

NASD
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
20050017907-01

TO: Department of Market Regulation
NASD

RE: Oppenheimer & Co. Inc.
BD No. 249

Pursuant to Rule 9216 of the NASD Code of Procedure, Oppenheimer & Co. Inc. (the "firm" or "OPCO") submits this Letter of Acceptance, Waiver and Consent ("AWC") for the purpose of proposing a settlement of the alleged rule violations described in Part II below. This AWC is submitted on the condition that, if accepted, NASD will not bring any future actions against the firm alleging violations based on the same factual findings.

The firm understands that:

1. Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by NASD's Department of Market Regulation and the National Adjudicatory Council ("NAC") Review Subcommittee or Office of Disciplinary Affairs, pursuant to NASD Rule 9216;
2. If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against the firm; and
3. If accepted:
 - a. this AWC will become part of the firm's permanent disciplinary record and may be considered in any future actions brought by the NASD or any other regulator against the firm;
 - b. this AWC will be made available through NASD's public disclosure program in response to public inquiries about the firm's disciplinary record;
 - c. NASD may make a public announcement concerning this agreement and the subject matter thereof in accordance with NASD Rule 8310 and IM-8310-2; and
 - d. the firm may not take any action or make or permit to be made any public statement, including in regulatory filings or otherwise, denying, directly or indirectly, any allegation in this AWC or create the impression that the AWC is without factual basis. Nothing in this provision affects the firm's testimonial obligations or right to take legal or factual positions in litigation or other legal proceedings in which the NASD is not a party.

The firm also understands that its experience in the securities industry and its disciplinary history may be factors that will be considered in deciding whether to accept this AWC.

OPCO became a member of NASD in 1945, and its registration remains in effect. OPCO has the following relevant disciplinary history:

- In June 2006, NASD accepted OPCO's AWC (20050002356) in which the firm agreed to a censure and a fine of \$17,500, \$10,000 of which was for failing to have in place reasonable written supervisory procedures to ensure compliance with NASD Marketplace Rule 5220(e), from January to June 2004, in violation of NASD Conduct Rule 3010.
- In December 2005, OPCO consented to a censure and a \$2,800,000 fine by the New York Stock Exchange (Case No. 05-181) for failing to establish and implement supervisory procedures concerning anti-money laundering controls and compliance with the Bank Secrecy Act and for violations of SEC Rules 17a-3 and 17a-4 for failing to keep books and records reflecting certain journal entries, among other violations of the securities laws and regulations, from 2002 to 2004.
- In May 2005, NASD accepted OPCO's Offer of Settlement to resolve a Complaint filed in October 2004 by the Department of Market Regulation (CMS040156). The firm agreed to a censure and a total fine of \$32,500, \$7,500 of which was for deficient written supervisory procedures, in violation of NASD Conduct Rule 3010, \$5,000 for violations of SEC Rule 10b-10, and \$5,000 for violations of NASD Conduct Rule 3110 and SEC Rules 17a-3 and 17a-4, in February 2003.
- In December 2003, NASD accepted OPCO's AWC ((MRD200234832) in which the firm agreed to a fine of \$4,500, \$1,000 of which was for violations of Conduct Rule 3110 and SEC Rules 17a-3 and 17a-4, in March 2002.

I.

WAIVER OF PROCEDURAL RIGHTS

The firm specifically and voluntarily waives the following rights granted under the NASD's Code of Procedure:

- A. To have a Formal Complaint issued specifying the allegations against the firm;
- B. To be notified of the Formal Complaint and have the opportunity to answer the allegations in writing;

- C. To defend against the allegations in a disciplinary hearing before a hearing panel, to have a written record of the hearing made and to have a written decision issued; and
- D. To appeal any such decision to the NAC and then to the U.S. Securities and Exchange Commission and a U.S. Court of Appeals.

Further, the firm specifically and voluntarily waives any right to claim bias or prejudgment of the General Counsel, the NAC, or any member of the NAC, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including acceptance, or rejection of this AWC.

The firm further specifically and voluntarily waives any right to claim that a person violated the *ex parte* prohibitions of Rule 9143 or the separation of functions prohibitions of Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including its acceptance or rejection.

II.

ACCEPTANCE AND CONSENT

This matter is the result of (i) OPCO's 2005 Trading and Market Making Surveillance Examination (20050017907), for which the on-site portion of the examination took place on July 25 to 28, 2005, and (ii) an OTC review (20050021285) for compliance with SEC Rule 15c2-11, for trade date July 18, 2005.

