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PROTOCOL AMENDING TAX CONVENTION WITH GERMANY

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

PROTOCOL AMENDING THE CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE FEDERAL REPUBLIC OF GERMANY FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND CAPITAL AND TO CERTAIN OTHER TAXES, SIGNED ON AUGUST 29, 1989, SIGNED AT BERLIN JUNE 1, 2006 (THE "PROTOCOL"), ALONG WITH A RELATED JOINT DECLARATION

SEPTEMBER 29, 2006.—Protocol was read the first time, and together with the accompanying papers, referred to the Committee on Foreign Relations and order to be printed for the use of the Senate

U.S. GOVERNMENT PRINTING OFFICE

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LETTER OF TRANSMITTAL

THE WHITE HOUSE, *September 29, 2006.*

To the Senate of the United States:

I transmit herewith, for Senate advice and consent to ratification, a Protocol Amending the Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, Signed on August 29, 1989, signed at Berlin June 1, 2006 (the "Protocol"), along with a related Joint Declaration. Also transmitted for the information of the Senate is the report of the Department of State with respect to the Protocol.

The Protocol eliminates the withholding tax on certain cross-border dividend payments. Like a number of recent U.S. tax agreements, the proposed Protocol provides for the elimination of the withholding tax on dividends arising from certain direct investments and cross-border dividend payments to pension funds. The Protocol also provides for mandatory arbitration of certain cases before the competent authorities. This provision is the first of its kind in a U.S. tax treaty. In addition, the Protocol also modernizes the Convention to bring it into closer conformity with current U.S. tax-treaty policy, including strengthening the treaty's provisons preventing so-called treaty shopping.

I recommend that the Senate give early and favorable consideration to the Protocol, along with the Joint Declaration and give it advice and consent to ratification.

GEORGE W. BUSH.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, August 2, 2006.

The PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you, with a view to its transmission to the Senate for advice and consent to ratification, a Protocol Amending the Convention Between the United States of America and the Federal Republic of Germany for the avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, Signed on 29th August 1989, signed at Berlin June 1, 2006 (the "Protocol"), along with a related Joint Declaration.

The Protocol eliminates the withholding tax on certain cross-border dividend payments. Like a number of recent U.S. tax agreements, the Protocol provides for the elimination of the withholding tax on dividends arising from certain direct investments and cross-border dividend payments to pension funds.

The Protocol also provides for mandatory arbitration of certain cases before the competent authorities. This provision is the first of its kind in a U.S. tax treaty. In addition, the Protocol modernizes the Convention to bring into closer conformity with current U.S. tax-treaty policy, including strengthening the treaty's provisions preventing so-called treaty shopping.

The Protocol was concluded in recognition of the importance of the United States' economic relations with Germany. The Department of the Treasury and the Department of State cooperated in the negotiation of the Protocol. It has the full approval of both Departments.

Respectfully submitted.

CONDOLEEZZA RICE.

Enclosures.

KEY PROVISIONS OF THE U.S.-GERMANY INCOME TAX PROTOCOL

The Protocol to the income tax Convention with Germany was negotiated to bring the current Convention, concluded in 1989, into closer conformity with current U.S. tax treaty policy. There are, as with all bilateral tax conventions, some variations from these norms. In the Protocol, these differences reflect particular aspects of German law and treaty policy, the interaction of U.S. and German law, and U.S.-German economic relations.

The most important aspect of the Protocol relates to the taxation of cross-border dividend payments. Under the Protocol, most dividends paid by a subsidiary in one country to its parent in the other

country will be exempt from withholding tax in the subsidiary's home country, rather than being subject to the current treaty's maximum withholding tax rate for direct dividends of five percent. The proposed Protocol also provides for a withholding rate of zero on cross-border dividend payments to pension funds. Eliminating withholding taxes on cross-border direct dividends and cross-border dividend payments to pension funds is consistent with an overall view that investment income should be taxed by the country of residence, not the country of source.

The Protocol also provides for mandatory arbitration of certain cases before the competent authorities. The arbitration provided for in the Protocol is at the taxpayer's election with respect to competent authority cases that cannot be resolved within a specified period, generally two years from the commencement of the case. The determination of an arbitration board constitutes a resolution by mutual agreement under the Convention and is binding on both countries, unless the taxpayer does not accept the determination. This provision is the first of its kind in a U.S. tax treaty and will be well received by the business community.

In addition, the Protocol also updates the current treaty's treatment of pensions. It removes barriers to the flow of personal services between the United States and Germany that could otherwise result from discontinuities in the laws of the two countries regarding the deductibility of pension contributions.

The Protocol also strengthens the treaty's provisions preventing so-called treaty shopping, which is the inappropriate use of a tax treaty by third-country residents.

Moreover, the Protocol updates the current treaty to reflect U.S. and German legislative changes since 1989. For example, the Protocol updates the "saving clause" to provide that former citizens or long-term residents of the United States may, for the period of ten years following the loss of such status, be taxed in accordance with the laws of the United States.

The Protocol also modernizes our treaty relationship and brings it into closer conformity with current U.S. tax treaty policy by making technical changes to the article dealing with the elimination of double taxation and by eliminating the article dealing with the taxation of independent personal services.

The proposed Protocol will enter into force upon the exchange of instruments of ratification. It will 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 upon which the Protocol enters into force and, with respect to other taxes, for taxable years beginning on or after the first day of January next following the date upon which the Protocol enters into force. However, where any person would be entitled to greater benefits under the Convention as unmodified by the Protocol, the Convention as unmodified, at the election of the person, continues to have effect in its entirety with respect to such person for a period of twelve-months from the date the provisions of the Protocol are effective.

PROTOCOL AMENDING THE CONVENTION BETWEEN
THE UNITED STATES OF AMERICA AND
THE FEDERAL REPUBLIC OF GERMANY
FOR THE AVOIDANCE OF DOUBLE TAXATION
AND THE PREVENTION OF FISCAL EVASION
WITH RESPECT TO TAXES ON INCOME AND CAPITAL AND TO CERTAIN
OTHER TAXES,
SIGNED ON 29th AUGUST 1989

The United States of America and the Federal Republic of Germany, desiring to amend the Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, and the related Protocol signed at Bonn on August 29, 1989 (hereinafter referred to as "the Convention" and "Protocol to the Convention", respectively).

Have agreed as follows:

ARTICLE I

Article 1 (Personal Scope) of the Convention is deleted and the following Article substituted:

"Article 1
General Scope

1. This Convention shall apply to persons who are residents of one or both of the Contracting States, except as otherwise provided in this Convention.

2. This Convention shall not restrict in any manner any exclusion, exemption, deduction, credit, or other allowance now or hereafter accorded:

a) by the laws of either Contracting State; or

b) by any other agreement to which the Contracting States are party.

3.

a) Notwithstanding the provisions of subparagraph b) of paragraph 2:

aa) the Contracting States agree that any question arising as to the interpretation or application of the Convention and, in particular, whether a taxation measure is within the scope of the Convention, shall be determined exclusively in accordance with the provisions of Article 25 (Mutual Agreement Procedure) of the Convention; and

bb) the provisions of any other agreement shall not apply to a taxation measure unless the competent authorities agree that the measure is not within the scope of Article 24 (Nondiscrimination) of this Convention.

b) For the purposes of this paragraph, a "measure" is a law, regulation, rule, procedure, decision, administrative action, or any similar provision or action.

4.

a) Except to the extent provided in paragraph 5, this Convention shall not affect the taxation by the United States of its residents (as determined under Article 4 (Residence)) and its citizens.

b) Notwithstanding the other provisions of this Convention, a former citizen or long-term resident of the United States may, for the period of ten years following the loss of such status, be taxed in accordance with the laws of the United States.

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5. The provisions of paragraph 4 shall not affect the benefits conferred by the United States:

a) under paragraph 2 of Article 9 (Associated Enterprises), paragraph 6 of Article 13 (Gains), paragraphs 3, 4 and 5 of Article 18 (Pensions, Annuities, Alimony, Child Support, and Social Security), paragraph 1 and 5 of Article 18A (Pension Plans), paragraph 3 of Article 19 (Government Service), and under Articles 23 (Relief from Double Taxation), 24 (Nondiscrimination), and 25 (Mutual Agreement Procedure); and

b) under paragraph 2 of Article18A (Pension Plans), subparagraph b) of paragraph 1 of Article 19 (Government Service), and under Articles 20 (Visiting Professors and Teachers; Students and Trainees) and 30 (Members of Diplomatic Missions and Consular Posts), upon individuals who are neither citizens of, nor have immigrant status in, the United States.

6. Nothing in the Convention shall be construed to prevent the Federal Republic of Germany from imposing its taxes on amounts included in the income of a resident of the Federal Republic of Germany according to part 4, 5, and 7 of the German "Außensteuergesetz". Where such imposition of tax gives rise to double taxation, the competent authorities shall consult for the elimination of such double taxation according to paragraph 3 of Article 25 (Mutual Agreement Procedure).

