

**FINANCIAL INDUSTRY REGULATORY AUTHORITY (FINRA)  
OFFICE OF HEARING OFFICERS**

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REGISTRATION & DISCLOSURE

Department of Enforcement,

Complainant,

v.

OPPENHEIMER & CO. INC.  
(CRD NO. 249)

AND



Respondents.

Disciplinary Proceeding  
No. 2005000316701

Hearing Officer AWH

**ORDER ACCEPTING OFFER  
OF SETTLEMENT**

Date: October 30, 2007

**INTRODUCTION**

Disciplinary Proceeding No. 2005000316701 was filed on January 9, 2006 by the Department of Enforcement of the Financial Industry Regulatory Authority ("FINRA") ("Complainant"). Respondents Oppenheimer & Co. Inc. ("Oppenheimer" or "Respondent") and [REDACTED] submitted an Offer of Settlement ("Offer") to Complainant on August 10, 2007. Pursuant to NASD Rule 9270(e), the Complainant, Hearing Panel, and the National Adjudicatory Council ("NAC"), a Review Subcommittee of the NAC, or the Office of Disciplinary Affairs ("ODA") have accepted the uncontested Offer. Accordingly, this Order now is issued pursuant to NASD Rule 9270(e)(3). The findings, conclusions and sanctions set forth in this Order are those stated in the Offer as accepted by the Complainant, and Hearing Panel, and approved by the NAC.

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Under the terms of the Offer, Respondents have consented, without admitting or denying the allegations of the Complaint, and solely for the purposes of this proceeding and any other proceeding brought by or on behalf of FINRA, or to which FINRA is a party, to the entry of findings of fact and violations by Respondent Oppenheimer of NASD Rules 8210, 3010, and 2110 as alleged in the Complaint, and to the imposition of the sanctions set forth below, and fully understand that this Order will become part of Oppenheimer's permanent disciplinary record and may be considered in any future actions brought by FINRA.

With consent of Respondents, FINRA has dismissed the allegations of violations of NASD Rules 8210, 3010(a), and 2110 by Respondent [REDACTED] as alleged in the Complaint, with prejudice, from this proceeding.

#### **BACKGROUND**

Oppenheimer has been a member of FINRA (f/k/a NASD) since at least March 1955. The firm is headquartered in New York City and is a full-service, self-clearing broker-dealer. It is currently one of the largest broker-dealers in the United States with approximately 3,000 employees in 83 offices in 21 states and two foreign jurisdictions. Oppenheimer is a wholly owned subsidiary of Oppenheimer Holdings, Inc., a publicly held company based in Toronto and listed on the New York Stock Exchange. In January 2003, Fahnestock & Co. Inc. acquired the U.S. Private Client Division of CIBC World Markets Corp. operating under the name Oppenheimer and subsequently assumed the Oppenheimer name.

[REDACTED] was first registered with a FINRA (f/k/a NASD) member in 1968 and has been the Chief Executive Officer of Oppenheimer or its predecessors continuously since 1985.

The firm's recent relevant disciplinary history follows:

On July 9, 2007, Oppenheimer entered into a Consent Order with the Commonwealth of

Massachusetts filed by the Enforcement Section of Massachusetts Securities Division. As part of the Consent Order, Oppenheimer's conduct was found to have violated M.G.L. c. 110A, § 204 (a)(2)(G); § 204(a)(2)(J); and § 404. Specifically, the Commonwealth found that Oppenheimer failed to reasonably supervise a registered representative; failed to conduct an adequate and thorough investigation of a registered representative's activities; failed to provide its branch office manager with adequate assistance in conducting an investigation; made or caused to be made filings with the Massachusetts Securities Division that were at the time and in light of the circumstances false or misleading in material respects, and; Oppenheimer failed to design, implement, and enforce a reasonable supervisory system with respect to its production of e-mail in response to regulatory requests for information. The firm was censured, fined \$1,000,000, ordered to pay a customer approximately \$135,000, directed to permanently cease and desist from violations of the Massachusetts Uniform Securities Act, M.L.G. M.L.G., and; directed to retrain an Independent Consultant to review certain of the firm's branch office policies, procedures and supervisory controls. (Docket Nos. E-2005-0195 & E-2006-0071)

On November 3, 2006, NASD accepted a Letter of Acceptance, Waiver and Consent from Oppenheimer in relation to violations of NASD Conduct Rules 2110 and 3010, NASD Marketplace Rule 6740, and SEC Rules 10b-10, 15c2-11, 17a-3, 17a-4, and 200(g). The firm was censured and fined \$27,500. (Case No. 20050017907-01).

