

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 59438 / February 24, 2009**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-13378**

<p><b>In the Matter of</b></p> <p style="text-align:center"><b>OPPENHEIMER &amp; CO. INC.,</b></p> <p><b>Respondent.</b></p>
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**ORDER INSTITUTING ADMINISTRATIVE PROCEEDINGS, PURSUANT TO SECTION 15(b) OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

**I.**

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted pursuant to Section 15(b) of the Securities Exchange Act of 1934 (“Exchange Act”) against Oppenheimer & Co. Inc. (“OPCO” or “Respondent”).

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (“Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over Respondent and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative Proceedings, Making Findings, and Imposing Remedial Sanctions Pursuant to Section 15(b) of the Securities Exchange Act of 1934 (“Order”), as set forth below.

### III.

On the basis of this Order and Respondent's Offer, the Commission finds<sup>1</sup> that:

#### A. Summary

From May 2003 to August 2004 (the "relevant period"), OPCO failed reasonably to supervise Frank Lu ("Lu"), a former salesperson at OPCO, with a view to preventing and detecting Lu's violations of the federal securities laws. During this period, Lu and Victor P. Machado ("Machado"), a former trader at two related entities, Leumi Investment Services Inc. and Bank Leumi USA, (collectively referred to as "Leumi"), engaged in a fraudulent scheme that resulted in a substantial increase of order flow from Leumi to OPCO. Pursuant to their scheme, Lu provided Machado with secret gratuities and entertainment and Machado, in violation of his duties to Leumi and its customers, directed a substantial flow of orders to OPCO for execution at prices that were favorable to OPCO and detrimental to Leumi's customers. As a result of this arrangement, on certain trades, Lu and Machado also positioned OPCO between Leumi and other broker-dealers offering better prices that Machado could have obtained for Leumi. Lu's and Machado's scheme caused significant harm to Leumi's customers.

During the relevant period, Lu and Machado conducted their trading and most of their communications by e-mail on the Bloomberg Mail messaging system.<sup>2</sup> Several e-mail exchanges between Lu and Machado presented red flags indicating that Machado was directing order flow to Lu, and in turn, Lu was providing secret gratuities to Machado. Because of a deficiency in OPCO's e-mail review procedures, none of Lu's Bloomberg e-mails was reviewed by OPCO staff, as required by OPCO's electronic communications policy. If OPCO had monitored Lu's Bloomberg e-mail communications, OPCO supervisors likely would have seen these messages and could have prevented Lu's misconduct or detected it at an earlier time. Accordingly, OPCO failed reasonably to supervise Lu, within the meaning of Section 15(b)(4) of the Exchange Act, by its failure to implement reasonable procedures for preventing or detecting Lu's violations of the federal securities laws.

#### B. Respondent

Oppenheimer & Co. Inc. is a New York corporation with its principal office in New York, New York. OPCO is registered with the Commission as both a broker-dealer and investment adviser.

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<sup>1</sup> The findings herein are made pursuant to Respondent's Offer and are not binding on any other person or entity in this or any other proceeding.

<sup>2</sup> Bloomberg Mail is a proprietary electronic messaging and e-mail system operated by Bloomberg L.P.

## C. Facts

### 1. **Lu's and Machado's Scheme**

From January 2003 until he resigned in March 2006, Lu was a salesperson at OPCO specializing in emerging market securities. As a salesperson, Lu performed various services for his customers, including soliciting trades and processing their orders. During the relevant period, Lu was compensated based solely on a percentage of the revenue generated by his customers' orders.

Lu and Machado began trading emerging market securities in 2000. In mid-2003, Lu and Machado secretly agreed that Machado would direct orders to Lu for execution at prices favorable to OPCO and, in exchange, Lu would provide Machado with gratuities and entertainment. The arrangement ensured that Lu received increased order flow, which, in turn, meant that Lu's compensation increased.

During 2003 and 2004, Lu entertained Machado numerous times per year. Each evening of entertainment typically cost at least a thousand dollars and was paid for by Lu in cash. In addition, approximately half a dozen times per year, Lu gave Machado gifts. Neither Lu nor Machado reported these gratuities and entertainment, as required under OPCO's and Leumi's respective policies.<sup>3</sup>

Under their secret arrangement, Machado frequently changed Lu's quoted price to make it more favorable to OPCO and, consequently, less favorable to Leumi and its customers. For example, if Leumi placed an order to buy a security and Lu quoted a price for that security to Machado at \$99.50, Machado instead would pay OPCO \$100 for the security.

As part of their arrangement, Lu and Machado also positioned OPCO between Leumi and other broker-dealers that offered better prices to Leumi. For example, after Machado received a favorable price quote from another broker-dealer, instead of executing the trade directly with that firm, Machado would direct Lu to contact that broker-dealer to buy or sell the securities in question at the favorable quoted price. Thereafter, Machado would execute Leumi's order with Lu at a price that was less favorable to Leumi and its customers than the price initially quoted by the other broker-dealer.

As a result of this secret arrangement, the average number of monthly trades that Machado executed with Lu through OPCO increased by approximately 450 percent during the relevant period. As a result of Lu's and Machado's scheme, Leumi and its customers were harmed by approximately \$1.1 million.

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<sup>3</sup> FINRA Rule 3060 (which was in effect during the relevant period) prohibits a person associated with a broker-dealer from directly or indirectly giving anything of value, including gratuities, in excess of one hundred dollars per individual per year to any person where such payment or gratuity is in relation to the business of the employer of the recipient of the payment or gratuity. The rule also requires that the broker-dealer retain a record of all payments or gratuities in any amount known to it.