For the 2005 TMMS examination, the staff reviewed the following during the on-site examination for trade dates May 24 and 25, 2005:

- 32 customer and proprietary sale transactions, for compliance with SEC Rules 200(g) and/or 203(b);
- 109 customer and proprietary sales, for compliance with NASD Marketplace Rule 6130;
- 50 limit orders executed as principal, for compliance with NASD Conduct Rules 2110, IM-2110-2, and 2320, Marketplace Rules 6440 and 6541, and SEC Rules 11Ac1-1 and 11Ac1-4;
- 14 "non displayed" limit orders and 0 marketable orders in the same securities received while holding the "non-dispayed" orders, for compliance with NASD Conduct Rule 2320;
- 50 limit and market orders executed in a principal or riskless principal capacity, for compliance with capacity reporting under NASD trade reporting and ACT rules;
- One open buy limit order and stop sell limit order in securities traded ex-dividend, for compliance with NASD Conduct Rule 3220;

- 25 orders in securities for which the firm was a market center for trades reported on May 25, 2005, for compliance with the order size/type requirement of SEC Rule 11Ac1-5 (now SEC Rule 605);
 - 30 orders as they related to four security/size/order data statistics published on the firm's monthly order execution report for April 2005, for compliance with SEC Rule 11Ac1-5 (now SEC Rule 605);
 - 25 customer transactions in OTCBB and OTC equity securities, for compliance with NASD Conduct Rules 2320 and 3110(b);
 - 50 cancelled transaction, for compliance with NASD Marketplace Rules 4632(g), 4642(g), 4652(g), 6420(f), and 6620(f) and SEC Rules 17a-3(a)(6) and (a)(7);
 - 16 persons engaged in the firm's trading and market making activities, selected from trading staff in May 2005, for compliance with NASD Membership and Registration Rules;
 - 258 order/trade records prepared and maintained for the above samples, for compliance with NASD Conduct Rule 3110 and SEC Rules 17a-3 and 17a-4;
 - 325 trades reported to ACT or TRACS in connection with the above samples, for compliance with NASD Trade Reporting and ACT rules;
 - 24 customer trade confirmations reviewed in connection with the above samples, for compliance with SEC Rule 10b-10;
 - 50 orders in NNM or SC securities submitted to OATS, for compliance with Marketplace Rule 6955;
 - the firm's establishment and implementation of "regular & rigorous" reviews of the execution quality of orders sent to other market centers for execution, based on procedures in effect in May 2005, for compliance with NASD Conduct Rules 2320 and 3010; and
 - the firm's establishment and implementation of a supervisory system and written supervisory procedures, based on procedures in effect in May 2005, for compliance with NASD Conduct Rule 3010.
- A. The firm hereby accepts and consents, without admitting or denying the allegations or findings, and solely for the purposes of this proceeding and any other proceeding brought by or on behalf of NASD, or to which NASD is a party, prior to a hearing and without an adjudication of any issue of law or fact, to the entry of the following findings by NASD:

2005 TMMS Examination (20050017907)

1. On May 24 and 25, 2005, OPCO executed three long sale orders and incorrectly marked the orders as short sales.
2. The conduct described in paragraph one constitutes separate and distinct violations SEC Rule 200(g).

3. On May 24 and 25, 2005, OPCO failed in three instances to disclose average price and the correct reported price on the customer confirmation. In two other instances, OPCO incorrectly disclosed average price on the customer confirmation.
4. The conduct described in paragraph three constitutes separate and distinct violations of SEC Rule 10b-10.
5. On May 24 and 25, 2005, OPCO failed to: (i) show the correct time of entry on the memorandum of six brokerage orders; (ii) show the order execution time on the memorandum of one brokerage order; (iii) show the order receipt time and the execution time on the memorandum of one brokerage order; (iv) show the correct execution quantity with the correct execution time on the memorandum of three brokerage orders; (v) correctly mark a short sale in OTCBB securities as short instead of short exempt on the memorandum of three brokerage orders; and (vi) preserve for a period of not less than three years, the first two in an accessible place, the memorandum of six brokerage orders.
6. The conduct described in paragraph six constitutes separate and distinct violations of SEC Rule 17a-3 and 17a-4.
7. The firm's supervisory system did not provide for supervision reasonably designed to achieve compliance with respect to the applicable securities laws and regulations, and the Rules of NASD, relating to trade reporting and OATS. The firm's supervisory system did not include written supervisory procedures providing for: (1) identification of the persons responsible for supervision with respect to the applicable rules; (2) a statement of the supervisory steps to be taken by the identified persons; (3) a statement as to how often such persons should take such steps; and (4) a statement as to how the completion of the steps included in the written supervisory procedures should be documented.
8. The conduct described in paragraph seven constitutes a violation of NASD Conduct Rules 2110 and 3010.

