

PROTOCOL AMENDING TAX CONVENTION WITH
SWISS CONFEDERATION

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

PROTOCOL AMENDING THE CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE SWISS CONFEDERATION FOR THE AVOIDANCE OF DOUBLE TAXATION WITH RESPECT TO TAXES ON INCOME, SIGNED AT WASHINGTON ON OCTOBER 2, 1996



JANUARY 26, 2011.—Treaty was read the first time, and together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate

U.S. GOVERNMENT PRINTING OFFICE

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *January 26, 2011.*

To the Senate of the United States:

I transmit herewith, for the advice and consent of the Senate to their ratification, the Protocol Amending the Convention between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, signed at Washington on October 2, 1996, signed on September 23, 2009, at Washington, as corrected by an exchange of notes effected November 16, 2010 (the “proposed Protocol”) and a related agreement effected by an exchange of notes on September 23, 2009 (the “related Agreement”). I also transmit for the information of the Senate the report of the Department of State, which includes an Overview of the proposed Protocol and related Agreement.

The proposed Protocol and related Agreement provide for more robust exchange of information between tax authorities in the two countries to facilitate the administration of each country’s tax laws. They generally follow the current U.S. Model Income Tax Convention and the Organization for Economic Cooperation and Development standards for exchange of tax information. The proposed Protocol and related Agreement also provide for mandatory arbitration of certain cases that the competent authorities of each country have been unable to resolve after a reasonable period of time.

I recommend that the Senate give early and favorable consideration to the proposed Protocol and related Agreement and give its advice and consent to their ratification.

BARACK OBAMA.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, December 8, 2010.

The PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you, with a view to their transmission to the Senate for advice and consent to ratification, the Protocol Amending the Convention between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, Signed at Washington on October 2, 1996, signed on September 23, 2009, at Washington, as corrected by an exchange of notes effected November 16, 2010 (“proposed Protocol”), together with a related agreement effected by an exchange of notes on the same day (“related Agreement”). The proposed Protocol and related Agreement were negotiated to bring the existing income tax Convention with Switzerland into closer conformity with current U.S. tax treaty policy, and in recognition of the importance of the United States’ economic relations with Switzerland. I recommend that the proposed Protocol and related Agreement be transmitted to the Senate for its advice and consent to ratification.

The proposed Protocol and related Agreement provide for more robust exchange of information between tax authorities in the two countries to facilitate the administration of each country’s tax laws. They generally follow the current U.S. Model Income Tax Convention and the current Organization for Economic Cooperation and Development standards for exchange of information. The proposed Protocol and related Agreement also provide for mandatory arbitration of certain cases that the competent authorities of each country have been unable to resolve after a reasonable period of time. An overview of key provisions of the proposed Protocol and related Agreement is enclosed with this report.

The proposed Protocol is self-executing. The Department of the Treasury and the Department of State cooperated in the negotiation of the proposed Protocol and related Agreement, and the Department of the Treasury joins the Department of State in recommending that the proposed Protocol and related Agreement be transmitted to the Senate as soon as possible for its advice and consent to ratification.

Respectfully submitted.

HILLARY RODHAM CLINTON.

Enclosures: as stated.

OVERVIEW

The proposed Protocol amending the Convention between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income (“proposed Protocol”) and the related agreement effected by exchange of notes (“related Agreement”) were negotiated to bring the existing convention (“existing Convention”), signed in 1996, into closer conformity with current U.S. tax treaty policy regarding exchange of information and to include mandatory arbitration procedures for certain cases that the competent authorities of the countries have been unable to resolve after a reasonable period of time. There are, as with all bilateral tax conventions, some variations from the language of the current U.S. Model Income Tax Convention. In the proposed Protocol and related Agreement, these minor differences reflect particular aspects of Swiss law and treaty policy. However, the proposed Protocol and related Agreement and generally follow the current U.S. Model Income Tax Convention and the Organization for Economic Cooperation and Development standard for exchange of tax information.

EXCHANGE OF INFORMATION

The proposed Protocol and related Agreement would replace the existing Convention’s tax information exchange provisions with updated rules that are consistent with current U.S. tax treaty practice. The proposed Protocol and related Agreement allow the tax authorities of each country to exchange information relevant to carrying out the provisions of the Convention or the domestic tax laws of either country, including information that would otherwise be protected by the bank secrecy laws of either country.