7. In the case of an item of income, profit or gain derived by or through a person that is fiscally transparent under the laws of either Contracting State, such item shall be considered to be derived by a resident of a State to the extent that the item is treated for the purposes of the taxation law of such State as the income, profit or gain of a resident."

ARTICLE II

Article 4 (Residence) of the Convention is amended by deleting paragraph 1 and substituting the following paragraph:

"1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature, and also includes that State and any political

subdivision or local authority thereof. The term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or of profits attributable to a permanent establishment in that State or capital situated therein."

ARTICLE III

Article 7 (Business Profits) of the Convention is modified by:

a) deleting paragraph 3 and substituting the following paragraph:

"3. In determining the business profits of a permanent establishment, there shall be allowed as deductions expenses that are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere."; and

b) in paragraph 7, adding the words "and income from the performance of professional services and of other activities of an independent character".

ARTICLE IV

Article 10 (Dividends) of the Convention is deleted and the following Article substituted:

"Article 10
Dividends

1. Dividends paid by a company that is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the dividends are derived and beneficially owned by a resident of the other Contracting State, the tax so charged shall not exceed:

a) 5 percent of the gross amount of the dividends if the beneficial owner is a company that owns directly at least 10 percent of the voting stock of the company paying the dividends;

b) 15 percent of the gross amount of the dividends in all other cases.

This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. Notwithstanding the provisions of paragraph 2, such dividends shall not be taxed in the Contracting State of which the company paying the dividends is a resident if the beneficial owner is:

a) a company that is a resident of the other Contracting State that has owned directly shares representing 80 percent or more of the voting power in the company paying the dividends for a 12-month period ending on the date entitlement to the dividend is determined and:

aa) satisfies the conditions of clause aa) or bb) of subparagraph c) of paragraph 2 of Article 28 (Limitation on Benefits);

bb) satisfies the conditions of clauses aa) and bb) of subparagraph f) of paragraph 2 of Article 28, provided that the company satisfies the conditions described in paragraph 4 of Article 28 with respect to the dividends;

cc) is entitled to benefits with respect to the dividends under paragraph 3 of Article 28; or

dd) has received a determination pursuant to paragraph 7 of Article 28 with respect to this paragraph; or

b) a pension fund that is a resident of the other Contracting State, provided that such dividends are not derived from the carrying on of a business, directly or indirectly, by such pension fund.

4. Subparagraph a) of paragraph 2 and subparagraph a) of paragraph 3 shall not apply in the case of dividends paid by a United States person that is a U.S. Regulated Investment Company (RIC), a United States person that is a U.S. Real Estate Investment Trust (REIT) or a German Investment Fund or a German *Investmentaktiengesellschaft* (collectively referred to as *Investmentvermögen*). In the case of dividends paid by a RIC or an Investmentvermögen, subparagraph b) of paragraph 2 and subparagraph b) of paragraph 3 shall apply. In the case of dividends paid by a REIT subparagraph b) of paragraph 2 shall apply only if:

a) the beneficial owner of the dividends is an individual holding an interest of not more than 10 percent in the REIT;

b) the dividends are paid with respect to a class of stock that is publicly traded and the beneficial owner of the dividends is a person holding an interest of not more than 5 percent of any class of the REIT's stock; or

c) the beneficial owner of the dividends is a person holding an interest of not more than 10 percent in the REIT and the REIT is diversified.

For purposes of this paragraph a REIT shall be diversified if no single interest in real property exceeds 10 percent of its total interests in real property. For the purposes of this paragraph foreclosure property shall not be an interest in real property. Where a REIT holds an interest in a partnership, it shall be treated as owning directly a proportion of the partnership's interests in real property corresponding to its interest in the partnership.

5. The term "dividends" as used in this Article means income from shares, "jouissance" shares or "jouissance" rights, founders' shares, or other rights (not being debt-claims) participating in profits, as well as other income from other rights that is subjected to the same taxation treatment as income from shares by the laws of the Contracting State of which the company making the distribution is a resident. The term "dividends" also includes in the Federal Republic of Germany income under a sleeping partnership (Stille Gesellschaft), a participating loan (partiarisches Darlehen), or "Gewinnobligation", as well as distributions on certificates of a German *Investmentvermögen*.

6. Notwithstanding the first sentence of paragraph 2 of this Article, paragraph 3 of this Article and paragraph 1 of Article 11 (Interest), income from arrangements carrying the right to participate in profits (including in the Federal Republic of Germany income under a sleeping partnership (Stille Gesellschaft), a participating loan (partiarisches Darlehen), or "Gewinnobligation", or "jouissance" shares or "jouissance" rights and in the United States contingent interest of a type that would not qualify as portfolio interest) that is deductible in determining the profits of the payor may be taxed in the Contracting State in which it arises according to the laws of that State.

7. The provisions of paragraphs 2 and 3 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State, of which the company paying the dividends is a resident, through a permanent establishment situated therein, and the holding in respect of which the

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dividends are paid forms part of the business property of such permanent establishment. In such case, the provisions of Article 7 (Business Profits) shall apply.

8. A Contracting State may not impose any tax on dividends paid by a company which is a resident of the other Contracting State, except insofar as such dividends are paid to a resident of the first-mentioned State or insofar as the holding in respect of which the dividends are paid forms part of the business property of a permanent establishment situated in that State, nor may it impose tax on a company's undistributed profits except as provided in paragraph 9 of this Article, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in that State.

9. A company that is a resident of a Contracting State and that has a permanent establishment in the other Contracting State, or that is subject to tax on a net basis in that other Contracting State on items of income that may be taxed in that other State under Article 6 (Income from Immovable (Real) Property) or under paragraph 1 of Article 13 (Gains), may be subject in that other Contracting State to a tax in addition to the tax allowable under the other provisions of this Convention. Such tax, however, may be imposed only on:

a) the portion of the business profits of the company attributable to the permanent establishment, and

b) the portion of the income referred to in the preceding sentence that is subject to tax under Article 6 or paragraph 1 of Article 13,

that represents the "dividend equivalent amount" of those profits and income; the term "dividend equivalent amount" shall, for the purposes of this subparagraph,

aa) in the case of the United States, have the meaning that it has under the law of the United States as it may be amended from time to time without changing the general principle thereof; and

bb) in the case of the Federal Republic of Germany, be that portion of the income described in subparagraph a) that is comparable to the amount that would be distributed as a dividend by a locally incorporated subsidiary.

10. The tax referred to in subparagraphs a) and b) of paragraph 9 of this Article shall not be imposed at a rate exceeding the rate specified in subparagraph a) of paragraph 2. In any case, it shall not be imposed on a company that:

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a) satisfies the conditions of clause aa) or bb) of subparagraph c) of paragraph 2 of Article 28 (Limitation on Benefits);

b) satisfies the conditions of clauses aa) and bb) of subparagraph f) of paragraph 2 of Article 28, provided that the company satisfies the conditions described in paragraph 4 of that Article with respect to an item of income, profit or gain described in paragraph 9 of this Article;

c) is entitled under paragraph 3 of Article 28 to benefits with respect to an item of income, profit or gain described in paragraph 9 of this Article; or

d) has received a determination pursuant to paragraph 7 of Article 28 with respect to this paragraph.

11. The term "pension fund" as used in this Article means any person that:

a) is established under the laws of a Contracting State;

b) is established and maintained in that Contracting State primarily to administer or provide pensions or other similar remuneration, including social security payments, disability pensions and widow's pensions or to earn income for the benefit of one or more of such persons; and

c) is either,

aa) in the case of the United States, exempt from tax in the United States with respect to the activities described in subparagraph b) of this paragraph, or

bb) in the case of the Federal Republic of Germany, a plan the contributions to which are eligible for preferential treatment under the Income Tax Act."

ARTICLE V

Article 11 (Interest) of the Convention is modified by:

a) inserting the following new paragraph 6:

"6. Notwithstanding the provisions of paragraph 1, interest that is an excess inclusion with respect to a residual interest in a U.S. real estate mortgage investment conduit may be taxed by the United States in accordance with its domestic law."; and

b) in paragraph 5, deleting the words "paragraph 8 (a)(bb)" where they appear and substituting the words "subparagraph b) of paragraph 9".

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ARTICLE VI

Article 13 (Gains) of the Convention is modified by deleting paragraph 6 and substituting the following new paragraph:

"6. Where an individual who, upon ceasing to be a resident of one of the Contracting States, is treated under the taxation law of that State as having alienated property and is taxed in that State by reason thereof, the individual may elect to be treated for purposes of taxation in the other Contracting State as if the individual had, immediately before ceasing to be a resident of the first-mentioned State, alienated and reacquired the property for an amount equal to its fair market value at that time."

ARTICLE VII

1. Article 14 (Independent Personal Services) of the Convention shall be deleted and the Articles following Article 14 shall not be re-numbered.

2. Paragraph 3 of Article 11 (Interest) of the Convention shall be modified by deleting the words ", or performs in that other State independent personal services from a fixed base situated therein,", "or fixed base", and "or Article 14 (Independent Personal Services), as the case may be," where they appear.

