



U.S. Department of Justice

Tax Division

Washington, D.C. 20530

CDC:TJS:KMQuesnel
5-16-4678
2014 200685

May 21, 2015

Daniel W. Levy, Esq.
Eric B. Halper, Esq.
McKool Smith
One Bryant Park
47th Floor
New York, NY 10036

Re: Berner Kantonalbank AG
DOJ Swiss Bank Program – Category 2
Non-Prosecution Agreement

Dear Mr. Levy:

Berner Kantonalbank AG submitted a Letter of Intent on December 30, 2013, to participate in Category 2 of the Department of Justice's Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks, as announced on August 29, 2013 (hereafter "Swiss Bank Program"). This Non-Prosecution Agreement ("Agreement") is entered into based on the representations of Berner Kantonalbank in its Letter of Intent and information provided by Berner Kantonalbank pursuant to the terms of the Swiss Bank Program. The Swiss Bank Program is incorporated by reference herein in its entirety in this Agreement.¹ Any violation by Berner Kantonalbank of the Swiss Bank Program will constitute a breach of this Agreement.

On the understandings specified below, the Department of Justice will not prosecute Berner Kantonalbank for any tax-related offenses under Titles 18 or 26, United States Code, or for any monetary transaction offenses under Title 31, United States Code, Sections 5314 and 5322, in connection with undeclared U.S. Related Accounts held by Berner Kantonalbank during the Applicable Period (the "conduct"). Berner Kantonalbank admits, accepts, and acknowledges responsibility for the conduct set forth in the Statement of Facts attached hereto as Exhibit A and agrees not to make any public statement contradicting the Statement of Facts. This Agreement does not provide any protection against prosecution for any offenses except as set forth above and applies only to Berner Kantonalbank and does not apply to any other entities or to any individuals. Berner Kantonalbank expressly understands that the protections provided under this

¹ Capitalized terms shall have the meaning ascribed to them in the Swiss Bank Program.

Agreement shall not apply to any acquirer or successor entity unless and until such acquirer or successor formally adopts and executes this Agreement. Berner Kantonalbank enters into this Agreement pursuant to the authority granted by its Board of Directors in the form of a Board Resolution (a copy of which is attached hereto as Exhibit B).

In recognition of the conduct described in this Agreement and in accordance with the terms of the Swiss Bank Program, Berner Kantonalbank agrees to pay the sum of \$4,619,000 as a penalty to the Department of Justice ("the Department"). This shall be paid directly to the United States within seven (7) days of the execution of this Agreement pursuant to payment instructions provided to Berner Kantonalbank. This payment is in lieu of restitution, forfeiture, or criminal fine against Berner Kantonalbank for the conduct described in this Agreement. The Department will take no further action to collect any additional criminal penalty from Berner Kantonalbank with respect to the conduct described in this Agreement, unless the Tax Division determines Berner Kantonalbank has materially violated the terms of this Agreement or the Swiss Bank Program as described on pages 5-6 below. Berner Kantonalbank acknowledges that this penalty payment is a final payment and no portion of the payment will be refunded or returned under any circumstance, including a determination by the Tax Division that Berner Kantonalbank has violated any provision of this Agreement. Berner Kantonalbank agrees that it shall not file any petitions for remission, restoration, or any other assertion of ownership or request for return relating to the penalty amount or the calculation thereof, or file any other action or motion, or make any request or claim whatsoever, seeking to collaterally attack the payment or calculation of the penalty. Berner Kantonalbank agrees that it shall not assist any others in filing any such claims, petitions, actions, or motions. Berner Kantonalbank further agrees that no portion of the penalty that Berner Kantonalbank has agreed to pay to the Department under the terms of this Agreement will serve as a basis for Berner Kantonalbank to claim, assert, or apply for, either directly or indirectly, any tax deduction, any tax credit, or any other offset against any U.S. federal, state, or local tax or taxable income.

The Department enters into this Agreement based, in part, on the following Swiss Bank Program factors:

(a) Berner Kantonalbank's timely, voluntary, and thorough disclosure of its conduct, including:

- how its cross-border business for U.S. Related Accounts was structured, operated, and supervised (including internal reporting and other communications with and among management);
- the name and function of the individuals who structured, operated, or supervised the cross-border business for U.S. Related Accounts during the Applicable Period;
- how Berner Kantonalbank attracted and serviced account holders; and
- an in-person presentation and documentation, properly translated, supporting the disclosure of the above information and other information that was requested by the Tax Division;

(b) Berner Kantonalbank's cooperation with the Tax Division, including conducting an internal investigation and making presentations to the Tax Division on the status and findings of the internal investigation;

(c) Berner Kantonalbank's production of information about its U.S. Related Accounts, including:

