

# **IMPLEMENTING ARRANGEMENT REGARDING PARAGRAPHS 6 AND 7 OF ARTICLE 25 OF THE CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE SWISS CONFEDERATION FOR THE AVOIDANCE OF DOUBLE TAXATION WITH REPECT TO TAXES ON INCOME**

## **Introduction**

The competent authorities of Switzerland and of the United States of America have established this arrangement to implement the arbitration process provided for in paragraphs 6 and 7 of Article 25 of 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, as Amended by the Protocols signed on October 2, 1996, and September 23, 2009 (the “Convention”) and the exchange of notes accompanying the 2009 Protocol which is annexed to the Convention as Annex A (“Treaty Annex A”) and which forms an integral part of the Convention.

Subject to certain exceptions described in paragraph 4, this arbitration process applies to cases that the competent authorities of Switzerland and the United States have determined are suitable for assistance under the mutual agreement procedure of Article 25 of the Convention in accordance with published guidance, in the case of Switzerland the “Factsheet on the mutual agreement procedure” of May 2018 or any amendment or successor provisions thereof, and in the case of the United States, Revenue Procedure 2015-40 or any amendment or successor provisions thereof.

This arrangement is adopted in accordance with paragraphs 6 and 7 of Article 25 of the Convention and subparagraphs a) and q) of paragraph 1 of the Treaty Annex A.

The competent authorities of both Contracting States, the presenter of the case, and the arbitrators will follow the procedures in this arrangement in good faith.

### **1. Definitions**

- A. “MAP” is the abbreviation for the Mutual Agreement Procedure proceedings of competent authorities under Article 25 of the Convention.

- B. The term “Concerned Person” means the presenter of a case to a competent authority for consideration under Article 25 of the Convention 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.
  - C. 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 the competent authorities of both Contracting States. The Commencement Date will be determined in accordance with paragraph 5 or, with respect to a case originally submitted as a request for an advance pricing arrangement (“APA”), in accordance with paragraph 21.
2. Competent Authority Assistance in General
- A. A request for competent authority assistance must comply with the requirements as set out for the United States in Revenue Procedure 2015-40, or subsequent guidance, and for Switzerland in the “Factsheet on the mutual agreement procedure” of May 2018, or any applicable subsequent guidance.
  - B. Taxpayers shall submit their requests for competent authority assistance pursuant to Article 25, paragraph 1 of the Convention.
3. Cases Eligible for Arbitration
- A. According to paragraphs 6 and 7 of Article 25 of the Convention, arbitration will be available where:
    - 1. pursuant to a mutual agreement procedure under Article 25 of the Convention the competent authorities have endeavored but are unable to reach a complete agreement; and
    - 2. all the requirements prescribed in paragraphs 6 and 7 of Article 25 of the Convention, paragraph 1 of the Treaty Annex A, and this arrangement are satisfied.
  - B. An unresolved competent authority request which originated with a bilateral APA request will be subject to arbitration procedures in accordance with paragraph 21.

C. Once a case is accepted into the MAP, neither competent authority will cease unilaterally to consider a case, except for the circumstances described in paragraph 4.

4. Cases Not Eligible for Arbitration

A. Arbitration is not available for cases that a competent authority has not accepted, or in which a competent authority ceases to provide assistance, in accordance with the Convention, the Protocol or published guidance.

1. The Swiss competent authority will generally not accept a request for competent authority assistance or will generally cease providing assistance to a taxpayer, and thus not provide for arbitration if the taxpayer does not comply with the requirements or under circumstances as described in the “Factsheet on the mutual agreement procedure” of May 2018 (or any applicable subsequent guidance).

2. The U.S. competent authority generally will not accept a request for competent authority assistance or will cease providing assistance to a taxpayer, and thus not provide for arbitration in the circumstances described in section 7.02 (Denial and Termination of Assistance) of Revenue Procedure 2015-40 (or any applicable subsequent guidance). In addition, the U.S. competent authority will not provide for arbitration for a case in which the taxpayer has reached a settlement on the issue with IRS Appeals (including an Appeals settlement through the Appeals arbitration process) or with Chief Counsel pursuant to an executed closing agreement or other written agreement such as Form 870-AD, unless otherwise permitted by Revenue Procedure 2015 40 (or any applicable subsequent guidance).

B. Arbitration is not available for cases that have been accepted for competent authority consideration, but for which the competent authorities agree that the particular case is not suitable for determination by arbitration and have notified the presenter of the case of such decision before the date on which arbitration proceedings would otherwise begin.

C. Arbitration is not available where a decision with respect to an unresolved case has been rendered by a court or administrative tribunal of either Contracting State.

5. Commencement Date

A. Within 60 days of receipt of a MAP request for assistance each competent authority will review the request and verify whether it contains the information necessary to undertake substantive consideration for a mutual agreement, pursuant to subparagraph b) of paragraph 7 of Article 25 of the Convention.

B. If a competent authority determines that the request for assistance is not complete, that competent authority will inform the taxpayer in writing within 60 days of receipt of the request, what information is necessary consistent with Rev. Proc. 2015-40 (or subsequent guidance) or the information required under Switzerland's "Factsheet on the mutual agreement procedure" of May 2018 (or subsequent guidance).

C. Once complete information is provided, each competent authority will inform the other competent authority of the date it received the information necessary to undertake substantive consideration for a mutual agreement. The latter of these dates will be the Commencement Date, except as described in paragraph 21 with respect to cases that originated as an APA.

D. Contemporaneously, the competent authorities will confirm with each other that each has received the same information.

E. When the Commencement Date is established:

1. the competent authorities of both Contracting States will exchange correspondence with each other confirming the Commencement Date and the date the arbitration proceedings potentially shall begin for any subsequently necessary arbitration, and

2. each competent authority will inform the Concerned Person(s) resident in its territory in writing of the Commencement Date and the date the arbitration proceedings potentially shall begin for any subsequently necessary arbitration.