DISPUTE RESOLUTION THROUGH MANDATORY BINDING ARBITRATION

The proposed Protocol and related Agreement update the provisions of the existing Convention with respect to the mutual agreement procedure by incorporating mandatory arbitration of certain cases that the competent authorities of the United States and the Swiss Confederation have been unable to resolve after a reasonable period of time. The arbitration provisions in the proposed Protocol and related Agreement are similar to other mandatory arbitration provisions that have recently been included in other U.S. bilateral tax treaties and that are currently in force.

INDIVIDUAL RETIREMENT ACCOUNTS

The proposed Protocol updates the provisions of the existing Convention to provide that individual retirement accounts are eligible for the benefits afforded a pension under the Convention.

VIII

ENTRY INTO FORCE

The proposed Protocol would enter into force when the United States and the Swiss Confederation exchange instruments of ratification. The proposed Protocol would have effect, with respect to taxes withheld at source, for amounts paid or credited on or after the first day of January of the year following entry into force of the Protocol. With respect to tax information exchange, the proposed Protocol would have effect with respect to requests for bank information to information that relates to any date beginning on or after the date of signature of the proposed Protocol and, with respect to all other cases, would have effect with respect to requests for information that relate to taxable periods beginning on or after the first day of January of the year following the date of signature. The mandatory arbitration provision would have effect with respect both to cases that are under consideration by the competent authorities as of the date on which the Protocol enters into force and to cases that come under consideration after that date. The related Agreement would enter into force on the date of entry into force of the proposed Protocol and would be annexed to the Convention as Annex A thereto and would be an integral part of the Convention.

PROTOCOL

**AMENDING THE CONVENTION BETWEEN THE UNITED STATES OF AMERICA
AND THE SWISS CONFEDERATION FOR THE AVOIDANCE OF DOUBLE
TAXATION WITH RESPECT TO TAXES ON INCOME, SIGNED AT WASHINGTON
ON OCTOBER 2, 1996**

THE UNITED STATES OF AMERICA

AND

THE SWISS CONFEDERATION

Desiring to conclude a Protocol to amend the Convention between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with respect to Taxes on Income, signed at Washington on October 2, 1996 (hereinafter referred to as the "Convention"),

Have agreed as follows:

Article 1

Paragraph 3 of Article 10 of the Convention shall be deleted and replaced by the following:

"3. Notwithstanding paragraph 2, dividends may not be taxed in the Contracting State of which the company paying the dividends is a resident if the beneficial owner of the dividends is a pension or other retirement arrangement which is a resident of the other Contracting State, or an individual retirement savings plan set up in, and owned by a resident of, the other Contracting State, and the competent authorities of the Contracting States agree that the pension or retirement arrangement, or the individual retirement savings plan, in a Contracting State generally corresponds to a pension or other retirement arrangement, or to an individual retirement savings plan, recognized for tax purposes in the other Contracting State. This paragraph shall not apply if such pension or retirement arrangement, or such individual retirement savings plan, controls the company paying the dividend."

Article 2

Paragraph 6 of Article 25 of the Convention shall be deleted and replaced by the following paragraphs:

"6. Where, pursuant to a mutual agreement procedure under this Article, the competent authorities have endeavored but are unable to reach a complete agreement, the case shall be resolved through arbitration conducted in the manner prescribed by, and subject to, the requirements of paragraph 7 and any rules or procedures agreed upon by the Contracting States if:

- a) tax returns have been filed with at least one of the Contracting States with respect to the taxable years at issue in the case;
- b) the case is not a particular case that both competent authorities agree, before the date on which arbitration proceedings would otherwise have begun, is not suitable for determination by arbitration; and
- c) all concerned persons agree according to provisions of subparagraph d) of paragraph 7.

An unresolved case shall not, however, be submitted to arbitration if a decision on such case has already been rendered by a court or administrative tribunal of either Contracting State.

7. For the purposes of paragraph 6 and this paragraph, the following rules and definitions shall apply:

- a) the term "concerned person" means the presenter of a case to a competent authority for consideration under this Article and all other persons, if any, whose tax liability to either Contracting State may be directly affected by a mutual agreement, arising from that consideration;
- b) the "commencement date" for a case is the earliest date on which the information necessary to undertake substantive consideration for a mutual agreement has been received by both competent authorities;
- c) arbitration proceedings in a case shall begin on the later of:
 - i) two years after the commencement date of that case, unless both competent authorities have previously agreed to a different date, and
 - ii) the earliest date upon which the agreement required by subparagraph d) has been received by both competent authorities;
- d) the concerned person(s), and their authorized representatives or agents, must agree prior to the beginning of arbitration proceedings not to disclose to any other person any information received during the course of the arbitration proceeding from either Contracting State or the arbitration panel, other than the determination of such panel;
- e) unless any concerned person does not accept the determination of an arbitration panel the determination shall constitute a resolution by mutual agreement under this Article and shall be binding on both Contracting States with respect to that case only; and
- f) for purposes of an arbitration proceeding under paragraph 6 and this paragraph, the members of the arbitration panel and their staffs shall be involved "persons or authorities" to whom information may be disclosed under Article 26 of the Convention."