On September 26, 2006, the Department of Enforcement of NASD filed a Complaint against the firm charging violations of MSRB Rules G-14 and G-27, Section 17(a) of the Securities Exchange Act of 1934 and Rule 17a-4 thereunder, and NASD Rules 8210, 2110, 3110, and 3010(a) and (b) in that the firm failed to timely and accurately report municipal securities transactions to the Municipal Securities Rulemaking Board, failed to have a system in place to

save all electronic communications between its employees, and provided untimely and incomplete responses to requests for information made under Procedural Rule 8210. The trade reporting violations were alleged to have occurred from January 1, 2003 to May 31, 2004. An Offer of Settlement was entered in that matter, effective October 2006, and Oppenheimer consented to a fine of \$800,000 and to engage outside counsel to review and modify Oppenheimer's written supervisory procedures. (Case No. CE4050002).

On June 30, 2006, NASD accepted a Letter of Acceptance, Waiver and Consent from Oppenheimer in relation to violations of NASD Rules 2110, 3010, and 5220(e), for, as an intermarket trading system/computer assisted execution system (ITS/CAES) market maker, failing to maintain continuous two-sided quotations in the absence of the grant of an excused withdrawal or a functional excused withdrawal by NASD; and failing to maintain a supervisory system that provided for supervision reasonably designed to achieve compliance with respect to applicable securities laws, regulations, and NASD rules concerning maintaining two-sided quotations as an ITS/CAES market maker. The firm was censured, fined \$17,500, and ordered to revise its written supervisory procedures with respect to maintaining two-sided quotations as an ITS/CAES market maker. (Case No. 20050002356-01).

On January 9, 2006, NASD accepted a Letter of Acceptance, Waiver and Consent from Oppenheimer in relation to violations of NASD Conduct Rules 2110 and 3010, for failing to file amendments to Forms U-4 and U-5, and initial Form U-5 in a timely manner, and failing to establish and maintain supervisory systems and procedures reasonably designed to achieve compliance with NASD By-Laws, Article V, Sections 2(c), 3(a), and 3(b) reporting obligations ("Article V Reporting Obligations"). The firm was censured, fined \$250,000, and ordered to conduct an audit to assess, and provide a certification regarding, the effectiveness of the firm's

systems and procedures for ensuring compliance with Article V Reporting Obligations. (Case No. EAF0400720002).

On October 18, 2004, NASD's Department of Market Regulation filed a complaint against the firm charging violations of NASD Rules 3370, 3110, and 3010, NASD Marketplace Rule 5220(e), and SEC Rules 10a-1, 10b-10, 17a-3 and 17a-4 in that Oppenheimer failed to make and annotate an affirmative determination for short sales, failed to mark orders as short, failed to disclose correct capacity, failed to show time of execution and correct volume, failed to maintain two-sided quotations, and failed to establish and maintain a supervisory system. The violations occurred in February 2003, with the exception of the two-sided quotations, which occurred between April and June 2003. An Offer of Settlement for the named violations was entered in that matter, effective May 17, 2005, and Oppenheimer consented to a censure and fine of \$32,500. (Case No. CMS040156).

On June 4, 2003, Oppenheimer consented to a censure and findings that it had failed to notify the NYSE and other appropriate regulators of problems at the firm and violated, *inter alia*, Exchange Rules 401 and 412 and SEC Regulation § 240.17a-11(d). The firm also was found to have failed to make or keep current or preserve books and records, and failed to supervise. Oppenheimer was fined \$500,000 agreed to certain undertakings. (NYSE Disc. Action 2003-100).