- the total number of U.S. Related Accounts and the maximum dollar value, in the aggregate, of the U.S. Related Accounts that (i) existed on August 1, 2008; (ii) were opened between August 1, 2008, and February 28, 2009; and (iii) were opened after February 28, 2009;
- the total number of accounts that were closed during the Applicable Period; and
- upon execution of the Agreement, as to each account that was closed during the Applicable Period, (i) the maximum value, in dollars, of each account, during the Applicable Period; (ii) the number of U.S. persons or entities affiliated or potentially affiliated with each account, and further noting the nature of the relationship to the account of each such U.S. person or entity or potential U.S. person or entity (e.g., a financial interest, beneficial interest, ownership, or signature authority, whether directly or indirectly, or other authority); (iii) whether it was held in the name of an individual or an entity; (iv) whether it held U.S. securities at any time during the Applicable Period; (v) the name and function of any relationship manager, client advisor, asset manager, financial advisor, trustee, fiduciary, nominee, attorney, accountant, or other individual or entity functioning in a similar capacity known by Berner Kantonalbank to be affiliated with said account at any time during the Applicable Period; and (vi) information concerning the transfer of funds into and out of the account during the Applicable Period, including (a) whether funds were deposited or withdrawn in cash; (b) whether funds were transferred through an intermediary (including but not limited to an asset manager, financial advisor, trustee, fiduciary, nominee, attorney, accountant, or other third party functioning in a similar capacity) and the name and function of any such intermediary; (c) identification of any financial institution and domicile of any financial institution that transferred funds into or received funds from the account; and (d) identification of any country to or from which funds were transferred; and

(d) Berner Kantonalbank's retention of a qualified independent examiner who has verified the information Berner Kantonalbank disclosed pursuant to II.D.2 of the Swiss Bank Program.

Under the terms of this Agreement, Berner Kantonalbank shall: (a) commit no U.S. federal offenses; and (b) truthfully and completely disclose, and continue to disclose during the term of this Agreement, consistent with applicable law and regulations, all material information described in Part II.D.1 of the Swiss Bank Program that is not protected by a valid claim of privilege or work product with respect to the activities of Berner Kantonalbank, those of its

parent company and its affiliates, and its officers, directors, employees, agents, consultants, and others, which information can be used for any purpose, except as otherwise limited in this Agreement.

Notwithstanding the term of this Agreement, Berner Kantonalbank shall also, subject to applicable laws or regulations: (a) cooperate fully with the Department, the Internal Revenue Service, and any other federal law enforcement agency designated by the Department regarding all matters related to the conduct described in this Agreement; (b) provide all necessary information and assist the United States with the drafting of treaty requests seeking account information of U.S. Related Accounts, whether open or closed, and collect and maintain all records that are potentially responsive to such treaty requests in order to facilitate a prompt response; (c) assist the Department or any designated federal law enforcement agency in any investigation, prosecution, or civil proceeding arising out of or related to the conduct covered by this Agreement by providing logistical and technical support for any meeting, interview, federal grand jury proceeding, or any federal trial or other federal court proceeding; (d) use its best efforts promptly to secure the attendance and truthful statements or testimony of any officer, director, employee, agent, or consultant of Berner Kantonalbank at any meeting or interview or before a federal grand jury or at any federal trial or other federal court proceeding regarding matters arising out of or related to the conduct covered by this Agreement; (e) provide testimony of a competent witness as needed to enable the Department and any designated federal law enforcement agency to use the information and evidence obtained pursuant to Berner Kantonalbank's participation in the Swiss Bank Program; (f) provide the Department, upon request, consistent with applicable law and regulations, all information, documents, records, or other tangible evidence not protected by a valid claim of privilege or work product regarding matters arising out of or related to the conduct covered by this Agreement about which the Department or any designated federal law enforcement agency inquires, including the translation of significant documents at the expense of Berner Kantonalbank; and (g) provide to any state law enforcement agency such assistance as may reasonably be requested in order to establish the basis for admission into evidence of documents already in the possession of such state law enforcement agency in connection with any state civil or criminal tax proceedings brought by such state law enforcement agency against an individual arising out of or related to the conduct described in this Agreement.

Berner Kantonalbank further agrees to undertake the following:

1. Berner Kantonalbank agrees, to the extent it has not provided complete transaction information pursuant to Part II.D.2.b.vi of the Swiss Bank Program, and set forth in subparagraph (c) on pages 2-3 of this Agreement, because the Tax Division has agreed to specific dollar threshold limitations for the initial production, Berner Kantonalbank will promptly provide the entirety of the transaction information upon request of the Tax Division.
2. Berner Kantonalbank agrees to close as soon as practicable, and in no event later than two years from the date of this Agreement, any and all accounts of recalcitrant account holders, as defined in Section 1471(d)(6) of the Internal Revenue Code; has implemented, or will implement, procedures to prevent its

employees from assisting recalcitrant account holders to engage in acts of further concealment in connection with closing any account or transferring any funds; and will not open any U.S. Related Accounts except on conditions that ensure that the account will be declared to the United States and will be subject to disclosure by Berner Kantonalbank.