Article 3

Article 26 (Exchange of Information) of the Convention shall be deleted and replaced by the following provisions:

"ARTICLE 26

Exchange of Information

1. The competent authorities of the Contracting States shall exchange such information as may be relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes covered by the Convention insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Article 1.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the administration, assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of such functions. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the requested State authorizes such use.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

- a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
- b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
- c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public).

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic use.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person. In order to obtain such information, the tax authorities of the requested Contracting State, if necessary to comply with its obligations under this paragraph, shall have the power to enforce the disclosure of information covered by this paragraph, notwithstanding paragraph 3 or any contrary provisions in its domestic laws."

Article 4

Paragraph 10 of the Protocol to the Convention shall be deleted and replaced by the following new paragraph 10.

"10. With reference to Article 26 (Exchange of Information)

a) It is understood that the competent authority of a Contracting State shall provide the following information to the competent authority of the requested State when making a request for information under Article 26 of the Convention:

- i) information sufficient to identify the person under examination or investigation (typically, name and, to the extent known, address, account number or similar identifying information);
- ii) the period of time for which the information is requested;

iii) a statement of the information sought including its nature and the form in which the requesting State wishes to receive the information from the requested State;

iv) the tax purpose for which the information is sought; and

v) the name and, to the extent known, the address of any person believed to be in possession of the requested information.

b) The purpose of referring to information that may be relevant is intended to provide for exchange of information in tax matters to the widest possible extent without allowing the Contracting States to engage in "fishing expeditions" or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. While paragraph 10(a) contains important procedural requirements that are intended to ensure that fishing expeditions do not occur, subparagraphs (i) through (v) of paragraph 10(a) nevertheless are to be interpreted in order not to frustrate effective exchange of information.

c) If specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State shall provide information under Article 26 of the Convention in the form of authenticated copies of unedited original documents (including books, papers, statements, records, accounts, and writings).

d) Although Article 26 of the Convention does not restrict the possible methods for exchanging information, it shall not commit a Contracting State to exchange information on an automatic or spontaneous basis. The Contracting States expect to provide information to one another necessary for carrying out the provisions of the Convention.

e) It is understood that in the case of an exchange of information under Article 26 of the Convention, the administrative procedural rules regarding a taxpayer's rights (such as the right to be notified or the right to appeal) provided for in the requested State remain applicable before the information is exchanged with the requesting State. It is further understood that these rules are intended to provide the taxpayer a fair procedure and not to prevent or unduly delay the exchange of information process."

Article 5

1. This Protocol shall be subject to ratification in accordance with the applicable procedures of each Contracting State and instruments of ratification shall be exchanged as soon as possible.

2. This Protocol shall enter into force upon the exchange of instruments of ratification. Its provisions shall have effect:

a) in respect of tax withheld at source, for amounts paid or credited on or after the first January of the year following the entry into force of this Protocol;

b) in respect of Articles 3 and 4 of this Protocol, to requests made on or after the date of entry into force of this Protocol:

i) regarding information described in paragraph 5 of Article 26 of the Convention, to information that relates to any date beginning on or after the date of signature of this Protocol, and

ii) in all other cases, to information that relates to taxable periods beginning on or after the first January of the year following the date of signature of this Protocol.

c) in respect of paragraphs 6 and 7 of Article 25 of the Convention, with respect to

XIII

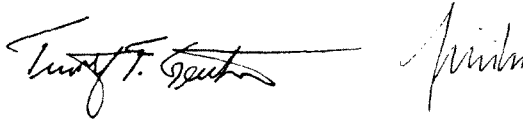
i) cases that are under consideration by the competent authorities as of the date on which this Protocol enters into force, and

ii) cases that come under such consideration after that time,

and the commencement date for a case described in clause i) of this subparagraph shall be the date on which this Protocol enters into force.

