

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 2013038149001**

TO: Department of Enforcement
Financial Industry Regulatory Authority ("FINRA")

RE: Oppenheimer & Co., Inc., Respondent
Broker-Dealer
CRD No. 249

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

I.

ACCEPTANCE AND CONSENT

- A. The Firm hereby accepts and consents, without admitting or denying the findings, 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, prior to a hearing and without an adjudication of any issue of law or fact, to the entry of the following findings by FINRA:

BACKGROUND

Oppenheimer has been a member of FINRA since 1945 and conducts a general securities business. Oppenheimer has 113 branch offices throughout the United States and more than 2,200 registered representatives. It is a wholly-owned subsidiary of Oppenheimer Holdings, Inc., which is based in Toronto and listed on the New York Stock Exchange.

RELEVANT DISCIPLINARY HISTORY

In AWC No. 2009018102501 (December 2013), FINRA censured and fined Oppenheimer \$675,000 for violating MSRB Rules G-17, G-27 and G-30(a). FINRA found that Oppenheimer violated MSRB Rules G-17 and G-30(a) by selling certain municipal securities to customers at an aggregate price (including any mark-up or mark-down) that was not fair and reasonable, and by not disclosing markups to customers. FINRA found that Oppenheimer violated MSRB Rule G-27 because of the deficiencies in its supervisory system that allowed the conduct to occur.

In AWC No. 2008013630001 (October 2010), FINRA censured and fined Oppenheimer \$57,500 for violating, among other rules, MSRB Rules G-17 and G-30(a) by selling certain municipal securities to customers at an aggregate price (including any mark-up or mark-down) that was not fair and reasonable.

OVERVIEW

From January 1, 2009 through September 20, 2014 (the “relevant period”), Oppenheimer failed to reasonably supervise and to have an adequate supervisory system, including adequate written supervisory procedures, to address short positions in tax-exempt municipal bonds that resulted primarily from trading errors. As a result of these supervisory failures, Oppenheimer inaccurately represented to its customers holding municipal bonds that at least \$188,974.38 in interest that the Firm paid to those customers was exempt from taxation. In fact, the Firm did not hold the bonds on behalf of the customers and the interest that the customers received was paid by Oppenheimer and thus taxable as ordinary income.¹ The Firm failed to consider – and its Dividend department that was responsible for distributing and reconciling the interest owed to customers did not take into account – whether the interest paid to customers should be coded as non-taxable when the interest was paid by the Firm rather than the municipal issuer. Oppenheimer’s failure to have adequate systems and procedures to address instances in which it became short municipal bonds violated MSRB Rule G-27. The Firm’s misstatements to customers regarding the tax-exempt status of interest payments violated MSRB Rules G-17 and G-8. And, its failure to maintain a record of the customers to whom its municipal short positions were allocated violated MSRB Rule G-8.

FACTS AND VIOLATIVE CONDUCT

Facts

Characteristics of Municipal Securities

Following an initial distribution period, municipal bonds generally trade infrequently in an over-the-counter dealer market with more than one million different individual municipal bonds outstanding.² Given the high number of individual municipal bonds, that many investors traditionally buy and hold municipal securities until maturity, and the lack of centralized trading in the municipal securities market, the average municipal bond is less liquid than the average corporate bond and may not always be available for purchase in the secondary market.³

Municipal bonds typically pay tax-exempt interest on a semi-annual basis. Only interest that is received from a municipal issuer is exempt from federal income tax,⁴ and any

¹ This resulted in the underpayment of not less than \$68,227.43 in federal income taxes.

² See Report on the Municipal Securities Market, U.S. Securities and Exchange Commission (July 31, 2012).

³ *Id.*

⁴ See IRS Rev. Rul. 80-135 (1980-1 C.B. 18).

substitute interest paid by a firm on a short position is taxable. If a firm is short a tax-free municipal bond that corresponds to a customer long position, the firm will pay the customer any applicable interest.

Oppenheimer Maintained Short Positions in Municipal Securities

During the relevant period, Oppenheimer held approximately 85 short positions in tax-exempt municipal securities that corresponded to long positions in customer accounts. The short positions resulted primarily from trading and operational errors. In these instances, Oppenheimer paid the interest to customers and the interest was taxable.