## **FINDINGS AND CONCLUSIONS**

It has been determined that the Offer be accepted. Pursuant to the Offer, the allegations against Respondent [REDACTED] are hereby dismissed.

In connection with charges against Oppenheimer, findings are hereby made as follows:

### **Summary**

1. On June 11, 2003, and on November 20, 2003, Oppenheimer submitted inaccurate and incomplete data in response to NASD's request that the firm perform a self-assessment of its mutual fund breakpoint discount practices. Oppenheimer knowingly, or at a minimum, recklessly, submitted flawed data to NASD, failed to notify NASD that the data was flawed, failed to follow up to correct the firm's data, and failed to timely submit accurate data to NASD. Oppenheimer's conduct violated NASD Procedural Rule 8210 and Conduct Rule 2110. In addition, Oppenheimer failed to adequately supervise the submission of data to NASD and failed to appropriately delegate to a qualified person the responsibility of ensuring that the data was collected and submitted to NASD in a complete, accurate and timely manner in violation of NASD Conduct Rules 3010(a) and 2110.

### **Facts**

2. On January 16, 2003, NASD conducted an on-line survey (the "Survey") of its member broker-dealers, including Oppenheimer, to collect statistical information regarding broker-dealers' sales of mutual funds. Item 12 of the Survey required the firms to answer the following questions, among others: (i) "Does the firm maintain a database of mutual fund information that includes breakpoint schedules, information regarding the types of accounts and share classes that may be linked to obtain sales charge discounts and other

information critical to the pricing decision?,” (ii) “Does the firm’s customer account database maintain account linkages for the purpose of identifying breakpoint opportunities?” and (iii) “Are these databases linked to ensure customers receive the appropriate sales charges?”

3. As of February 14, 2003, over 5,000 broker-dealers, including Oppenheimer, had responded to the Survey. In Oppenheimer’s response to Item 12 of the Survey, the firm answered “No” to each of the three above-quoted questions and further stated that, with respect to its mutual fund breakpoint discount practices, “[t]he compliance department reviews transactions for breakpoint violations. Most breakpoint commission resolution is effected by the mutual fund families.” Oppenheimer’s Survey response listed LS, a compliance officer at Oppenheimer, as the person responsible for the information contained in the Survey.
4. On March 11, 2003, NASD and several other securities regulators jointly issued a report of examination (the “Joint Report”) that showed that nearly one in three mutual fund transactions in front-end load mutual funds that appeared eligible for a breakpoint discount did not receive one.
5. As a result of the findings in the Joint Report, and based on concerns that investors were not consistently receiving available sales load discounts, NASD determined that it would require approximately 2,000 broker-dealers that sold front-end load mutual funds during 2001-2002 to conduct a self-assessment of their compliance with mutual fund breakpoint discount requirements (the “breakpoint self-assessment”), and report the results to NASD. Oppenheimer was among the approximately 2,000 firms selected.

**A. NASD issued a Rule 8210 request to Oppenheimer  
to perform a breakpoint self-assessment.**

6. On or about March 17, 2003, NASD sent a request to Oppenheimer (the “March 17<sup>th</sup> Request”), pursuant to NASD Procedural Rule 8210, that required Oppenheimer to conduct a breakpoint self-assessment. The March 17<sup>th</sup> Request was addressed to LS, a compliance officer at Oppenheimer.
7. The March 17<sup>th</sup> Request required Oppenheimer to complete an online self-assessment, following a standard sampling methodology established by NASD. The online self-assessment (the “Self-Assessment”) and the self-assessment instructions (“Instructions”) were posted on the “Breakpoint Web Page” of NASD’s web site.
8. The Instructions required Oppenheimer to sample 800 front-end load Class “A” share transactions effected between January 1, 2001 and December 31, 2002, and to fill-out various spreadsheet fields with information regarding the 800 Class “A” share transactions, including without limitation NAV data and information on linked or related accounts.
9. The March 17<sup>th</sup> Request stated that Oppenheimer’s Self-Assessment was due on May 15, 2003, which NASD subsequently extended (for all firms) to June 13, 2003.
10. WC was designated as the “Responsible Principal” – the firm’s registered principal responsible for the Self-Assessment – in the firm’s Self-Assessment submission to NASD.
11. From on or about mid-May to on or about early June 2003, WC was out of the office for surgery and follow-up treatment for a medical condition. Upon WC’s return to the office in early June 2003, WC was taking strong medication that made WC less aware than he otherwise would have been.