DONE at Washington, in duplicate, this 23rd day of September, 2009, in the English and German languages, the two texts having equal authenticity.

FOR THE UNITED STATES OF AMERICA: FOR THE SWISS CONFEDERATION:

The image shows two handwritten signatures in black ink. The signature on the left is for the United States of America, and the signature on the right is for the Swiss Confederation. Both signatures are written in a cursive style.



Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Schweizerische Botschaft in den Vereinigten Staaten von
Amerika

The Embassy of Switzerland presents its compliments to the United States Department of State and, referring to the Protocol (the "Protocol") signed today between the Swiss Confederation and the United States of America amending the Convention for the Avoidance of Double Taxation with Respect to Taxes on Income signed in Washington on October 2, 1996, and the protocol signed in Washington on October 2, 1996, (the "Convention"), and on behalf of the Government of Switzerland has the honor to propose the following:

1. In respect of any case where the competent authorities have endeavored but are unable to reach an agreement under Article 25 of the Convention regarding the application of the Convention, binding arbitration shall be used to determine such application, unless the competent authorities agree that the particular case is not suitable for determination by arbitration. If an arbitration proceeding under paragraph 6 of Article 25 commences (the Proceeding), the following rules and procedures shall apply.
 - a) The Proceeding shall be conducted in the manner prescribed by, and subject to the requirements of, paragraphs 6 and 7 of Article 25 and these rules and procedures, as completed by any other rules and procedures agreed upon by the competent authorities pursuant to subparagraph q) below.
 - b) The determination reached by an arbitration panel in the Proceeding shall be limited to a determination regarding the amount of income, expense or tax reportable to the Contracting States.
 - c) Notwithstanding the initiation of the Proceeding, the competent authorities may reach a mutual agreement to resolve a case and terminate the Proceeding. Correspondingly, a concerned person may withdraw a request for the competent authorities to engage in the Mutual Agreement Procedure (and thereby terminate the Proceeding) at any time.
 - d) The requirements of subparagraph d) of paragraph 7 of Article 25 shall be met when the competent authorities have each received from each concerned person a statement agreeing that the concerned person and each person acting on the concerned person's behalf shall not disclose to any other person any information received during the course

of the Proceeding from either Contracting State or the arbitration panel, other than the determination of the Proceeding. A concerned person that has the legal authority to bind any other concerned person(s) on this matter may do so in a comprehensive statement.

- e) Each Contracting State shall have 90 days from the date on which the Proceeding begins to send a written communication to the other Contracting State appointing one member of the arbitration panel. The members appointed shall not be employees of the tax administration of the Contracting State which appoints them. Within 60 days of the date on which the second such communication is sent, the two members appointed by the Contracting States shall appoint a third member, who shall serve as Chair of the panel. If the members appointed by the Contracting States fail to agree upon the third member, these members shall be regarded as dismissed and each Contracting State shall appoint a new member of the panel within 30 days of the dismissal of the original members. The competent authorities shall develop a non-exclusive list of individuals with familiarity in international tax matters who may potentially serve as the Chair of the panel. In any case, the Chair shall not be a citizen or resident of either Contracting State.
- f) The arbitration panel may adopt any procedures necessary for the conduct of its business, provided that the procedures are not inconsistent with any provision of Article 25 or of this note.
- g) Each of the Contracting States shall be permitted to submit, within 60 days of the appointment of the Chair of the arbitration panel, a Proposed Resolution describing the proposed disposition of the specific monetary amounts of income, expense or taxation at issue in the case, and a supporting Position Paper, for consideration by the arbitration panel. Copies of the Proposed Resolution and supporting Position Paper shall be provided by the panel to the other Contracting State on the date on which the later of the submissions is submitted to the panel. In the event that only one Contracting State submits a Proposed Resolution within the allotted time, then that Proposed Resolution shall be deemed to be the determination of the panel in that case and the Proceeding shall be terminated. Each of the Contracting States may, if it so desires, submit a Reply Submission to the panel within 120 days of the appointment of its Chair, to address any points raised by the Proposed Resolution or Position Paper submitted by the other Contracting State. Additional information may be submitted to the arbitration panel only at its request, and copies of the panel's request and the Contracting State's response shall be provided to the other Contracting State on the

XVI

date on which the request or the response is submitted. Except for logistical matters such as those identified in subparagraphs l), n) and o) below, all communications from the Contracting States to the arbitration panel, and vice versa, shall take place only through written communications between the designated competent authorities and the Chair of the panel.