3. Paragraph 5 of Article 11 of the Convention shall be modified by deleting the words "or a fixed base" where they appear.

4. Paragraph 3 of Article 12 (Royalties) of the Convention shall be modified by deleting the words ", or performs in that other State independent personal services from a fixed base situated therein," and "or Article 14 (Independent Personal Services), as the case may be," where they appear.

5. Paragraph 3 of Article 13 (Gains) of the Convention shall be modified by deleting the words "or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services" and "or of such fixed base" where they appear.

6. Subparagraph c) of paragraph 2 of Article 15 (Dependent Personal Services) of the Convention shall be modified by deleting the words "or a fixed base" where they appear.

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7. Paragraph 1 of Article 17 (Artistes and Athletes) of the Convention shall be modified by deleting the words ", 14 (Independent Personal Services)" where they appear.

8. Paragraph 2 of Article 17 of the Convention shall be modified by deleting the words "and 14 (Independent Personal Services)," where they appear.

9. Paragraph 2 of Article 21 (Other Income) of the Convention shall be modified by deleting the words "; or the recipient performs in that other State independent personal services from a fixed base situated therein, and the income is attributable to the fixed base" where they appear.

10. Paragraph 2 of Article 22 (Capital) of the Convention shall be modified by deleting the words ", or by movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services," where they appear.

ARTICLE VIII

Article 18 (Pensions, Annuities, Alimony, and Child Support) of the Convention is modified by:

a) deleting the title "Article 18 (Pensions, Annuities, Alimony, and Child Support)" and replacing it with the title "Article 18 (Pensions, Annuities, Alimony, Child Support, and Social Security)";

b) by adding a new paragraph 5 as follows:

"5. Social security benefits paid under the social security legislation of a Contracting State and other public pensions (not dealt with in Article 19 (Government Service)) paid by a Contracting State to a resident of the other Contracting State shall be taxable only in that other Contracting State. In applying the preceding sentence, that other Contracting State shall treat such benefit or pension as though it were a social security benefit paid under the social security legislation of that other Contracting State."

ARTICLE IX

The following new Article 18A (Pension Plans) shall be added to the Convention:

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"Article 18A
Pension Plans

1. Where an individual who is a resident of a Contracting State is a member or beneficiary of, or participant in, a pension plan established in the other Contracting State, income earned by the pension plan may be taxed as income of that individual only when, and, to the extent that, it is paid to, or for the benefit of, that individual from the pension plan (and not transferred to another pension plan in that other Contracting State).

2. Where an individual who is a beneficiary of, or participant in, a pension plan established in a Contracting State exercises an employment or self-employment in the other Contracting State:

a) contributions paid by or on behalf of that individual to the pension plan during the period or attributable to the period that he exercises an employment or self-employment in the other State shall be deductible (or excludable) in computing his taxable income in that other State; and

b) any benefits accrued under the pension plan, or contributions made to the pension plan by or on behalf of the individual's employer, during that period shall not be treated as part of the employee's taxable income; any such contributions shall be allowed as a deduction in computing the business profits of his employer in that other State.

The relief available under this paragraph shall not exceed the relief that would be allowed by the other State to residents of that State for contributions to, or benefits accrued under, a pension plan or plans established in that State. The competent authorities of the Contracting States shall determine the relief available under this paragraph pursuant to the preceding sentence.

3. The provisions of paragraph 2 shall not apply unless:

a) contributions by or on behalf of the individual, or by or on behalf of the individual's employer were made before the individual began to exercise an employment or self-employment in the other State; and

b) the pension plan is accepted by the competent authority of that State as generally corresponding to a pension plan recognized as such for tax purposes by that State.

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4. The term "pension plan" means an arrangement established in a Contracting State which is operated principally to administer or provide pension or retirement benefits or to earn income for the benefit of one or more such arrangements.

5. a) Where a citizen of the United States who is a resident of the Federal Republic of Germany exercises an employment in the Federal Republic of Germany the income from which is taxable in the Federal Republic of Germany and is borne by an employer who is a resident of the Federal Republic of Germany or by a permanent establishment situated in the Federal Republic of Germany, and the individual is a beneficiary of, or participant in, a pension plan established in the Federal Republic of Germany,

aa) contributions paid by or on behalf of that individual to the pension plan during the period or attributable to the period that he exercises the employment in the Federal Republic of Germany, and that are attributable to the employment, shall be deductible (or excludable) in computing his taxable income in the United States; and

bb) any benefits accrued under the pension plan, or contributions made to the pension plan by or on behalf of the individual's employer, during that period or attributable to that period, and that are attributable to the employment, shall not be treated as part of the employee's taxable income in computing his taxable income in the United States.

This paragraph shall apply only to the extent that the contributions or benefits qualify for tax relief in the Federal Republic of Germany.

b) The relief available under this paragraph shall not exceed the relief that would be allowed by the United States to its residents for contributions to, or benefits accrued under, a generally corresponding pension plan established in the United States.

c) For purposes of determining an individual's eligibility to participate in and receive tax benefits with respect to a pension plan established in the United States, contributions made to, or benefits accrued under, a pension plan established in the Federal Republic of Germany shall be treated as contributions or benefits under a generally corresponding pension plan established in the United States to the extent relief is available to the individual under this paragraph.

d) This paragraph shall not apply unless the competent authority of the United States has agreed that the pension plan generally corresponds to a pension plan established in the United States."

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ARTICLE X

Article 19 (Government Service; Social Security) of the Convention is deleted and the following Article substituted:

"Article 19
Government Service

1. Notwithstanding the provisions of Articles 15 (Dependent Personal Services), 16 (Directors' Fees), and 17 (Artistes and Athletes):

a) salaries, wages and other similar remuneration, other than a pension, paid by a Contracting State or a political subdivision, local authority or an instrumentality thereof to an individual in respect of services rendered to that Contracting State or a political subdivision, local authority or an instrumentality thereof shall, subject to the provisions of subparagraph b), be taxable only in that State;

b) such remuneration, however, shall be taxable only in the other Contracting State if the services are rendered in that State and the individual is a resident of that State who:

aa) is a national of that State; or

bb) did not become a resident of that State solely for the purpose of rendering the services.

2. a) Notwithstanding the provisions of paragraph 1, pensions and other similar remuneration paid by, or out of funds created by, a Contracting State or a political subdivision, local authority or an instrumentality thereof to an individual in respect of services rendered to that State or subdivision, authority or instrumentality shall be taxable only in that State.

b) However, such pensions and other remuneration shall be taxable only in the other Contracting State if the individual is a

aa) resident of, and a national of, that State; or

bb) the pension is not subject to tax in the Contracting State for which the services were performed because the services were performed entirely in the other Contracting State.

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3. Pensions, annuities, and other amounts paid by one of the Contracting States or by a juridical person organized under the public laws of that State as compensation for an injury or damage sustained as a result of hostilities or political persecution shall be exempt from tax by the other State.

4. The provisions of Articles 15 (Dependent Personal Services) , 16 (Directors' Fees), 17 (Artistes and Athletes), and 18 (Pensions, Annuities, Alimony, Child Support, and Social Security) shall apply to salaries, wages and other similar remuneration, and to pensions, in respect of services rendered in connection with a business carried on by a Contracting State or by a political subdivision, local authority or an instrumentality thereof.

5. In this Article, the term "instrumentality" means any agent or entity created or organized by a Contracting State, one of its states or a political subdivision or local authority thereof in order to carry out functions of a governmental nature which is specified and agreed to in letters exchanged between the competent authorities of the Contracting States."

ARTICLE XI

Article 20 (Visiting Professors and Teachers; Students and Trainees) of the Convention is modified by:

a) deleting paragraph 1 and substituting the following paragraph:

"1. Remuneration that a professor or teacher who is a resident of a Contracting State and who is temporarily present in the other Contracting State for the primary purpose of carrying out advanced study or research or for teaching at an accredited university or other recognized educational institution, or an institution engaged in research for the public benefit, receives for such work shall be taxable only in the first-mentioned Contracting State for a period not exceeding two years from the date of his arrival. This Article shall not apply to income from research if such research is undertaken not in the public interest but primarily for the private benefit of a specific person or persons. The benefits provided in this paragraph shall not be granted to an individual who, during the immediately preceding period, enjoyed the benefits of paragraph 2, 3, or 4."; and

b) in paragraph 4, deleting the words "$5,000 (five thousand United States dollars)" and substituting the words "$9,000 (nine thousand United States dollars)".

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ARTICLE XII

Article 23 (Relief from Double Taxation) of the Convention is deleted and the following Article substituted:

"Article 23
Relief from Double Taxation

1. In accordance with the provisions and subject to the limitations of the law of the United States (as it may be amended from time to time without changing the general principle hereof), the United States shall allow to a resident or citizen of the United States as a credit against the United States tax on income:

a) the income tax paid or accrued to the Federal Republic of Germany by or on behalf of such resident or citizen; and

b) in the case of a United States company owning at least 10 percent of the voting stock of a company that is a resident of the Federal Republic of Germany and from which the United States company receives dividends, the income tax paid or accrued to the Federal Republic of Germany by or on behalf of the payer with respect to the profits out of which the dividends are paid.

