

**FINANCIAL INDUSTRY REGULATORY AUTHORITY  
LETTER OF ACCEPTANCE, WAIVER AND CONSENT  
NO. 2013038180801**

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

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

Pursuant to FINRA Rule 9216 of FINRA's Code of Procedure, Respondent 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. 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 March 1945. The Firm is headquartered in New York, New York, and maintains approximately 115 branch offices and has approximately 2,158 registered personnel.

**RELEVANT DISCIPLINARY HISTORY**

On December 22, 2015, an AWC was issued against Oppenheimer for, among other violations, a failure to establish an adequate supervisory system and written supervisory procedures addressing short positions in tax-exempt municipal bonds. Oppenheimer was censured and fined \$225,000.

On May 16, 2013, an Order accepting an Offer of Settlement was issued against Oppenheimer for, among other violations, a failure to implement a supervisory system reasonably designed to achieve compliance with Section 5 of the Securities Act of 1933. Oppenheimer was censured, fined \$1,425,000, and required to retain an independent consultant to review the Firm's supervisory systems, procedures and training in certain

## OVERVIEW

From August 4, 2009 to September 30, 2013 (the "Relevant Period"), Oppenheimer failed to establish, maintain and enforce a reasonably-designed supervisory system and written supervisory procedures ("WSPs") regarding the sales of leveraged, inverse, and inverse-leveraged Exchange-Traded Funds ("Non-Traditional ETFs"). Based on the foregoing, Oppenheimer violated NASD Rule 3010 and FINRA Rule 2010.

Also, during the Relevant Period, Oppenheimer violated NASD Rule 2310 and FINRA Rules 2111 and 2010 by allowing representatives to recommend Non-Traditional ETFs (1) without performing reasonable diligence to understand the risks and features associated with them, and (2) that were unsuitable for certain customers based on their age, investment objectives and financial situation.

## FACTS AND VIOLATIVE CONDUCT

### **A. Oppenheimer Failed to Establish, Maintain and Enforce a Reasonably-Designed Supervisory System and WSPs Regarding Non-Traditional ETFs**

#### **1. Non-Traditional ETFs**

Non-Traditional ETFs are designed to return a multiple of an underlying index or benchmark, the inverse of that benchmark, or both, over only the course of one trading session – usually a single day. As a result, the performance of Non-Traditional ETFs over periods of time longer than a single trading session "can differ significantly from the performance . . . of their underlying index or benchmark during the same period of time." *FINRA Regulatory Notice 09-31*. Because of these risks and the inherent complexity of these products, FINRA has advised broker-dealers and their representatives that Non-Traditional ETFs "are typically not suitable for retail investors who plan to hold them for more than one trading session, particularly in volatile markets." *Id.*

#### **2. Oppenheimer's Non-Traditional ETF Business**

During the Relevant Period, Oppenheimer executed in retail brokerage accounts 30,740 Non-Traditional ETF transactions totaling approximately \$1.7 billion. The trading in Non-Traditional ETFs occurred in approximately 1,713 customer accounts, serviced by more than 760 registered representatives.

**3. Oppenheimer Failed to Adequately Supervise the Sale of Non-Traditional ETFs**

**a. Oppenheimer's WSPs for Non-Traditional ETFs**

In response to FINRA's Regulatory Notice 09-31, dated June 2009, Oppenheimer instituted WSPs that prohibited representatives from soliciting retail customers to purchase Non-Traditional ETFs. The WSPs permitted unsolicited purchases of Non-Traditional ETFs by retail customers, but only if the customer was "pre-qualified." To meet this pre-qualification requirement, Oppenheimer's WSPs required that representatives obtain a "Leveraged ETF Representation Letter" (the "ETF Qualification Letter") from each customer seeking to purchase a Non-Traditional ETF. The ETF Qualification Letter required the customer to represent to Oppenheimer that he or she had (1) liquid assets in excess of \$500,000; (2) an annual income in the past two years of at least \$200,000 (or \$300,000 when combined with that of a spouse); and (3) at least one year of experience trading in options. These procedures were in effect during the Relevant Period.