- h) The presenter of the case to the competent authority of a Contracting State shall be permitted to submit, within 90 days of the appointment of the Chair of the arbitration panel, a Position Paper for consideration by the arbitration panel. Copies of the Position Paper shall be provided by the panel to the Contracting States on the date on which the later of the submissions of the Contracting States is submitted to the panel.
- i) The arbitration panel shall deliver a determination in writing to the Contracting States within six months of the appointment of its Chair. The panel shall adopt as its determination one of the Proposed Resolutions submitted by the Contracting States.
- j) The determination of the arbitration panel shall pertain to the application of the Convention in a particular case, and shall be binding on the Contracting States. The determination of the panel shall not state a rationale. It shall have no precedential value.
- k) As provided in subparagraph e) of paragraph 7 of Article 25, the determination of an arbitration panel shall constitute a resolution by mutual agreement under Article 25. Each concerned person must, within 30 days of receiving the determination of the panel from the competent authority to which the case was first presented, advise that competent authority whether that concerned person accepts the determination of the panel. In the event the case is in litigation, each concerned person who is a party to the litigation must also advise, within the same time frame, the relevant court of its acceptance of the determination of the panel as the resolution by mutual agreement and withdraw from the consideration of the court the issues resolved through the Proceeding. If any concerned person fails to so advise the relevant competent authority and relevant court within this time frame, the determination of the panel shall be considered not to have been accepted in that case. Where the determination of the panel is not accepted, the case may not subsequently be the subject of a Proceeding.
- l) Any meeting(s) of the arbitration panel shall be in facilities provided by the Contracting State whose competent authority initiated the mutual agreement proceedings in the case.

XVII

- m) The treatment of any associated interest or penalties is outside the scope of the Proceeding and shall be determined by applicable domestic law of the Contracting State(s) concerned.
- n) No information relating to the Proceeding (including the panel's determination) may be disclosed by the members of the arbitration panel or their staffs or by either competent authority, except as permitted by the Convention and the domestic laws of the Contracting States. In addition, all material prepared in the course of, or relating to, the Proceeding shall be considered to be information exchanged between the Contracting States. All members of the arbitration panel and their staffs must agree in statements sent to each of the Contracting States in confirmation of their appointment to the arbitration panel to abide by and be subject to the confidentiality and nondisclosure provisions of Article 26 (Exchange of Information) of the Convention and the applicable domestic laws of the Contracting States. In the event those provisions conflict, the most restrictive condition shall apply.
- o) The fees and expenses shall be borne equally by the Contracting States. In general, the fees of members of the arbitration panel shall be set at the fixed amount of \$2,000 (two thousand United States dollars) per day or the equivalent amount in Swiss francs, subject to modification by the competent authorities. In general, the expenses of members of the arbitration panel shall be set in accordance with the International Centre for Settlement of Investment Disputes (ICSID) Schedule of Fees for arbitrators (as in effect on the date on which the arbitration proceedings begin), subject to modification by the competent authorities. Any fees for language translation shall also be borne equally by the Contracting States. Meeting facilities, related resources, financial management, other logistical support, and general administrative coordination of the Proceeding shall be provided, at its own cost, by the Contracting State whose competent authority initiated the mutual agreement proceedings in the case. Any other costs shall be borne by the Contracting State that incurs them.
- p) For purposes of paragraphs 6 and 7 of Article 25 and this paragraph, each competent authority shall confirm in writing to the other competent authority and to the concerned person(s) the date of its receipt of the information necessary to undertake substantive consideration for a mutual agreement. Such information shall be submitted to the competent authorities under relevant internal rules and procedures of each of the Contracting States. However, this information shall not be considered received until both competent authorities have received copies of all materials submitted to either

XVIII

Contracting State by the concerned person(s) in connection with the mutual agreement procedure.

- q) The competent authorities of the Contracting States may complete the above rules and procedures as necessary to more effectively implement the intent of paragraph 6 of Article 25 to eliminate double taxation.

2. It is understood that paragraph 5 of Article 26 of the Convention does not preclude a Contracting State from invoking paragraph 3 of Article 26 to refuse to supply information held by a bank, financial institution, a person acting in an agency or fiduciary capacity or information relating to ownership interests. However, such refusal must be based on reasons unrelated to the person's status as a bank, financial institution, agent, fiduciary, nominee, or the fact that the information relates to ownership interests. For instance, a legal representative acting for a client may be acting in an agency capacity but for any information protected as a confidential communication between attorneys, solicitors or other admitted legal representatives and their clients, paragraph 3 of Article 26 continues to provide a possible basis for declining to supply the information.