For the purposes of this paragraph, the taxes referred to in subparagraph b) of paragraph 1 of Article 2 (Taxes Covered) and paragraph 2 of Article 2 , other than the capital tax (*Vermögensteuer*), shall be considered income taxes.

2. For the purposes of applying paragraph 1 of this Article, an item of gross income, as determined under the laws of the United States, derived by a resident of the United States that, under this Convention, may be taxed in the Federal Republic of Germany shall be deemed to be income from sources in the Federal Republic of Germany.

3. Where a resident of the Federal Republic of Germany derives income or owns capital which, in accordance with the provisions of this Convention, may be taxed in the United States or is exempt from United States tax under paragraph 3 of Article 10 (Dividends), tax shall be determined as follows:

a) Except as provided in subparagraph b), the income or capital shall be excluded from the basis upon which German tax is imposed. The Federal Republic of Germany, however, retains the right to take into account in the determination of its rate of tax items of income and capital excluded under the provisions of this Convention. In the case of income from dividends the foregoing provisions shall apply only to such

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income from distributions of profits on corporate rights subject to corporate income tax under United States law as are paid to a company (not including partnerships) being a resident of the Federal Republic of Germany by a company being a resident of the United States at least 10 percent of the voting shares of which is owned directly by the German company. The exclusion provided by the first sentence of this subparagraph shall not apply to dividends paid by a U.S. Regulated Investment Company (RIC) or a U.S. Real Estate Investment Trust (REIT) and distributions that are deductible for United States tax purposes by the company distributing them. For the purposes of taxes on capital there shall also be excluded from the basis upon which German tax is imposed any shareholding the dividends of which, if paid, would be excluded, according to the two immediately foregoing sentences, from the basis upon which German tax is imposed.

b) There shall be allowed as a credit against German tax on income, subject to the provisions of German tax law regarding credit for foreign tax, the United States tax paid in accordance with the law of the United States and with the provisions of this Convention on the following items of income:

aa) income from dividends within the meaning of Article 10 (Dividends) to which subparagraph a) does not apply;

bb) gains to which Article 13 (Gains) applies provided such gains are taxable in the United States by reason only of subparagraph b) of paragraph 2 of Article 13;

cc) income to which Article 16 (Directors' Fees) applies;

dd) income to which Article 17 (Artistes and Athletes) applies;

ee) income which would, but for Article 28 (Limitation on Benefits), remain exempt from United States tax under this Convention.

For the purposes of this paragraph, income, profit or gain derived by a resident of the Federal Republic of Germany that, under this Convention, may be taxed in the United States shall be deemed to be income from sources within the United States.

4. a) Notwithstanding subparagraph a) of paragraph 3, double taxation shall be avoided by a credit as provided for in subparagraph b) of paragraph 3, if income or capital would be subject to double taxation due to the placement of such income or capital

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under different provisions of the Convention and this conflict cannot be settled by a procedure pursuant to Article 25 (Mutual Agreement Procedure).

b) The provisions of subparagraph a) of paragraph 3 shall not apply to income or capital where the United States applies the provisions of the Convention to exempt such income or capital from tax, or applies paragraphs 2 or 3 of Article 10 (Dividends) to such income, or may under the provisions of the Convention tax such income or capital but is prevented from doing so under its laws.

c) The provisions of subparagraph b) and not the provisions of subparagraph a) of paragraph 3 shall apply to items of income or capital of which the Federal Republic of Germany has, after due consultation, notified the United States through diplomatic channels. In such a case, the provisions of subparagraph b) shall apply for any taxable year following the year of such notification.

5. Where a United States citizen is a resident of the Federal Republic of Germany:

a) With respect to items of income not excluded from the basis of German tax under paragraph 3 that are exempt from United States tax or that are subject to a reduced rate of United States tax when derived by a resident of the Federal Republic of Germany who is not a United States citizen, the Federal Republic of Germany shall allow as a credit against German tax, subject to the provisions of German tax law regarding credit for foreign tax, only the tax paid, if any, that the United States may impose under the provisions of this Convention, other than taxes that may be imposed solely by reason of citizenship under paragraph 4 of Article 1 (General Scope);

b) For purposes of computing United States tax, the United States shall allow as a credit against United States tax the income tax paid to the Federal Republic of Germany after the credit referred to in subparagraph a); the credit so allowed shall not reduce that portion of the United States tax that is creditable against the German tax in accordance with subparagraph a); and

c) For the exclusive purpose of relieving double taxation in the United States under subparagraph b), items of income referred to in subparagraph a) shall be deemed to arise in the Federal Republic of Germany to the extent necessary to avoid double taxation of such income under subparagraph b)."

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ARTICLE XIII

Paragraph 5 of Article 25 (Mutual Agreement Procedure) of the Convention shall be deleted and replaced with the following paragraph:

"5. Where, pursuant to a mutual agreement procedure under this Article, the competent authorities have endeavored but are unable to reach a complete agreement in a case, the case shall be resolved through arbitration conducted in the manner prescribed by, and subject to, the requirements of paragraph 6 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

aa) is a case that

A) involves the application of one or more Articles that the Contracting States have agreed shall be the subject of arbitration, and

B) is not a particular case that the competent authorities agree, before the date on which arbitration proceedings would otherwise have begun, is not suitable for determination by arbitration, or

bb) is a particular case that the competent authorities agree is suitable for determination by arbitration; and

c) all concerned persons agree according to the provisions of subparagraph d) of paragraph 6.

6. For the purposes of paragraph 5 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:

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aa) Two years after the commencement date of that case, unless both competent authorities have previously agreed to a different date, and

bb) 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 board, other than the determination of such board;

e) Unless any concerned person does not accept the determination of an arbitration board, 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; and

f) For purposes of an arbitration proceeding under paragraph 5 and this paragraph, the members of the arbitration board and their staffs shall be considered "persons or authorities" to whom information may be disclosed under Article 26 (Exchange of Information and Administrative Assistance) of the Convention."

ARTICLE XIV

Article 28 (Limitation on Benefits) of the Convention is deleted and the following Article substituted:

"Article 28
Limitation on Benefits

1. Except as otherwise provided in this Article, a resident of one of the Contracting States that derives income from the other Contracting State shall be entitled, in that other Contracting State, to all the benefits of this Convention otherwise accorded to residents of a Contracting State only if such resident is a "qualified person" as defined in paragraph 2 of this Article and satisfies any other conditions specified in the Convention for the obtaining of such benefits.

2. A resident of one of the Contracting States is a qualified person for a taxable year only if such resident is either:

a) an individual;

b) a Contracting State, political subdivision or local authority thereof;

c) a company, if

aa) its principal class of shares (and any disproportionate class of shares) is regularly traded on one or more recognized stock exchanges, and either

A) its principal class of shares is primarily traded on a recognized stock exchange located in the Contracting State of which the company is a resident; or

B) the company's primary place of management and control is in the Contracting State of which it is a resident; or

bb) shares representing at least 50 percent of the aggregate voting power and value (and at least 50 percent of any disproportionate class of shares) of the company are owned directly or indirectly by five or fewer companies entitled to benefits under clause aa) of this subparagraph, provided that, in the case of indirect ownership, each intermediate owner is a resident of either Contracting State;

d) an entity organized under the laws of one of the Contracting States and established and maintained in that Contracting State exclusively for a religious, charitable, educational, scientific, or other similar purpose;

e) an entity organized under the laws of one of the Contracting States and established and maintained in that Contracting State to provide, pursuant to a plan, pensions or other similar benefits to employed and self-employed persons, provided that:

aa) more than 50 percent of the entity's beneficiaries, members or participants are individuals resident in either Contracting State; or

bb) the organization sponsoring such person is entitled to the benefits of the Convention pursuant to this paragraph;

f) a person other than an individual, if:

aa) on at least half the days of the taxable year at least 50 percent of each class of shares or other beneficial interests in the person is owned, directly or indirectly, by residents of that Contracting State that are entitled to the benefits of this Convention under subparagraph a), subparagraph b), clause aa) of subparagraph c), subparagraph d) or subparagraph e) of this paragraph, provided that, in the case of indirect ownership, each intermediate owner is a resident of that Contracting State; and

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bb) less than 50 percent of the person's gross income for the taxable year is paid or accrued, directly or indirectly, to persons who are not residents of either Contracting State entitled to the benefits of this Convention under subparagraph a), subparagraph b), clause aa) of subparagraph c), subparagraph d) or subparagraph e) of this paragraph in the form of payments that are deductible for purposes of the taxes covered by this Convention in the person's State of residence.

3. Notwithstanding that a company that is a resident of a Contracting State may not be a qualified person, it shall be entitled to all the benefits of this Convention otherwise accorded to residents of a Contracting State with respect to an item of income if it satisfies any other specified conditions for the obtaining of such benefits and:

a) shares representing at least 95 percent of the aggregate voting power and value (and at least 50 percent of any disproportionate class of shares) of the company are owned, directly or indirectly, by seven or fewer persons who are equivalent beneficiaries; and

b) less than 50 percent of the company's gross income for the taxable year in which the item of income arises is paid or accrued, directly or indirectly, to persons who are not equivalent beneficiaries, in the form of payments that are deductible for the purposes of the taxes covered by this Convention in the Contracting State of which the company is a resident.