The majority of Oppenheimer's municipal short positions occurred through the Firm's retail branches or through the Firm's trading accounts. When branch-level errors occurred in connection with a municipal bond order, the resulting short position was moved to a branch error account. The branch office managers were responsible for reviewing and covering all short positions in their branch error account. While the Firm's procedures directed branch managers to cover all transactions placed in the branch error account as soon as possible, the Firm did not provide adequate guidance or oversight on how and when municipal short positions should be covered. When a municipal short position was created through the Firm's institutional sales and trading activity, the resulting short position was held in the corresponding Firm trading account. However, prior to April 2014 the Firm did not have any procedures regarding how and when those municipal short positions should be covered. As a result of the Firm's procedures, or lack thereof, regarding municipal short positions in branch error accounts and Firm trading accounts, many of the short positions were not covered in a timely fashion. This deficiency may have been prolonged due to the difficulty of covering these positions in light of the characteristics of municipal securities described above as well as the limited amount outstanding of a particular municipal bond.

In 2013, Oppenheimer recognized that short positions were not being covered in a timely fashion and subsequently revised its procedures to reduce the number of aged short positions. Nevertheless, during the relevant period, Oppenheimer often did not cover municipal short positions for a month or more, and some of the short positions were not covered for more than a year. Oppenheimer has also implemented revised procedures to minimize its short municipal bond positions and to properly report firm-paid interest as taxable.

Oppenheimer Did Not Ensure Appropriate Tax Reporting to Customers When It Was Short Municipal Bonds

As described above, the Firm's trading departments and branch offices were responsible for covering short positions in municipal bonds in their respective trading and error accounts, and the Firm's Dividend department was responsible for crediting interest payments to customer accounts. The Dividend department credited interest payments to customers through a dividend payment system, which would classify each municipal interest payment as taxable or tax-exempt. Separately, the Firm's Year End department

utilized an application known as "Compliance Plus" to perform the Firm's year end reporting to the IRS and issue Forms 1099 to customers. The "Compliance Plus" application relied on payment classification information from the dividend payment system to determine whether interest would be classified as taxable or tax-exempt. The dividend payment system classified interest payments for short municipal bond positions as tax-exempt, thus causing tax reporting to customers to incorrectly categorize taxable income as tax-exempt. Consequently, Oppenheimer failed to disclose to customers that they were not receiving tax-exempt interest when the Firm was short municipal bonds. In addition, as a result of the foregoing, Oppenheimer sent inaccurate Forms 1099 to certain customers who received firm-paid interest for calendar years 2009 through 2014 and also sent inaccurate account statements to certain customers during the review period that incorrectly classified firm-paid interest as tax-exempt when it should have been classified as taxable.

In 2013, FINRA examination staff found that Oppenheimer had inaccurately reported firm-paid interest from short municipal bond positions to customers on Forms 1099 and account statements. Thereafter, Oppenheimer implemented revised procedures to minimize its short municipal positions and properly report firm-paid interest as taxable on the Forms 1099 issued to customers. Oppenheimer has also agreed in principal with the IRS to make a payment to relieve its customers of the burden of filing amended tax returns and paying additional federal income tax.

Oppenheimer Did Not Maintain Records of Customer Accounts Offsetting Its Short Municipal Bond Positions

During the relevant period, Oppenheimer did not maintain records identifying particular customer accounts that offset its short municipal bond positions. The Firm's short positions were held in aggregate and not allocated to specified customers. Because the Firm's short municipal bond positions were not offset against specific customer holdings, Oppenheimer was unable to accurately report taxable income to its customers who were receiving firm-paid interest as taxable income.

Violations

MSRB Rule G-27(a) requires each broker, dealer, and municipal securities dealer ("municipal dealers") to supervise the conduct of their municipal securities activities and to ensure compliance with MSRB Rules and the Securities Exchange Act of 1934. MSRB Rule G-27(b) requires municipal dealers to establish and maintain a supervisory system that is reasonably designed to achieve compliance with applicable securities laws and regulations and MSRB Rules. Rule G-27(c) further requires each municipal dealer to adopt, maintain, and enforce written supervisory procedures that are reasonably designed to ensure that the conduct of municipal securities activities is in compliance with MSRB Rules and the Exchange Act. As described above, Oppenheimer failed to reasonably supervise, implement adequate written procedures, or maintain a supervisory system that was reasonably designed to ensure compliance with MSRB Rules when the Firm maintained short positions in municipal securities and paid taxable substitute interest to

its customers. As a result, Oppenheimer mischaracterized at least \$188,974.38 in interest paid by the firm to customers as exempt from taxation. Accordingly, Oppenheimer violated MSRB Rule G-27.

