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FOUNDED 1866

December 10, 2014

By Electronic Mail

Sebastian Gomez Abero, Esq.
Chief, Office of Small Business Policy
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F St., NE
Washington, DC 20549

Re: Waiver Request of Oppenheimer & Co. Inc. with respect to
In the Matter of Oppenheimer & Co. Inc.

Dear Mr. Gomez Abero:

We are writing on behalf of Oppenheimer & Co. Inc. (“Oppenheimer” or the “Firm”) in connection with the anticipated settlement relating to *In the Matter of Oppenheimer & Co. Inc.* The settlement would result in an Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (the “Order”) against Oppenheimer.

We hereby respectfully request a waiver of any disqualification that may arise pursuant to Rule 506 of Regulation D under the Securities Act of 1933 (the “Securities Act”) with respect to Oppenheimer or any of its affiliates as a result of the entry of the Order.

BACKGROUND

Oppenheimer has engaged in settlement discussions with the Division of Enforcement in connection with its investigation of alleged violations of Sections 15(a) and 17(a) of the Securities Exchange Act of 1934 (the “Exchange Act”) and Rules 17a-3 and 17a-8 thereunder, and Section 5 of the Securities Act. As a result of these discussions, Oppenheimer has submitted an Offer of Settlement and agreed to the Order, which was presented by the Staff to the Commission.

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Oppenheimer is a registered broker-dealer and investment adviser under the Exchange Act and the Investment Advisers Act of 1940, respectively, and is a wholly-owned subsidiary of Oppenheimer Holdings Inc., a publicly traded company with securities registered with the Commission pursuant to Section 12(b) of the Exchange Act.

The Order

The Order cites Oppenheimer for conduct relating to two separate customer accounts.

Account A

From July 2008 through May 2009, Oppenheimer sold shares of securities from the account (“Account A”) of a non-U.S. broker-dealer (“Customer A”). Although Account A was Customer A’s proprietary account, the Order finds that Customer A executed transactions and provided brokerage services through Account A for its clients, some of whom were U.S. persons. As a result, the Order finds that Customer A violated Section 15(a) of the Exchange Act by acting as an unregistered broker-dealer in the United States and that Oppenheimer willfully aided and abetted and was a cause of Customer A’s violation.

The Order also finds that certain Oppenheimer personnel knew that Customer A’s clients were the beneficial owners of the securities in Account A and, therefore, Oppenheimer was required to, but did not, withhold and remit taxes from the gross proceeds of any sales of securities in Account A. As Oppenheimer became liable for the taxes that it failed to withhold and remit, Oppenheimer was required to, but did not, record this liability and related expense, which caused its books and records to become inaccurate. As a result, Oppenheimer willfully violated Section 17(a) of the Exchange Act and Rule 17a-3(a)(2) under the Exchange Act, which requires broker-dealers to maintain ledgers accurately reflecting liabilities and expenses. The Order also finds that Oppenheimer’s books and records were also inaccurate because they failed to reflect the actual beneficial ownership of the securities in Account A. As a result, Oppenheimer willfully violated Rule 17a-3(a)(9), which requires broker-dealers to maintain records for each account showing the name and address of the beneficial owners of the securities.

Because the transactions conducted in Account A presented anti-money laundering (“AML”) risks, they were required to be reported in suspicious activity reports (“SARs”) filed with the U.S. Treasury Department’s Financial Crimes Enforcement Network (“FinCEN”). Oppenheimer’s failure to report these transactions in SARs to FinCEN violated the Bank Secrecy Act (“BSA”). As Exchange Act Rule 17a-8 requires broker-dealers to comply with the reporting, record-keeping and record retention requirements of the BSA, the Order also finds that Oppenheimer willfully violated Section 17(a) of the Exchange Act and Rule 17a-8 by failing to file SARs with respect to Account A with FinCEN.

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Account B

In October 2009, a customer (“Customer B”) opened an account (“Account B”) with Oppenheimer in its Boca Raton, Florida branch. During the period from October 2009 through December 2010, the Order finds that Customer B acquired large tranches of penny stocks directly from the issuers, deposited those shares in Account B and sold the shares shortly after acquiring them. No registration statements were filed to cover these resales, and Customer B’s trading patterns were consistent with red flags identified by Oppenheimer’s compliance department’s internal guidance issued in October 2009 as being indicative of illegal unregistered distributions.