4.

a) Notwithstanding that a resident of a Contracting State may not be a qualified person, it shall be entitled to all the benefits of this Convention otherwise accorded to residents of a Contracting State with respect to an item of income derived from the other Contracting State, if the resident is engaged in the active conduct of a trade or business in the first-mentioned Contracting State (other than the activities of making or managing investments for the resident's own account, unless these activities are banking, insurance or securities dealing carried on by a bank, insurance company or registered securities dealer), the income derived from the other Contracting State is derived in connection with, or is incidental to, that trade

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or business and that resident satisfies any other specified conditions for the obtaining of such benefits.

b) If a resident of one of the Contracting States or any of its associated enterprises carries on a trade or business activity in the other Contracting State which gives rise to an item of income, subparagraph a) of this paragraph shall apply to such item only if the trade or business activity in the first-mentioned Contracting State is substantial in relation to the trade or business activity in the other Contracting State.

c) In determining whether a person is engaged in the active conduct of a trade or business in a Contracting State under subparagraph a) of this paragraph, activities conducted by persons connected to such person shall be deemed to be conducted by such person. A person shall be connected to another if one possesses at least 50 percent of the beneficial interest in the other (or, in the case of a company, shares representing at least 50 percent of the aggregate voting power and value of the company or of the beneficial equity interest in the company) or another person possesses, directly or indirectly, at least 50 percent of the beneficial interest (or, in the case of a company, shares representing at least 50 percent of the aggregate voting power and value of the company or of the beneficial equity interest in the company) in each person. In any case, a person shall be considered to be connected to another if, on the basis of all the facts and circumstances, one has control of the other or both are under the control of the same person or persons.

5. Notwithstanding the preceding provisions of this Article, where an enterprise of a Contracting State derives income from the other Contracting State, and that income is attributable to a permanent establishment which that enterprise has in a third jurisdiction, the tax benefits that would otherwise apply under the other provisions of the Convention will not apply to that income if the combined tax that is actually paid with respect to such income in the first-mentioned Contracting State and in the third jurisdiction is less than 60 percent of the tax that would have been payable in the first-mentioned State if the income were earned in that Contracting State by the enterprise and were not attributable to the permanent establishment in the third jurisdiction. Any dividends, interest or royalties to which the provisions of this paragraph apply shall be subject to tax at a rate that shall not exceed 15 percent of the gross amount thereof. Any other income to which

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the provisions of this paragraph apply will be subject to tax under the provisions of the domestic law of the other Contracting State, notwithstanding any other provision of the Convention. The provisions of this paragraph shall not apply if:

a) in the case of royalties, the royalties are received as compensation for the use of, or the right to use, intangible property produced or developed by the permanent establishment itself; or

b) in the case of any other income, the income derived from the other Contracting State is derived in connection with, or is incidental to, the active conduct of a trade or business carried on by the permanent establishment in the third jurisdiction (other than the business of making, managing or simply holding investments for the person's own account, unless these activities are banking or securities activities carried on by a bank or registered securities dealer).

6. Notwithstanding the preceding provisions of this Article, a German Investment Fund or German *Investmentaktiengesellschaft (*collectively referred to as *Investmentvermögen)* may only be granted the benefits of this Convention if at least 90 percent of the shares or other beneficial interests in the German *Investmentvermögen* are owned, directly or indirectly, by residents of the Federal Republic of Germany that are entitled to the benefits of this Convention under subparagraph a), subparagraph b), clause aa) of subparagraph c), subparagraph d) or subparagraph e) of paragraph 2 of this Article or by persons that are equivalent beneficiaries with respect to the income derived by the German *Investmentvermögen* for which benefits are being claimed. For the purposes of this paragraph, beneficiaries of entities that are subject to numbers 3 and 5 of paragraph 1 of section 1 of the German Corporate Tax Act shall be treated as indirectly owning shares of a German Investmentvermögen. Foundations referred to in number 5 of paragraph 1 of section 1 of the German Corporate Tax Act, other than those referred to in subparagraph d) of paragraph 2 of this Article, shall not be taken into account in determining whether a German Investmentvermögen meets the 90 percent minimum ownership threshold.

7. A person resident of one of the Contracting States, who is not entitled to some or all of the benefits of this Convention because of the foregoing paragraphs, may, nevertheless, be granted benefits of this Convention if the competent authority of the Contracting State

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in which the income in question arises so determines. In making such determination, the competent authority shall take into account as its guidelines whether the establishment, acquisition or maintenance of such person or the conduct of its operations has or had as one of its principal purposes the obtaining of benefits under this Convention. The competent authority of the Contracting State in which the income arises will consult with the competent authority of the other Contracting State before denying the benefits of the Convention under this paragraph.

8. For the purposes of this Article the following rules and definitions shall apply:

a) the term "recognized stock exchange" means:

aa) the NASDAQ System and any stock exchange registered with the U.S. Securities and Exchange Commission as a national securities exchange under the U.S. Securities Exchange Act of 1934;

bb) any German stock exchange on which registered dealings in shares take place;

cc) any other stock exchange which the competent authorities agree to recognize for the purposes of this Article;

b)

aa) the term "principal class of shares" means the ordinary or common shares of the company, provided that such class of shares represents the majority of the voting power and value of the company. If no single class of ordinary or common shares represents the majority of the aggregate voting power and value of the company, the "principal class of shares" is that class or those classes that in the aggregate represent a majority of the aggregate voting power and value of the company;

bb) the term "shares" shall include depository receipts thereof or trust certificates thereof;

c) the term "disproportionate class of shares" means any class of shares of a company resident in one of the Contracting States that entitles the shareholder to disproportionately higher participation, through dividends, redemption payments or otherwise, in the earnings generated in the other Contracting State by particular assets or activities of the company;

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d) the company's primary place of management and control will be in the Contracting State of which it is a resident only if executive officers and senior management employees exercise day-to-day responsibility for more of the strategic, financial and operational policy decision making for the company (including its direct and indirect subsidiaries) in that Contracting State than in any other state and the staffs conduct more of the day-to-day activities necessary for preparing and making those decisions in that Contracting State than in any other state.

e) an equivalent beneficiary is a resident of a member state of the European Union or of a European Economic Area state or of a party to the North American Free Trade Agreement but only if that resident:

aa)

A) would be entitled to all the benefits of a comprehensive convention for the avoidance of double taxation between any member state of the European Union or a European Economic Area state or any party to the North American Free Trade Agreement and the State from which the benefits of this Convention are claimed under provisions analogous to subparagraph a), subparagraph b), clause aa) of subparagraph c), subparagraph d) or subparagraph e) of paragraph 2 of this Article provided that if such convention does not contain a comprehensive limitation on benefits article, the person would be a qualified person under subparagraph a), subparagraph b), clause aa) of subparagraph c), subparagraph d) or subparagraph e) of paragraph 2 of this Article if such person were a resident of one of the States under Article 4 (Resident) of this Convention; and

B) with respect to insurance premiums and to income referred to in Article 10 (Dividends), 11 (Interest) or 12 (Royalties) of this Convention, would be entitled under such convention to a rate of tax with respect to the particular class of income for which benefits are being claimed under this Convention that is at least as low as the rate applicable under this Convention; or

bb) is a resident of a Contracting State that is a qualified person by reason of subparagraph a), subparagraph b), clause aa) of subparagraph c), subparagraph d) or subparagraph e) of paragraph 2 of this Article.

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For the purposes of applying paragraph 3 of Article 10 (Dividends) in order to determine whether a person, owning shares, directly or indirectly, in the company claiming the benefits of this Convention, is an equivalent beneficiary, such person shall be deemed to hold the same voting power in the company paying the dividend as the company claiming the benefits holds in such company;

f) with respect to dividends, interest or royalties arising in the Federal Republic of Germany and beneficially owned by a company that is a resident of the United States, a company that is a resident of a member state of the European Union will be treated as satisfying the requirements of clause aa) B) of subparagraph e) for purposes of determining whether such United States resident is entitled to benefits under this paragraph if a payment of dividends, interest or royalties arising in the Federal Republic of Germany and paid directly to such resident of a member state of the European Union would have been exempt from tax pursuant to any directive of the European Union, notwithstanding that the income tax convention between the Federal Republic of Germany and that other member state of the European Union would provide for a higher rate of tax with respect to such payment than the rate of tax applicable to such United States company under Article 10 (Dividends), 11 (Interest), or 12 (Royalties) of this Convention."

ARTICLE XV

Paragraph 1 of Article 17 (Artistes and Athletes) of the Convention and paragraph 4 and 5 of Article 20 (Visiting Professors and Teachers; Students and Trainees) of the Convention are modified by deleting the words "Deutsche Mark" where they appear and replacing them with the word "Euro".

