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DISCIPLINARY PROCEEDING NO.

DEPARTMENT OF MARKET REGULATION,

DISCIPLINARY PROCEEDING NO.

Complainant,

CMS040156

v.

HEARING OFFICER: FITZGERALD

OPPENHEIMER & CO. INC.,
F/K/A FAHNESTOCK & CO. INC.
(BD No. 249),

May 17, 2005

Respondent.

ORDER ACCEPTING OFFER OF SETTLEMENT

Disciplinary Proceeding No. CMS040156 was filed on October 18, 2004, by the Department of Market Regulation ("Complainant"). Respondent Oppenheimer & Co. Inc., formerly known as Fahnestock & Co. Inc., ("Respondent") submitted an Offer of Settlement ("Offer") on April 29, 2005. Under Code of Procedure Rule 9270(e), the Complainant and the National Adjudicatory Council ("NAC") Review Subcommittee or the Office of Disciplinary Affairs ("ODA") have accepted the uncontested Offer. Accordingly, this Order is now issued under Code of Procedure 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 approved by the NAC.

Under the terms of the Offer, Respondent has consented for the purpose of this proceeding only, without admitting or denying the allegations of the Complaint, and solely for the purposes of this proceeding and any other proceeding in which NASD is a

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party, to the entry of findings of facts and violations consistent with the allegations of the Complaint, and to the imposition of the sanctions set forth below, and fully understands that this Order will become part of Respondent's permanent disciplinary record and may be considered in any future actions brought by NASD.

BACKGROUND

Respondent became a member of NASD in 1945, and its registration remains in effect. In December 2003, NASD accepted Respondent's Letter of Acceptance, Waiver and Consent in which it agreed to a censure and a fine for violations of NASD Conduct Rules 3110 and 3370 and SEC Rule 17a-3, among other rules.

FINDINGS AND CONCLUSIONS

It has been determined that the Offer be accepted and that findings be made as follows:

Cause One: On February 20, 2003, Fahnestock effected two short sales in certain securities for the firm's proprietary accounts and failed to make and annotate an affirmative determination that the firm could borrow the securities or otherwise provide for delivery of the securities by settlement date. The conduct constitutes separate and distinct violations of NASD Conduct Rule 3370.

Cause Two: On February 20, 2003, the firm executed five short sale orders in CQS securities and failed to properly mark the orders as short in its trading ledger. The conduct constitutes separate and distinct violations of SEC Rule 10a-1.

Cause Three: On February 20, 2003, the firm on three occasions failed to provide written notification disclosing to its customer its correct capacity in the transaction. The firm incorrectly stated its capacity as agent on the customer confirmations. The conduct constitutes separate and distinct violations of SEC Rule 10b-10.

Cause Four: On February 20, 2003, the firm failed on one occasion to show the time of order receipt on the memorandum of its brokerage orders and failed on one occasion to show the correct volume on the memorandum of its brokerage orders. The conduct constitutes separate and distinct violations of SEC Rules 17a-3 and 17a-4 and NASD Conduct Rule 3110.

Cause Five: On February 20, 2003, the firm failed on three occasions to document the name of each dealer it contacted and the quotations received to determine the best inter-dealer market. The conduct constitutes separate and distinct violations of NASD Conduct Rule 3110.

Cause Six: During the period from April 1, 2003, through June 30, 2003, the firm, registered with NASD as an ITS/CAES Market Maker, as the term is defined in NASD Marketplace Rule 5210(e), in each security in which it made a market in ITS, failed in 78 instances to maintain continuous two-sided quotations in the absence of the grant of an excused withdrawal or a functional excused withdrawal by the NASD. The conduct constitutes separate and distinct violations of NASD Marketplace Rule 5220(e).

Cause Seven: 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, concerning: (i) registration qualifications of firm

personnel, (ii) best execution, (iii) anti-intimidation, (iv) short sales, and (v) maintaining continuous two-sided quotations as an ITS/CAES market maker. Specifically, 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 step(s) 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 should be documented. The conduct constitutes separate and distinct violations of NASD Conduct Rules 2110 and 3010.

The findings herein are pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity named as a respondent in this or any other proceeding.

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 from any future misconduct, and represent a proper discharge by NASD of its regulatory responsibilities under the Securities Exchange Act of 1934.

SANCTIONS

It is ordered that Respondent be:

— censured and fined a total of \$32,500, comprised of the following fines:

- \$5,000 for NASD Conduct Rule 3370 (Cause One);
- \$5,000 for SEC Rule 10a-1 (Cause Two);

- \$5,000 for SEC Rule 10b-10 (Cause Three);
- \$5,000 for SEC Rules 17a-3 and 17a-4 and Conduct Rule 3110 (Causes Four and Five);
- \$5,000 for Marketplace Rule 5220(e) (Cause Six); and
- \$7,500 for Conduct Rules 2110 and 3010 (Cause Seven).

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

Pursuant to IM-8310-2(f), a bar shall become effective upon approval or acceptance of this Order by the NAC.

SO ORDERED.

NASD

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May 16, 2005

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

on behalf of the Director of ODA, pursuant
to delegated authority

Copies to:

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