

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
LETTER OF ACCEPTANCE, WAIVER, AND CONSENT
NO. 2018057952801**

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

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

Pursuant to FINRA Rule 9216, Respondent Oppenheimer & Co. Inc. 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 Respondent alleging violations based on the same factual findings described in this AWC.

I.

ACCEPTANCE AND CONSENT

- A. Respondent 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 FINRA member since 1945. The firm is a full-service broker-dealer that is headquartered in New York, New York. Oppenheimer has approximately 140 branch offices and over 1,900 registered representatives.

Respondent does not have any relevant disciplinary history.

OVERVIEW

From January 2014 through December 2019, Oppenheimer negligently misrepresented cost basis information on more than 1,000 customer account statements and Forms 1099.

By making negligent misrepresentations on customer account statements and Forms 1099, Oppenheimer violated FINRA Rule 2010. By making and preserving inaccurate customer account statements, Oppenheimer violated FINRA Rules 4511 and 2010.

FACTS AND VIOLATIVE CONDUCT

This matter originated from a routine examination of Oppenheimer.

Applicable FINRA Rules

FINRA Rule 2010 requires “a member, in the conduct of its business, [to] observe high standards of commercial honor and just and equitable principles of trade.” When a member firm makes negligent misrepresentations of material fact, it violates FINRA Rule 2010.

FINRA Rule 4511 requires member firms to “make and preserve books and records as required under the FINRA rules” FINRA Rule 2231, like its predecessor NASD Rule 2340, requires “general securities member[s]” to send customer account statements not less than once every calendar quarter.¹ Implicit in the obligation to make and preserve books and records is the requirement that they be accurate. A violation of FINRA Rule 4511 is also a violation of FINRA Rule 2010.

IRS Regulations

Cost basis is the original purchase price for a security (plus any commissions and fees). Adjusted basis is the cost basis for a security, but adjusted as required under Internal Revenue Service (IRS) rules. Cost basis must be adjusted under IRS rules for routine corporate events, such as stock splits, mergers, and non-dividend distributions, as well as in other circumstances, such as inheritances. When a securities position is sold, net taxable gain or loss is calculated by taking the gross proceeds of the transaction and subtracting the adjusted basis of the securities sold.

In the early 2010s, tax reporting rules for broker-dealers changed in two ways that are relevant to this matter. First, Congress required broker-dealers to report adjusted basis on Forms 1099.² Previously, broker-dealers were required only to report gross proceeds of securities transactions on Forms 1099, leaving customers to track and report adjusted basis to the IRS on their own. Since this new requirement came into effect, both customers and the IRS could use the adjusted basis information provided by broker-dealers on Forms 1099 to determine customers’ net taxable gain or loss and therefore more easily calculate their tax liability.

Second, Congress also changed the reporting requirements for partial sales of securities positions. It provided that when a customer sold a portion of a securities position with multiple tax lots—*i.e.*, sets of shares purchased on different dates at different prices—broker-dealers had to report the sale pursuant to the first-in, first-out method (FIFO)

¹ FINRA Rule 2231 superseded NASD Rule 2340 on May 8, 2019.

FINRA Rule 2231(d) defines “general securities member” as a member firm “that conducts a general securities business and is required to calculate its net capital pursuant to the provisions of SEA Rule 15c3-1(a),” but exempts from the Rule firms that do not carry customer accounts and do not hold customer funds or securities. At all relevant times, Oppenheimer met the definition of a general securities member and was subject to the requirements of FINRA Rule 2231.

² See 26 U.S.C. § 6045(g)(2)(A)(2008). Both new requirements described here began in January 2011 for most equity securities and in January 2014 for most debt securities. See *id.* at (g)(3); see also 26 C.F.R. § 1.6045-1(a)(15).

unless the customer specifically identified which shares to sell.³ The IRS instituted corresponding regulations requiring that specific identification take place prior to settlement date.⁴ Therefore, under these requirements, in the absence of timely contrary instructions from the customer, broker-dealers are required to report the longest-held shares as sold first. When the market is trending upward, longer-held shares typically will have lower adjusted basis than more recently purchased shares and therefore their sale will generate a higher taxable gain and higher tax liability when sold.

Oppenheimer's Tracking and Reporting of Cost Basis Information

Since at least January 2014, Oppenheimer has reported adjusted basis on Forms 1099, as required by the rules discussed above. Oppenheimer also has reported adjusted basis and related realized and unrealized gain and loss information on periodic account statements, which Oppenheimer issues monthly.

From January 2014 through December 2019, Oppenheimer maintained cost basis information, as well as information about the taxable gain or loss resulting from its customers' securities transactions, in a database system. When a customer partially liquidated a securities position with multiple tax lots, Oppenheimer's system defaulted to FIFO, unless the customer's registered representative specified before settlement that the customer wanted to sell a specific tax lot, in accordance with the IRS regulations discussed above.

