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Re: 2013/14 Consultation on the *Canada Business Corporations Act* (the "**CBCA**")

We welcome the opportunity to provide this submission concerning Industry Canada's public consultation regarding the governance framework for CBCA corporations. Our Board takes matters of corporate governance very seriously and IGM Financial Inc. ("IGM") is an active participant in the public dialogue regarding corporate governance in Canada.

IGM Financial Inc.

IGM (TSX: IGM) is a diversified financial services provider which operates through its business units Investors Group Inc., Mackenzie Inc., and Investment Planning Counsel Inc. and their respective subsidiaries. IGM is incorporated under the CBCA. IGM manages over $138 billion in assets under management, as of April 30, 2014, on behalf of over a million clients across Canada. It is a public company listed on The Toronto Stock Exchange with a market capitalization of over $13 billion. IGM also speaks as a controlled company, as Power Financial Corporation holds approximately 62% of its common shares. IGM also has several wholly-owned subsidiaries, which are themselves CBCA-incorporated.

Scope of Response

While Industry Canada's consultation discussion paper (the "**Consultation Paper**") covers a wide range of governance topics, as well as administrative and technical matters concerning the CBCA, our submission concentrates on some broad overarching concepts and a few select topics, including: (i) shareholder advisory votes on compensation packages ("**Say-on-Pay**"); (ii) director elections by majority vote ("**Majority Voting**"); and (iii) an anomaly in the CBCA as it applies to otherwise-regulated mutual funds which adopt a "corporate class" form, a topic which, while not forming part of the Consultation Paper, should be addressed in any amendments to the CBCA. This focus should not be viewed as blanket support for other issues raised in the Consultation Paper. While this submission will address the application of governance concepts and the proposed amendments to the CBCA in relation to public companies, we also have

wholly-owned private company subsidiaries incorporated under the CBCA and do not believe that Say-on-Pay and Majority Voting, among other proposals in the Consultation Paper, should apply to non-distributing corporations.

Rules vs. Principles

As noted in the Consultation Paper, "As a framework statute, the CBCA provides the basic structure and standards for the direction and control of a corporation, but it does not prescribe how a corporation is to be run."[1] It is essential that any amendments to the CBCA have regard for this established rationale and do not radically transform the CBCA into a prescriptive rule-based statute. This view has been supported by Industry Canada officials, who in 2010 raised concerns that amending the CBCA to provide for Say on Pay "would be a more prescriptive approach to include in a statute that was designed to be a framework only."[2]

The regulatory regime that encompasses corporate governance currently suffers from an inflation of one-size-fits-all/"check-the-box" requirements (particularly for public companies) that fail to recognize the diversity of business structures that comprise Canada's capital markets, including controlled companies[3]. Companies incorporated under the CBCA include both private companies and companies that issue publicly-traded shares, widely held companies and companies with a controlling shareholder or shareholder group, and growth-oriented founder-run start-ups and mature profitable companies. It is therefore important that the CBCA not prescribe rigid rules, but rather facilitate the ability of corporations to arrange their governance structures in ways that they determine as being appropriate to their particular circumstances and to adapt such structures as the economy and the business evolve over time. This also allows investors a wider choice of investments and governance models. This view has been supported by Industry Canada who have noted that "legislated standards may not have the flexibility needed to reflect particular circumstances and are typically more difficult to change quickly to adapt to new contexts"[4] and by the Canadian Securities Administrators, who in National Instrument 58-101 – *Disclosure of Corporate Governance Practices*, National Policy 58-201 – *Corporate Governance Guidelines* and National Instrument 52-110 – *Audit Committees*, provide for a flexible, disclosure-based regime that is not intended to be prescriptive.

Lack of Necessity for Revisions

The legal components of Canada's corporate governance framework have been the subject of over a century and a half of carefully considered and well-developed corporate law. This well-developed corporate governance regime should not be undermined by legislative amendments which would impair both its principled operation and its demonstrated flexibility and ability to address issues in a changing environment.

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[1] Consultation Paper at "Introduction – About the Act".
[2] According to the Report of the Standing Committee on Industry, Science and Technology – Statutory Review of the Canada Business Corporations Act, June 2010 at p. 8.
[3] Although, as noted in the CCGG Controlled Company Guidelines (defined herein), "Effective equity control can come from holding as little as 20% of the common shares of a widely held company.", when used herein, "controlling shareholder" refers to shareholder with at least a 50% voting interest in a corporation and such corporations are referred to herein as "controlled companies".
[4] From "Towards an Improved Standard of Corporate Governance for Federally Incorporated Companies – Proposals for Amendments to the *Canada Business Corporations Act*", May 2004 at p. 3.