**b. Oppenheimer Failed to Enforce its WSPs**

**i. Oppenheimer's Representatives Continued to Solicit Non-Traditional ETF Purchases**

Oppenheimer failed to enforce its WSPs prohibiting the solicitation of Non-Traditional ETF purchases for retail customers in several respects. First, Oppenheimer did not adequately train its supervisors and registered representatives on the prohibition against solicited Non-Traditional ETF purchases. Second, Oppenheimer did not prevent representatives and the trading desk from entering solicited Non-Traditional ETF trades in the Firm's order-entry system. Third, Oppenheimer did not use an effective surveillance report to identify solicited Non-Traditional ETF trades. As a result, during the Relevant Period, Oppenheimer's representatives continued to solicit Non-Traditional ETF purchases from retail customers in violation of the Firm's policies.

**ii. Oppenheimer's Representatives Executed Non-Traditional ETF Purchases for Customers Who Were Not "Pre-Qualified"**

Oppenheimer also failed to enforce its WSPs by allowing retail customers to make unsolicited Non-Traditional ETF purchases even though the customers were not pre-qualified, either because they did not have an ETF Qualification Letter on file or because they failed to meet the pre-qualification criteria set forth in the ETF Qualification Letter. As a result, during the Relevant Period, unsolicited Non-Traditional ETF purchases continued to be executed for customers who were not pre-qualified in violation of the Firm's policies.

**c. Oppenheimer Failed to Monitor Non-Traditional ETF Holding Periods**

Oppenheimer did not establish an adequate supervisory system, including the use of exception reports, to effectively monitor holding periods for Non-Traditional ETFs. As discussed above, a primary risk with Non-Traditional ETFs is that their performance over longer periods of time can differ significantly from the performance of their underlying index or benchmark, particularly in volatile markets. Oppenheimer's failure to have an adequate supervisory system to monitor holding periods for Non-Traditional ETFs contributed to customer losses.

Based on the foregoing, Oppenheimer violated NASD Rule 3010 and FINRA Rule 2010.

**B. Unsuitable Non-Traditional ETF Transactions**

The reasonable-basis suitability obligation under NASD Rule 2310 and FINRA Rule 2111 requires a broker-dealer and its registered representatives to, *inter alia*, perform reasonable diligence to understand the nature of a recommended security, as well as the potential risks and rewards. As FINRA has stated, “[w]ith respect to leveraged and inverse ETFs, this means that a firm must understand the terms and features of the funds, including how they are designed to perform, how they achieve that objective and the impact that market volatility, the ETF’s use of leverage, and the customer’s intended holding period will have on their performance.”<sup>1</sup> Although Oppenheimer’s WSPs prohibited solicitation of Non-Traditional ETFs, Oppenheimer’s representatives nonetheless continued to offer these securities to retail customers. Before doing so, Oppenheimer did not perform an adequate reasonable basis suitability analysis of Non-Traditional ETFs to understand the risks and features associated with Non-Traditional ETFs.

Oppenheimer representatives solicited and effected Non-Traditional ETF purchases that were unsuitable for specific customers. Certain Oppenheimer representatives recommended these complex and speculative products to numerous customers with conservative investment objectives, certain of whom were elderly. Moreover, some of these customers held Non-Traditional ETF positions for extended periods of time – often months and sometime years. For example:

- An 89-year conservative customer with annual income of \$50,000 held 96 solicited Non-Traditional ETF positions for an average of 32 days (and for up to 470 days) for a net loss of \$51,847.

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<sup>1</sup> See Notice 09-31, at 3; see also FINRA Regulatory Notice 12-03, *Complex Products- Heightened Supervision of Complex Product* (January 2012), at 5-6.

- A 91-year conservative customer with an annual income of \$30,000 held 56 solicited Non-Traditional ETF positions for an average of 48 days (and for up to 706 days) for a net loss of \$11,161.
- A 67-year conservative customer with an annual income of \$40,000 held two solicited Non-Traditional ETF positions in her account for 729 days for a loss of \$2,746.

Based on the foregoing, Oppenheimer violated NASD Rule 2310 and FINRA Rules 2111 and 2010.<sup>1</sup>

B. Oppenheimer consents to the imposition of the following sanctions:

- censure; and
- fine of \$2,250,000

Oppenheimer is also ordered to pay restitution in the amount of \$716,831.80 to the customers listed in Attachment A hereto, plus interest at the rate set forth in Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. 6621(a)(2), from September 30, 2013, until the date this AWC is accepted by the NAC.