3. Berner Kantonalbank agrees to use best efforts to close as soon as practicable, and in no event later than the four-year term of this Agreement, any and all U.S. Related Accounts classified as "dormant" in accordance with applicable laws, regulations and guidelines, and will provide periodic reporting upon request of the Tax Division if unable to close any dormant accounts within that time period. Berner Kantonalbank will only provide banking or securities services in connection with any such "dormant" account to the extent that such services are required pursuant to applicable laws, regulations and guidelines. If at any point contact with the account holder(s) (or other person(s) with authority over the account) is re-established, Berner Kantonalbank will promptly proceed to follow the procedures described above in paragraph 2.
4. Berner Kantonalbank agrees to retain all records relating to its U.S. cross-border business, including records relating to all U.S. Related Accounts closed during the Applicable Period, for a period of ten (10) years from the termination date of the this Agreement.

With respect to any information, testimony, documents, records or other tangible evidence provided to the Tax Division pursuant to this Agreement, the Tax Division provides notice that it may, subject to applicable law and regulations, disclose such information or materials to other domestic governmental authorities for purposes of law enforcement or regulatory action as the Tax Division, in its sole discretion, shall deem appropriate.

Berner Kantonalbank's obligations under this Agreement shall continue for a period of four (4) years from the date this Agreement is fully executed. Berner Kantonalbank, however, shall cooperate fully with the Department in any and all matters relating to the conduct described in this Agreement, until the date on which all civil or criminal examinations, investigations, or proceedings, including all appeals, are concluded, whether those examinations, investigations, or proceedings are concluded within the four-year term of this Agreement.

It is understood that if the Tax Division determines, in its sole discretion, that: (a) Berner Kantonalbank committed any U.S. federal offenses during the term of this Agreement; (b) Berner Kantonalbank or any of its representatives have given materially false, incomplete, or misleading testimony or information; (c) the misconduct extended beyond that described in the Statement of Facts or disclosed to the Tax Division pursuant to Part II.D.1 of the Swiss Bank Program; or (d) Berner Kantonalbank has otherwise materially violated any provision of this Agreement or the terms of the Swiss Bank Program, then (i) Berner Kantonalbank shall thereafter be subject to prosecution and any applicable penalty, including restitution, forfeiture, or criminal fine, for any federal offense of which the Department has knowledge, including perjury and obstruction of justice; (ii) all statements made by Berner Kantonalbank's

representatives to the Tax Division or other designated law enforcement agents, including but not limited to the appended Statement of Facts, any testimony given by Berner Kantonalbank's representatives before a grand jury or other tribunal whether prior to or subsequent to the signing of this Agreement, and any leads therefrom, and any documents provided to the Department, the Internal Revenue Service, or designated law enforcement authority by Berner Kantonalbank shall be admissible in evidence in any criminal proceeding brought against Berner Kantonalbank and relied upon as evidence to support any penalty on Berner Kantonalbank; and (iii) Berner Kantonalbank shall assert no claim under the United States Constitution, any statute, Rule 410 of the Federal Rules of Evidence, or any other federal rule that such statements or documents or any leads therefrom should be suppressed.

Determination of whether Berner Kantonalbank has breached this Agreement and whether to pursue prosecution of Berner Kantonalbank shall be in the Tax Division's sole discretion. The decision whether conduct or statements of any current director, officer or employee, or any person acting on behalf of, or at the direction of, Berner Kantonalbank, will be imputed to Berner Kantonalbank for the purpose of determining whether Berner Kantonalbank has materially violated any provision of this Agreement shall be in the sole discretion of the Tax Division.

In the event that the Tax Division determines that Berner Kantonalbank has breached this Agreement, the Tax Division agrees to provide Berner Kantonalbank with written notice of such breach prior to instituting any prosecution resulting from such breach. Within thirty (30) days of receipt of such notice, Berner Kantonalbank may respond to the Tax Division in writing to explain the nature and circumstances of such breach, as well as the actions that Berner Kantonalbank has taken to address and remediate the situation, which explanation the Tax Division shall consider in determining whether to pursue prosecution of Berner Kantonalbank.

