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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 Power Corporation of Canada ("**Power**") and its publicly-traded subsidiaries are active participants in the public dialogue regarding corporate governance in Canada.

The Power Group

Power (TSX: POW) is a diversified international management and holding company that holds interests, directly or indirectly, in companies that are active in the financial services, communications and other business sectors in Canada, the United States, Europe and Asia. We believe that it is important to note that we ourselves are major long-term shareholders of companies, including CBCA-incorporated public company subsidiaries, such as Power Financial Corporation[1], Great-West Lifeco Inc.[2] and IGM Financial Inc.[3] Power has had controlling shareholders since its beginnings in 1925 and its present controlling shareholder holds, in aggregate, directly or indirectly, an approximately 59.4% voting interest in Power.

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

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[1] Power holds an approximately 65.8% voting interest in Power Financial Corporation.

[2] Power Financial Corporation and IGM Financial Inc. hold 67.0% and 4.0%, respectively, of Great-West Lifeco Inc.'s common shares, representing, in aggregate, approximately 65.0% of the voting rights attached to all outstanding Great-West Lifeco Inc. voting shares.

[3] Power Financial Corporation and The Great-West Life Assurance Company, a subsidiary of Great-West Lifeco Inc., hold 58.6% and 3.6%, respectively, of IGM Financial Inc.'s common shares, representing, in aggregate, an approximately 62.2% voting interest in IGM Financial Inc.

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) separation of the roles of the Chief Executive Officer ("**CEO**") and the Chair of the Board ("**Split Roles**"). 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, Majority Voting and Split Roles, 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."[4] 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."[5]

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[6]. 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"[7] and by the Canadian Securities Administrators, who in National Instrument 58-101 –

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[4] Consultation Paper at "Introduction – About the Act".

[5] 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.

[6] 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".

[7] 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.

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.

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, established 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[8], 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, Majority Voting and Split Roles, amongst other topics, is necessary or appropriate. Publicly-traded issuers in Canada have been voluntarily adopting Say-on-Pay, Majority Voting and Split Roles to the extent that such measures are

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

determined to be best suited to such issuers' particular needs and circumstances, after engagement with applicable stakeholders. 128 Canadian publicly-traded companies had adopted Say-on-Pay as of February 2014 (up from 70 in May 2011 and 97 in June 2012)[9], including 41% of the issuers in the S&P/TSX Composite Index[10], while 88% of S&P/TSX Composite Index issuers have implemented Majority Voting[11] and 84% of S&P/TSX Composite Index issuers have Split Roles[12]. 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, Majority Voting and Split Roles into effect, it is our submission that these measures are viewed by shareholders of these issuers 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.

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**")[13]. While we do

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

[10] 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/

[11] 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

[12] *Ibid*

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

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."[14] 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.[15] 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, Majority Voting and Split Roles, 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 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 certain public companies over-weigh near-term earnings, to the detriment of long-term value-creation[16,17]. Any amendments to the CBCA should not undermine the beneficial

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[14] 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.

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

[16] 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.

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

Power 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-GAAP 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.

- 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."

[17] It is noteworthy that on April 9, 2014, the European Commission presented a proposal for the revision of its Shareholder Rights Directive, a key focus of which proposal centered on the importance of long-term shareholders in the context of capital markets that exert pressure on companies to perform in the short-term. The proposal and accompanying frequently asked questions note the following: "Short-term incentives turn focus and resources away from making investments based on the fundamentals (strategy, performance and governance) and longer term perspectives, from evaluating the real value and longer-term value creative capacity of companies and increasing the value of the equity investments through shareholder engagement."; "Lack of proper accountability and short-term pressure leads to suboptimal governance and prevents companies from creating long-term value and from generating growth."; and "The proposal would incentivise institutional investors with long-term commitments to provide more "patient", i.e. long-term, capital to companies - this is about keeping shares for longer […]." The proposal is available at http://ec.europa.eu/internal_market/company/docs/modern/cgp/shrd/140409-shrd_en.pdf, and the frequently asked questions are available at http://europa.eu/rapid/press-release_MEMO-14-275_en.htm?locale=en.