The corporate law framework has been, more recently and increasingly, augmented by securities legislation passed by provincial legislatures, rules and policies implemented by provincial and territorial securities regulators (the "**CSA**") and the listing policies of Canadian stock exchanges (collectively, "**Securities Laws**"). Securities Laws have addressed matters of corporate governance through enhanced disclosure and, thereby, establishing a framework that facilitates fully-informed investors to choose which companies they wish to invest in and become shareholders of. We believe that it is of fundamental importance that investors make informed investment decisions and, accordingly, provided that a company's disclosure record is clear, investors should be free to support the company or not through their investment decisions.

Updating the 2013 figures noted in the Consultation Paper, Canada continues to be ranked highly by the World Bank in its 2014 Doing Business Report[5], placing fourth among 189 economies in respect of protecting investors and second for ease of starting a business. In contrast, internationally, many recent corporate governance initiatives have been mandated to address perceived structural failures in the face of apparent crises. Many of these developments, which have increased both the extent and rigidity of the regulatory framework, have been criticized as being rushed, "knee-jerk" reactions that have overshot their mark or as simplistic, window dressing that has instigated unintended, adverse consequences. While we strongly believe that sound corporate governance practices are essential to the well-being of a company, prior to importing concepts from foreign jurisdictions, great care should be taken in our view to consider the impact of such measures in the appropriate context, rather than in isolation, and to avoid indiscriminately accepting the ratcheting-up of governance regulations in other jurisdictions as being synonymous with best practices that should be universally adopted.

Given that Canada has a well-functioning regime currently in-place and has not suffered the same failures that are perceived to have occurred in other jurisdictions, it is not apparent that affixing requirements into the CBCA regarding Say-on-Pay and Majority Voting is necessary or appropriate. Publicly-traded issuers in Canada have been voluntarily adopting Say-on-Pay and Majority Voting to the extent that such measures are determined to be best suited to such issuers' particular needs and circumstances, after engagement with applicable stakeholders. 128 Canadian publicly-traded companies have adopted Say-on-Pay (up from 70 in May 2011 and 97 in June 2012)[6], including 41% of the issuers in the S&P/TSX Composite Index[7], while 88% of S&P/TSX Composite Index issuers have implemented Majority Voting[8]. Given the ease of accessibility provided by the shareholder proposal provisions in the CBCA and other Canadian statutes, as well as the ability of shareholders to propose and elect new directors to replace those who do not adopt requested initiatives, to the extent issuers have not put Say-on-Pay or Majority Voting into effect, it is our submission that these measures are viewed by shareholders as being unnecessary additions to such issuer's governing framework. Further, it would be a particularly acute disenfranchisement of shareholders were the CBCA to be amended to include governance provisions which have already been the subject matter of an unsupported shareholder proposal.

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[5] World Bank, "Ease of Doing Business in Canada," *Doing Business 2014*.

[6] According to the Shareholder Association for Research and Education at http://www.share.ca/say_on_pay/.

[7] According to the Board Games 2013 as published by the Globe and Mail Report on Business at http://www.theglobeandmail.com/report-on-business/careers/management/board-games-2013/#dashboard/follows/

[8] According to the 2013 Clarkson Centre Board Shareholder Confidence Index at http://www.rotman.utoronto.ca/-/media/Files/Programs-and-Areas/Institutes/Clarkson/BoardShareholderConfidenceIndex2013ScoringBreakdown.pdf

What should matter in our view is not adherence to automatic "check-the-box" rules, but rather whether a company has a robust, principled governance system in place which is appropriately customized to the attributes of the company and is delivering solid long-term results for the benefit of all stakeholders, including shareholders.

Acknowledgement of Governance Differences for Controlled Companies

Controlled corporations have unique considerations that impact on governance structures and the appropriateness or necessity for particular governance measures. This fact has been recognized by both regulators and commentators.

In National Policy 58-201 – *Effective Corporate Governance*, the CSA acknowledged that concerns have been expressed in respect of how existing governance policies affect controlled companies and the CSA committed to carefully considering such concerns, and to undertaking a study, with consultation of market participants, to examine the governance of controlled companies and consider whether to change how existing governance policies treat such companies.