By the conduct described above, Lu violated Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and aided and abetted Machado's violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

## **2. OPCO's Failure to Review Lu's E-mail Communications**

During the relevant period, OPCO's electronic communications policy required that supervisors (or their designees) review for each employee twenty-five percent of the daily outgoing e-mails, 100 percent of the daily incoming e-mails, and 100 percent of quarantined e-mails.<sup>4</sup> To satisfy this requirement, OPCO employed a computer system that was designed to load all employees' daily electronic communications (including Bloomberg e-mail) into a database, which would then be reviewed by supervisors or their designees. However, based on a deficiency in OPCO's procedures, Lu's Bloomberg e-mails never were obtained by OPCO, loaded into OPCO's computer system, or reviewed by any OPCO supervisor during the entire period of the scheme.

During the relevant period, at the end of each workday, OPCO's computer system was to obtain from Bloomberg all e-mail for each OPCO employee who had a Bloomberg account and used the Bloomberg e-mail system. After identifying those e-mails, OPCO's computer system was programmed to download the e-mail into a database for review by each employee's supervisor (or the supervisor's designee). During this period, OPCO failed to implement reasonable procedures for identifying which OPCO employees had Bloomberg accounts, and programming that information into its computer system. As a result of this deficiency, for more than four years, OPCO's computer system did not retrieve from Bloomberg, or load into OPCO's database for supervisory review, the Bloomberg e-mail messages for approximately 370 OPCO employees (including Lu). This failure was not detected by OPCO supervisors (or their designees) in the course of their daily reviews of employee e-mail.

During the relevant period, Lu and Machado conducted their trading and most of their communications over the Bloomberg messaging system. Several Bloomberg e-mail exchanges between Lu and Machado presented red flags indicating that Machado was directing order flow to Lu, and in exchange, Lu was providing secret gratuities to Machado. If OPCO had monitored Lu's Bloomberg e-mail communications as required under OPCO's electronic communications policy, OPCO likely would have prevented Lu's misconduct or detected it at an earlier time. Given that Lu received most of his order flow from Leumi and that the amount of business that Lu received from Leumi had increased dramatically during the period that these e-mails were being sent, the messages likely would have alerted Lu's supervisor to the improper dealings between Lu and Machado.

OPCO's failure to review any of Lu's Bloomberg messages for an extended period – contrary to OPCO's policy – constitutes a failure to implement reasonable procedures for preventing or detecting Lu's fraudulent conduct.

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<sup>4</sup> Under OPCO's e-mail review system, e-mails containing certain words or phrases were quarantined for supervisory review.

## **E. Violations**

Section 15(b)(4)(E) of the Exchange Act gives the Commission the authority to censure, suspend, or revoke the registration of any broker or dealer who has failed reasonably to supervise associated persons, with a view toward preventing and detecting violations of the federal securities laws. Section 15(b)(4) states that a broker-dealer may discharge its supervisory responsibilities by having “established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect” these violations.

“The Commission has repeatedly emphasized that the duty to supervise is a critical component of the federal regulatory scheme.” *In the Matter of Oechsle International Advisors, L.L.C.*, Admin. Proc. File No. 3-10554, 5 (August 10, 2001). “Where there has been an underlying violation of the federal securities laws, the failure to have or follow compliance procedures has frequently been found to evidence a failure reasonably to supervise the primary violator.” *In the Matter of William V. Giordano*, Admin. Proc. File No. 3-8933 (January 19, 1996). In addition to adopting effective procedures for supervision, broker-dealers “must provide effective staffing, sufficient resources and a system of follow up and review to determine that any responsibility to supervise delegated to compliance officers, branch managers and other personnel is being diligently exercised.” *In the Matter of Mabon, Nugent & Co.*, Admin. Proc. File No. 3-6207 (January 13, 1983).

As discussed in paragraph C 2 above, OPCO’s electronic communications review procedure required OPCO’s supervisors to review daily a significant percentage of the Bloomberg e-mail for its employees, including Lu. However, OPCO failed to implement reasonable procedures for identifying these employees and, as a result, failed to retrieve from Bloomberg, or load into OPCO’s database for supervisory review, these employees’ Bloomberg e-mails. Consequently, OPCO failed to review the Bloomberg e-mails for approximately 370 employees, including Lu, for more than four years. During this period, OPCO did not provide “sufficient resources and a system of follow up and review to determine” whether its supervisors were, in fact, reviewing all of the Bloomberg e-mail communications of its employees. Effective implementation of its communication review policies likely would have enabled OPCO to prevent and detect Lu’s improper dealings with Machado.

By engaging in the conduct described above, OPCO failed reasonably to supervise Lu with a view toward preventing and detecting Lu’s violations of the federal securities laws.

## **F. Undertakings**

OPCO has undertaken to review its policies, procedures and systems regarding the capture and reviewing of electronic communications by its employees. Within ninety days of the issuance of this Order, unless otherwise extended by the staff of the Commission for good cause shown, OPCO shall submit a report to the Commission describing the review performed and the conclusions and changes made as a result of this review. Further, at the time that OPCO submits the report, OPCO shall certify to the Commission in writing that it has established procedures, and

a system for applying such procedures, which are reasonably expected to prevent and detect, insofar as practicable, the violations described in this Order.

#### IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent's Offer.

Accordingly, pursuant to Section 15(b) of the Exchange Act, it is hereby ORDERED that:

A. OPCO be, and hereby is censured;

B. IT IS FURTHER ORDERED that OPCO shall, within 10 days of the entry of this Order, pay a civil money penalty of \$850,000 to the United States Treasury. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment shall be: (A) made by United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies OPCO as a respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Antonia Chion, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., N.E., Washington, D.C. 20549-8549; and

C. OPCO shall comply with the undertaking enumerated in Section III, paragraph F above.

By the Commission.

Elizabeth M. Murphy  
Secretary