In addition, any prosecution for any offense referred to on page 1 of this Agreement that is not time-barred by the applicable statute of limitations on the date of the announcement of the Swiss Bank Program (August 29, 2013) may be commenced against Berner Kantonalbank, notwithstanding the expiration of the statute of limitations between such date and the commencement of such prosecution. For any such prosecutions, Berner Kantonalbank waives any defenses premised upon the expiration of the statute of limitations, as well as any constitutional, statutory, or other claim concerning pre-indictment delay and agrees that such waiver is knowing, voluntary, and in express reliance upon the advice of Berner Kantonalbank's counsel.


It is understood that Berner Kantonalbank contends that it has jurisdictional arguments and defenses that it could raise to support a claim that it is not subject to prosecution for any criminal offense in the courts of the United States. By entering into this Agreement, Berner Kantonalbank does not prospectively waive these arguments or defenses and it reserves the right to assert any applicable jurisdictional argument or defense in any future prosecution or civil action by the United States.

It is understood that the terms of this Agreement, do not bind any other federal, state, or local prosecuting authorities other than the Department. If requested by Berner Kantonalbank,


the Tax Division will, however, bring the cooperation of Berner Kantonalbank to the attention of such other prosecuting offices or regulatory agencies.

It is further understood that this Agreement and the Statement of Facts attached hereto may be disclosed to the public by the Department and Berner Kantonalbank consistent with Part V.B of the Swiss Bank Program.

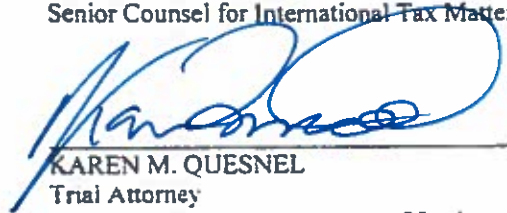
This Agreement supersedes all prior understandings, promises and/or conditions between the Department and Berner Kantonalbank. No additional promises, agreements, and conditions have been entered into other than those set forth in this Agreement and none will be entered into unless in writing and signed by both parties.


CAROLINE D. CIRAULO
Acting Assistant Attorney General
Tax Division

6/9/2015
DATE


THOMAS J. SAWYER
Senior Counsel for International Tax Matters

6/9/2015
DATE


KAREN M. QUESNEL
Trial Attorney
Tax Division, U.S. Department of Justice

6/9/2015
DATE

AGREED AND CONSENTED TO:

BERNER KANTONALBANK AG

By: 
ANTOINETTE HUNZIKER-EBNETER
Chairperson of the Board of Directors

28.5.15
DATE

By: 
HANSPETER RUFENACHT
Chief Executive Officer

28.5.15
DATE

APPROVED:

DANIEL W. LEVY
McKool Smith

5/29/15
DATE


ERIC B. HALPER
McKool Smith

5/29/15
DATE

**EXHIBIT A TO BERNER KANTONALBANK AG
NON-PROSECUTION AGREEMENT**

STATEMENT OF FACTS

INTRODUCTION

1. Berner Kantonalbank AG (“BEKB” or “the Bank”) was founded in 1834 as Kantonalbank von Bern, the first Swiss cantonal bank. In 1846, the Hypothekarkasse was founded for mortgage lending, and in 1991 it merged with the Kantonalbank von Bern to form Berner Kantonalbank AG. The Canton of Bern, holding 51.5% of the shares of the Bank, is the majority shareholder. BEKB is based in the Canton of Bern, Switzerland and presently has 73 branches. After 1999, the Bank also opened branches in the Canton of Solothurn. BEKB has approximately 1,400 employees. The Bank has no branches or offices in Zurich or Geneva, and has never had any branch offices outside of Switzerland. The Bank’s primary market is the Canton of Bern and its clientele is mostly based in the Canton of Bern. The vast majority of the assets held by the Bank for its clients belong to Swiss-domiciled customers. BEKB does not operate a private bank or business unit to cater to high net worth individuals.
2. During the Applicable Period, as defined in the United States Department of Justice’s Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks (referred to as the “Swiss Bank Program”), the Bank had approximately 500,000 accounts and held approximately \$45 billion in client assets.

U.S. INCOME TAX & REPORTING OBLIGATIONS

3. U.S. citizens, resident aliens, and legal permanent residents have an obligation to report all income earned from foreign bank accounts on their tax returns and to pay the taxes due on that income. Since tax year 1976, U.S. citizens, resident aliens, and legal permanent residents have had an obligation to report to the Internal Revenue Service (“IRS”) on Schedule B of a U.S. Individual Income Tax Return, Form 1040, whether that individual had a financial interest in, or signature authority over, a financial account in a foreign country in a particular year by checking “Yes” or “No” in the appropriate box and identifying the country where the account was maintained.
4. Since 1970, U.S. citizens, resident aliens, and legal permanent residents who have had a financial interest in, or signature authority over, one or more financial accounts in a foreign country with an aggregate value of more than \$10,000 at any time during a particular year have been required to file with the Department of the Treasury a Report of Foreign Bank and Financial Accounts, FinCEN Form 114 (the “FBAR,” formerly known as Form TD F 90-22.1). The FBAR must be filed on or before June 30 of the following year.