The Order finds that Oppenheimer was aware or should have been aware that Customer B was engaging in unregistered distributions of securities. In light of the red flags associated with Customer B’s deposits and resales of penny stocks, Oppenheimer was required to, but did not, engage in a “searching inquiry” in order to properly rely on the brokers’ transaction exemption in Section 4(a)(4) of the Securities Act. As a result, Oppenheimer could not claim the brokers’ transaction exemption under Section 4(a)(4) in executing Customer B’s orders to sell its shares of penny stocks in unregistered transactions and therefore willfully violated Section 5 of the Securities Act. In addition, the Order finds that, pursuant to Section 15(b)(4)(E) of the Exchange Act, Oppenheimer failed reasonably to supervise because it did not establish and implement policies and procedures reasonably designed to prevent and detect violations of Section 5 by Oppenheimer personnel.

Based on the conduct summarized above, the Order finds that Oppenheimer violated Sections 15(a) and 17(a) of the Exchange Act and Rules 17a-3(a)(2), 17a-3(a)(9) and 17a-8 thereunder, and Section 5 of the Securities Act. The Order censures Oppenheimer and requires Oppenheimer to cease and desist from committing or causing any violations and any future violations of the same provisions. In addition, the Order requires Oppenheimer to pay a total of \$20 million, comprised of \$4,168,400 in disgorgement, \$753,471 in prejudgment interest and \$15,078,129 in civil penalties, of which \$10 million in civil penalties will be paid to FINCEN in settlement of findings by that agency. Notably, the Order calls for \$10 million to be paid immediately and the balance of \$10 million within two years of the effective date of the Order. The Order also requires Oppenheimer to comply with undertakings related to the retention of an independent compliance consultant (the “Independent Consultant”) to conduct a review of certain of Oppenheimer’s systems, policies and procedures.

The FINRA Order

Although not addressed in the Order, but in the interest of full disclosure, we bring to the Division’s attention the fact that FINRA conducted an investigation of the same facts and pattern

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of conduct with respect to Customer B (as referenced in the Order) and similarly situated customers. The Firm settled FINRA's investigation in August 2013 by agreeing to an Order Accepting Offer of Settlement issued on August 5, 2013 (the "FINRA Order"). See Oppenheimer & Co., Inc., FINRA Disciplinary Proceeding No. 2009018668801 (Aug. 5, 2013). Specifically, FINRA found that, between August 19, 2008 and September 20, 2010, Oppenheimer failed to reasonably supervise trading activity in penny stocks at 5 branch offices across the U.S. (including Boca Raton) involving 13 customers (including Customer B) and 7 Oppenheimer financial advisers. FINRA also found that, during this period, these 13 customers sold over one billion shares of 20 penny stocks in unregistered transactions, in violation of Section 5.

The FINRA Order ordered that Oppenheimer be censured and fined in the amount of \$1,425,000 and undertake to retain an independent consultant to conduct a comprehensive review of the adequacy of the Firm's policies, systems and procedures and training relating to the purchase and sale of penny stocks, the supervision of foreign financial institutions and anti-money laundering procedures. Oppenheimer engaged Grant Thornton LLP to serve as its independent consultant; Grant Thornton LLP issued its report; and Oppenheimer agreed to adopt and implement all of Grant Thornton LLP's low-priced securities and AML recommendations. To date, Oppenheimer has implemented all of the low-priced securities recommendations and nearly all of the AML recommendations, and is working assiduously to complete its implementation of all of the AML recommendations.

OCIE Examination

In a recent examination by OCIE, it was noted that three clients continued to sell low-priced stocks through Oppenheimer during the period from 2011 to 2013, but that effectively all activity in low-priced stocks ceased after August 2013.

DISCUSSION

Oppenheimer understands that the entry of the Order will disqualify it and its affiliates from relying on Rule 506 of Regulation D under the Securities Act. Oppenheimer is concerned that, should it or any of its affiliates be deemed to be an issuer, predecessor of an issuer, affiliated issuer, general partner or managing member of issuer, or promoter of securities – or should it be deemed to be acting in any other capacity described in Rule 506 for purposes of Rules 506(d)(1)(iv) and 506(d)(1)(v)(B) – Oppenheimer, its affiliates and third parties that engage Oppenheimer and its affiliates to act in (or otherwise involve Oppenheimer in) one of the listed capacities in connection with their securities offerings would be prohibited from relying on Rule 506.