OTC Review (20050021285)

9. On July 18, 2005, OPCO published 34 quotations in OTC Equity securities, or, directly or indirectly, submitted such quotations for publication, in a quotation medium, the Pink Sheets, and: (i) did not have in its records the documentation required by SEC Rule 15c2-11(a) ("Paragraph (a) information"); (ii) did not have a reasonable basis under the circumstances for believing that the Paragraph (a) information was accurate in all material respects; or (iii) did not have a reasonable basis under the circumstances for believing that the sources of the Paragraph (a)

information were reliable. The quotations did not represent a customer's indication of *unsolicited interest*.

10. The conduct described in paragraph nine constitutes separate and distinct violations of SEC Rule 15c2-11 and NASD Conduct Rule 2110.
11. For each quotation described in paragraph nine, OPCO failed to file a Form 211 with NASD at least three business days before OPCO's quotations were published or displayed in a quotation medium.
12. The conduct described in paragraph 11 constitutes separate and distinct violations of NASD Marketplace Rule 6740 (currently Marketplace Rule 6640, effective August 1, 2006) and NASD Conduct Rule 2110.
13. The firm's supervisory system did not provide for supervision reasonably designed to achieve compliance with respect to the applicable securities laws and regulations, and the Rules of NASD, relating to compliance with SEC Rule 15c2-11 and NASD Marketplace Rule 6740. The firm's supervisory system did not include written supervisory procedures providing for: (1) identification of the persons responsible for supervision with respect to the applicable rules; (2) a statement of the supervisory steps to be taken by the identified persons; (3) a statement as to how often such persons should take such steps; and (4) a statement as to how the completion of the steps included in the written supervisory procedures should be documented.
14. The conduct described in paragraph 13 constitutes a violation of NASD Conduct Rules 2110 and 3010.

B. The firm also consents to the imposition, at a maximum, of the following sanctions:

A censure and a fine totaling \$27,500, comprised of the following fines:

- \$ 5,000 for violations of SEC Rule 200(g);
- \$ 5,000 for violations of SEC Rule 10b-10;
- \$ 5,000 for violations of SEC Rules 17a-3 and 17a-4;
- \$ 5,000 for violations of SEC Rule 15c2-11 and NASD Marketplace Rule 6740; and
- \$ 7,500 for violations of Conduct Rule 3010.

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

III.

OTHER MATTERS

- A. The firm understands that it may attach a Corrective Action Statement to this AWC, which is a statement of demonstrable corrective steps taken to prevent future misconduct. Respondent understands that it may not deny the charges or make any statement that is inconsistent with the AWC in this Statement. This Statement does not constitute factual or legal findings by NASD, nor does it reflect the views of NASD or its staff.
- B. The firm agrees to pay any monetary sanctions imposed on it upon notice that this AWC has been accepted and that such payments are due and payable, and has attached the Election of Payment form showing the method by which the firm proposes to pay any fine imposed.
- C. The firm specifically and voluntarily waives any right to claim that it is unable to pay, now or at any time hereafter, any monetary sanction imposed in this matter.

The firm certifies that it has read and understands all of the provisions of this AWC and has been given a full opportunity to ask questions about it, and that no offer, threat, inducement, or promise of any kind, other than the terms set forth herein, has been made to induce the firm to submit it.

Respondent,
Oppenheimer & Co. Inc.

9/19/06
Date

By: Allen R. Cox
Name: ALLEN R. COX
Title: VICE PRESIDENT
OTC TRADING

Reviewed by:

[Signature]
Counsel for Oppenheimer & Co. Inc.
CCO

Accepted by NASD:

11/3/06
Date

Thomas R. Gira
Thomas R. Gira
Executive Vice President and Deputy
Department of Market Regulation

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

Attachment:

Standard Election of Payment Form

This Corrective Action Statement is submitted by the Respondent (OPCO- "the Firm"). It does not constitute factual or legal findings by NASD, nor does it reflect the views of the NASD, or its staff.

RE: 20050017907—2005 TMMS Examination

Marking of Short Sales: The Firm contacted Sungard Systems to determine the reason for the incorrect markings in these cases, and the Firm continues to monitor this particular situation to ensure that the system properly marks trades in accordance with Reg SHO.

Confirmation Disclosure of Average Price Trades: Several meetings were held with representatives of the Information Technology Department to review these findings and to ensure that there was not a systemic cause as to why two trades were incorrectly disclosed as average price executions. It appeared that these instances were isolated.

Written Supervisory Procedures- Trade Reporting and OATS: The Firm addressed these findings and modified the OTC Trading Department Procedures.

RE: 20050021285—Quotation in OTC Equity (Non Piggyback Qualified)

Written Supervisory Procedures: The rules and requirements covering these equities were reiterated and reviewed with the traders. Written supervisory procedures to monitor quotes entered by traders in Non Piggyback Qualified equity stocks were established in November 2005.