5. An “undeclared account” was a financial account owned by an individual subject to U.S. tax and maintained in a foreign country that had not been reported by the individual account owner to the U.S. government on an income tax return and an FBAR.
6. “U.S. Related Accounts” means accounts which exceeded \$50,000 in value at any time during the Applicable Period, and as to which indicia exist that a U.S. Person or Entity has or had a financial or beneficial interest in, ownership of, or signature authority (whether direct or indirect) or other authority over the account.
7. Since 1935, Switzerland has maintained criminal laws that ensure the secrecy of client relationships at Swiss banks. While Swiss law permits the exchange of information in response to administrative requests made pursuant to a tax treaty with the United States and certain legal requests in cases of tax fraud, Swiss law otherwise prohibits the disclosure of identifying information without client authorization. Because of the secrecy guarantee that they created, these Swiss criminal provisions have historically enabled U.S. clients to conceal their Swiss bank accounts from U.S. authorities.
8. In or about 2008, Swiss bank UBS AG (“UBS”) publicly announced that it was the target of a criminal investigation by the Internal Revenue Service and the United States Department of Justice and that it would be exiting and no longer accepting certain U.S. clients. On February 18, 2009, the Department of Justice and UBS filed a deferred prosecution agreement in the Southern District of Florida in which UBS admitted that its cross-border banking business used Swiss privacy law to aid and assist U.S. clients in opening accounts and maintaining undeclared assets and income from the IRS. Since the UBS investigation became public, several other Swiss banks have publicly announced that they were or are the targets of similar criminal investigations and that they would likewise be exiting and not accepting certain U.S. clients (UBS and the other targeted Swiss banks are collectively referred to as “Category I banks”). These cases have been closely monitored by banks operating in Switzerland, including BEKB, since at least August of 2008.

OVERVIEW OF THE BANK’S U.S. CROSS-BORDER BUSINESS

9. Berner Kantonalbank’s main lines of business are credit for individuals and businesses, financing partnerships with businesses, and asset management. Specifically, the Bank provides services in the following areas (a) retail banking (including home mortgages and savings accounts); (b) corporate banking (including small business loans); (c) retail banking with securities holdings and a higher level of service; and (d) asset management (portfolio management for institutional investors). The Bank did not structure, operate, or supervise its U.S. Related Accounts in any way that was different or separate from its non-U.S. Related Accounts. The Bank’s board of directors, executive management, and heads of various business units structured, operated, and supervised the Bank’s client-facing business generally.

10. The Bank, during the Applicable Period, held approximately 720 U.S. Related Accounts, which included both undeclared and not undeclared accounts, with total assets of approximately \$176.5 million.
11. The Bank was aware that U.S. taxpayers had a legal duty to report to the IRS and pay taxes on the basis of all of their income, including income earned in accounts that the U.S. taxpayers maintained at the Bank. The Bank knew or had reason to know that it was likely that some U.S. taxpayers who maintained accounts at the Bank during the Applicable Period were not complying with their U.S. reporting obligations.
12. The Bank provided services that facilitated some U.S. clients' opening and maintaining undeclared accounts in Switzerland and concealing the assets the clients held in those accounts and income they received in connection with those accounts. Those services included the following:
 - opening and maintaining numbered accounts for U.S. taxpayers and allowing some clients to use code names for their accounts, rather than using the full account numbers, thereby assisting such U.S. taxpayers in concealing their identity and assets. For numbered accounts, access to information about the accounts, including the identities of the account holders, was limited to only certain employees of the Bank. Of the 720 U.S. Related Accounts, 11 (or 1.5%) were "numbered" accounts;
 - opening and maintaining a numbered account for a client who was a dual U.S.-Swiss citizen who had a U.S. passport, when the relationship manager knew that, although the client had relatives in Switzerland, the client lived in the United States and had a U.S. passport. In 2011 and 2012, when the client was asked to execute documents relating to the Foreign Account Tax Compliance Act ("FATCA"), the client refused and, in response, the Bank closed the account and the account holder made large cash withdrawals from the numbered account. In 2014, as part of the Swiss Bank Program, the Bank determined that the account was not declared;
 - opening approximately 22 accounts for account holders exited from other Swiss banks and accepting deposits of funds from accounts at the banks from which the account holders exited;
 - processing standing orders for a person who had power of attorney over two accounts maintained by two relatives to issue checks of \$5,000 per month and send the checks to the person who maintained power of attorney in the United States. In 2011, after the Bank contacted the person who maintained power of attorney concerning FATCA and voluntary disclosure, the person who maintained power of attorney asked the Bank to send one check per day of \$9,000 from the relatives' accounts until the accounts were depleted of their balance, which was approximately \$342,000 at the time of the request; and