12. On or about June 10, 2003, firm management knew that the 800 sample transactions that comprised the firm's Self-Assessment were flawed because they included Class "A," "B" and "C" share transactions, whereas NASD had requested only Class "A" share transactions.
13. The firm knew that only Class "A" share transactions were responsive to NASD's March 17<sup>th</sup> Request. The firm knew the firm's Self-Assessment data included Class "A," "B" and "C" share transactions. The firm knew that the firm's inclusion of "B" and "C" share transactions improperly diluted the firm's 800-transaction sample, rendering it incomplete and inaccurate. Rather than sampling 800 Class "A" share transactions, the firm knew that the firm had sampled fewer Class "A" transactions than what NASD had required.
14. The Firm submitted flawed Self-Assessment data to NASD. The following day, June 11, 2003, Oppenheimer electronically submitted its flawed Self-Assessment to NASD, two days before the June 13<sup>th</sup> deadline.
15. Although the firm knew that the Self-Assessment data submitted by the firm was flawed because it erroneously contained Class "B" and "C" share transactions, the firm did not communicate this to NASD, either before or after the firm's submission.

**B. Oppenheimer's Self-Assessment, filed on June 11, 2003,  
was improperly prepared and pervasively flawed.**

16. By letter dated June 13, 2003 (the "June 13<sup>th</sup> Letter") from NASD to WC and to PC, Oppenheimer's Director of Compliance, NASD informed Oppenheimer that its Self-Assessment data was "improperly prepared and rife with errors," "pervasively flawed" and "too fundamentally flawed to be of use."
17. The June 13<sup>th</sup> Letter stated, as Oppenheimer already knew, that the firm had improperly included Class "B" and "C" share transactions in the Self-Assessment. The June 13<sup>th</sup>

Letter also identified the following additional flaws with the firm's Self-Assessment data:

a) the data included transactions done at net asset value ("NAV") that were not eligible for the assessment, b) the firm did not include required NAV data as requested by NASD, c) the actual sales charge percentages reported by the firm were inaccurate, d) of the 800 transactions reported, the firm identified only one with a linked account, which based on comparable data from other firms, appeared "exceedingly improbable," e) the firm identified only one account that was eligible for a breakpoint discount, which also appeared unlikely, and f) for all transactions, the firm inaccurately entered whole numbers in the fields for actual sales charge and appropriate sales charge.

18. Based on these numerous defects in Oppenheimer's data, NASD's June 13<sup>th</sup> Letter directed Oppenheimer to immediately generate a new, proper sample; to properly perform the Self-Assessment using that sample; and to resubmit the Self-Assessment to NASD.
19. Oppenheimer did not immediately respond to NASD's June 13<sup>th</sup> Letter. Instead, the firm embarked on a process that took more than five months to generate and submit a second Self-Assessment to NASD.
20. On or about August 12, 2003, however, WC's job responsibilities at the firm were terminated, including his responsibility for completing and submitting a second Self-Assessment. WC was terminated for reasons unrelated to WC's responsibilities for, or work on, the Self-Assessment.
21. Oppenheimer failed to designate a qualified Responsible Principal to replace WC as the firm's registered principal responsible for the Self-Assessment.

22. A clerk in the firm's mutual fund operations department electronically submitted the firm's second Self-Assessment (the "second Self-Assessment") on or about November 20, 2003, over five months after the firm submitted its initial Self-Assessment.
23. The second Self-Assessment, like the first, continued to identify WC as the "Responsible Principal" – although, WC had not had any responsibility for the second Self-Assessment for the prior three plus months.