## 6. Date Arbitration Proceedings Begin

- A. An arbitration proceeding with respect to a case will begin on a date (hereinafter “Date Arbitration Proceedings Begin”) which is the latest of:
1. two years after the Commencement Date of that case, unless both competent authorities have previously agreed to a different date and notified the presenter of the case (as provided in subparagraphs B and C), and
  2. the earliest date upon which the nondisclosure agreements have been received by both competent authorities. (See subparagraph c) of paragraph 7 of Article 25 of the Convention.)
- B. As provided in Article 25(7)(c)(i) of the Convention, the competent authorities of both Contracting States may decide that the Date Arbitration Proceedings Begin with respect to a case should be earlier or later than what it would have been without such decision in appropriate situations. Such appropriate situations could be, for example, where the competent authorities are close to reaching a mutual agreement to resolve the case, where there has been a delay by a Concerned Person in providing information in the MAP of the case, where MAP is suspended by a request from the presenter of the case, or where a Concerned Person has provided significant new information after the Commencement Date of the case.
- C. If the competent authorities of both Contracting States decide the Date Arbitration Proceedings Begin with respect to a case under subparagraph B, then the competent authorities will confirm that date in writing to each other and to the Concerned Persons resident in their territory.

## 7. Confidentiality

According to subparagraph c) of paragraph 6 and subparagraphs d) and f) of paragraph 7 of Article 25 of the Convention and subparagraphs d) and n) of paragraph 1 of the Treaty Annex A, the confidentiality of a case will be maintained in the following manner:

- A. All Concerned Persons 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 the competent authorities of either Contracting State or the arbitration panel, other than the determination of the panel.

- B. No information relating to an arbitration proceeding (including the determination of the arbitration panel) may be disclosed by the members of the arbitration panel or their staffs or by the competent authorities of the Contracting States, 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, an arbitration proceeding will be considered to be information exchanged between the competent authorities pursuant to Article 26 of the Convention.
- C. For purposes of an arbitration proceeding under paragraphs 6 and 7 of Article 25 of the Convention, the members of arbitration panel (hereinafter referred to as “arbitrators”) and their staffs will be considered to be “persons or authorities” to whom information may be disclosed under Article 26 of the Convention.
- D. The competent authorities of both Contracting States will ensure that all arbitrators (and any of their staff which will assist them in carrying on the arbitration), prior to their acting in an arbitration proceeding, agree in a Declaration of Arbitrator specified by both of the competent authorities (see, e.g., Attachment 4 to this arrangement) to not disclose any information relating to an arbitration proceeding (including the determination of the arbitration panel), and to abide by and be subject to the confidentiality and nondisclosure provisions of Article 26 of the Convention and similar provisions of relevant domestic laws of the Contracting States. However, the members of the arbitration panel or their staff will disclose the determination of the arbitration panel to the competent authorities. In the event those provisions conflict, the most restrictive condition shall apply. The arbitrators must send their staff’s non-disclosure agreement to both of the competent authorities.

## 8. Eligibility of Arbitrators

- A. In order to be eligible as an arbitrator:
  - 1. the individual is not an employee nor has been an employee within the twelve-month period prior to the Date Arbitration

Proceedings Begin of the tax administration, the Treasury Department, or the Ministry of Finance of the Contracting State which identifies him or her;

2. the individual does not have any prior involvement with the specific matters at issue in the arbitration proceeding for which he or she is being considered as an arbitrator; and
3. in addition, the individual who will serve as the chair of the arbitration panel (“Chair”) is not a citizen or resident of either Contracting State.

B. The competent authorities of both Contracting States will identify and jointly agree on 5 to 10 persons who are qualified and willing to serve as the Chair of an arbitration panel. The competent authorities will review and revise this list as necessary every three years or earlier if required.

C. The arbitrator must maintain the impartiality and independence conditions set out in clauses 1 to 3 of subparagraph A throughout the proceedings and avoid any conduct for 12 months after the date the arbitration panel delivers its decision under paragraph 18 which may damage the appearance of impartiality and independence.

D. The arbitrators will undertake to promptly disclose to both competent authorities, in writing, any new facts or circumstances that arise during or following the arbitration proceedings that might give rise to doubts with respect to their impartiality or independence.

E. The staff person of an arbitrator will be subject to the same conflict of interest rules applicable to the arbitrators as described in subparagraph A of paragraph 8.

## 9. Appointment of Arbitrators

A. Each competent authority of the Contracting States will appoint one arbitrator to the arbitration panel by sending a written communication (that includes a copy of the Declaration of Arbitrator identified in subparagraph D of paragraph 7, signed by the arbitrator) indicating their appointment to the other competent authority within 90 days of the Date Arbitration Proceedings Begin. (See subparagraph e) of paragraph 1 of the Treaty Annex A).

- B. In the event that the competent authority of a Contracting State fails to make such appointment in the manner and within the time period in this paragraph, the appointed arbitrator shall contact the competent authority that appointed him or her. That competent authority shall contact the highest-ranking member of the Secretariat at the Centre for Tax Policy and Administration of the Organization for Economic Co-operation and Development (OECD) who is not a citizen or resident of either Switzerland or the United States, who shall appoint an arbitrator by written notice to both countries within 60 days of the date of such failure.
- C. The procedure in subparagraph B will not apply, where the failure of such appointment within the period in subparagraph A is due to the fact that an individual who had agreed to serve as an arbitrator becomes unable to serve because of circumstances outside his or her control (for example, death, serious illness or natural disaster). The competent authorities of both Contracting States will determine the appropriate time period for the appointment of an arbitrator in such a case.
- D. Within 60 days of the date on which the second communication of the country-appointed arbitrator is sent, the arbitrators so appointed will appoint a third arbitrator who shall serve as Chair of the panel among the list established pursuant to subparagraph B of paragraph 8. The third arbitrator so selected will inform the competent authorities of both Contracting States of his or her appointment as soon as possible and send the Declaration of Arbitrator to the competent authorities. The competent authority which received the request for assistance will inform the presenter of the case of the date of the Chair's appointment.
- E. If the two initial arbitrators fail to select the third arbitrator in the manner and within the time period in this paragraph, the two initial arbitrators will be dismissed, and each competent authority of the Contracting States will select a new arbitrator of the arbitration panel within 30 days of the dismissal of the original members.
- F. The procedure in subparagraph E will not apply, where the failure of such selection within the time period in subparagraph D is due to the fact that the individual selected to serve as Chair becomes unable to serve because of circumstances outside his or her control (for