During this period, registered representatives of the firm were permitted to request changes to cost basis information. As noted, it is appropriate to change or adjust cost basis in a number of circumstances. However, because the individual who supervised the group that operated the database system described above did not understand the regulations applicable to post-settlement cost basis changes, Oppenheimer regularly granted requests to change cost basis information in the case of partial liquidations of securities positions—even when requests to change the tax lot sold were made after the settlement date. Emails and documents pertaining to these changes (where they exist) showed that the firm's registered representatives and other operations personnel, for the most part, likewise lacked a proper understanding of the regulations applicable to post-settlement cost basis changes.

The firm was supposed to have kept track of manual changes to cost basis in a database system. This system contained information about hundreds of thousands of cost basis changes. But, the system lacked basic information about cost basis changes, including the reason for the changes. The database system also contained fields that could be overwritten after the date of the change. As a result, there were numerous instances in which information concerning manual cost basis changes had been overwritten and could not be retrieved.

³ See 26 U.S.C. § 6045(g)(2)(B)(i)(I).

⁴ 26 C.F.R. § 1.6045-1(d)(2)(ii) (incorporating 26 C.F.R. § 1.1012-1(c) (defining adequate and timely identification as being made prior to settlement date)).

Oppenheimer Negligently Misrepresented Cost Basis Information on More Than 1,000 Account Statements and Forms 1099

From January 2014 through December 2019, Oppenheimer made improper post-settlement cost basis changes for approximately 500 to 1,000 partial liquidations of securities positions in customer accounts.⁵ Each such instance resulted in Oppenheimer issuing at least one Form 1099 in which Oppenheimer misrepresented the adjusted basis.⁶ Each such instance also resulted in Oppenheimer sending to the customer one or more monthly account statements in which Oppenheimer misreported adjusted basis and related realized and unrealized gain or loss information.⁷ Therefore, from January 2014 through December 2019, Oppenheimer made a total of at least 1,000 negligent misrepresentations of cost basis information on customer account statements and Forms 1099.

Approximately one quarter of the improper cost basis changes occurred more than 30 days after settlement date; some cost basis changes were made several months after settlement. For example, a registered representative sold over 150 shares of stock in a customer's account in March 2017. Because the representative failed to identify the specific shares to sell prior to settlement date, Oppenheimer's system correctly defaulted to FIFO. This resulted in the sale of the customer's longest held shares, which were purchased in May 2009 and had an adjusted basis of roughly \$3,000. The transaction resulted in approximately \$19,000 in capital gains for the customer.

The registered representative contacted the firm's operations group more than nine months after settlement date to request a change to cost basis to reduce those capital gains. Oppenheimer did so, which resulted in the firm misreporting on customer account statements that the customer's shares purchased in May 2009 remained in the account—when, in fact, they had been sold—and that other, more recently purchased shares with a higher cost basis had been sold, when that was not the case. Additionally, Oppenheimer misrepresented on both the customer's account statements and on a Form 1099 that the transaction resulted in approximately \$10,000 in capital gains when, in fact, it had resulted in approximately \$19,000 in capital gains.

By negligently misrepresenting cost basis information on Forms 1099 and customer account statements, Oppenheimer violated FINRA Rule 2010. By making and preserving inaccurate account statements, Oppenheimer violated FINRA Rules 4511 and 2010.

⁵ Because of the deficiencies with the firm's systems that were supposed to track manual changes to cost basis information, Oppenheimer was unable to identify each instance in which it made post-settlement changes to tax lot identification in the case of partial liquidations of securities positions.

⁶ If and when a customer sold the remainder of a securities position in a subsequent tax year, that second sale would result in Oppenheimer issuing a second Form 1099 in which Oppenheimer misrepresented adjusted basis information.

⁷ All monthly account statements subsequent to the initial partial liquidation would contain misrepresented adjusted basis information; only after the remainder of the securities position was sold or otherwise disposed, and the position removed from the monthly account statements, would the misrepresentations cease.