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The Commission has the authority to waive these disqualifications upon a showing of good cause that such disqualifications are not necessary under the circumstances. Oppenheimer requests that the Commission waive any disqualifying effects that the Order will have under Rule 506 as of result of its entry as to Oppenheimer and its affiliates on the following grounds:

1. Even though Oppenheimer's conduct at issue in the Order relates to the offers and sales of securities, it does not relate to offers or sales of securities in Rule 506 offerings by Oppenheimer or to any Rule 506 securities offerings in which Oppenheimer was an offering participant, nor does it relate to any disclosures to investors by Oppenheimer or by its public company parent Oppenheimer Holdings, Inc.

Although the Order charges Oppenheimer for violating Section 5 of the Securities Act in connection with Customer B's trading activity, that violation stems from Oppenheimer's supervisory failures. Specifically, Oppenheimer's failure to conduct a "searching inquiry" as to whether Customer B's resales were in compliance with Rule 144, which resulted in Oppenheimer's inability to claim the Section 4(a)(4) brokers' transaction exemption in executing Customer B's sell orders, thereby causing Oppenheimer to violate Section 5. As cited in the FINRA Order, there were also similar supervisory failures of penny stock transactions in other branch offices and other financial advisers and clients – in total, 5 branch offices involving 13 customers (including Customer B) and 7 financial advisers.

To put these activities into perspective, the total fees that Oppenheimer received from the trading activities of the customers identified in the Order, the FINRA Order and in OCIE's examination constituted less than approximately 0.25% of revenues from 2008 to the present. Oppenheimer did not solicit this trading activity; Oppenheimer did not financially benefit from this trading activity in any meaningful way, nor was it widespread in terms of the number of offices, customers and financial advisers.

2. Oppenheimer has taken many, and will take additional, steps to address the conduct at issue in the Order. First, the three financial advisers to Customer A, the financial adviser to Customer B, the branch manager in Boca Raton and the Firm's Chief Compliance Officer during the period covered by the Order are no longer with the Firm. In addition, the Firm's head of National Sales will no longer be employed by Oppenheimer by December 15, 2014.

Second, in response to the FINRA Order and Grant Thornton LLP's recommendations, Oppenheimer has adopted and implemented each of Grant Thornton's recommendations relating to low-priced securities and revised Oppenheimer's written policies and procedures to eliminate the ability of customers to deposit and immediately liquidate large amounts of low-priced securities in their accounts. As a result of new limits imposed on the sale of penny stocks in any

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three-month period, the volume of penny stock transactions has been reduced to very modest levels. Oppenheimer's enhanced policies prohibit penny stock sales of the type described in the Order and only permit incidental penny stock sales for established customers subject to strict volume limitations per quarter to ensure against a client conducting an unregistered distribution. Grant Thornton LLP has also provided Oppenheimer with its recommendations for changes to Oppenheimer's AML policies and procedures, all of which Oppenheimer agreed to adopt and implement. To date, Oppenheimer has finished implementing nearly all of the AML recommendations and is working assiduously to complete its implementation of all of the AML recommendations.

Third, pursuant to the Order, Oppenheimer will take still other steps to address the conduct underlying the Order. Most important, Oppenheimer will comply with the undertakings in the Order, including, among other things: (a) to retain an Independent Consultant to review Oppenheimer's systems, policies and procedures as they relate to compliance with Section 5 of the Securities Act, BSA, the Patriot Act, Oppenheimer's AML program and proper recognition of liabilities and expenses associated with accounting for failure to withhold taxes and report on income on accounts of foreign entities trading on behalf of customers, and to report income for U.S. customers trading through foreign financial institutions; (b) to adopt and implement all of the Independent Consultant's recommendations that the Independent Consultant deems appropriate; (c) to have the Independent Consultant conduct a periodic review to determine whether Oppenheimer is implementing all of the Independent Consultant's recommendations; (d) to cooperate fully with the Independent Consultant and provide access to Oppenheimer's files, books, records and personnel as reasonably requested by the Independent Consultant; and (e) to certify, in writing, its compliance with the undertakings, including providing written evidence of compliance in the form of a narrative, supported by exhibits sufficient to demonstrate compliance.

In sum, Oppenheimer has taken and will continue to take concrete steps to address the conduct at issue in the Order. The steps are designed to preclude the possibility of similar conduct occurring in the future and make disqualifying Oppenheimer and its affiliates from relying on Rule 506 in connection with an offering unnecessary.