example, death, serious illness or natural disaster). In such a case, unless otherwise decided, the two arbitrators will appoint a third arbitrator to serve as Chair from among the list of candidates described in subparagraph B of paragraph 8.

- G. The arbitrators will be selected from individuals who:
1. satisfy the eligibility requirements identified in subparagraph A of paragraph 8 at the time of accepting an appointment to serve, and are reasonably expected to remain so during the entire arbitration proceeding and for a reasonable time thereafter in accordance with subparagraph C of paragraph 8; and
  2. have significant experience in international tax matters (he or she need not, however, have experience as either a judge or arbitrator).
- H. An arbitrator will be deemed appointed on the date on which he or she signs the Declaration of Arbitrator of intent to so serve required by subparagraph D of paragraph 7, such Declaration of Arbitrator to be in the form agreed by the competent authorities of both Contracting States.
- I. Where one of the two initial arbitrators becomes ineligible for service as an arbitrator (e.g., violates the Declaration of Arbitrator identified in subparagraph D of paragraph 7) or for any other reason it is necessary to replace an arbitrator after the arbitrator was appointed, the competent authority who had selected that individual will select a replacement as soon as possible and no later than 30 days after the position becomes vacant.
- J. Where the third arbitrator (the Chair) becomes ineligible for service as an arbitrator (e.g., violates the Declaration of Arbitrator identified in subparagraph D of paragraph 7) or for any other reason it is necessary to replace the third arbitrator after he or she was appointed, the two initial arbitrators will select a replacement among the list established pursuant to subparagraph B of paragraph 8 as soon as possible and no later than 14 days after the position becomes vacant.
- K. If any arbitrator is unable to fulfill his or her duties, the competent authorities will consult with the remaining panel members to determine a new timetable, if necessary.

- L. Should it come to light that an arbitrator has a conflict of interest which would have prevented that arbitrator's original appointment, the arbitrator must recuse himself or herself from consideration of the case and inform the competent authorities.

## 10. Terms of Reference

- A. As soon as possible after the Date Arbitration Proceedings Begin, the competent authorities of both Contracting States will develop a brief Statement of Information which will identify the Concerned Person(s) and contain a general description of the proposed adjustments or similar issues to be resolved in a case. The competent authority of a Contracting State, or an arbitrator selected by the competent authority of a Contracting State, may disclose the Statement of Information, if the confidentiality of the information is ensured by first obtaining an Affirmation of Confidentiality (see, e.g., Attachment 5 to this arrangement) and such disclosure is permitted by the law of the Contracting State, to a candidate to be an arbitrator of the case to check whether that candidate satisfies the eligibility requirements identified in subparagraph A of paragraph 8.
- B. The competent authorities of both Contracting States undertake to develop, within 30 days after the Date Arbitration Proceedings Begin, a "Terms of Reference" for a case to include:
  - 1. description of the relevant business activities of the Concerned Person(s);
  - 2. description of the adjustments or similar issues in dispute in the case;
  - 3. description of the matters to be considered for the resolution of the case; including identification of all matters in the case previously agreed between the competent authorities; and
  - 4. a description of the final position taken by each competent authority in the negotiation of the unresolved matters which prevent the mutual agreement between the competent authorities.

The competent authorities may also provide logistical or procedural information in the Terms of Reference.

- C. The Terms of Reference will be communicated to the Chair on the date of his or her appointment, or as soon thereafter as possible.
- D. If the Terms of Reference has not been completed by the date for submission of the Proposed Resolutions and Position Papers, the competent authorities of both Contracting States will send to the Chair their most recent written proposals for the Terms of Reference along with their Proposed Resolutions and Position Papers. All the matters identified as unresolved in these draft Terms of References are treated as unresolved for the purpose of the subsequent proceedings.

#### 11. Proposed Resolutions, Position Papers, and Reply Submissions

- A. As provided in subparagraph g) of paragraph 1 of the Treaty Annex A, the competent authority of each of the Contracting States will be permitted to submit a Proposed Resolution, not to exceed five pages in total, addressing each adjustment or similar issue raised in a case. Such Proposed Resolution will be a resolution of the entire case, and will reflect, without modification, all matters in the case previously agreed between the competent authorities of both Contracting States. Such Proposed Resolution will be limited to a disposition of the specific monetary amounts of income, expense or taxation reportable to the Contracting States, for each adjustment or similar issue in the case, based on the application of the Convention to the case. The competent authority of each of the Contracting States will also be permitted to submit a supporting Position Paper, not to exceed 30 pages plus annexes, for consideration by the arbitration panel.
- B. The submission of a Proposed Resolution and supporting Position Paper by the competent authority of a Contracting State will be made by posting it (or similarly sending it via express delivery service) to the Chair within 60 days of the appointment of the Chair. Unless alternative arrangements are made, the Chair will in turn send a copy of each competent authority's Proposed Resolution and supporting Position Paper to the other panel members and the other competent authority within 5 days of receipt of the later submission by the panel.
- C. In the event that only one of the competent authorities of the Contracting States submits a Proposed Resolution within the allotted time, then that Proposed Resolution shall be deemed to be the

determination of the arbitration panel in that case and the arbitration panel shall be terminated.

