



INVESTMENT INDUSTRY ASSOCIATION OF CANADA  
ASSOCIATION CANADIENNE DU COMMERCE DES VALEURS MOBILIÈRES

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Mr. Michael Bodson  
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Dear Mr. Bodson:

**Re: IIAC Comments on Proposed Tender Offer Changes**

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I am writing on behalf of the members of the Investment Industry Association of Canada (IIAC)<sup>1</sup> with regards to DTC's decision to implement procedures under REG-140206-06: *Notice of Proposed Rulemaking (NPR) and Notice of Public Hearing Withholding Procedures Under Section 1441 for Certain Distributions to Which Section 302 Applies* (Internal Revenue Bulletin: 2007-46 (November 13, 2007)) before it has been finalized and is expected to come into force. We note that DTC's Section 302 Distribution Instructions state that "... DTC is exercising the option in the proposed regulations to implement certain procedures that permit a reduced rate of withholding available before the proposed effective date of the regulations. DTC will begin using these procedures effective January 1, 2008." A significant portion of our members have raised this as a concern, and on their behalf we ask that you delay implementation, upon their request(s), until the following issues have been resolved:

1. The NPR is still out for comment, with hearings only scheduled for February 2008, after which there will be a period during which the IRS will consider changes to the proposed

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<sup>1</sup> The IIAC is a member-based, professional association that advances the growth and development of the Canadian investment industry. IIAC acts as a strong, proactive voice to represent the interests of the investment industry for all market participants. Our member firms range in size from small regional brokers to large investment dealers that employ thousands of individuals across the country. Our members work with Canadians to help build prosperity and investment security for investors and their families.

rule. It is very unusual to us to implement the requirements of a draft rule prior to it coming into force and we believe that it is very rare, legally, that regulations would be applied retroactively. **Please explain your reasoning for applying this regulation on January 1, 2008 in the way we have been advised.**

2. There is confusion between U.S. withholding agents and even within DTC itself regarding which corporate action events the self-tender procedures would apply to. This is implied by the fact that DTC's estimated number of possible self-tender events exceeds by 120 to 160 times the volume estimates in the NPR. As an example, DTC appears to be including spin-offs in these self-tenders, which our members would not have included. For this reason, we believe it is premature to have DTC initiate the new withholding and escrow regime as we are concerned that there will be inconsistency of application across withholding agents, thereby causing investor confusion and potential liability. **We believe that DTC, CDS and other major U.S. withholding agents should discuss and agree on the appropriate corporate action events that this rule covers and ensure that all situations (e.g., when certificates are held in physical form) have been discussed and a common approach agreed upon, by the end of January 2008.**
3. While we understand that DTC has received legal advice regarding its position, we believe that it was unlikely that legal counsel was instructed to consider the positions of other parties, including qualified intermediaries (QIs). The NPR, as drafted, only requires DTC to adopt the escrow procedures as of December 31, 2008 ... and then only if the rule is passed without amendment, for example, without opening the withholding agent procedures to QIs in the instance of self-tenders. In the meantime, it is our understanding that DTC is only liable to withhold 30 per cent of the payment *if* the payor (DTC) cannot "reliably associate the payment with documentation upon which the payor can rely to treat the payment as made to a beneficial owner that is a U.S. person or as made to a beneficial owner that is a foreign person entitled to a reduced rate of withholding under the Code, regulations or an income tax treaty." As you are aware, the IRS has binding agreements with Canadian QIs to do withholding and reporting for all their clients. In recent communications with the QI Team of the IRS, we received no indication of why Canadian QIs would not be entitled to withhold and report for all their clients. **We therefore propose that, until December 31, 2008, DTC should only apply these proposed procedures if a QI specifically requests it or, at a minimum, should not apply the procedures if a QI requests DTC to delay the escrow and certification requirements.**
4. An estimated half of all U.S. securities owned in Canada are held in registered retirement savings plans (RRSPs) and registered retirement income funds (RRIFs) that are exempt from tax under Canadian tax law and under the *Canada-United States Protocol*. For example, the recently signed Protocol provides under Article XXI that "... income referred to in Articles X (Dividends) and XI (Interest) derived by a trust, company, organization or other arrangement that is a resident of a Contracting State, generally exempt from income taxation in a taxable year in that State and operated exclusively to administer or provide pension, retirement or employee benefits shall be exempt from income taxation in that taxable year in the other Contracting State." **Applying a withholding tax on income payments for securities held in registered pension- and retirement-related plans, even if for only a short period, is inconsistent with the tax treaty between Canada and the U.S.**

In view of the above, we believe that parties in the Canadian QI chain should not bear the costs of the unilateral change in policy that is being implemented before DTC is required to do so by law and with outstanding questions on a number of application and procedural issues that will have extensive impacts on the Canadian QI community. We request that DTC apply the proposed procedures if a QI so requests or, at a minimum, not apply the procedures if a QI requests that DTC delay the escrow and certification requirements until the earlier of further notification by the QI or December 31, 2008. We have additional concerns with the NPR that we will be addressing with the IRS directly and may communicate with you further on these matters in mid-January.

On a related matter, a number of members would like to better understand the associated fee structure that seems to penalize the early provision of information regarding investors subject to a less than 30-per-cent rate of withholding. Our members that are DTC participants would appreciate clarification of how the fee level and approach were derived and whether there is an opportunity for adjustment.

We would appreciate a teleconference meeting with your office, representatives of CDS and a number of our members in early January to review our concerns and solutions with you. Please do not hesitate to contact me in the interim if you have any questions.

Yours truly,

A handwritten signature in blue ink, appearing to read "Ian DeSacia".

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