFDA, IIROC, or CBA) or was self-proposed.
- 9.3. OBSI should set out whether it will involve its Consumer and Investor Advisory Council in the process used to identify director candidates (other than industry nominees).

10. Chair of the Board

- 10.1. We believe that the Chair should exhibit the qualities set out in the Consultation and, in particular, be a champion of OBSI (its vision, mandate and strategic plan) and have excellent communication and consensus-building skills. The Chair should also have a comprehensive understanding of the Canadian financial services industry.
- 10.2. The Chair will likely need to be an "independent" director but we would not exclude an industry person who exhibits the qualities set out in paragraph 10.1, above, and is truly committed to the vision, mandate and strategic plan of OBSI.

11. Consultation Process

- 11.1. FAIR Canada is surprised at the short period of time provided for stakeholders to submit comments (17 days) and suggests that, in future, a period of a minimum of 60 days be given to obtain feedback.
- 11.2. FAIR Canada is somewhat disappointed with the quality of the consultation document. We believe that it should have more background information and analysis including a discussion of the current problems with the existing governance structure, an examination of the governance issues raised in the Khoury Report and an analysis of how the proposed reforms are intended to address any problems or will lead to improvements.

We look forward to steps being taken by OBSI and the regulators in respect of the other strategic recommendation set out in the Khoury Report, and would be pleased to provide our comments on the other strategic recommendations.

We thank you for the opportunity to provide our comments and views in this submission. We welcome its public posting and would be pleased to discuss this letter with you at your convenience. Please feel free to contact Ermanno Pascutto at 416-214-3443 (ermanno.pascutto@faircanada.ca) or Marian Passmore at 416-214-3441 (marian.passmore@faircanada.ca).

Sincerely,



Canadian Foundation for Advancement of Investor Rights