

**FINANCIAL INDUSTRY REGULATORY AUTHORITY  
LETTER OF ACCEPTANCE, WAIVER AND CONSENT  
NO. 2016050508501**

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

RE: Oppenheimer & Co. Inc., Respondent  
Member Firm  
CRD No. 249

Pursuant to FINRA Rule 9216 of FINRA's Code of Procedure, Oppenheimer & Co. Inc. (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 the firm 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**

The firm has been a member of FINRA since March 22, 1945. The firm's headquarters are in New York, New York, and the firm currently employs a total of approximately 1,809 registered representatives at its headquarters and its 122 branch office locations. The firm is a self-clearing broker-dealer that provides a full range of brokerage and investment services. Its primary lines of business are commission-based brokerage, asset management, investment banking and research, and trading, executing and clearing. The firm has no relevant disciplinary history.

## **OVERVIEW**

This matter resulted from routine surveillance by the staff of the Customer Issues Group of the Department of Market Regulation.

From January 1, 2013 to July 28, 2016, OPCO failed to record "Not Held" terms and conditions on the firm's order memoranda for institutional customers of one of the firm's trading desks. In addition, for the same orders, OPCO transmitted reports to the Order Audit Trail System ("OATS") that failed to contain that "Not Held" special handling code.

From April 1, 2013 to October 31, 2016, OPCO transmitted reports to OATS that failed to properly report the Market on Close ("MOC") or Limit on Close ("LOC") special handling codes.

From January 1, 2013 to July 1, 2017, OPCO failed to establish and maintain a supervisory system and establish, maintain, and enforce written supervisory procedures reasonably designed to achieve compliance with the rules of FINRA concerning maintaining accurate books and records, specifically order memoranda.

From January 1, 2013 to the present, OPCO failed to establish and maintain a supervisory system and establish, maintain, and enforce written supervisory procedures reasonably designed to achieve compliance with the rules of FINRA concerning OATS reporting.

Thus, OPCO violated Section 17(a)(1) of the Securities Exchange Act of 1934 ("the Exchange Act"), and Rule 17a-3(a)(6)(i) thereunder, NASD Rules 3010(a) and 3010(b), and FINRA Rules 4511, 7450, 3110(a), 3110(b) and 2010.

## **FACTS AND VIOLATIVE CONDUCT**

### **Relevant Rules**

1. Section 17(a)(1) of the Exchange Act requires broker-dealers to make, keep, and furnish copies of records as the SEC requires. Exchange Act Rule 17a-3(a)(6)(i) requires broker-dealers to make and maintain a memorandum of each brokerage order that contains the complete terms and conditions of the order. Whether the broker or dealer has time and price discretion over an order, and is therefore "Not Held" to the inside market, constitutes a term and condition of the order, which must be recorded pursuant to Exchange Act Rule 17a-3(a)(6)(i). Implicit in the requirement that a member make and maintain records is the requirement that those records be accurate.
2. FINRA Rule 4511 states, in relevant part, that "[m]embers shall make and preserve books and records as required under the FINRA Rules, the Exchange Act, and the applicable Exchange Act Rules."

3. FINRA Rule 7450 states, in relevant part, that “[a]ll applicable order information required to be recorded under Rule 7440 shall be transmitted to the Order Audit Trail System by each Reporting Member.” FINRA Rule 7440 states, in relevant part, that “the following order information must be recorded under this Rule when an order is received or originated ... special handling requests, specified by FINRA for purposes of this Rule.”
4. FINRA Rule 3110(a) and its predecessor, NASD Rule 3010(a) state, in relevant part, that “[e]ach member shall establish and maintain a system to supervise the activities of each registered representative, registered principal, and other associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA Rules.” NASD Rule 3010(a) applies to conduct prior to December 1, 2014.
5. FINRA Rule 3110(b) and its predecessor, NASD Rule 3010(b) state, in relevant part, that “[e]ach member shall establish, maintain, and enforce written procedures to supervise the activities of registered representatives, registered principals, and other associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA Rules.” NASD Rule 3010(b) applies to conduct prior to December 1, 2014.
6. FINRA Rule 2010 states that “[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade.” A violation of FINRA Rules constitutes a violation of FINRA Rule 2010.

#### Violative Conduct

7. Orders entered on an exchange must be marked and represented with a correct special handling code when appropriate, including a code to identify orders that are “Not Held” (an order in which the broker has both time and price discretion), “LOC” (a limit on close order, which is an order to be executed at the market closing price, if the price is at or better than the submitted limit price), or “MOC” (a market on close order, which is an order to be executed at the market closing price). Failing to include a required special handling code leads to inaccuracies in the audit trail. Moreover, an incorrect special handling code could affect FINRA’s ability to surveil for and detect potential violations of exchange rules and of federal securities laws. For instance, failure to include a required “Not Held” code may cause false positive exceptions in FINRA’s surveillance for trading ahead or best execution.
8. From January 1, 2013 to July 28, 2016, the firm transmitted 429,153 reports to OATS that failed to contain the “Not Held” special handling code. A default setting in the firm’s FIX<sup>1</sup> application was incorrectly set for orders routed to the firm’s portfolio trading system. In cases where an institutional portfolio trading customer did not

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<sup>1</sup> A FIX connection is the Financial Information eXchange protocol that permits broker-dealers, among others, to optimize financial data communications.

populate the Held/Not Held terms and conditions field (i.e. sent blank), it was incorrectly defaulted to Held for OATS reporting purposes. This issue only affected three institutional customers. The firm learned about the issue through a regulatory inquiry from FINRA, and it fixed the software issue as of July 28, 2016. The conduct described in this paragraph constitutes separate and distinct violations of FINRA Rules 7450 and 2010.