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, 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 both a controlled company and a controlling shareholder, 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.

Split Roles

Requiring that all companies incorporated under the CBCA have Split Roles focusses too narrowly on one attribute of a corporation's Chair, without consideration of the specific characteristics of the company and its board. It

omits some key dimensions of effective board leadership and of a Chair's ability to have a positive impact on the long-term results of the corporation, such as the Chair's ability to generate a productive group discussion (including encouraging exploration of different points of view) and to facilitate a positive board culture (including its relationship with management).

Within the Power group of companies, our Chair is also a co-CEO of Power, while our subsidiaries Power Financial Corporation, IGM Financial Inc. and Great-West Lifeco Inc. have each implemented Split Roles. Power is the top holding company in our corporate group and the company in which our controlling shareholder exercises majority voting control directly. Power, in turn, exercises majority voting control, directly and indirectly, through the chain of ownership of its subsidiaries. Accordingly, we believe it is appropriate not to have Split Roles at Power and for our Chair and co-CEOs to be associates of our controlling shareholder, since it is at the Power level that many important decisions affecting our group (e.g., capital allocation and strategy) are discussed and made. It is therefore important for the controlling shareholder to be directly involved, both at the management and Board level, in those decisions.

A financially strong and long-term oriented controlling shareholder can have a significant positive impact on a corporation's long-term returns, benefiting all shareholders and the corporation as a whole. Consistent with this fact, we believe that in appropriate situations, a controlling shareholder, as a significant investor, has a legitimate interest in serving as the Chair of the board of directors of a controlled corporation (or having a director that is not independent of the controlling shareholder so serve), and in participating in the day-to-day management of the controlled corporation, to encourage and support management in the pursuit of long-term strategies.

The Chair has a fiduciary duty to the corporation and investors expect a controlling shareholder to be more actively involved in managing its investment.[18] In such situations, the appropriate guiding principle is to ensure that effective structures and procedures are in-place to provide assurance both that the board of the controlled corporation can act independently of management (e.g. having opportunities for directors who are independent of management to meet without management present and have candid and robust discussions lead by an independent director who appropriately, subsequently provides feedback to the directors that are not independent of the controlling shareholder) and that actual or potential conflicts of interest between the controlled corporation and its controlling shareholder are dealt with appropriately (e.g. referring such matters to a suitably constituted conflict of interest committee, as is done at each of Power, Power Financial Corporation, Great-West Lifeco Inc. and IGM Financial Inc.). Corporate law, through both its conflict of interest provisions and the directors' fundamental duty to act with a view to the best interests of the corporation (and

[18] This view is supported by the CCGG Controlled Company Guidelines, which provide "In general, CCGG recognizes that a controlling shareholder may have a legitimate interest in being actively involved in the board of directors of the corporation. In fact, many institutional investors expect shareholders that control a corporation by virtue of their equity holdings to have substantial influence over the strategic direction of the company, the election of some of the directors, the appointment of executives, the financial affairs of the business and executive compensation." at p. 1.

not their own personal interests), already directly and effectively address the underlying issues whereas mandating Split Roles would be a significant change that would address the underlying issues indirectly and ineffectively, while creating other, negative, consequences.

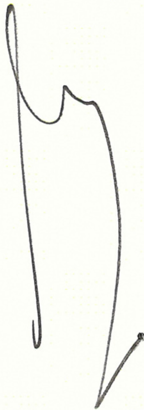
Imposing a requirement for all CBCA corporations to have Split Roles undermines the board's ability to oversee its own leadership structure and overlooks the benefits of CEO serving as Chair in certain companies with particular circumstances.

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, Majority Voting and Split Roles.

If Industry Canada determines to proceed with requiring CBCA corporations to adopt Say-on-Pay, Majority Voting and/or Split Roles, 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.

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



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