- D. As provided in subparagraph g) of paragraph 1 of the Treaty Annex A, each of the competent authorities of the Contracting States will be permitted to submit a Reply Submission, not to exceed 10 pages, plus annexes, to the arbitration panel in order to address any points raised by the Proposed Resolution or supporting Position Paper submitted by the other competent authority. In this Reply Submission, the competent authority may also comment upon any Presenter Position Paper submitted under the provisions of paragraph 12. If the competent authority exercises its option to also comment upon a Presenter Position Paper, its Reply Submission should not exceed 20 pages, plus annexes. The submission of a Reply Submission by the competent authority will be made by posting it (or similarly sending it via express delivery service) to the Chair within 120 days of appointment of the Chair. Unless alternative arrangements are made, the Chair will send a copy of each competent authority's Reply Submission paper to the other panel members and the other competent authority within 5 days of receipt of the later reply by the panel.
- E. In a particular case, the competent authorities of both Contracting States may decide to use a different presentation or page limitation for the Proposed Resolutions, supporting Position Papers, or Reply Submissions, such as provided in paragraphs 13 and 14.
- F. Any annex to a supporting Position Paper or Reply Submission which does not reflect information widely available to the general public must be a document previously made available for the competent authorities of both Contracting States to use in negotiation. Any factual information used in a supporting Position Paper or Reply Submission, which does not reflect information widely available to the general public, must be what was contained in a document previously made available for both competent authorities to use in negotiation.
- G. Except with respect to the final position taken by the competent authority of the other Contracting State as described in clause 4 of subparagraph B of paragraph 10, the competent authority of a Contracting State will only be permitted to refer to a proposal for

resolution made by either competent authority of the Contracting States during negotiations if that proposal is submitted to the arbitration panel for consideration as a Proposed Resolution.

- H. The arbitration panel may ask both competent authorities in writing for additional information. Such additional information may be submitted to the arbitration panel only at its request and copies of the panel's request and the competent authority's response shall be provided to the competent authority of the other Contracting State on the date on which the request or the response is submitted. The panel shall establish a deadline for responding to the request. If the panel requests information or analyses that have not previously been available or considered for purposes of the negotiation, the competent authorities will consult with each other to determine how to respond to the panel's request. The panel may not request additional information from the presenter of the case.
- I. Unless otherwise decided between the competent authorities of both Contracting States and the Chair, the competent authorities will send to the Chair four copies of each document submitted to the arbitration panel, for distribution to the other arbitrators and the other competent authority.
- J. Unless otherwise decided between the competent authorities of both Contracting States, any information which does not reflect information widely available to the general public (including any information provided by the presenter of a case or his authorized representatives or agents in writing or orally) that was not available to both competent authorities before the Date Arbitration Proceedings Begin will not be taken into account for purposes of the arbitration decision. Furthermore, any Reply Submission or any additional information that was provided to the panel after the deadline specified in subparagraph D or H respectively will not be taken into account for purposes of the arbitration decision.
- K. To the extent needed, the arbitration panel may adopt any additional procedures necessary for the conduct of its business, provided that the procedures are not inconsistent with any provision of Article 25 of the Convention, the Treaty Annex A, or this arrangement or any other procedural rules decided between the competent authorities of both Contracting States. If the arbitration panel adopts any additional

procedures, the Chair will provide a written copy of them to the competent authorities.

## 12. Presenter Position Paper

- A. According to subparagraph h) of paragraph 1 of the Treaty Annex A, within 90 days of the appointment of the Chair, the presenter of a case may submit a Position Paper (“Presenter Position Paper”) not to exceed 30 pages, plus annexes. The position, arguments, or analyses raised in the Presenter Position Paper must be positions, arguments, or analyses previously provided to the competent authorities for their consideration in negotiation prior to the Date Arbitration Proceedings Begin. Any annex of the Presenter Position Paper which does not reflect information widely available to the general public must be a document made available to the competent authorities for their consideration prior to the Date Arbitration Proceedings Begin.
- B. Any Presenter Position Paper should be sent so that each competent authority receives it simultaneously. The competent authority initiating the MAP will deliver copies of the Presenter Position Paper to the panel, according to the instructions of the Chair no later than 7 days after receipt of the original Presenter Position Paper.

## 13. Multiple Adjustments

- A. Where an arbitration proceeding concerns a case comprising multiple adjustments or similar issues each requiring a disposition of specific monetary amounts of income, expense or taxation, the Proposed Resolution may propose a separate disposition for each adjustment or similar issue.
- B. Unless the competent authorities of both Contracting States decide upon a different presentation to the arbitration panel, the Proposed Resolution and supporting Position Paper in such a case will address each adjustment separately, within the overall page limitation.
- C. The arbitration panel will make a determination on each adjustment or similar issue, separately. Thus, the final determination of the arbitration panel may be comprised of a Proposed Resolution from the competent authority of a Contracting State on one adjustment and a Proposed Resolution from the competent authority of the other Contracting State on another adjustment.

## 14. Permanent Establishment, Residency, and Other Threshold Questions

### A. In the case of an arbitration proceeding concerning:

1. the taxation of an individual with respect to whom the competent authorities of the Contracting States have been unable to reach an agreement regarding the Contracting State of which the individual is resident;
2. the taxation of the business profits of an enterprise with respect to which the competent authorities have been unable to reach an agreement on whether a permanent establishment exists; or
3. such other issues the determination of which are contingent on resolution of similar threshold questions;

the competent authorities may submit Proposed Resolutions separately addressing the relevant threshold questions as described in clause 1, 2, or 3 (for example, the question of whether a permanent establishment exists) and the contingent determinations (for example, the determination of the amount of profit attributable to such permanent establishment).