- providing a hold mail service to, inter alia, its U.S. taxpayer clients — a service by which U.S. persons could request that the Bank hold statements and other account-related mail at the Bank's offices in Switzerland rather than sending the documents to the accountholders in the United States. This service was used by holders of 130 of the 720 U.S. Related Accounts (or 18.1%). As a consequence, documents reflecting the existence of these accounts remained outside of the United States.
13. Berner Kantonalbank opened, serviced, and profited from accounts for U.S. clients who were not complying with their income tax obligations.. The Bank's total revenue associated with all U.S. Related Accounts over the Applicable Period was approximately \$1 million. Due in part to the assistance of BEKB and its personnel, and with the knowledge that Swiss banking secrecy laws would likely prevent the Bank from disclosing their identities to the IRS, some U.S. clients of BEKB filed false and fraudulent U.S. Individual Income Tax Returns, Forms 1040, which failed to report the clients' interests in their undeclared accounts and the related income. Some of the Bank's U.S. clients also failed to file and otherwise report their undeclared accounts on FBARs.
 14. Relationship managers served as the primary contact for U.S. clients with accounts at the Bank. Generally, each active account is assigned to at least one relationship manager. The Bank has approximately 800 relationship managers. Each relationship manager at the Bank has hundreds of customers, with an average of over 600 customers each. The Bank did not have a dedicated group of relationship managers or client advisers assigned to U.S. Related Accounts. U.S. Related Accounts were distributed generally over the entire relationship manager population. For example, 275 relationship managers (out of around 800) were assigned the 720 U.S. Related Accounts, and 187 relationship managers had only one or two U.S. Related Accounts. Account holders might meet with several relationship managers over the life of their accounts, depending on who was working at the branch on any given day. Because of this, the Bank's relationship managers generally did not develop special or close relationships with account holders. Finally, relationship managers never traveled to the United States to solicit clients, service clients, or provide clients with investment advice.
 15. The Bank never utilized a strategy to market its services to U.S. citizens or U.S. residents. The Bank never had a U.S. desk or any foreign desk. Since 2009, the Bank has had policies forbidding the acceptance of orders sent from the United States. According to the Bank's bylaws, no more than five percent of its operating income can come from foreign sources. Relationship managers never traveled to the United States to either solicit clients or to provide clients with investment advice. Moreover, all of the Bank's marketing materials are in German and French — the languages primarily spoken in the Canton of Bern. Embassies located in Bern and tourist destinations in the Canton of Bern do attract visitors from abroad who sometimes seek basic banking

services such as checking accounts and mortgages from the Bank. Many of the U.S. Related accounts were held by U.S. persons with a connection to Switzerland.

16. The Bank's employees were not compensated on the basis of attracting net new money, either from U.S. Persons or others. Many of the employees who were assigned U.S. Related Accounts functioned as account officers who serviced the everyday banking needs of accountholders, such as bill paying. Compensation for the Bank's relationship managers is not based on performance — relationship managers receive a fixed salary with a nominal bonus not to exceed one month's salary.
17. The Bank had a few relationships with external asset managers in connection with its U.S. Related Accounts. External asset managers were typically compensated in the form of retrocession fees that were generally not more than 50% of the commissions generated in the managed accounts less certain expenses that were billed back to the external asset managers. Retrocession is a mechanism by which the Bank shares revenue with external asset managers based on their management of client assets. Two external asset managers managed four U.S. Related Accounts. All four of the accounts were opened before the Applicable Period and all are now closed. The combined high value of assets of the four accounts totaled approximately \$2.1 million. As part of its participation in the Swiss Bank Program, the Bank determined that three of the four externally managed accounts were not undeclared within the meaning of the Swiss Bank Program.
18. Beginning in 1992, Berner Kantonalbank forbade the purchasing or holding of U.S. securities for U.S. persons. After entering into a Qualified Intermediary Agreement with the IRS, in 2005, the Bank maintained this policy, even if the U.S. person had provided an IRS Form W-9 to the Bank. In 2006, the Bank issued a written policy confirming its existing ban on the opening of new accounts for persons with U.S. citizenship and domicile.
19. After the Department of Justice's investigation of UBS became public in May 2008, the Bank analyzed the situation and formulated a response. In September 2008, the Bank issued a memorandum directing its employees not to accept as customers former UBS offshore clients who did not wish to transfer to UBS's affiliate in the United States and who were seeking a new banking relationship in Switzerland. The Bank also instructed that no clients domiciled in the United States would be acquired on the basis of correspondence. Additionally, the Bank reaffirmed its policy that all persons subject to U.S. tax must continue to sign a declaration for U.S. taxpayers in which those persons declare that they will refrain from buying or holding U.S. securities with the Bank.
20. In 2009, the Bank instituted additional restrictions, with exceptions for low risk customers such as students or professors, on the opening of accounts for persons subject to U.S. tax. A U.S. person with Swiss citizenship domiciled in Switzerland could open or expand an account, but only if the prospective client signed a waiver

regarding U.S. securities. Clients with existing accounts at the Bank could expand their accounts, but only if the expansion was not, in effect, an account opening; a relationship manager was assigned to the customer; and the customer had a connection to the Bern region.