A registered principal of Oppenheimer shall submit satisfactory proof of payment of restitution or of reasonable and documented efforts undertaken to effect restitution. Such proof shall be submitted to David F. Newman, Senior Regional Counsel, FINRA Department of Enforcement, 1835 Market Street, Suite 1900, Philadelphia, PA 19103, either by letter that identifies Oppenheimer and the case number or by email from a work-related account of the registered principal of Oppenheimer to [EnforcementNotice@FINRA.org](mailto:EnforcementNotice@FINRA.org). This proof shall be provided to the FINRA staff member listed above no later than 120 days after acceptance of the AWC.

If for any reason Oppenheimer cannot locate any customers identified in Attachment A after reasonable and documented efforts within 120 days from the date of the AWC is accepted, or such additional period agreed to by a FINRA staff member in writing, Oppenheimer shall forward any undistributed restitution and interest to the appropriate escheat, unclaimed property or abandoned property fund in the state in which the customer is last known to have resided. Oppenheimer shall provide satisfactory proof of such action to the FINRA staff member identified above and in the manner described above, within 14 days of forwarding the undistributed restitution to the appropriate state authority.

The imposition of a restitution order or any other monetary sanction herein, and the timing of such ordered payments, does not preclude customers from pursuing their own actions to obtain restitution or other remedies.

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<sup>1</sup> NASD Rule 2310 applies to conduct that occurred prior to July 9, 2012, and FINRA Rule 2111 applies to conduct that occurred on or after July 9, 2012.

Oppenheimer agrees to pay the monetary sanctions upon notice that this AWC has been accepted and that such payments are due and payable. Oppenheimer has submitted an Election of Payment form showing the method by which it proposes to pay the fine imposed.

Oppenheimer has specifically and voluntarily waived any right to claim an inability to pay 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 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.

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:**

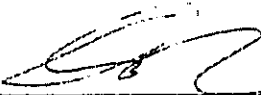
- A. **Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by the NAC, a Review Subcommittee of the NAC, or the Office of Disciplinary Affairs ("ODA"), pursuant to FINRA Rule 9216;**
- B. **If this AWC is not accepted, its submission 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 the Respondent'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 response to public inquiries about Respondent's disciplinary record;**
  - 3. **FINRA may make a public announcement concerning this agreement and the subject matter thereof 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: (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. **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 they 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**

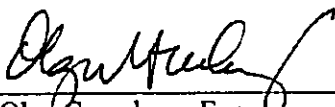
to ask questions about it; that the Firm has agreed to its provisions voluntarily; and that no offer, threat, inducement, or promise of any kind, other than the terms set forth herein and the prospect of avoiding the issuance of a Complaint, has been made to induce the Firm to submit it.

Oppenheimer & Co. Inc.

05/14/2016  
Date (mm/dd/yyyy)

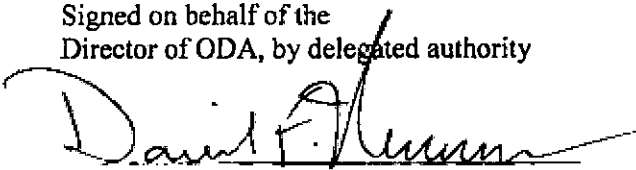
By:   
Dennis P. McNamara  
Executive Vice-President & General Counsel

Reviewed by:

  
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Accepted by FINRA:

June 7, 2016  
Date

Signed on behalf of the  
Director of ODA, by delegated authority  
  
David F. Newman  
Senior Regional Counsel  
FINRA Department of Enforcement  
1835 Market Street, Suite 19103  
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Tel: (215) 665-1180  
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E-Mail: [david.newman@finra.org](mailto:david.newman@finra.org)