ARTICLE XVI

The Protocol to the Convention is amended by deleting paragraphs 1 through 28 and replacing them with the following paragraphs:

"1. *WITH REFERENCE TO SUBPARAGRAPH b) OF PARAGRAPH 4 OF ARTICLE 1 (GENERAL SCOPE)*

The term "long-term resident" shall mean any individual who is a lawful permanent resident of the United States in eight or more taxable years during the preceding 15

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taxable years. In determining whether the threshold in the preceding sentence is met, an individual shall not be treated as a lawful permanent resident of the United States for any taxable year in which such individual is treated as a resident of a country other than the United States under the provisions of a tax treaty of the United States and the individual does not waive the benefits of such treaty provided by the United States to a resident of the other country. Consequently, if during each of the 15 taxable years preceding the loss of his status as a lawful permanent resident an individual was a resident of the Federal Republic of Germany (as determined under Article 4 (Residence)) and claimed the benefits provided by the United States to a resident of the Federal Republic of Germany, the individual shall not be considered a long-term resident.

2. *WITH REFERENCE TO PARAGRAPH 1 OF ARTICLE 4 (RESIDENCE)*

a) The Federal Republic of Germany shall treat a United States citizen or an alien lawfully admitted for permanent residence (a "green card" holder) as a resident of the United States only if such person has a substantial presence, permanent home, or habitual abode in the United States.

b) It is understood that a German Investment Fund and a German *Investmentaktiengesellschaft* (collectively referred to as *Investmentvermögen*) to which the provisions of the Investment Act (*Investmentgesetz*) apply are residents of the Federal Republic of Germany and that a U.S. Regulated Investment Company (RIC) and a U.S. Real Estate Investment Trust (REIT) are residents of the United States.

3. *WITH REFERENCE TO ARTICLE 5 (PERMANENT ESTABLISHMENT)* A resident of a Contracting State that performs in the other Contracting State concerts, theatrical or artistic performances, or similar shows and revues and that may not be taxed in that other State under the provisions of Article 17 (Artistes and Athletes) shall not be deemed to have a permanent establishment in that State if its presence does not exceed in the aggregate 183 days in the calendar year concerned.

4. *WITH REFERENCE TO ARTICLE 7 (BUSINESS PROFITS)*

It is understood that the business profits to be attributed to a permanent establishment shall include only the profits derived from the assets used, risks assumed, and activities performed by the permanent establishment. The principles of the OECD Transfer Pricing Guidelines will apply for purposes of determining the profits attributable to a

permanent establishment, taking into account the different economic and legal circumstances of a single entity. Accordingly, any of the methods described therein as acceptable methods for determining an arm's-length result may be used to determine the income of a permanent establishment so long as those methods are applied in accordance with the Guidelines. In particular, in determining the amount of attributable profits, the permanent establishment shall be treated as having the same amount of capital that it would need to support its activities if it were a distinct and separate enterprise engaged in the same or similar activities. With respect to financial institutions other than insurance companies, a Contracting State may determine the amount of capital to be attributed to a permanent establishment by allocating the institution's total equity between its various offices on the basis of the proportion of the financial institution's risk-weighted assets attributable to each of them. A financial institution may determine the amount of the capital attributed to its permanent establishment using its risk weighted assets only if it risk weights its assets in the ordinary course of its business.

5. *WITH REFERENCE TO PARAGRAPHS 1 AND 2 OF ARTICLE 7 (BUSINESS PROFITS) AND PARAGRAPH 3 OF ARTICLE 13 (GAINS)*

For the implementation of paragraphs 1 and 2 of Article 7 and paragraph 3 of Article 13 any income, gain, or expense attributable to a permanent establishment is taxable or deductible in the Contracting State where such permanent establishment is situated even if the payments are deferred until such permanent establishment ceases to exist. Nothing in the preceding sentence shall prevent the application to such deferred payments of rules regarding the accrual of income and expenses according to the domestic law of a Contracting State.

6. *WITH REFERENCE TO ARTICLE 7 (BUSINESS PROFITS) AND ARTICLE 13 (GAINS)*

Gains from the alienation of movable property that at any time formed part of the business property of a permanent establishment that a resident of one Contracting State has or had in the other Contracting State may be taxed by that other State only to the extent of the gain that accrued during that time. Notwithstanding any provision of Article 7 or Article 13, such tax may be imposed on such gains at the time when realized and recognized under the laws of that other State, if it is within ten years of the date on which

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the property ceases to be part of the business property of the permanent establishment (or such shorter period provided by the laws of either Contracting State).

7. *WITH REFERENCE TO ARTICLE 9 (ASSOCIATED ENTERPRISES)*

Either State may apply the rules of its national law that permit the distribution, apportionment, or allocation of income, deductions, credits, or allowances between related persons with a view to apportioning or allocating such deductions, credits, or allowances in accordance with the general principles of paragraph 1 of Article 9. Article 9 shall not be construed to limit either Contracting State in allocating income between persons that are related other than by direct or indirect participation within the meaning of paragraph 1, such as by commercial or contractual relationships resulting in controlling influence, so long as such allocation is otherwise in accordance with the general principles of paragraph 1 of Article 9.

8. *WITH REFERENCE TO PARAGRAPH 3 OF ARTICLE 10 (DIVIDENDS)*

a) If the Federal Republic of Germany introduces a taxation regime that exempts from taxation Real Estate Investment Companies, subparagraph b) of paragraph 3 of Article 10 shall not apply.

b) It is understood that in the case of the Federal Republic of Germany, subparagraph b of paragraph 3 of Article 10 applies to the person treated as the owner of the assets of the pension fund under section 39 of the Fiscal Code, provided the dividends may only be used for providing retirement benefits through such fund.

9. *WITH REFERENCE TO PARAGRAPH 9 OF ARTICLE 10 (DIVIDENDS)*

The general principle of the "dividend equivalent amount", as used in the United States law, is to approximate that portion of the income mentioned in paragraph 9 that is comparable to the amount that would be distributed as a dividend if such income were earned by a locally incorporated subsidiary.

10. *WITH REFERENCE TO ARTICLE 11 (INTEREST)*

The excess of the amount of interest deductible by a United States permanent establishment of a German company over the interest actually paid by such permanent establishment shall be treated as interest derived and beneficially owned by a resident of the Federal Republic of Germany.

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11. *WITH REFERENCE TO ARTICLE 12 (ROYALTIES)*

Where an artiste resident in one Contracting State records a performance in the other Contracting State, has a copyrightable interest in the recording, and receives consideration for the right to use the recording based on the sale or public playing of such recording, then such consideration shall be governed by this Article.

12. *WITH REFERENCE TO PARAGRAPH 2 OF ARTICLE 13 (GAINS)*

The term "immovable property situated in the other Contracting State", as described in this paragraph, when the United States is that other Contracting State includes a United States real property interest.

13. *WITH REFERENCE TO PARAGRAPH 3 OF ARTICLE 13 (GAINS)*

Nothing in this Article shall prevent gains from the alienation by a resident of a Contracting State of an interest in a partnership, trust, or estate that has a permanent establishment situated in the other Contracting State from being treated as gain under paragraph 3.

14. *WITH REFERENCE TO PARAGRAPH 1 OF ARTICLE 17 (ARTISTES AND ATHLETES)*

If an artiste or athlete is not subject to tax in the Federal Republic of Germany under the provisions of paragraph 1 of Article 17, tax may be withheld at source in the Federal Republic of Germany, and shall be refunded to the taxpayer only upon application at the end of the calendar year concerned. Paragraph 6 of Article 29 (Refund of Withholding Tax) shall remain unaffected.

15. *WITH REFERENCE TO PARAGRAPH 3 OF ARTICLE 18 (PENSIONS, ANNUITIES, ALIMONY, CHILD SUPPORT, AND SOCIAL SECURITY)*

In determining the taxable income of an individual who is a resident of the Federal Republic of Germany there shall be allowed as a deduction in respect of alimony or similar allowances paid to an individual who is a resident of the United States the amount that would be allowed as a deduction if that last-mentioned individual were subject to unlimited tax liability in the Federal Republic of Germany.

16. *WITH REFERENCE TO PARAGRAPH 4 OF ARTICLE 18A (PENSION PLANS)*

a) For purposes of paragraph 4 of Article 18A, the term "pension plan" shall include the following and any identical or substantially similar plans established pursuant to legislation enacted after the date of signature of this Protocol:

aa) In the case of the United States, qualified plans under section 401(a) of the Internal Revenue Code, individual retirement plans (including individual retirement plans that are part of a simplified employee pension plan that satisfies section 408(k), individual retirement accounts, individual retirement annuities, and section 408(p) accounts, and Roth IRAs under Section 408A), section 403(a) qualified annuity plans, section 403(b) plans, and section 457(b) governmental plans.

bb) In the case of the Federal Republic of Germany, arrangements under section 1 of the German law on employment-related pensions (*Betriebsrentengesetz*).

b) For purposes of subparagraph b) of paragraph 3 and subparagraph d) of paragraph 5 of Article 18A, it is understood that:

aa) The Federal Republic of Germany recognizes qualified plans specifically listed in clause aa) of subparagraph a), other than Roth IRAs, as arrangements that correspond to pension plans referred to under section 1 of the German law on employment-related pensions (*Betriebsrentengesetz*). The Federal Republic of Germany shall provide the corresponding relief under section 3 No. 63 of the Income Tax Act; and

bb) The United States recognizes arrangements under section 1 of the German law on employment-related pensions (*Betriebsrentengesetz*) as arrangements that correspond to pension plans referred to in clause aa) of subparagraph a) above.