### B. In such a case, a competent authority is allowed to submit a Proposed Resolution and supporting Position Paper which will address each issue separately, taking alternative positions as appropriate. For example, the competent authority is allowed to take a position that no permanent establishment exists in one Proposed Resolution, and to propose an amount of business profit to be attributable to a permanent establishment in another Proposed Resolution in case the arbitration panel determines that a permanent establishment exists.

### C. The arbitration panel will make a determination on the threshold question and the contingent determination separately. For example, if the competent authorities have not reached an agreement on the existence of a permanent establishment, the panel must first determine whether a permanent establishment exists. Once it is determined that a permanent establishment exists, the panel must then determine the amount of profits attributable to that permanent establishment.

## 15. Communication

- A. Before the Chair is appointed, the competent authorities of both Contracting States will send any correspondence concurrently to both arbitrators.
- B. After the Chair is appointed, unless otherwise agreed between the Chair and competent authorities, the competent authorities will send any correspondence to the Chair. Similarly, the Chair will send any correspondence concurrently to the competent authorities.
- C. No competent authority of the Contracting States will have any ex parte communications, except for administrative or logistical reasons, with an arbitrator.
- D. All communication, except for logistical matters, between the competent authorities of both Contracting States and the panel must be in writing. Written communication by fax or email is allowed, however, no information that may identify the taxpayer(s) may be included in an email unless other security precautions to protect taxpayer information are agreed upon by both competent authorities. Express mail or air mail shall be used for all correspondence other than that sent via facsimile or email.
- E. The arbitrators may communicate by telephone, videoconference, fax or face-to-face meetings. Arbitrators may communicate by e-mail; however, they must not include any taxpayer information in the e-mail.
- F. All arbitrators must be present (physically or remotely) during substantive discussions.
- G. No arbitrator shall have communications regarding the issues or matters before the panel with the presenter of the case, the taxpayers involved in the case, or their representatives during or subsequent to the arbitration process.

#### 16. Competent Authority Initiating the MAP

- A. For requests for competent authority assistance concerning an adjustment raised in either Switzerland or the United States, the competent authority of the country that proposed the adjustment (or in the case where there is no adjustment, denied the credit or claim) is considered the competent authority initiating the MAP.

- B. For requests originally submitted as an APA, the competent authority of the country in which the parent company is located is considered the competent authority initiating the MAP. For APA requests originally submitted by associated enterprises other than the parent company, the competent authorities will determine the competent authority that is considered the competent authority initiating the MAP.
- C. Meeting facilities, related resources, financial management, other logistical support, and general administrative coordination of the arbitration proceeding will be provided, at its own cost, by the Contracting State whose competent authority initiated the MAP in a case. (See subparagraph o) of paragraph 1 of the Treaty Annex A.)
- D. The competent authorities encourage the arbitrators to use tele- and videoconferencing. If a face-to-face meeting is necessary, the Chair will contact the competent authority of the Contracting State who initiated the MAP in a case and ask it to arrange facilities for the meeting. The competent authority initiating the MAP in a case may arrange meeting facilities in a location that minimizes the arbitration panel's travel time and expenses. Each competent authority may arrange a meeting in the other's meeting facilities, as needed.

## 17. Fees and Expenses

- A. The fees and expenses will be borne equally by the Contracting States. (See subparagraph o) of paragraph 1 of the Treaty Annex A.)
- B. Neither competent authority of both Contracting States will charge any Concerned Persons for costs associated with the arbitration procedure itself. The recharge of potential costs related to the mutual agreement procedure to the Concerned Person pursuant to domestic law remains reserved.
- C. The fees of the arbitrators will be set at the fixed amount of \$2000 (two thousand United States dollars) or the equivalent in Swiss francs per day, subject to modification by the competent authorities. (See subparagraph o) of paragraph 1 of the Treaty Annex A.) The competent authorities will not compensate a staff member of an arbitrator. The competent authorities anticipate that the arbitrators will be able to perform their duties without the use of staff.

- D. In general, each arbitrator will be compensated for no more than seven days of work on the arbitration (e.g., five days of preparation and two meeting days). If the arbitrators feel they require additional time to properly consider the case, the Chair will contact the competent authorities to request additional time. As a general rule, the competent authorities envision that the panel will be able to complete their joint consideration of the case through telecommunications.
- E. In general, the expenses of the arbitrators will be set in accordance with the International Centre for Settlement of Investment Disputes Schedule of Fees for arbitrators in effect on the Date Arbitration Proceedings Begin, subject to modification by the competent authorities. (See subparagraph o) of paragraph 1 of the Treaty Annex A.) This applies in particular for hotel, meals and incidental costs. With regard to travel expenses, the arbitrators will be reimbursed for economy class travel.

#### 18. Arbitration Panel Determination

- A. The arbitration panel shall deliver a written determination concurrently to the competent authorities of both Contracting States within six months of the appointment of its Chair (or, where subparagraph I or J of paragraph 9 applies, unless otherwise decided by the competent authorities of both Contracting States, within six months of the appointment of the new arbitrator).
- B. In making its determination, the arbitration panel will apply, as necessary and in descending order of priority:
  1. the provisions of the Convention, as interpreted according to the customary rules of international law;
  2. any agreed commentaries or explanations of the Contracting States concerning the Convention;
  3. the laws of the Contracting States to the extent they are not inconsistent with each other; and
  4. any OECD Commentary, Guidelines, or Reports regarding relevant analogous portions of the OECD Tax Model Convention.
- C. The determination of the arbitration panel will be limited to one of the Proposed Resolutions submitted by the competent authorities of

the Contracting States for each adjustment or similar issue and any threshold questions, and will not include a rationale or any other explanation of the determination. The determination of the arbitration panel has no precedential value with respect to the application of the Convention to any other case.