ATTACHMENT A  
AWC NO. 2013038180801

CUSTOMER INITIALS	AMOUNT OF RESTITUTION
BA & DA	\$1,404.22
RA	\$1,147.83
MA	\$349.57
MA	\$337.57
JA	\$144.64
JB	\$1,684.51
KB & MB	\$10,693.64
MB	\$579.37
MB & CB	\$261.44
SB	\$2,924.49
JB	\$1,480.98
AB	\$575.22
JB	\$2,158.92
JB	\$2,590.67
BB	\$486.71
BB	\$1,432.64
CB	\$5,362.27
JC	\$6,197.96
JC	\$2,399.47
JC	\$2,041.07
AC	\$11,181.50
AC	\$63,285.85
DC	\$1,688.62
JC	\$2,707.96
CBC	\$195.19
AC	\$26.03
SC	\$140.35
ED	\$611.39
DF	\$718.30
RD	\$4,563.42
RD	\$50,125.36
CD	\$3,753.11
ME	\$100.69
SE	\$3,098.84
DE	\$151.80
SE	\$1,213.35
LE & VE	\$16,050.53
LE	\$1,694.71
SF	\$3,509.47
TF	\$3,019.76
SF	\$13,724.81
MF	\$2,288.68
Initial "F"	\$10,872.83
AF	\$1,530.49
GF & KF	\$455.91
MF	\$2,847.48

ATTACHMENT A  
AWC NO. 2013038180801

CUSTOMER INITIALS	AMOUNT OF RESTITUTION
MF	\$1,049.53
JF	\$14,626.29
DG	\$759.92
MG & NG	\$32,997.26
MG & NG	\$16,588.30
Initial "G"	\$38.43
LG	\$704.58
SG	\$344.39
TG & KG	\$11,681.13
MH	\$604.18
KH	\$1,236.69
DH & RH	\$716.75
KH	\$809.18
GH	\$5,081.22
HH & AH	\$3,353.03
MJ	\$220.36
PJ	\$708.22
PJ	\$712.88
PJ	\$708.22
RJ	\$10,488.79
RJ	\$5,562.91
PJ	\$4,085.56
TK	\$2,308.19
MK	\$1,718.35
MK	\$1,811.67
RK	\$19,046.58
AL	\$9,209.81
JL & ML	\$568.84
ML	\$1,268.69
SL	\$790.72
SL	\$3,008.44
HL	\$6,327.35
LL & JL	\$2,728.06
LL	\$812.83
JL	\$15,097.42
JL	\$1,040.77
JL	\$42,266.48
LL	\$3,612.80
LL	\$579.53
HL	\$158.49
GL	\$12,468.40
MM	\$9,920.40
JM	\$3,298.26
DM	\$2,746.17
BM	\$1,260.11
JM	\$804.61

**ATTACHMENT A**  
**AWC NO. 2013038180801**

<b>CUSTOMER INITIALS</b>	<b>AMOUNT OF RESTITUTION</b>
AM	\$4,277.84
PM	\$2,301.20
GM	\$6,518.34
GM	\$1,308.89
BM	\$5,425.64
AM	\$4,284.04
MJT	\$5,679.04
PM	\$2,517.10
MST	\$1,859.37
SM	\$2,276.41
SM	\$7,088.15
SM	\$7,017.91
DO	\$810.61
OT	\$620.85
RP & VP	\$7,741.88
RP	\$3,150.90
PP	\$711.04
TP	\$731.00
DP	\$732.80
EP	\$1,589.18
RP	\$7,253.77
PGC	\$1,137.99
PMC	\$1,126.26
CP	\$3,227.80
BQ	\$3,311.10
PR	\$1,382.94
AR	\$442.12
RR	\$1,884.06
MS	\$6,067.08
ST	\$1,388.18
PS	\$7,744.10
WS	\$3,610.56
NS	\$2,107.04
SS	\$36,991.01
SS	\$11,561.68
DS	\$2,870.70
DS	\$148.04
WS	\$148.74
RS	\$1,157.75
KS	\$2,697.21
SC	\$2,004.36
WT	\$866.58
ST	\$261.33
AT	\$180.14
TC	\$4,011.57
JT	\$3,892.87

ATTACHMENT A  
AWC NO. 2013038180801

<b>CUSTOMER INITIALS</b>	<b>AMOUNT OF RESTITUTION</b>
AT	\$247.55
MT	\$15,075.97
VTR	\$4,910.39
FV	\$510.14
RW & JW	\$532.68
SW	\$6,828.60
JW	\$79.65
WW	\$2,784.14
LW	\$1,653.20
BW	\$2,376.42
KY	\$7,461.84
JZ	\$513.64
	<b>\$716,831.80</b>