B. Respondent also consents to the imposition of the following sanctions:

- a censure;
- a \$525,000 fine; and
- an undertaking to retain an independent consultant as described below:
 - a. Retain at its own expense and within 30 days of the date of the notice of acceptance of this AWC an independent consultant not unacceptable to FINRA to conduct a comprehensive review of the adequacy of the firm's procedures, systems, and controls to track and report cost basis information relating to any updates and changes made to cost basis information for customer securities transactions.
 - b. Ensure that the independent consultant, any firm with which the independent consultant is affiliated or of which he or she is a member, and any person engaged to assist the independent consultant in performance of his or her duties, shall not have provided consulting, legal, auditing, or other professional services to, or had any affiliation with, Respondent during the two years prior to the date of the notice of acceptance of this AWC.
 - c. Cooperate with the independent consultant in all respects, including providing the independent consultant with access to Respondent's files, books, records, and personnel, as reasonably requested for the above-mentioned review. Respondent shall require the independent consultant to report to FINRA on its activities as FINRA may request and shall place no restrictions on the independent consultant's communications with FINRA. Further, upon request, Respondent shall make available to FINRA any and all communications between the independent consultant and the Respondent and documents examined by the independent consultant in connection with this review.
 - d. Refrain from terminating the relationship with the independent consultant without FINRA's written approval. Respondent 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 FINRA;
 - e. Require the independent consultant to submit an initial written report to Respondent and FINRA at the conclusion of the independent consultant's review, which shall be no more than 120 days after the date of the notice of acceptance of this AWC. The initial report shall, at a minimum,
 - (i) evaluate and address the adequacy of Respondent's procedures, systems, and controls to track and report cost basis information, including any changes to cost basis information, for customer securities transactions;

(ii) provide a description of the review performed and the conclusions reached; and (iii) make recommendations as may be needed regarding how Respondent should modify or supplement its processes, controls, policies, systems, procedures, and training to manage its regulatory and other risks in relation to the tracking and reporting of cost basis information, including any changes to cost basis information, for customer securities transactions; and

- (i) Within 120 days after delivery of the initial report, Respondent shall adopt and implement the recommendations of the independent consultant or, if Respondent considers a recommendation to be, in whole or in part, unduly burdensome or impractical, propose an alternative procedure to the independent consultant designed to achieve the same objective. Respondent shall submit such proposed alternative procedures in writing simultaneously to the independent consultant and FINRA.
- (ii) Respondent shall require the independent consultant to (A) reasonably evaluate the alternative procedures and determine whether it will achieve the same objective as the independent consultant's original recommendation and (B) provide Respondent and FINRA with a written report reflecting its evaluation and determination within 30 days of submission of any Respondent's proposed alternative procedures. In the event the independent consultant and Respondent are unable to agree, Respondent must 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.
- (iii) Within 150 days after the issuance of the independent consultant's initial report or 60 days after the independent consultant's written report regarding proposed alternative procedures, if applicable, Respondent shall provide the independent consultant and FINRA with a written implementation report, certified by an officer of Respondent, attesting to, containing documentation of, and setting forth the details of Respondent's implementation of the independent consultant's recommendations. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. FINRA may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence.

- f. Require the independent consultant to enter into a written agreement that, for the duration of the engagement and for a period of two years from the completion of the engagement, the independent consultant shall not enter

into any other employment, consultant, attorney-client, auditing, or other professional relationship with Respondent, 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 or of which it is a member, and any person engaged to assist the independent consultant in the performance of its duties pursuant to this AWC, shall not, without FINRA's prior written consent, enter into any employment, consultant, attorney-client, auditing, or other professional relationship with Respondent or any of Respondent's 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.

2. Upon written request showing good cause, FINRA may extend any of the procedural dates set forth above.

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 it proposes to pay the fine imposed.

Respondent specifically and voluntarily waives any right to claim an inability to pay, now or at any time after the execution of this AWC, the monetary sanction imposed in this matter.

The sanctions imposed in this AWC shall be effective on a date set by FINRA.

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 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 its acceptance or rejection.

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 Respondent; and
- C. If accepted:
 - 1. this AWC will become part of Respondent's permanent disciplinary record and may be considered in any future action brought by FINRA or any other regulator against Respondent;
 - 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 its subject matter in accordance with FINRA Rule 8313; and
 - 4. Respondent 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. Respondent 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 Respondent's testimonial obligations or right to take legal or factual positions in litigation or other legal proceedings in which FINRA is not a party.

- D. Respondent may attach a corrective action statement to this AWC that 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 FINRA, nor does it reflect the views of FINRA.

The undersigned, on behalf of Respondent, certifies that a person duly authorized to act on Respondent's 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 the AWC's provisions voluntarily; and that no offer, threat, inducement, or promise of any kind, other than the terms set forth in this AWC and the prospect of avoiding the issuance of a complaint, has been made to induce Respondent to submit this AWC.

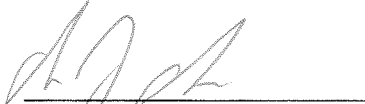
4/14/21
Date


Oppenheimer & Co. Inc.
Respondent

Print Name: Dennis McNamara

Title: Executive Vice President and General Counsel

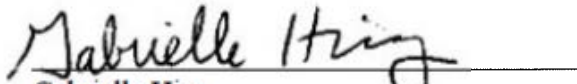
Reviewed by:


Adam Algaze
Counsel for Respondent
Oppenheimer & Co. Inc.
85 Broad St., 25th Floor
New York, NY 10004

Accepted by FINRA:

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

4/22/2021
Date


Gabrielle Hirz
Principal Counsel
FINRA
Department of Enforcement
99 High St., 9th Floor
Boston, MA 02110