- D. Unless the Concerned Persons do not accept the determination of the arbitration panel, such determination shall constitute a resolution by mutual agreement under Article 25 of the Convention and shall be binding on both competent authorities with respect to that case.
- E. The determination of the panel will be decided on the basis of a majority vote.
- F. 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 in writing whether that Concerned Person accepts the determination of the panel. If the Concerned Persons fail to accept the determination within 30 days, the determination is considered rejected.
- G. If any Concerned Person fails to advise the competent authority within that period of time, the determination will be considered not to have been accepted and the case will be closed.
- H. If a Concerned Person has not renounced domestic legal remedies with respect to all of the issues covered by the arbitration decision by the time that person accepts the panel's determination, the determination is considered rejected and the case will be closed.
- I. Where the determination of the arbitration panel is not accepted, the case may not subsequently be the subject of an arbitration proceeding.
- J. The treatment of any interest or penalties will be determined by applicable domestic law of Switzerland or the United States.
- K. In the event that the panel does not agree on a determination within six months of the appointment of its Chair (or, where subparagraph I or J of paragraph 9 applies, unless otherwise decided by the competent authorities of both Contracting States, within six months of the appointment of the new arbitrator), the Competent authorities will agree on the procedure to apply.

## 19. Terminating Proceedings

- A. If at any time before the arbitration panel delivers a determination to the competent authorities of the Contracting States:
1. the competent authorities notify in writing the arbitrators and the presenter of the case that they have reached a mutual agreement to resolve the case pursuant to Article 25 of the Convention;
  2. the competent authorities notify in writing the arbitrators that the presenter of the case has withdrawn its request for assistance;
  3. a decision concerning the case is rendered by a court or administrative tribunal of one of the Contracting States during the arbitration proceeding; or
  4. if any Concerned Person or their authorized representative or agents violates the written nondisclosure statement required by subparagraph d) of paragraph 7 of Article 25 of the Convention, and the competent authorities of both Contracting States agree that such violation should result in the termination of the arbitration proceeding;
- then the MAP, including the arbitration proceeding, with respect to the case will terminate.
- B. If the arbitration proceeding and MAP with respect to the case is terminated under clauses 2, 3, or 4 of subparagraph A, the competent authorities of both Contracting States will exchange letters to close the MAP case unagreed.
- C. If the presenter terminates an arbitration proceeding by withdrawing its request for assistance, the presenter will not ordinarily be allowed access to the competent authority procedures for the same matter and same years
- D. The presenter's death is not an event triggering the termination of the arbitration proceeding, unless explicitly requested by the heirs.
- E. At the termination of any proceeding each arbitrator must immediately destroy all documents or other information received from either competent authority of the Contracting State, or that otherwise reflect the considerations or discussions of the arbitration

panel, and delete all information that may be stored on any computer, personal data assistant or other electronic device or media.

## 20. Miscellaneous

- A. In computing the days necessary for an action in this arrangement, the day when the event beginning this computation occurred will not be counted.
- B. Any due date which falls upon a weekend or holiday for either competent authority will be extended to the next calendar day which is a business day for both competent authorities.

## 21. Advance Pricing Agreements

- A. A case initially submitted to the competent authorities as a request for an APA is eligible for arbitration, but only with respect to tax years covered by the APA for which tax returns have been filed. Tax years prior to those covered by the APA for which the taxpayer has requested a rollback will be covered by the arbitration determination only if both competent authorities have agreed to cover those years in their position papers and only to the extent the tax years are still open to assessment according to the time limits in the domestic law of both Contracting States.
- B. For APA years for which tax returns have not been filed, the competent authorities agree to apply the transfer pricing method used in the Position Paper of the competent authority whose result the panel determined was the better result, provided the transfer pricing method is sufficiently described in the supporting Position Paper.
- C. For purposes of establishing a Commencement Date for a case initially submitted as a request for an APA, the information necessary to undertake substantive consideration for a mutual agreement in the United States is the information required to be submitted to the Internal Revenue Service under Revenue Procedure 2015-41, section 3 (or any applicable successor provisions). In Switzerland, the information is that which would be required under instructions or commentaries published by the Federal Department of Finance.
- D. Once complete information is provided, the Commencement Date of the case, for purposes of any subsequently necessary arbitration, will

be the earlier of i) the date on which the competent authorities have exchanged position papers setting forth their initial negotiating positions or ii) two years from the earliest date on which the information necessary to undertake substantive consideration for a mutual agreement concerning the APA has been received by both competent authorities. The arbitration proceedings will begin on the date determined under paragraph 6.

- E. For requests originally submitted as an APA, the competent authority of the country in which the parent company is located is considered the competent authority initiating the Mutual Agreement Procedure. For APA requests originally submitted by associated enterprises other than the parent company, the competent authorities will determine the competent authority serving as the one initiating the MAP.
- F. The provisions of paragraphs 1 through 20 and 22 apply as appropriate.

## 22. Coordination with Protocol Entry into Force

Notwithstanding subparagraphs A through D of paragraph 5 and subparagraph D of paragraph 21, the Commencement Date for a MAP case (or a case that was initially submitted as an APA) that was already under consideration by the competent authorities as of September 20, 2019 will be September 20, 2019. (See subparagraph c) of paragraph 2 of Article 5 of the 2009 Protocol.)