3. Oppenheimer's inability to engage in private placements pursuant to Rule 506 would be extremely damaging to the Firm. First, Oppenheimer sponsors and serves as general partner in a wide range of alternative investments, such as single manager hedge funds, fund of funds and private equity vehicles, all of which raise capital in exempt offerings in reliance on Rule 506. Because of Oppenheimer's role as general partner, these funds would be disqualified from relying on Rule 506 to raise new capital if the Order is issued and there is no waiver. While Section 4(a)(2) of the Securities Act is theoretically available to these funds, the lack of a safe harbor would render these alternative investments untenable, given the legal uncertainty of

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determining whether a potential investor requires the protections of the Securities Act to invest in these types of alternative investments due to, in many cases, the complexity of these investments. Second, Oppenheimer currently acts as compensated solicitor for third-party funds that rely on Rule 506 to raise capital. Once the Order is issued, without a waiver, Oppenheimer would no longer be able to act as a compensated solicitor in Rule 506 offerings. In 2013, the last audited period, Oppenheimer served as the general partner of 13 Oppenheimer-sponsored funds and as compensated solicitor for 15 third-party funds and raised over \$354 million in capital in both sets of funds and earned \$49.7 million in fees from its activities in alternative investments offered to clients.

With respect to alternative investments, the critical perspective here is the client's perspective. Alternative investments – in the form of Oppenheimer-sponsored hedge funds as well as third-party hedge funds for which Oppenheimer acts as compensated solicitor – offered pursuant to Rule 506 are an integral part of Oppenheimer's product offerings to clients and a key competitive differentiator for Oppenheimer as compared to its peer middle-market firms. As of January 1, 2014, Oppenheimer had over \$3 billion in alternative investments under management (\$2.7 billion in 13 Oppenheimer-sponsored funds and \$300 million in 15 third-party hedge funds). The clients owning these securities are clients of 773 Oppenheimer financial advisers who collectively oversee \$52.8 billion of client assets, which constitute 60% of Oppenheimer's total assets under custody and administration. These 773 financial advisers are located throughout Oppenheimer's 94 branch offices. Oppenheimer believes that there is a real risk that clients who want to invest in alternative investments after the Order is issued would leave the Firm if Oppenheimer can no longer offer alternative investments to them.

Third, Oppenheimer acts as private placement agent in Rule 506 offerings of securities issued by its company clients. If the Order is issued and a waiver is not granted, then Oppenheimer would no longer be able to provide this service to its company clients. While the volume varies from year to year, in 2013, Oppenheimer served as placement agent in Rule 506 offerings raising \$103 million for issuers, and Oppenheimer received placement fees of \$2.5 million. If the Order is issued and there is no waiver, then Oppenheimer would not be able to act as private placement agent for its clients' Rule 506 offerings. The team of bankers working on these offerings collectively generated revenues of \$15 million (which includes the placement fees of \$2.5 million) in 2013, which was 30% of Oppenheimer's revenues from its investment banking business in 2013. Oppenheimer believes that the inability to act as placement agent in Rule 506 offerings would greatly damage Oppenheimer's ability to provide the full suite of services to corporate clients and would jeopardize its investment banking business as there is a real risk that these corporate clients and the Oppenheimer bankers who serve them would leave the firm as a result.

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In short, the inability to participate in Rule 506 offerings would not only place Oppenheimer at a competitive disadvantage to its peer firms that can engage in such activities, it would put Oppenheimer's alternative investments, private client and investment banking businesses in jeopardy. For these reasons, and because, as noted above, the conduct underlying the Order was not related to an offering or sale of securities by Oppenheimer, disqualifying Oppenheimer and its affiliates from relying on Rule 506 is not necessary.

4. As stated above, even though Oppenheimer's conduct at issue in the Order relates to the offers and sales of securities, Oppenheimer's conduct at issue in the Order does not relate to offers or sales of securities in Rule 506 offerings by Oppenheimer or to any Rule 506 securities offerings in which Oppenheimer was an offering participant, nor does it relate to any disclosures to investors by Oppenheimer or by its public company parent Oppenheimer Holdings, Inc. Nevertheless, we recognize and can appreciate that the Order may raise questions about supervisory failures that could occur in the future in connection with any Rule 506 offering in which Oppenheimer or any of its affiliates is an issuer or market participant. To squarely address these questions and to increase the likelihood that there will not be any such failures or violations in the future, Oppenheimer intends to do the following:

- Within 30 days after the issuance of the Rule 506(d) waiver, Oppenheimer will engage a nationally recognized law firm with significant expertise in Rule 506 offerings (the "Law Firm"), not unacceptable to the Division of Corporation Finance, to review Oppenheimer's policies and procedures relating to Rule 506 offerings – with respect to both its activities as private placement agent in its investment banking business as well as its activities as issuer and as compensated solicitor in its wealth management business – the implementation of those policies and procedures, and compliance with those policies and procedures. Within 6 months after the issuance of the Rule 506(d) waiver, the Law Firm will submit a written and dated report of its findings to Oppenheimer. This report will not be privileged and will be provided to the Division of Corporation Finance. In addition, it can be reviewed by OCIE in its next examination of Oppenheimer.
- Oppenheimer will adopt and implement all recommendations in the report for changes in or improvements to Oppenheimer's policies and procedures; provided, however, that within 30 days after the date of the report, Oppenheimer shall in writing advise the Law Firm and the Division of any recommendations that Oppenheimer considers to be unduly burdensome, impractical or inappropriate. With respect to any recommendation that Oppenheimer considers unduly burdensome, impractical or inappropriate, Oppenheimer need not adopt that recommendation at that time but shall propose in writing an alternative policy, procedure or system designed to achieve the same objective or purpose. As to any recommendation with respect to

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Oppenheimer's policies and procedures on which Oppenheimer and the Law Firm do not agree, Oppenheimer and the Law Firm shall attempt in good faith to reach an agreement within 60 days after the date of the report. Within 15 days after the conclusion of the discussion and evaluation by Oppenheimer and the Law Firm, Oppenheimer shall require that the Law Firm inform Oppenheimer and the Division in writing of the Law Firm's final determination concerning any recommendation that Oppenheimer considers to be unduly burdensome, impractical, or inappropriate. Oppenheimer shall abide by the determinations of the Law Firm. Oppenheimer will adopt and implement all of the recommendations that the Law Firm deems appropriate within 12 months after the date of the report.

- After this 12-month period (or 18 months after the issuance of the Rule 506(d) waiver), Oppenheimer will engage the Law Firm to review Oppenheimer's compliance with the Law Firm's recommendations to ensure that all changes in or improvements to Oppenheimer's policies and procedures have been fully implemented. The Law Firm will have 6 months to complete its review and submit a written and dated report of its findings to Oppenheimer. Such report will not be privileged and will be provided to the Division of Corporation Finance. In addition, it can be reviewed by OCIE in its subsequent examination of Oppenheimer.
- Within 60 days after the issuance of the Rule 506(d) waiver, Oppenheimer will conduct and complete firmwide training for all registered persons on compliance with Rule 506.

5. The misconduct alleged in the Order is not criminal in nature and is not scienter-based.

6. For a period of five years from the date of the Order, Oppenheimer will furnish (or cause to be furnished) to each purchaser in a Rule 506 offering that would otherwise be subject to the disqualification under Rule 506(d)(1) as a result of the Order, a description in writing of the Order a reasonable time prior to sale.

In light of the grounds for relief discussed above, we believe that disqualification is not necessary under the circumstances and that Oppenheimer has shown good cause that relief should be granted. Accordingly, we respectfully urge the Commission, pursuant to Rule 506(d)(2)(ii), to waive the disqualification provisions in Rule 506 under the Securities Act to the

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extent they may be applicable to Oppenheimer and its affiliates as a result of the entry of the Order.¹

Sincerely,

A handwritten signature in black ink, appearing to read 'TK', with a horizontal line extending from the end of the signature.

Thomas J. Kim

¹ We note in support of this request that the Commission has granted relief under Rule 506 of Regulation D for similar reasons or in similar circumstances. *See, e.g., Bank of America, N.A.*, Release No. 9682 (Nov. 25, 2014); *Citigroup Global Markets Inc.*, Release No. 33-9657 (Sept. 26, 2014); *Barclays Capital Inc.*, Release No. 33-9651 (Sept. 23, 2014); *Wells Fargo Advisers, LLC*, Release No. 33-9649 (Sept. 22, 2014); *Dominick & Dominick LLC*, Release No. 33-9619 (July 28, 2014). Oppenheimer is not requesting waivers of the disqualifications from relying on Regulation A and Rule 505 of Regulation D at this time because it does not now use or participate in transactions under such offering exemptions. Oppenheimer understands that it may request such waivers in a separate request if circumstances change.