21. In 2009, the Bank initiated a process to close accounts held by residents of the United States.
22. In 2012, in preparation for compliance with the FATCA, the Bank required all remaining U.S.-domiciled clients to sign a tax declaration waiving bank secrecy with respect to the IRS, limiting contact with the Bank to on-site visits in Switzerland, and agreeing to adhere to all tax laws and regulations of their country of domicile or origin with respect to their assets at the Bank. Refusal to sign the declaration by the end of 2012 resulted in closure of the account.
23. In total, the Bank closed 333 U.S. Related Accounts with total assets of \$121,300,000 since August 1, 2008.
24. In December of 2013, Berner Kantonalbank entered the Swiss Bank Program as a Category 2 bank.

ACCOUNTS OPENED WITH FUNDS FROM UBS AND CREDIT SUISSE

25. Although the Bank did not seek to attract U.S. persons being exited from Swiss banks, including UBS and Credit Suisse, during the Applicable Period, the Bank opened accounts for 22 clients who transferred funds to the Bank from their UBS or Credit Suisse accounts. The 22 accounts were opened with 19 different relationship managers and are not related to each other. Of the 22 accounts, 11 remain open. In general, the account holders of the 22 accounts had a strong connection to Switzerland that may have contributed to the opening of these accounts, including Swiss residence, Swiss citizenship, or both; a pre-existing account holder relationship with the Bank; or a need to receive payments in Switzerland, such as Swiss social security.
26. In one instance, the Bank opened an account in July 2008, which was closed in June 2013 and had a high value of approximately \$90,000. The accountholder is a dentist and a dual Israeli-U.S. citizen who used to live in the United States, but moved to Israel before opening the BEKB account. Several wire transfers were made into the account of amounts between 5,000 and 12,000 Swiss Francs from UBS and Credit Suisse, among other financial institutions, before the account holder closed the account by transferring the balance of more than 60,000 Swiss Francs to Hong Kong. As part of its participation in the Swiss Bank Program, the Bank was unable to obtain evidence of this account's tax status.
27. On another occasion, the Bank opened an account in August 2008, which was closed in August 2012 and had a high value of approximately \$60,000. The accountholder is

a U.S. citizen-resident who opened the account with 45,500 Swiss Francs in cash from a UBS account. When BEKB asked the accountholder to sign a FATCA waiver, the accountholder refused to sign the required forms, closed the account, and transferred the assets to the United States. As part of its participation in the Swiss Bank Program, the Bank was unable to obtain evidence of this account's tax status.

28. The Bank opened another account in June 2010, which was closed in June 2012 and had a high value of approximately \$300,000. The account holders are British citizens who gave a Swiss address upon opening the account. The account was opened with a transfer of more than 260,000 Swiss Francs from Credit Suisse. Subsequent transfers from another Swiss bank and Credit Suisse totaled more than 275,000 Swiss Francs. Frequent transfers were made out to branches of an international bank in the United States, the United Kingdom, and Jersey. The account was not identified as a U.S. Related Account until 2014, during the relationship manager inquiry as part of the Bank's participation in the Swiss Bank Program, when the relationship manager indicated that the account holder had provided a new address in the United States in 2011. As part of its participation in the Swiss Bank Program, the Bank was unable to obtain evidence of this account's tax status.

CLOSING OF ACCOUNTS AND CONCEALMENT OF ASSETS

29. Twenty-three U.S. Related Accounts were closed within one month of making cash withdrawals of over 100,000 Swiss Francs. Eighteen U.S. Related Accounts were closed within one month of making transfers of over 100,000 Swiss Francs to other accounts at the Bank. An additional 49 U.S. Related Accounts were closed within one month of making transfers of over 100,000 Swiss Francs to the United States.
30. In one instance, a dual Swiss-U.S. citizen living in the United States, who had relatives in Switzerland, was asked by the relationship manager about FATCA and voluntary disclosure. In response to the account holder's failure to execute FATCA-related documents, the Bank took steps to close the account. In connection with the closing of the account, the account holder withdrew \$70,000 and approximately 500,000 Swiss Francs in cash.
31. In eight instances, the Bank processed standing orders from U.S. persons to transfer amounts under \$10,000 from their U.S. Related Accounts. All but two of those accounts were opened before the Applicable Period.