Agreed:

For Switzerland

For the United States of America

Pascal Duss  
State Secretariat for International  
Financial Matters SIF

Douglas W. O'Donnell  
United States Competent Authority  
Commissioner, Large Business and  
International Division

28 July 2020

23 July 2020

**Attachments:**

- 1. Sample Taxpayer Nondisclosure Statement**
- 2. Sample Nondisclosure Statement of Taxpayer's Authorized Representative**
- 3. Sample Taxpayer Authorization to Disclose Tax Information for Purposes of Treaty MAP Arbitration Proceedings**
- 4. Sample Declaration of Arbitrator**
- 5. Sample Affirmation of Confidentiality**

**Attachment 1**

**SAMPLE TAXPAYER NONDISCLOSURE STATEMENT**

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NAME OF TAXPAYER

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ADDRESS

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CITY	STATE/CANTON	COUNTRY	POSTAL CODE (ZIP CODE)
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The above-named taxpayer hereby consents to the competent authorities of the United States and Switzerland undertaking an arbitration proceeding described in paragraphs 6 and 7 of Article 25 (Mutual Agreement Procedure) of 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 as Amended by the Protocols signed on October 2, 1996, and September 23, 2009 (Convention) as necessary in order to reach a mutual agreement under Article 25 regarding the request filed with the [United States/Switzerland] Competent Authority on \_\_\_\_ [date] \_\_\_\_.

This consent and nondisclosure statement also covers the following concerned persons<sup>1</sup> that the taxpayer has the legal authority to bind:

[Enter name and address of each such concerned person. If none, enter "Not Applicable."]

The following concerned persons, if any, are not covered by this consent and nondisclosure statement (and therefore must submit a separate consent and nondisclosure statement on their own behalf): [Enter name and address of each such concerned person. If none, enter "Not Applicable."]

In making this consent, the taxpayer and, if applicable, each of the concerned persons covered by this consent and nondisclosure statement, agrees not to disclose to any person (other than the taxpayer's authorized representative or agent, another concerned person, its authorized

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<sup>1</sup> As defined in the relevant treaty provisions, the term "concerned person" means the taxpayer requesting mutual agreement procedure assistance from a competent authority under Article 25 of the Convention and any other person whose tax liability to either the United States or Switzerland may be directly affected by the mutual agreement arising from that request. 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.

representative or agent, or one of the competent authorities or its authorized representative<sup>2</sup>) any information received during the course of the arbitration proceeding from either Contracting State or the arbitration board, other than the determination of such board.

The following persons are all of the representatives or agents of the taxpayer or, if applicable, the specified concerned person, who have been authorized to assist the taxpayer or specified concerned person in the mutual agreement procedure to which this consent and nondisclosure statement applies. Attached to this consent and nondisclosure statement are the nondisclosure statements of each of these representatives and agents, as is required by paragraphs 6 and 7 of Article 25 of the Convention.

[Enter name and address of each such representative or agent and the concerned person(s) for which each is acting. If none, enter "Not Applicable."]

[Under penalties of perjury]<sup>3</sup>, I declare that I have examined this consent and nondisclosure statement and any accompanying attachments and to the best of my knowledge and belief, they are true, correct, and complete. Furthermore, I certify that I have the legal authority to execute this consent and nondisclosure statement on behalf of each concerned person covered by it and to bind each concerned person to its terms.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Position

\_\_\_\_\_  
<sup>2</sup> The U.S. Competent Authority has authorized the International Centre for Dispute Resolution (ICDR), a division of the American Arbitration Association, to act on its behalf with respect to certain designated matters concerning the arbitration proceeding.

<sup>3</sup> For use in the United States.

**Attachment 2**

**SAMPLE NONDISCLOSURE STATEMENT OF TAXPAYER'S AUTHORIZED REPRESENTATIVE**

I hereby agree that neither I nor any member of my firm's office staff nor any other person who may assist me or the firm in the mutual agreement proceeding requested in the letter of [date] submitted by [name of taxpayer] to the competent authorities of the United States and Switzerland will disclose to any person (other than the taxpayer, another concerned person,<sup>1</sup> its authorized representative or agent, or one of the competent authorities or its authorized representative<sup>2</sup>) any information received during the course of the arbitration proceeding from either Contracting State or the arbitration board, other than the determination of such board.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Position

\_\_\_\_\_  
<sup>1</sup> As defined in the relevant treaty provisions, the term "concerned person" means the taxpayer requesting mutual agreement procedure assistance from a competent authority under Article 25 of 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, as Amended by the Protocols signed on October 2, 1996, and September 23, 2009, and any other person whose tax liability to either the United States or Switzerland may be directly affected by the mutual agreement arising from that request.

<sup>2</sup> The U.S. Competent Authority has authorized the International Centre for Dispute Resolution (ICDR), a division of the American Arbitration Association to act on its behalf with respect to certain designated matters concerning the arbitration proceeding

**Attachment 3**

**SAMPLE TAXPAYER AUTHORIZATION TO DISCLOSE TAX INFORMATION  
FOR PURPOSES OF TREATY MAP ARBITRATION PROCEEDINGS**

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NAME OF TAXPAYER

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U.S. OR SWISS TAX IDENTIFICATION NUMBER (e.g., EIN)

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ADDRESS

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CITY STATE/CANTON COUNTRY POSTAL CODE (ZIP CODE)

The above-named taxpayer, in accordance with the competent authorities of the United States and Switzerland undertaking an arbitration proceeding described in paragraphs 6 and 7 of Article 25 of 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 as Amended by the Protocols signed on October 2, 1996 and September 23, 2009 (Convention), consents to the disclosure by the competent authorities of Switzerland and the United States of any and all returns and return information with respect to the taxpayer's mutual agreement procedure (MAP) request submitted to the competent authorities on [date], to the individuals appointed (or identified for potential appointment pending clearance) by the respective competent authorities to arbitrate the MAP case, the individual appointed (or identified for potential appointment pending clearance) as the Chair of the arbitration panel, and the following representatives, if any, of the respective competent authorities who are authorized by the competent authority to act on its behalf with respect to certain designated matters concerning the arbitration proceeding:

In the case of the United States: International Centre for Dispute Resolution (ICDR), a division of the American Arbitration Association

In the case of Switzerland: \_\_\_\_\_.