**C. Oppenheimer's second Self-Assessment, filed on November 20, 2003, also contained inaccurate, incomplete, and otherwise flawed data.**

24. Oppenheimer's second Self-Assessment, like the first, also contained inaccurate, incomplete, and otherwise flawed data. For example, the second Self-Assessment included the following obvious deficiencies on its face: a) the data continued to include certain Class "B" share transactions, b) of the 800 transactions reported, the firm identified only one with a linked account, which based on comparable data from other firms, appeared exceedingly improbable, and c) the firm identified no accounts that were eligible for a breakpoint discount, which also appeared unlikely.
25. Based on the obvious deficiencies on the face of the second Self-Assessment, NASD decided to perform an on-site examination at the firm's headquarters to review the second Self-Assessment and the firm's work papers related to the second Self-Assessment. NASD performed its on-site examination from on or about February 9, 2004 through February 13, 2004.
26. In connection with NASD's on-site examination, NASD staff used a random sampling methodology to review a total of 59 transactions from the firm's second Self-Assessment. NASD staff found that the second Self-Assessment, like the first, in numerous instances, failed to identify linked accounts; failed to include proper discount information; failed to

provide the actual sales charge percentages, appropriate sales charge percentages, and the proper discount descriptions; and failed to identify overcharged trades.

27. In order to expand the number of transactions reviewed among the 800-transaction sample that comprised the firm's second Self-Assessment, NASD performed a second on-site examination at the firm's headquarters and reviewed an additional 141 transactions – bringing the total transactions reviewed to 200, or one-fourth of all transactions in the 800-transaction sample. NASD performed this second on-site examination from on or about October 10 through October 21, 2005.
28. In connection with NASD's second on-site examination, NASD staff applied a systematic sampling methodology to review 141 additional transactions from the firm's second Self-Assessment. NASD found that the 141 additional transactions reviewed, like the 59 transactions reviewed during the first on-site examination, in numerous instances, failed to identify linked accounts; failed to include proper discount information; failed to provide the actual sales charge percentages, appropriate sales charge percentages, and the proper discount descriptions; and failed to indicate overcharged trades. For example, NASD found that in over 10% of the 141 transactions reviewed, customers were overcharged and none of these overcharges were noted in the firm's second Self-Assessment.
29. NASD also found that Oppenheimer did not use a valid 800-transaction sample in its second Self-Assessment. For example, NASD identified three transactions that Oppenheimer should not have included in its 800-transaction sample because they were not "Qualifying Automated Purchases" (automated purchases of \$2,500 or more, on which the firm received a concession of greater than 1%), as defined in the Instructions;

these three transactions included one "B" share transaction, and two transactions that were cancelled.

30. Oppenheimer knew that NASD's on-site examinations had identified several continuing flaws with the sample data contained in the firm's second Self-Assessment, and the firm did not undertake any action to correct or submit complete and accurate data to NASD following the second Self-Assessment.

**D. Oppenheimer's flawed and untimely Self-Assessment submissions hampered NASD's ability to assess the firm's breakpoint compliance.**

31. Oppenheimer's Self-Assessment submissions so completely and fundamentally failed to comply with NASD's March 17th Request that NASD could not rely on or use the firm's data for purposes of analyzing the firm's breakpoint compliance in both absolute terms, and in relation to the approximately 2,000 other member firms that contemporaneously submitted breakpoint self-assessments.
32. Oppenheimer's second Self-Assessment was not submitted until November 20, 2003 – more than five months after NASD's June 13<sup>th</sup> Letter requesting an "immediate" response from the firm.

Based on the foregoing, Respondent Oppenheimer violated NASD Rules 8210, 3010(a) and 2110.

Based on these considerations, the sanctions hereby imposed by the acceptance of the Offer are in the public interest, are sufficiently remedial to deter Respondent Oppenheimer from any future misconduct, and represent a proper discharge by FINRA, of its regulatory responsibility under the Securities Exchange Act of 1934.