BEKB'S COOPERATION THROUGHOUT THE SWISS BANK PROGRAM

32. Throughout its participation in the Swiss Bank Program, BEKB committed to providing full cooperation to the U.S. government and has generally made timely and comprehensive disclosures regarding its cross-border business with, inter alia, U.S.

persons. Specifically, the Bank, with the assistance of U.S. and Swiss counsel, outside information technology support, and in compliance with Swiss law has:

- conducted an internal investigation which included but is not limited to: (a) interviews of key relationship managers, supervisory relationship managers and members of management; (b) reviews of client account files and correspondence; (c) analysis of relevant management policies; and (d) review of email;
- reviewed U.S. Related Accounts held at the Bank since August of 2008 to determine whether any accounts would support treaty requests to the Swiss competent authority for U.S. client account records. None of the U.S. Related Accounts met the “fraud and the like” treaty standard;
- described in detail the structure of its cross-border business with U.S. persons, which included, but is not limited to: (a) the policies concerning U.S. account holders effective during the Applicable Period; (b) a narrative description of five of the top twenty accounts by value of assets and of an additional 15 of the next largest accounts by value for which the Bank was unable to obtain evidence of the account holders’ tax status; (c) a narrative description of the 14 U.S. Related accounts held by entities; (d) a narrative description of the four externally managed U.S. Related Accounts; (e) a narrative description of seven accounts opened by the Bank for U.S. persons who used funds from Swiss banks from which the account holders had been exited; and (f) a chart summarizing the U.S. Related Accounts managed by the top ten relationship managers;
- provided a list of the names and functions of sixteen individuals who structured, operated, or supervised the cross-border business at Berner Kantonalbank. These individuals served as the chairman of the board of directors, members of the executive board, regional managers, heads of departments, or heads of divisions. The regional managers managed relationship managers in their respective banks;
- provided information concerning its relationship managers; and
- provided information on its relationships with external asset managers.

**RESOLUTION OF THE BOARD OF DIRECTORS
OF BERNER KANTONALBANK AG**

At a duly held meeting held on May 28, 2015, the Board of Directors (the "Board") of Berner Kantonalbank AG (the "Bank") resolved as follows:

WHEREAS, the Bank has been engaged in discussions with the United States Department of Justice (the "Department") arising out of the Bank's participation in Category 2 of the Department's Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks;

WHEREAS, in order to conclude such discussions, the Department has proposed that the Bank enter into a non-prosecution agreement with the Department substantially in the form attached hereto (the "Agreement"); and

WHEREAS, the Bank's outside U.S. and Swiss counsel have advised the Board of the Bank's rights, possible defenses, the terms of the Agreement, and the consequences of entering into the Agreement; and

WHEREAS, the Board has reviewed the Agreement, including the Statement of Facts attached to the Agreement, consulted with U.S. and Swiss counsel in connection with this matter, and voted to enter into the Agreement;

The Board hereby RESOLVES that:

1. Antoinette Hunziker-Ebnetter, Chairwoman of the Board, and Hanspeter Rüfenacht, Chief Executive Officer, are hereby authorized to execute the Agreement on behalf of the Bank substantially in the form reviewed by the Board and with such non-material changes as they may approve.
2. Daniel W. Levy and Eric B. Halper, of McKool Smith P.C., U.S. counsel to the Bank, are hereby authorized to execute the Agreement as additional signatories.
3. The Bank agrees to pay an amount equal to US\$4,619,000 pursuant to the Agreement and to perform the obligations described in the Agreement consistent with, and subject to, Swiss law;
4. The Board hereby authorizes, empowers, and directs Antoinette Hunziker-Ebnetter and Hanspeter Rüfenacht, or their delegates, to take, on behalf of the Bank, any and all actions as may be necessary or appropriate, and to approve and execute the forms, terms, or provisions of any agreement or other documents as may be necessary or appropriate to carry out and effectuate the purpose and intent of the foregoing resolutions; and

Exhibit B to Non-Prosecution Agreement, dated May 21, 2015

5. All of the actions of Antoinette Hunziker-Ebnetter and Hanspeter Rüfenacht, which actions would have been authorized by the foregoing resolutions except that such actions were taken prior to the adoption of such resolutions, are hereby severally ratified, confirmed, approved, and adopted as actions on behalf of the Bank.

IN WITNESS WHEREOF, the Board of Directors of the Bank has executed this Resolution, effective as of May 28, 2015.



Hanspeter Merz
Secretary of the Board of
Directors of Berner Kantonalbank AG