9. In addition, from January 1, 2013 to July 28, 2016, as a result of the same software error that led to the firm's transmission of reports to OATS without the appropriate "Not Held" order indicator, the firm failed to record "Not Held" terms and conditions on the firm's order memoranda in 429,153 instances. The conduct described in this paragraph constitutes separate and distinct violations of Section 17(a)(1) of the Exchange Act, Rule 17a-3(a)(6)(i) thereunder, and FINRA Rules 4511 and 2010.
10. From April 1, 2013 to October 31, 2016, the firm transmitted at least 1,200 reports to OATS that failed to properly report the "LOC" and "MOC" special handling codes. A software limitation in the firm's system caused these codes to be included in the incorrect section of the firm's reports to OATS, which is the functional equivalent of a failure to report the required special handling codes to OATS. The firm learned about the issue through a regulatory inquiry from FINRA and began working on a solution to fix the problem. However, given the complexity of the problem, the firm was not able to complete its fix of the software limitation until October 31, 2018. The conduct described in this paragraph constitutes separate and distinct violations of FINRA Rules 7450 and 2010.
11. From January 1, 2013 to July 1, 2017, the firm failed to establish and maintain a supervisory system and failed to enforce written supervisory procedures reasonably designed to achieve compliance with the rules of the SEC and FINRA concerning the accuracy of order memoranda. The firm's written supervisory procedures required reviews to ensure the accuracy of order records, but failed to provide specific guidance regarding the special handling instructions that should be attached to certain orders. In practice, the supervisory reviews focused on the accuracy of execution records and did not include a review of the accuracy of the terms and conditions of orders. A review that does not include special handling codes is not reasonably designed to achieve compliance with the rules of the SEC and FINRA concerning the accuracy of order memoranda. The conduct described in this paragraph constitutes violations of NASD Rules 3010(a) and (b) (for conduct prior to December 1, 2014) and FINRA Rules 3110(a) and (b) (for conduct on or after December 1, 2014) and 2010.
12. In addition, from January 1, 2013 to the present, the firm failed to establish and maintain a supervisory system and failed to establish, maintain and enforce written procedures reasonably designed to achieve compliance with the rules of the SEC and FINRA concerning the accuracy of OATS reporting. In particular, the firm's written supervisory procedures did not provide detailed specificity as to the special handling

instructions that should be attached to certain orders that were routed to the Program Trading Desk. This particular issue was remediated on July 1, 2017 through enhancements to the firm's written supervisory procedures. In addition, the firm's supervisory process concerning the accuracy of special handling codes was a review of a sample of OATS orders. However, given the firm's business model and volume of trading activity on the trading desk at issue, the firm's supervisory system and written supervisory procedures, which relied on a small sample of OATS orders, were not reasonably designed to achieve compliance with the OATS reporting requirements of FINRA. The conduct described in this paragraph constitutes violations of NASD Rules 3010(a) and (b) (for conduct prior to December 1, 2014) and FINRA Rules 3110(a) and (b) (for conduct on or after December 1, 2014) and 2010.

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

a censure; a fine of \$85,000 (\$65,000 for the violations related to OATS and recordkeeping, and \$20,000 for the violations related to supervision); and an undertaking to revise the firm's written supervisory procedures with respect to the area described in paragraph I.A.12. Within 30 calendar days of acceptance of this AWC by the National Adjudicatory Council ("NAC"), a registered principal of the firm shall submit to the COMPLIANCE ASSISTANT, DEPARTMENT OF ENFORCEMENT, 15200 OMEGA DRIVE, SUITE 300, ROCKVILLE, MD 20850, a signed, dated letter, or an e-mail from a work-related account of the registered principal to [MarketRegulationComp@finra.org](mailto:MarketRegulationComp@finra.org), providing the following information: (1) a reference to this matter; (2) a representation that the firm has revised its written supervisory procedures to address the above-described deficiencies; and (3) the date the revised procedures were implemented.

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

The firm specifically and voluntarily waives any right to claim that it 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**

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

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

The firm 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**

The firm 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 the firm; and

C. If accepted:

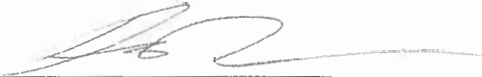
1. this AWC will become part of the firm's permanent disciplinary record and may be considered in any future actions brought by FINRA or any other regulator against the firm;
2. this AWC will be made available through FINRA's public disclosure program in accordance with FINRA Rule 8313;
3. FINRA may 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 firm, 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 it has agreed to the AWC's 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.

12/13/19  
Date

Respondent  
Oppenheimer & Co. Inc.

By: 

Print Name: DENNIS P. MCNAMARA

Title: EVP and General Counsel

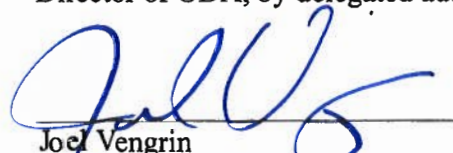
Reviewed by:

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Accepted by FINRA:

12.20.19  
Date

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

  
Joel Vengrin  
Senior Counsel  
Department of Enforcement