MSRB Rule G-17 provides that "[i]n the conduct of its municipal securities activities, each broker, dealer, and municipal securities dealer shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice." Scienler is not required to demonstrate a violation of MSRB Rule G-17. As described above, Oppenheimer inaccurately represented to its customers that the interest the customers were receiving was tax exempt, and also failed to disclose that the interest they were receiving was not entitled to tax exempt status. Accordingly, Oppenheimer violated MSRB Rule G-17.

MSRB Rule G-8 requires municipal dealers to make and keep current certain books and records, including account statements that they choose to send to their customers. It also requires firms to maintain a record of the customers to whom its municipal short positions allocate. As described above, Oppenheimer sent account statements to customers that inaccurately stated that the customers were receiving tax-exempt income. Oppenheimer also failed to maintain a record of the customers to whom its municipal short positions allocated. Accordingly, Oppenheimer violated MSRB Rule G-8.

B. The Firm also consents to the imposition of the following sanctions:

1. A censure;
2. A fine in the amount of \$225,000.

Respondent agrees to pay the monetary sanction upon notice that this AWC has been accepted and that such payment is due and payable. Respondent has submitted an Election of Payment form showing the method by which Respondent proposes to pay the fine imposed.

Respondent specifically and voluntarily waives any right to claim that Respondent is unable to pay, now or at any time hereafter, the monetary sanction imposed in this matter.

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

II.

WAIVER OF PROCEDURAL RIGHTS

Respondent specifically and voluntarily waives the following rights granted under FINRA's Code of Procedure:

- A. To have a Complaint issued specifying the allegations against it;

- B. To be notified of the 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 National Adjudicatory Council ("NAC") and then to the U.S. Securities and Exchange Commission and a U.S. Court of Appeals.

Further, Respondent specifically and voluntarily waives any right to claim bias or prejudice of the Chief Legal Officer, 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.

Respondent further specifically and voluntarily waives any right to claim that a person violated the ex parte prohibitions of FINRA Rule 9143 or the separation of functions prohibitions of FINRA 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.

III.

OTHER MATTERS

Respondent understands that:

- A. Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by the NAC, a Review Subcommittee of the NAC, or the Office of Disciplinary Affairs ("ODA"), pursuant to FINRA Rule 9216;
- B. If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against it; and
- C. If accepted:
 - 1. this AWC will become part of the Firm's permanent disciplinary record and may be considered in any future actions brought by FINRA or any other regulator against it;
 - 2. this AWC will be made available through FINRA's public disclosure program in accordance with FINRA Rule 8313;
 - 3. FINRA may make a public announcement concerning this agreement and

the subject matter thereof in accordance with FINRA Rule 8313; and

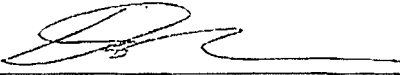
4. the Firm may not take any action or make or permit to be made any public statement, including in regulatory filings or otherwise, denying, directly or indirectly, any finding in this AWC or create the impression that the AWC is without factual basis. The Firm may not take any position in any proceeding brought by or on behalf of FINRA, or to which FINRA is a party, that is inconsistent with any part of this AWC. Nothing in this provision affects the Firm's: (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation or other legal proceedings in which FINRA is not a party.

- D. The Firm may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. The Firm 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 FINRA, nor does it reflect the views of FINRA or its staff.

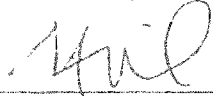
The undersigned, on behalf of the Respondent, certifies that a person duly authorized to act on its behalf has read and understands all of the provisions of this AWC and has been given a full opportunity to ask questions about it; that Respondent has agreed to its provisions voluntarily; and that no offer, threat, inducement, or promise of any kind, other than the terms set forth herein and the prospect of avoiding the issuance of a Complaint, has been made to induce the Firm to submit it.

12/11/15
Date (mm/dd/yyyy)

Respondent
Oppenheimer & Co., Inc.

By: 
Dennis P. McNamara, EVP

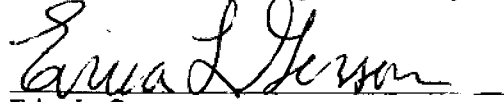
Reviewed by:


Elizabeth Baird, Esq.
Morgan, Lewis & Bockius LLP
2020 K St. NW
Washington, DC 20006
202-373-6561

Accepted by FINRA:

12/22/2015
Date

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

A handwritten signature in black ink, appearing to read "Erica L. Gerson", written over a horizontal line.

Erica L. Gerson

Principal Counsel

FINRA Department of Enforcement

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