17. *WITH REFERENCE TO PARAGRAPH 2 OF ARTICLE 20 (VISITING PROFESSORS AND TEACHERS; STUDENTS AND TRAINEES).*

Payments that are made out of public funds of a Contracting State or by a scholarship organization endowed with such funds shall be considered to arise in full from sources outside the other Contracting State. The preceding sentence shall also apply when such payments are made under programs funded jointly by organizations of both Contracting States if more than 50 percent of these funds are provided out of public funds of the first-mentioned State or by a scholarship organization endowed with such funds. The competent authorities shall consult with each other to identify those scholarship programs whose payments shall be treated as arising from sources outside a Contracting State under the foregoing rules.

18. *WITH REFERENCE TO PARAGRAPH 2 OF ARTICLE 21 (OTHER INCOME)*

Where the recipient and the payor of a dividend are both residents of the Federal Republic of Germany and the dividend is attributed to a permanent establishment that the

recipient of the dividend has in the United States, the Federal Republic of Germany may tax such a dividend at the rates provided for in paragraphs 2 and 3 of Article 10 (Dividends). The United States shall give a credit for such tax according to the provisions of Article 23 (Relief from Double Taxation).

19. *WITH REFERENCE TO PARAGRAPH 1 OF ARTICLE 23 (RELIEF FROM DOUBLE TAXATION)*

For purposes of paragraph 1 of Article 23, the "general principle hereof" means the avoidance of double taxation by allowing a credit for taxes imposed on items of income arising in the Federal Republic of Germany, as determined under the applicable United States source rules, as modified by the Convention. While the details and limitations of the credit pursuant to this paragraph may change as provisions of United States law change, any such changes must preserve a credit for German taxes imposed with respect to items of income that the Federal Republic of Germany may tax pursuant to the Convention.

20. *WITH REFERENCE TO PARAGRAPH 1 OF ARTICLE 24 (NONDISCRIMINATION)*

Paragraph 1 of Article 24 does not obligate the United States to subject an individual who is a German national not resident in the United States to the same taxing regime as that applied to a citizen of the United States not resident in the United States.

21. *WITH REFERENCE TO PARAGRAPH 4 OF ARTICLE 24 (NONDISCRIMINATION)*

It is understood that paragraph 4 of Article 24 shall not be construed as obligating a Contracting State to permit cross-border consolidation of income or similar benefits between enterprises.

22. *WITH REFERENCE TO PARAGRAPHS 5 AND 6 OF ARTICLE 25 (MUTUAL AGREEMENT PROCEDURE)*

In respect of any case where the competent authorities have endeavored but are unable to reach an agreement under Article 25 regarding the application of one or more of the following Articles of the Convention: 4 (Residence) (but only insofar as it relates to the residence of a natural person), 5 (Permanent Establishment), 7 (Business Profits), 9 (Associated Enterprises), 12 (Royalties), 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. In addition, the competent authorities may, on an ad hoc basis, agree that binding arbitration shall be used in respect of any other matter

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to which Article 25 applies. If an arbitration proceeding (the Proceeding) under paragraph 5 of Article 25 commences, the following rules and procedures will apply:

a) The Proceeding will be conducted in the manner prescribed by, and subject to the requirements of, paragraphs 5 and 6 of Article 25 and these rules and procedures, as modified or supplemented by any other rules and procedures agreed upon by the competent authorities pursuant to subparagraph q) below.

b) The determination reached by an arbitration board 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 6 of Article 25 will 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 will not disclose to any other person any information received during the course of the Proceeding from either Contracting State or the Arbitration Board, 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 will have 60 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 board. Within 60 days of the date on which the second such communication is sent, the two members appointed by the Contracting States will appoint a third member, who will serve as Chair of the board. If either Contracting State fails to appoint a member, or if the members appointed by the Contracting States fail to agree upon the third member in the manner prescribed by this paragraph, the remaining member(s) will be appointed by the highest-ranking member of the Secretariat at the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation

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and Development (OECD) who is not a citizen of either Contracting State, by written notice to both Contracting States within 60 days of the date of such failure. The competent authorities will develop a non-exclusive list of individuals with familiarity in international tax matters who may potentially serve as the Chair of the board. In any case, the Chair shall not be a citizen of either Contracting State.

f) The arbitration board 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 the Protocol to the Convention.

g) Each of the Contracting States will be permitted to submit, within 90 days of the appointment of the Chair of the arbitration board, 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 board. Copies of the Proposed Resolution and supporting Position Paper shall be provided by the board to the other Contracting State on the date on which the later of the submissions is submitted to the board. 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 board 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 board within 180 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 board only at its request, and copies of the board'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 board, and vice versa, shall take place only through written communications between the designated competent authorities and the Chair of the board.

h) The arbitration board will deliver a determination in writing to the Contracting States within six months of the appointment of its Chair. The board will adopt as its determination one of the Proposed Resolutions submitted by the Contracting States.

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i) In making its determination, the arbitration board will apply, as necessary and in descending order of priority:

aa) the provisions of the Convention;

bb) any agreed commentaries or explanations of the Contracting States concerning the Convention;

cc) the laws of the Contracting States to the extent they are not inconsistent with each other; and

dd) any OECD Commentary, Guidelines or Reports regarding relevant analogous portions of the OECD Model Tax Convention.

j) The determination of the arbitration board in a particular case shall be binding on the Contracting States. The determination of the board will not state a rationale. It will have no precedential value.

k) As provided in subparagraph e) of paragraph 6 of Article 25, the determination of an arbitration board shall constitute a resolution by mutual agreement under Article 25. Each concerned person must, within 30 days of receiving the determination of the board from the competent authority to which the case was first presented, advise that competent authority whether that concerned person accepts the determination of the board. If any concerned person fails to so advise the relevant competent authority within this time frame, the determination of the board will be considered not to have been accepted in that case. Where the determination of the board is not accepted, the case may not subsequently be the subject of a Proceeding.

l) Any meeting(s) of the arbitration board 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 will be determined by applicable domestic law of the Contracting State(s) concerned.

n) No information relating to the Proceeding (including the board's determination) may be disclosed by the members of the arbitration board 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 board and their staffs must agree in statements sent to each of the Contracting States in confirmation of their appointment to the arbitration board to abide by and be subject to the confidentiality and nondisclosure provisions of Article 26 (Exchange of Information and Administrative Assistance) 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 will be borne equally by the Contracting States. In general, the fees of members of the arbitration board will be set at the fixed amount of $2,000 (two thousand United States dollars) per day or the equivalent amount in euro, subject to modification by the competent authorities. In general, the expenses of members of the arbitration board will 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 will also be borne equally by the Contracting States. Meeting facilities, related resources, financial management, other logistical support, and general administrative coordination of the Proceeding will 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 5 and 6 of Article 25 and this paragraph, each competent authority will 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 will be:

aa) in the United States, the information required to be submitted to the United States competent authority under Revenue Procedure 2002-52, section 4.05 (or any applicable successor provisions) and, for cases initially submitted as a request for an Advance Pricing Agreement, the information required to be submitted to the Internal Revenue Service under Revenue Procedure 2006-9, section 4 (or any applicable successor provisions), and

bb) in the Federal Republic of Germany, the information required to be submitted to the competent authority in the Federal Republic of Germany under

the circular of July 1, 1997, - IV C 5 - S 1300 - 189/96 -, published by the Ministry of Finance (or any applicable successor circular).

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 modify or supplement the above rules and procedures as necessary to more effectively implement the intent of paragraph 5 of Article 25 to eliminate double taxation.

23. *WITH REFERENCE TO ARTICLE 26 (EXCHANGE OF INFORMATION AND ADMINISTRATIVE ASSISTANCE)*

a) It is understood that the powers of each Contracting State's competent authorities to obtain information include powers to obtain information held by financial institutions, nominees, or persons acting in an agency or fiduciary capacity, and information relating to the ownership of legal persons, and that each Contracting State's competent authority is able to exchange such information in accordance with Article 26.

b) The Federal Republic of Germany shall under this Article exchange information with or without request to the extent provided for in the law of 19 December 1985 (*EG-Amtshilfe-Gesetz*) as amended from time to time without changing the general principles thereof.

24. *WITH REFERENCE TO PARAGRAPH 6 OF ARTICLE 28 (LIMITATION ON BENEFITS)*

The competent authorities of the Contracting States shall establish procedures for determining indirect ownership for purposes of determining whether the 90 percent ownership threshold contained in paragraph 6 of Article 28 is satisfied. It is anticipated that these procedures may include the use of statistically valid sampling techniques."