On October 11, 2011, the Canadian Coalition for Good Governance ("**CCGG**") published its Policy Regarding Governance Differences of Controlled Corporations (the "**CCGG Controlled Company Guidelines**")[9]. While we do not agree with all aspects of the CCGG Guidelines, they reflect the culmination of CCGG's consultative research of equity controlled companies, undertaken in order to understand such companies' unique governance issues. The CCGG Controlled Company Guidelines recognize that certain of the governance guidelines contained in CCGG's Building High Performance Boards "may not apply equally to equity controlled companies" and, accordingly, supplement those guidelines to take into account "the legitimate governance differences of equity controlled corporations". In September 2013, CCGG published its Dual Class Share Policy, which noted that the principles set out in the CCGG Controlled Company Guidelines also apply to dual class share companies, except to the extent modified by the Dual Class Share Policy.

Further, the Toronto Stock Exchange ("**TSX**") has noted that it "understands that controlled corporations have unique considerations regarding Majority Voting."[10] We note that the TSX in its recent amendments to its rules to mandate majority voting for TSX listed companies recognized the rationale for the exclusion of controlled companies from those requirements.[11] Also, we understand that the New York Stock Exchange and NASDAQ provide controlled companies with blanket exemptions from compliance with corporate governance requirements of such exchanges.

Accordingly, while we are not supportive of the CBCA being amended to include requirements in respect of Say-on-Pay or Majority Voting, if any such amendments are to be enacted, it is essential that they recognize differences among companies, such as the presence of a controlling shareholder. A long-term oriented controlling shareholder with an active ownership approach can have a significant positive impact on a corporation's long-term returns, benefiting all shareholders

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[9] http://www.ccgg.ca/site/ccgg/assets/pdf/Gov_Differences_of_Equity_Controlled_Corps_FINAL_Formatted.pdf

[10] See Notice of Approval – Amendments to Part I and Part IV of the Manual (October 4, 2012) at Appendix A: Summary of Comments and Responses Part IV – Majority Voting.

[11] See Notice of Approval – Amendments to Part IV of the Manual (February 13, 2014).

and the corporation as a whole. The benefits can include the ability to encourage and support management in the pursuit of long-term strategies, representing an antidote to what has been observed as being the current gradual descent into "quarterly capitalism" or the "tyranny of short-termism" where management and the boards of public companies over-weigh near-term earnings, to the detriment of long-term value-creation[12]. Any amendments to the CBCA should not undermine the beneficial role served by a controlling shareholder in this respect and should not detract from management's and the board's ability to focus on enabling the long-term growth of their enterprise.

Say-on-Pay

IGM and our Board of Directors appreciate the importance placed on effective executive compensation programs. One of the key responsibilities of a company's board of directors is to assess the performance of senior executives and approve their compensation arrangements, with the objective of generating superior long-term performance.

Executive compensation policies have become increasingly complex and must take into account many factors. Boards and compensation committees are faced with a multitude of potential forms of compensation to be considered, including cash (e.g., salary, annual bonus, long-term non-equity plans and pensions) and equity-based compensation (e.g., stock options, restricted share units, performance share units and stock appreciation rights), each with its own particular incentives and pay-out profile, which can be contingent on the achievement of outcomes across an extensive array of performance-based triggers (e.g., earnings per share, return on invested capital, stock price levels and any number of appropriately-crafted non-IFRS measures) which can vary as between industries, issuer growth profiles and even executive titles. We believe that a corporation's directors are in a better position than shareholders to oversee executive compensation arrangements. A corporation's board (or a committee thereof) has full access to the necessary information and has the benefit of external professional guidance and the relevant experience of its members to make the appropriate decisions with respect to executive compensation.

The directors, who are elected by the shareholders, have a duty to supervise the management of the business and affairs of a corporation and are required to make decisions in accordance with their fiduciary duties to act with due care and with a view to the best interests of the corporation,

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[12] See, for example, Dominic Barton and Mark Wiseman, "Focusing Capital on the Long Term" Harvard Business Review, January 01, 2014", which notes: "Thankfully, a small but growing number of leading asset owners and asset managers have begun to act much more like private owners and managers who just happen to be operating in a public market. To create value, they engage with a company's executives—and stay engaged over time. BlackRock CEO Laurence Fink, a leader in this kind of effort, tells companies not to focus simply on winning over proxy advisory firms (which counsel institutional investors on how to vote in shareholder elections). Instead, says Fink, companies should work directly with BlackRock and other shareholders to build long-term relationships." and "Early in 2013 McKinsey and the Canada Pension Plan Investment Board (CPPIB) conducted a McKinsey Quarterly survey of more than 1,000 board members and C-suite executives around the world to assess their progress in taking a longer-term approach to running their companies. The results are stark:

- 63% of respondents said the pressure to generate strong short-term results had increased over the previous five years.
- 79% felt especially pressured to demonstrate strong financial performance over a period of just two years or less.
- 44% said they use a time horizon of less than three years in setting strategy.
- 73% said they should use a time horizon of more than three years.
- 86% declared that using a longer time horizon to make business decisions would positively affect corporate performance in a number of ways, including strengthening financial returns and increasing innovation."

including its shareholders as a whole. Our courts have indicated that, in some cases, fiduciary duties may extend to other stakeholders of the corporation. Individual shareholders have no such duties, to other shareholders, to the corporation or other stakeholders. It is our view that it is important to maintain clarity regarding the role of a board as distinct from the role of shareholders. (Indeed, if shareholders are to be encouraged to usurp the role of the board, one is tempted to ask why such intrusion should stop with executive compensation, and not extend to other issues such as corporate strategy, capital allocation or risks, which, from most points of view, are likely far more material to the corporation.)

Further, directors are responsible for ensuring that a corporation can attract and retain high-calibre executives capable of steering the corporation towards long-term success. The threat of a negative vote by shareholders may gradually emphasize the achievement of short- and medium-term financial measures while neglecting long-term value creation. To illustrate this point, in some cases, value protection, rather than growth, may be of strategic importance for a company (e.g., if a company rallies and adopts a new strategy to maintain market share and profitability in the face of new entrants or disruptive developments initiated by competitors), and the successful management of such a threat may be viewed positively by a company's board of directors, and negatively by shareholders focused narrowly on short-term growth and out-performance. The current approach to overseeing executive compensation appropriately recognizes the board's role and aligns the interests of a corporation's shareholders with the need for flexibility and certainty in structuring appropriate compensation arrangements.

While proponents for Say-on-Pay argue that it is an important part of the dialogue between shareholders and company boards, Say-on-Pay votes can be difficult to interpret or misleading, because shareholders may be expressing a view about recent corporate performance rather than making a specific assessment of executive compensation. We also note that as part of the dialogue, Securities Laws provide for comprehensive and detailed disclosure of compensation for senior executives, and the processes for decisions relating thereto and, therefore, fully-informed shareholders are free to choose whether or not to invest in (or divest investments in) companies based on their views regarding such disclosures.

Any proposal requiring shareholder votes on executive compensation at a controlled company would be neither effective nor efficient. Requiring a controlled company to adopt such a policy would be an illusory shareholder democracy development at best and not serve a concrete purpose since the controlling shareholder would necessarily cast a majority of the votes to be cast in respect of such a matter. A controlling shareholder would be expected to have an active dialogue with the controlled company through its board and compensation committee, and would not choose the casting of votes at a shareholder meeting as the forum for raising its displeasure with executive compensation. Accordingly, imposing such requirements on a controlled company would only serve to increase the costs and complexity of the process for setting executive compensation.

Imposing a requirement for all CBCA corporations to implement Say on Pay would fail to recognize the role of the corporation's board, would impose this mandatory request on corporations whose shareholders have not chosen to pursue this model, would ignore the realities of controlled corporations and their unique governance considerations, and compromise the need for flexibility and certainty in structuring appropriate compensation arrangements. We do not

believe that such a requirement would be in the best interests of CBCA corporations or their shareholders.

Majority Voting

As a controlled company, it is our view that, as concerns Majority Voting, the current regime under corporate law is appropriate and no changes are desirable or necessary, particularly given recent developments under Securities Laws.

Requiring controlled companies to adopt a majority voting policy would be an illusory shareholder democracy development at best and would not serve a concrete purpose since the controlling shareholder would necessarily cast a majority of the votes to be cast in an election of the company's directors. A controlling shareholder would be expected to have an active dialogue with the controlled company through its board and nominating committee and, as a practical matter, would not choose the casting of votes at a shareholder meeting as the forum for raising its displeasure with any board nominees. Accordingly, imposing such requirements on a controlled company would serve no purpose and would be misleading to shareholders (given it can have no possible practical effect). In addition, it would only serve to increase the costs and complexity of the process for electing directors which would not be in the best interests of the shareholders as a whole. This view has been accepted by the TSX, which, in the recent amendments to its rules to mandate majority voting for TSX listed companies, provided an exemption for controlled companies.