If the above proposal is acceptable to the Government of the United States of America, the Embassy of Switzerland proposes that this Note and the Department of State's reply reflecting such acceptance shall constitute an agreement between the two Governments that shall enter into force on the date of entry into force of the Protocol and shall be annexed to the Convention as Annex A thereto and shall therefore be an integral part of the Convention.

The Embassy of Switzerland avails itself of this opportunity to renew to the Department of State the assurance of its highest consideration.

Washington, D.C. September 23, 2009



United States Department of State
Washington, D.C.

XIX

The Department of State acknowledges receipt of the note dated September 23, 2009, from the Embassy of Switzerland which states:

“The Embassy of Switzerland presents its compliments to the United States Department of State and, referring to the Protocol (the “Protocol”) signed today between the Swiss Confederation and the United States of America amending the Convention for the Avoidance of Double Taxation with Respect to Taxes on Income signed in Washington on October 2, 1996, and the protocol signed in Washington on October 2, 1996, (the “Convention”), and on behalf of the Government of Switzerland has the honor to propose the following:

1. In respect of any case where the competent authorities have endeavored but are unable to reach an agreement under Article 25 of the Convention regarding the application of the Convention, binding arbitration shall be used to determine such application, unless the competent authorities agree that the particular case is not suitable for determination by arbitration. If an arbitration proceeding under paragraph 6 of Article 25 commences (the Proceeding), the following rules and procedures shall apply.

- a) The Proceeding shall be conducted in the manner prescribed by, and subject to the requirements of, paragraphs 6 and 7 of Article 25 and these rules and procedures, as completed by any other rules and procedures agreed upon by the competent authorities pursuant to subparagraph q) below.
- b) The determination reached by an arbitration panel in the Proceeding shall be limited to a determination regarding the amount of income, expense or tax reportable to the Contracting States.
- c) Notwithstanding the initiation of the Proceeding, the competent authorities may reach a mutual agreement to resolve a case and terminate the Proceeding. Correspondingly, a concerned person may withdraw a request for the

DIPLOMATIC NOTE

competent authorities to engage in the Mutual Agreement Procedure (and thereby terminate the Proceeding) at any time.

- d) The requirements of subparagraph d) of paragraph 7 of Article 25 shall be met when the competent authorities have each received from each concerned person a statement agreeing that the concerned person and each person acting on the concerned person's behalf shall not disclose to any other person any information received during the course of the Proceeding from either Contracting State or the arbitration panel, other than the determination of the Proceeding. A concerned person that has the legal authority to bind any other concerned person(s) on this matter may do so in a comprehensive statement.
- e) Each Contracting State shall have 90 days from the date on which the Proceeding begins to send a written communication to the other Contracting State appointing one member of the arbitration panel. The members appointed shall not be employees of the tax administration of the Contracting State which appoints them. Within 60 days of the date on which the second such communication is sent, the two members appointed by the Contracting States shall appoint a third member, who shall serve as Chair of the panel. If the members appointed by the Contracting States fail to agree upon the third member, these members shall be regarded as dismissed and each Contracting State shall appoint a new member of the panel within 30 days of the dismissal of the original members. The competent authorities shall develop a non-exclusive list of individuals with familiarity in international tax matters who may potentially serve as the Chair of the panel. In any case, the Chair shall not be a citizen or resident of either Contracting State.
- f) The arbitration panel may adopt any procedures necessary for the conduct of its business, provided that the procedures are not inconsistent with any provision of Article 25 or of this note.
- g) Each of the Contracting States shall be permitted to submit, within 60 days of the appointment of the Chair of the arbitration panel, a Proposed Resolution describing the proposed disposition of the specific monetary amounts of income, expense or taxation at issue in the case, and a supporting Position Paper, for consideration by the arbitration panel. Copies of the Proposed Resolution and supporting Position Paper shall be provided by the panel to the other Contracting State on the date on which the later of the submissions is

submitted to the panel. In the event that only one Contracting State submits a Proposed Resolution within the allotted time, then that Proposed Resolution shall be deemed to be the determination of the panel in that case and the Proceeding shall be terminated. Each of the Contracting States may, if it so desires, submit a Reply Submission to the panel within 120 days of the appointment of its Chair, to address any points raised by the Proposed Resolution or Position Paper submitted by the other Contracting State. Additional information may be submitted to the arbitration panel only at its request, and copies of the panel's request and the Contracting State's response shall be provided to the other Contracting State on the date on which the request or the response is submitted. Except for logistical matters such as those identified in subparagraphs l), n) and o) below, all communications from the Contracting States to the arbitration panel, and vice versa, shall take place only through written communications between the designated competent authorities and the Chair of the panel.