In the case of a consolidated group of U.S. corporations, this consent is made in regard to all such information concerning the following members of the consolidated group, who are the subjects of the mutual agreement request:

[Enter name and address of each consolidated group member, if any, who is a concerned person.<sup>1</sup> If none, enter "Not Applicable."]

I certify that I have the legal authority to execute a request for or consent to disclose a return or return information to disclose information to third parties and I hereby make this consent on behalf of the taxpayer, including each of the members of the consolidated group listed above.<sup>2</sup>

In the case of married Swiss tax resident filing jointly and involved in an arbitration, both spouses shall sign the authorization to disclose tax information for purposes of treaty MAP arbitration proceedings.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Position

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<sup>1</sup> As defined in the relevant treaty provisions, the term "concerned person" means the taxpayer requesting mutual agreement procedure assistance from a competent authority under Article 25 of the Convention and any other person whose tax liability to either the United States or Switzerland may be directly affected by the mutual agreement arising from that request.

<sup>2</sup> Each taxpayer or concerned person (as defined in footnote 1) whose U.S. tax liability may be directly affected by the mutual agreement procedure request must sign a consent. In the case of a consolidated group (as defined in Treas. Reg. 1.1502-1(h)), a person authorized by law to act for the common parent should execute the consent on behalf of the group. See Treas. Reg. §1.1502-77(a).

## **Attachment 4**

### **SAMPLE DECLARATION OF ARBITRATOR**

In the matter of the Mutual Agreement Procedure case under Article 25 of 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 as Amended by the Protocols signed on October 2, 1996, and September 23, 2009 (Convention) involving the following Concerned Persons:

[Names and addresses of taxpayers that will be directly affected by the decision]

Paragraphs 6 and 7 of Article 25 (Mutual Agreement Procedure) of the Convention and the Implementing Arrangement regarding paragraphs 6 and 7 of Article 25 of the Convention between the Competent Authorities of Switzerland and the United States (Implementing Arrangement) provide rules and procedures under which the United States - Switzerland arbitration process (the Proceeding) will operate. As provided in subparagraphs A and C of paragraph 8 of the Implementing Arrangement, I certify that I can serve impartially in this case, and that I am independent of the Contracting States and Concerned Persons at this time and shall remain so during the entire arbitration proceeding and for a reasonable period of time thereafter.

Past or existing facts or circumstances that might be likely to give rise to justifiable doubts as to my impartiality or independence, if any, are identified in an Attachment to this Declaration.

Notwithstanding such relationships and interests, if any, I believe that I can be impartial and can exercise independent judgment in making my decisions in the Proceeding and thus to the best of my knowledge and belief, there is no reason why I should not serve as an Arbitrator with respect to the above-noted case. If, at any stage during the Proceeding, any new fact or circumstance arises that might give rise to such doubts, I shall promptly disclose such fact or circumstance to both competent authorities.

I understand that with regard to any information received from International Centre for Dispute Resolution, a division of the American Arbitration Association, the Swiss State Secretariat for International Finance, and the U.S. Internal Revenue Service in connection with the Proceeding, I and my staff, if any, are considered to be among the "persons or authorities" involved in the administration of taxes covered by Article 26 (Exchange of Information) of the Convention. I and my staff agree to abide by and be subject to the confidentiality and nondisclosure provisions of Articles 25 (Mutual Agreement Procedure) and 26 (Exchange of Information) of the Convention and the applicable domestic laws of Switzerland and the United States concerning the confidentiality of tax information. In the event those provisions conflict, the most restrictive condition shall apply. I confirm that I have the legal authority to bind my staff in this matter and will ensure they are aware of their obligations regarding confidentiality and non-disclosure. In particular, I agree that I may not disclose any information relating to the Proceeding, except as permitted by the Convention and the domestic laws of Switzerland and the United States. In addition, all material received and prepared in the course of, or relating to the Proceeding shall be considered to be information exchanged between the Switzerland and the United States and

shall be destroyed in accordance with subparagraph E of paragraph 19 of the Implementing Arrangement referenced above.

[Under penalties of perjury]<sup>1</sup>, I hereby accept appointment as an Arbitrator in this case and will fairly decide the matters in controversy between the Competent Authorities of Switzerland and the United States in accordance with the Convention and the related agreements referred to above. I declare that these statements and any accompanying attachments are, to the best of my knowledge and belief, true, correct, and complete.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Address

\_\_\_\_\_  
<sup>1</sup> For use in the United States.

**Attachment 5**

**SAMPLE AFFIRMATION OF CONFIDENTIALITY**

This affirmation is provided in order to consider the acceptance of an appointment as an arbitrator in the MAP case number xxx (hereinafter referred to as the Proceeding) based on Article 25 (Mutual Agreement Procedure) of 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 as Amended by the Protocols signed on October 2, 1996, and September 23, 2009 (hereinafter referred to as the Convention).

I understand that with regard to any information received from the International Centre for Dispute Resolution, a division of the American Arbitration Association, the Swiss State Secretariat for International Finance, and the U.S. Internal Revenue Service in connection with the Proceeding, I am considered to be among the “persons or authorities” involved in the administration of taxes covered by Article 26 (Exchange of Information) of the Convention. I agree to abide by and be subject to the confidentiality and nondisclosure provisions of Article 25 (Mutual Agreement Procedure) and Article 26 (Exchange of Information) of the Convention and the applicable domestic laws of the United States and Switzerland concerning the confidentiality of tax information. In the event those provisions conflict, the most restrictive condition shall apply. In particular, I agree that I may not disclose any information relating to the Proceeding, except as permitted by the Convention and the domestic laws of the United States and Switzerland. In addition, all material received and prepared in the course of, or relating to the Proceeding shall be considered to be information exchanged between United States and Switzerland, and shall be destroyed in accordance with subparagraph E of paragraph 19 of the Implementing Arrangement regarding paragraphs 6 and 7 of Article 25 of the Convention between the Competent Authorities of Switzerland and the United States.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Address