If Industry Canada determines to proceed with a requirement for CBCA corporations to use Majority Voting, our view is that it should not apply to companies where a controlling shareholder holds a majority of the votes to be cast in respect of the election of directors, in recognition of the fact that such controlled companies have unique governance considerations and that a majority voting policy does not serve a useful purpose for shareholders of such companies. While we strongly believe in the importance of sound corporate governance for the well-being of a company, no single corporate governance model is superior in all respects and the imposition of a "one-size-fits-all" governance measure is inappropriate as it fails to recognize differences among companies, such as the presence of a controlling shareholder.

Mergers of Corporate Class Mutual Funds

Public mutual funds in Canada are subject to comprehensive and extensive regulation under Securities Laws. The CSA has enacted, as National Instruments, NI 81-101 through NI 81-107, which together constitute a comprehensive code for the operational, governance and disclosure rule applicable to mutual funds.

For approximately 15 years, major Canadian mutual fund managers have offered funds in a "corporate class" structure. In such structures, instead of being formed as free standing unit trusts, mutual funds are created as separate classes within a mutual fund corporation. The primary benefit to investors of the corporate class structure is the ability generally to shift investments among funds within the same corporate class structure without immediate tax consequences.

Securities Laws regulate mergers of mutual funds. In most cases, those rules provide that securityholder approval is required for a terminating mutual fund which is being merged into

anther fund, but that securityholder approval is not required for a continuing mutual fund in a merger unless the merger would be a material change to such continuing mutual fund. For mutual funds organized as unit trusts, if the merger is not a material change, no securityholder meeting for the continuing mutual fund is required to be held. By comparison, and in what we submit is an anomaly, in the case of a corporate class mutual fund that is merging, section 176(1)(g) of the CBCA requires that the shareholders of the continuing class must vote on a merger. This is the case even where a merger is not a material change for the continuing class.

What seems even odder is that securityholders of a terminating class or unit trust mutual fund may not have to vote, due to various exceptions in the CBCA and NI 81-102, yet the shareholders of the continuing class would still be required to have a meeting and vote due to section 176(1)(g) of the CBCA.

There is no logical reason to differentiate between the incorporated and unit trust mutual fund structures, and this can cause confusion for a person who holds both incorporated and unit trust mutual funds, as they receive meeting material for the former but not the latter. Even more confusion results if a person holds both the terminating and continuing classes of a corporate class structure, as they receive meeting material for the continuing class, but not the terminating class. In addition, there is the time and expense associated with preparing and sending out meeting material in the case of corporate class funds, which would not be incurred for unit trust mutual funds.

We therefore recommend in the case of incorporated mutual funds that the CBCA contain an exemption to dispense with the requirement for a securityholder meeting to be held to approve a merger, provided that such a meeting is not required by virtue of Securities Laws.

Conclusion

While we strongly believe that sound corporate governance is essential to the well-being of a company, no single corporate governance model is superior in all respects and the imposition of a "one-size-fits-all" governance measure is inappropriate as it fails to recognize differences among companies, such as the presence of a controlling shareholder. The current governance regime under the CBCA and, subject to a few exceptions, under Securities Laws, provides for an adaptable, principled framework within which companies can select the measures that are appropriate to their situations, in support of the goal of delivering solid long-term results for the benefit of all stakeholders, including shareholders. We do not view it as being appropriate or necessary for the CBCA to be amended to provide for a rigid, prescriptive approach containing "check-the-box" rules regarding Say-on-Pay or Majority Voting.

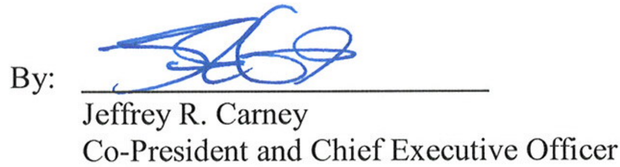
If Industry Canada determines to proceed with requiring CBCA corporations to adopt Say-on-Pay or Majority Voting, our view is that such measures should not apply to controlled corporations, in recognition of the fact that such controlled corporations have unique governance considerations.

In addition, if Industry Canada determines to proceed with amendments to the CBCA, we recommend that the amendments address and correct the anomaly currently existing between the treatment of CBCA – incorporated corporate class mutual funds, and unit trust mutual funds described above.

Representatives of IGM would be pleased to discuss the foregoing with Industry Canada if that would be of assistance.

Yours truly,

IGM FINANCIAL INC.

By: 

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