ARTICLE XVII

1. This Protocol shall be subject to ratification and the instruments of ratification shall be exchanged as soon as possible.

2. This Protocol shall enter into force on the date on which the instruments of ratification are exchanged and shall have effect in both Contracting States:

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a) in respect of taxes withheld at source, for amounts paid or credited on or after the first day of January of the year in which this Protocol enters into force;

b) in respect of other taxes on income for any taxable year beginning on or after the first day of January next following the date this Protocol enters into force; and

c) in respect of taxes on capital for the taxes levied on items of capital owned on or after the first day of January next following the date this Protocol enters into force.

3. Notwithstanding the provisions of paragraph 2,

a) the provisions of paragraphs 2 and 3 of Article 1 (General Scope) shall have effect after the entry into force of this Protocol and shall apply in respect of any tax claim irrespective of whether such tax claim pre-dates the entry into force of this Protocol or the effective date of any of its provisions; and

b) the amendments made by Article X of this Protocol shall not have effect with respect to individuals who, at the time of the signing of the Convention, were employed by the United States, a political subdivision or local authority thereof.

4. Article XIII of this Protocol shall have effect with respect to

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

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

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

5. Notwithstanding paragraph 2, where any person entitled to benefits under the Convention as unmodified by this Protocol would have been entitled to greater benefits thereunder than under the Convention as modified by this Protocol, the Convention as unmodified shall, at the election of such person, continue to have effect in its entirety with respect to such person for a twelve-month period from the date on which the provisions of this Protocol would have effect under paragraph 2 of this Article.

6. The Notes exchanged on 29 August 1989 and referring to paragraph 5 of Article 25 (Mutual Agreement Procedure) and Article 28 (Limitation on Benefits) as well as the German Note of 3 November 1989 referring to paragraph 21 of the Protocol to the Convention shall cease to have effect when the provisions of this Protocol take effect in accordance with this Article.

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Done in duplicate at Berlin on the first day of June, 2006, in the English and German languages, both texts being equally authentic

FOR THE
UNITED STATES OF AMERICA:

Robert M. Kimmitt

FOR THE
FEDERAL REPUBLIC OF GERMANY:

Peter Hindrichs

Joint Declaration
by the United States of America and the Federal Republic of Germany
on the Occasion
of the Signing on 1 June 2006
of the Protocol Amending the Convention
Between the United States of America and the Federal Republic of Germany
for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion
with Respect to Taxes on Income and Capital and to Certain Other Taxes
Signed on 29th August 1989

The United States of America and the Federal Republic of Germany on the occasion of the signing on 1 June 2006 of the Protocol Amending the Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes signed on 29th August 1989 (hereafter "Protocol of 1 June 2006"), and with regard to Article 18 (Pensions, Annuities, Alimony, Child Support, and Social Security) of the Convention as amended by the Protocol of 1 June 2006, in which it is agreed that pensions and other similar remuneration paid in consideration of past employment as well as benefits paid under the social security legislation of a Contracting State shall be taxable only in the Contracting State of which the recipient of that pension or benefits on the basis of the social security legislation is a resident,

Have reached the following understanding:

I.

1. The Federal Republic of Germany draws attention to the fact

   a) that, effective as of 1 January 2005, legislation introduced on 5 July 2004 (Federal Law Gazette part I page 1427) has fundamentally changed in the Federal Republic of Germany the taxation of retirement income,

   b) that these changes combine full taxation of retirement income with extended tax exemption of contributions to pension plans.

2. The Federal Republic of Germany therefore expresses its conviction

a) that, as a result of these legislative changes, Article 18 of the Convention as amended by the Protocol of 1 June 2006 should be further amended to such effect as to also provide for the taxation of retirement income in the Contracting State in which the income arises or in which the contributions to the pension plan were exempt from taxation;

b) that taking into account the successive implementation in the Federal Republic of Germany of the taxation of retirement income, as amended by legislation of 5 July 2004, any further amendment to Article 18 of the Convention of 29 August 1989 as amended by the Protocol of 1 June 2006 should not enter into force before 1 January 2015.

II.

The Federal Republic of Germany and the United States of America therefore reaffirm their intentions declared during negotiations on the Protocol of 1 June 2006 to enter into consultations at the appropriate time, but not before 1 January 2013, with a view to further amending Article 18 of the Convention as amended by the Protocol of 1 June 2006 to allow for the taxation of retirement income in the Contracting State in which the income arises based on the following principles:

1. Benefits paid under the social security legislation of a Contracting State may also be taxed by that Contracting State; the tax may not however exceed 15 percent of the gross amount of such payments;

2. Pensions and other similar remuneration paid in consideration of past employment may also be taxed in the Contracting State in which the employment had been exercised for a substantial period of time; the tax may not however exceed 15 percent of the gross amount of such payments.

This Joint Declaration is signed in duplicate, in the English and German languages.

Berlin, 1 June 2006

FOR THE
UNITED STATES OF AMERICA:

FOR THE
FEDERAL REPUBLIC OF GERMANY:

The Department of State refers the Embassy of the Federal Republic of Germany to the Protocol signed in Berlin on June 1, 2006, Amending the Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, Signed on 29th August 1989 (hereinafter "Protocol").

A few inaccuracies were discovered upon review of the Protocol. The following seven inaccuracies relate to both language versions.

1. Paragraph 4 of Article 10 (Article IV of the Protocol)

   a) In the German version the words "ist Absatz 2 Buchstabe b nur anzuwenden" shall be replaced by the words "sind Absatz 2 Buchstabe b und Absatz 3 Buchstabe b nur anzuwenden" and

   b) in the English version the words "and subparagraph b) of paragraph 3" shall be added after the words "In the case of dividends paid by a REIT subparagraph b) of paragraph 2".

2. Subparagraph a) of paragraph 4 of Article 10 (Article IV of the Protocol)

   a) In the German version the words "der Nutzungsberechtigte der Dividenden eine natürliche Person ist, die mit nicht mehr als 10 vom Hundert an dem REIT beteiligt ist" shall be replaced by the words "der Nutzungsberechtigte der Dividenden eine natürliche Person oder ein Pensionsfonds ist und die natürliche Person oder der Pensionsfonds mit nicht mehr als 10 vom Hundert an dem REIT beteiligt ist" and

   b) in the English version the words "or a pension fund, in either case" shall be inserted after the word "individual".

3. Subparagraph b) of paragraph 4 of Article 23 (Article XII of the Protocol)

   a) In the German version, the words "Absatz 3 Buchstabe a gilt nicht" shall be replaced by the words "Absatz 3 Buchstabe b und nicht Buchstabe a gilt" and

   b) in the English version, the words "The provisions of subparagraph a) of paragraph 3 shall not" shall be replaced by

the words "The provisions of subparagraph b) and not the provisions of subparagraph a) of paragraph 3 shall".

4. Clause bb) of subparagraph e) of paragraph 2 of Article 28 (Article XIV of the Protocol)

   a) In the German version the full stop shall be replaced by a semicolon and the word "oder" and

   b) in the English version, the word "or" shall be added after the semicolon.

5. Chapeau of Article XIII of the Protocol

   a) In the German version the word "den" shall be replaced by the word "die" and the word "Absatz" shall be replaced by the word "Absätze" and

   b) in the English version the word "paragraph" shall be replaced by the word "paragraphs".

6. Subparagraph a) of paragraph 8 of the Protocol to the Convention (Article XVI of the Protocol)

   a) In the German version the words "auf Ausschüttungen einer solchen in der Bundesrepublik Deutschland ansässigen Gesellschaft" shall be inserted after the

words "Artikel 10 Absatz 3 Buchstabe b" and

b) in the English version the words "to dividends paid by such a company that is a resident of the Federal Republic of Germany" shall be added at the end of the sentence.

7. Subparagraph h) of paragraph 22 of the Protocol to the Convention (Article XVI of the Protocol)

a) In the German version the number "6" shall be replaced by the word "neun" and

b) in the English version the word "six" shall be replaced by the word "nine".

The following three inaccuracies relate to the German language version only:

1. In subparagraph a) of paragraph 11 of Article 10 (Article IV of the Protocol)

a) the word "nach" shall be inserted before the words "dem Recht" and

b) the word "wurde" shall be added after the word "errichtet".

2. In subparagraph f) of paragraph 8 of Article 28 (Article XIV of the Protocol) the words "des Buchstabens f" shall be replaced by the words "des Buchstabens e".

3. In paragraph 4 of the Protocol to the Convention (Article XVI of the Protocol) the word "Einzelunternehmens" shall be replaced by the word "Einheitsunternehmens".

In order to correct the Protocol, the Department of State proposes that:

I. The German language version and 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 the Federal Republic of Germany concurs with the proposals contained in paragraphs I. and II. above, this note and the note in reply thereto expressing the approval of the Government of the Federal Republic of Germany shall constitute the correction of the German and English language versions of the Protocol, and shall become part of the original thereof.

Department of State,

Washington, August 17, 2006.

A true copy of the signed original.