- h) The presenter of the case to the competent authority of a Contracting State shall be permitted to submit, within 90 days of the appointment of the Chair of the arbitration panel, a Position Paper for consideration by the arbitration panel. Copies of the Position Paper shall be provided by the panel to the Contracting States on the date on which the later of the submissions of the Contracting States is submitted to the panel.
- i) The arbitration panel shall deliver a determination in writing to the Contracting States within six months of the appointment of its Chair. The panel shall adopt as its determination one of the Proposed Resolutions submitted by the Contracting States.
- j) The determination of the arbitration panel shall pertain to the application of the Convention in a particular case, and shall be binding on the Contracting States. The determination of the panel shall not state a rationale. It shall have no precedential value.
- k) As provided in subparagraph e) of paragraph 7 of Article 25, the determination of an arbitration panel shall constitute a resolution by mutual agreement under Article 25. Each concerned person must, within 30 days of receiving the determination of the panel from the competent authority to which the case was first presented, advise that competent authority whether

that concerned person accepts the determination of the panel. In the event the case is in litigation, each concerned person who is a party to the litigation must also advise, within the same time frame, the relevant court of its acceptance of the determination of the panel as the resolution by mutual agreement and withdraw from the consideration of the court the issues resolved through the Proceeding. If any concerned person fails to so advise the relevant competent authority and relevant court within this time frame, the determination of the panel shall be considered not to have been accepted in that case. Where the determination of the panel is not accepted, the case may not subsequently be the subject of a Proceeding.

- l) Any meeting(s) of the arbitration panel shall be in facilities provided by the Contracting State whose competent authority initiated the mutual agreement proceedings in the case.
- m) The treatment of any associated interest or penalties is outside the scope of the Proceeding and shall be determined by applicable domestic law of the Contracting State(s) concerned.
- n) No information relating to the Proceeding (including the panel's determination) may be disclosed by the members of the arbitration panel or their staffs or by either competent authority, except as permitted by the Convention and the domestic laws of the Contracting States. In addition, all material prepared in the course of, or relating to, the Proceeding shall be considered to be information exchanged between the Contracting States. All members of the arbitration panel and their staffs must agree in statements sent to each of the Contracting States in confirmation of their appointment to the arbitration panel to abide by and be subject to the confidentiality and nondisclosure provisions of Article 26 (Exchange of Information) of the Convention and the applicable domestic laws of the Contracting States. In the event those provisions conflict, the most restrictive condition shall apply.
- o) The fees and expenses shall be borne equally by the Contracting States. In general, the fees of members of the arbitration panel shall be set at the fixed amount of \$2,000 (two thousand United States dollars) per day or the equivalent amount in Swiss francs, subject to modification by the competent authorities. In general, the expenses of members of the arbitration panel shall be set in accordance with the International Centre for Settlement of

XXIII

Investment Disputes (ICSID) Schedule of Fees for arbitrators (as in effect on the date on which the arbitration proceedings begin), subject to modification by the competent authorities. Any fees for language translation shall also be borne equally by the Contracting States. Meeting facilities, related resources, financial management, other logistical support, and general administrative coordination of the Proceeding shall be provided, at its own cost, by the Contracting State whose competent authority initiated the mutual agreement proceedings in the case. Any other costs shall be borne by the Contracting State that incurs them.

- p) For purposes of paragraphs 6 and 7 of Article 25 and this paragraph, each competent authority shall confirm in writing to the other competent authority and to the concerned person(s) the date of its receipt of the information necessary to undertake substantive consideration for a mutual agreement. Such information shall be submitted to the competent authorities under relevant internal rules and procedures of each of the Contracting States. However, this information shall not be considered received until both competent authorities have received copies of all materials submitted to either Contracting State by the concerned person(s) in connection with the mutual agreement procedure.
- q) The competent authorities of the Contracting States may complete the above rules and procedures as necessary to more effectively implement the intent of paragraph 6 of Article 25 to eliminate double taxation.