## SANCTIONS

It is ordered that Respondent Oppenheimer:

1. Be censured;
2. Pay fines totaling \$1,000,000, comprised as follows:
  - \$ 750,000 for violation of NASD Rules 8210 and 2110, and
  - \$ 250,000 for violation of NASD Rules 3010(a) and 2110;
3. Oppenheimer undertakes the following:
  - a. Oppenheimer's Internal Audit Department will conduct audits, consistent with Generally Accepted Auditing Standards, on a quarterly basis for six quarters to review the intake, assignment, and responses to regulatory inquiries. Specifically, the Internal Audit Department will review:
    - i. Whether Oppenheimer delegated responsibility for replying to regulatory requests reasonably;
    - ii. Whether the person delegated with the responsibility carried out that responsibility reasonably;
    - iii. What the process was to comply with the request; and
    - iv. Whether the request was completed in a timely and complete manner.No more than 60 days after the end of each quarter, Oppenheimer shall submit to FINRA staff the Internal Audit Department's quarterly report for the covered quarter.
  - b. Oppenheimer shall:
    - i. Retain, within 60 days of the date of the Order Accepting Offer of Settlement, an Independent Consultant, not unacceptable to FINRA staff, to conduct a comprehensive review of the adequacy of the Firm's policies, systems and procedures (written or otherwise) and training relating to the delegation of responsibility for responding to regulatory requests accurately and completely.
    - ii. Exclusively bear all costs, including compensation and expenses, associated with the retention of the Independent Consultant.
    - iii. Cooperate with the Independent Consultant in all respects, including by providing staff support. Oppenheimer shall place no restrictions on the

Independent Consultant's communications with FINRA staff and, upon request, shall make available to FINRA staff any and all communications between the Independent Consultant and the Firm and documents reviewed by the Independent Consultant in connection with his or her engagement. Once retained, Oppenheimer shall not terminate the relationship with the Independent Consultant without FINRA staff's written approval; Oppenheimer shall not be in and shall not have an attorney-client relationship with the Independent Consultant and shall not seek to invoke the attorney client privilege or other doctrine or privilege to prevent the Independent Consultant from transmitting any information, reports or documents to the FINRA.

- iv. At the conclusion of the review, which shall be no more than 120 days after the date of the Order Accepting the Offer of Settlement, require the Independent Consultant to submit to the Firm and FINRA staff a Written Report. The Written Report shall address, at a minimum, (i) the adequacy of the Firm's policies, systems, procedures and training relating to the delegation of responsibility for responding to regulatory requests accurately and completely; (ii) a description of the review performed and the conclusions reached, and (iii) the Independent Consultant's recommendations for modifications and additions to the Firm's policies, systems, procedures and training; and
- v. Require the Independent Consultant to enter into a written agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the Independent Consultant shall not enter in to any other employment, consultant, attorney-client, auditing or other professional relationship with Oppenheimer, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such. Any firm with which the Independent Consultant is affiliated in performing his or her duties pursuant to this Offer of Settlement shall not, without prior written consent of the FINRA staff, enter in to any employment, consultant, attorney-client, auditing or other professional relationship with Oppenheimer or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.
- c. Within 60 days after delivery of the Written Report, Oppenheimer shall adopt and implement the recommendations of the Independent Consultant or, if it determines that a recommendation is unduly burdensome or impractical, propose an alternative procedure to the Independent Consultant designed to achieve the same objective. The Firm shall submit such proposed alternatives in writing simultaneously to the Independent Consultant and the FINRA staff. Within 30 days of receipt of any proposed alternative procedure, the Independent Consultant shall: (i) reasonably

evaluate the alternative procedure and determine whether it will achieve the same objective as the Independent Consultant's original recommendation; and (ii) provide the Firm with a written decision reflecting his or her determination. The Firm will abide by the Independent Consultant's ultimate determination with respect to any proposed alternative procedure and must adopt and implement all recommendations deemed appropriate by the Independent Consultant.

- d. Within 30 days after the issuance of the later of the Independent Consultant's Written Report or written determination regarding alternative procedures (if any), Oppenheimer shall provide the FINRA staff with a written implementation report, certified by an officer of Oppenheimer, attesting to, containing documentation of, and setting forth the details of the Firm's implementation of the Independent Consultant's recommendations.
- e. Upon written request showing good cause, the FINRA staff may extend any of the procedural dates set forth above.

The sanctions imposed herein shall be effective on a date set by FINRA staff.

SO ORDERED.

FINRA

Signed on behalf of the  
Director of ODA, by delegated authority



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