2. It is understood that paragraph 5 of Article 26 of the Convention does not preclude a Contracting State from invoking paragraph 3 of Article 26 to refuse to supply information held by a bank, financial institution, a person acting in an agency or fiduciary capacity or information relating to ownership interests. However, such refusal must be based on reasons unrelated to the person's status as a bank, financial institution, agent, fiduciary, nominee, or the fact that the information relates to ownership interests. For instance, a legal representative acting for a client may be acting in an agency capacity but for any information protected as a confidential communication between attorneys, solicitors or other admitted legal representatives and their clients, paragraph 3 of Article 26 continues to provide a possible basis for declining to supply the information.

XXIV

If the above proposal is acceptable to the Government of the United States of America, the Embassy of Switzerland proposes that this Note and the Department of State's reply reflecting such acceptance shall constitute an agreement between the two Governments that shall enter into force on the date of entry into force of the Protocol and shall be annexed to the Convention as Annex A thereto and shall therefore be an integral part of the Convention.

The Embassy of Switzerland avails itself of this opportunity to renew to the Department of State the assurance of its highest consideration."

The Department of State confirms that the proposal set forth in the Embassy of Switzerland's note is acceptable to the Government of the United States of America and agrees that this note and the Government of Switzerland's note shall constitute an agreement between the two Governments that shall enter into force on the date of entry into force of the Protocol and shall be annexed to the Convention as Annex A thereto and shall therefore be an integral part of the Convention.

Department of State,

Washington, September 23, 2009.

The Department of State presents its compliments to the Embassy of Switzerland and refers the Embassy of Switzerland to the Protocol signed in Washington on September 23, 2009, entitled Protocol Amending the Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, Signed on October 2, 1996 (hereinafter "Protocol").

Some errors were discovered in the English language version of the Protocol which the Department of State proposes to rectify as follows:

1. Subparagraph a) of paragraph 2 of Article 5:

In the English version the words "the first January" shall be replaced by the words "the first of January".

2. Subsection ii) of subparagraph b) of paragraph 2 of Article 5:

In the English version the words "the first January" shall be replaced by the words "the first of January".

In order to correct the Protocol, the Department of State proposes, on behalf of the Government of the United States of America, that:

I. The English language version be corrected as set out above; and

II. The corrected texts replace the defective texts as from the date on which the Protocol was signed.

If the Government of Switzerland concurs with the proposals contained in paragraphs I. and II. above, the Department of State further proposes that this note and the note in reply thereto expressing the approval of the Government of Switzerland shall constitute the correction of the English language version of the Protocol, and shall become part of the original thereof.

Department of State,

Washington, November 16, 2010.

A handwritten signature in black ink, appearing to be initials or a stylized name, located to the right of the typed text.



Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Embassy of Switzerland in the United States of America

Note No. 75/2010

The Embassy of Switzerland presents its compliments to the United States Department of State and acknowledges receipt of the note dated November 16, 2010 which reads as follows:

"The Department of State presents its compliments to the Embassy of Switzerland and refers the Embassy of Switzerland to the Protocol signed in Washington on September 23, 2009, entitled Protocol Amending the Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, Signed on October 2, 1996 (hereinafter "the Protocol").

Some errors were discovered in the English language version of the Protocol which the Department of State proposes to rectify as follows:

1. Subparagraph a) of paragraph 2 of Article 5:

In the English version the words "the first January" shall be replaced by the words "the first of January".

2. Subsection ii) of subparagraph b) of paragraph 2 of Article 5:

In the English version the words "the first January" shall be replaced by the words "the first of January".

In order to correct the Protocol, the Department of State proposes, on behalf of the Government of the United States of America, that:

- I. The English language version be corrected as set out above; and
- II. The corrected texts replace the defective texts as from the date on which the Protocol was signed.

XXVIII

If the Government of Switzerland concurs with the proposals contained in paragraphs I. and II. above, the Department of State further proposes that this note and the note in reply thereto expressing the approval of the Government of Switzerland shall constitute the correction of the English language version of the Protocol, and shall become part of the original thereof."

The Embassy of Switzerland confirms that the Government of Switzerland agrees with the corrections proposed by the Government of the United States of America. Accordingly, the note of the United States Department of States of November 16, 2010, and this note in reply shall constitute the correction of the English language version of the Protocol and shall become part of the original thereof.

The Embassy of Switzerland avails itself of this opportunity to renew to the United States Department of State the assurances of its highest consideration.

Washington, D.C., November 16, 2010

United States Department of State
Washington, D.C.

