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April 5, 2005

Mr. Jonathan G. Katz  
Secretary  
U.S. Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, DC 20549-0609

**Re: File Number SR-NASD-2004-026  
Proposed Amendments to NASD Rule 2320(a)  
Governing "Best Execution"**

Dear Mr. Katz:

The Bond Market Association ("Association")<sup>1</sup> appreciates the opportunity to comment on the above-referenced proposed rule change (the "Proposal") of the National Association of Securities Dealers, Inc. ("NASD"). The Proposal would amend NASD's Rule 2320(a) (the "Rule"), which requires NASD members, in connection with "any transaction with or for a customer," to use reasonable due diligence so that the customer achieves as favorable a price as possible under prevailing market conditions. Among other things, the Proposal would (a) extend these due diligence obligations not just to an NASD member firm's own customers, but also to orders of the customers of another broker-dealer, and (b) oblige a member firm to seek out the best "market center" for a security (rather than the current obligation to seek out the best "inter-dealer market").

The Association and its members unequivocally endorse principles of customer protection in the bond markets. However, because of the special characteristics of debt instruments and the structure of the fixed income market, rules crafted with other instruments and markets in mind often cannot be imposed on the bond market without creating grave problems of interpretation, application and enforcement.

The Proposal was clearly developed solely with equities trading in mind. Whatever its merits may be for the equities markets, the Proposal is inappropriate for the market for

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<sup>1</sup> The Association represents securities firms and banks that underwrite, trade and sell debt securities, both domestically and internationally. The Association's member firms collectively represent in excess of 95% of the initial distribution and secondary market trading of municipal bonds, corporate bonds, mortgage and other asset-backed securities and other fixed income securities. More information about the Association is available on its website [www.bondmarkets.com](http://www.bondmarkets.com).

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fixed income securities for the reasons stated below. In fact, the Proposal would (if adopted) exacerbate existing difficulties in applying the Rule to the world of bond trading.

In a 1996 release, (the "NASD Government Securities Notice"), the NASD proposed to extend (and subsequently did extend) a number of the NASD's "Rules of Fair Practice," including the predecessor to Rule 2320(a), to government securities trading.<sup>2</sup> While acknowledging that "certain specific provisions of the Best Execution Interpretation may not be applicable to the government securities market..." and stating that "NASD will further consider whether an amendment to the Best Execution Interpretation is necessary to clarify [the application of the Best Execution Interpretation] ...," there has been a notable lack of guidance from the NASD regarding best execution obligations in either the government or corporate bond market.

The Association would welcome an opportunity to initiate a larger dialogue concerning best execution in corporate and government bonds with the NASD and the Securities and Exchange Commission (the "SEC"). In the interim, however, the Association respectfully urges the SEC not to approve the Proposal, unless it is amended to provide that it does not apply to bond trading.

## **Discussion**

### **I. Extension of Member Obligations to Customer Orders of Other Securities Firms**

The Association believes that the proposed extension of an NASD member's "due diligence" obligation to customer orders of other securities firms represents an unnecessary extension of fiduciary principles that is particularly inappropriate to the largely dealer structure of the bond market. Specifically, the Proposal would foist upon a bond dealer (a "receiving firm"), who has not dealt with a particular customer and who knows only another firm (a "forwarding" or "introducing" firm) that is making inquiry regarding inventory and prices, the *agency* obligation to seek out the best available price for the security and either execute it at that price or somehow forward it on to a firm that would have the same obligations (and so forth). The Association believes that this is (a) inconsistent with the customer's reasonable expectations of how its bond order will be handled; (b) impractical as a matter of fact in the case of the bond market; and (c) unfair to a receiving firm to such an extent that it constitutes an undue burden on competition in contravention of the Securities Exchange Act of 1934 (the "Exchange Act").

#### **(a) Customer Expectations**

In general, bond trading is conducted by dealers acting as principals. Where a customer seeks to trade with a dealer, the customer should have a right to rely upon representations and express agreements made by that dealer, and upon the integrity of the dealer to transact at prices that are fair, taking into account all relevant circumstances,

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<sup>2</sup> See File No. SR-NASD-95-39, 61 FR 11655, at 11658 (March 21, 1996).

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including market conditions at the time of purchase or sale and other pertinent factors.<sup>3</sup> In this regard, the Association concurs with the position of the Municipal Securities Rulemaking Board (“MSRB”) that, because dealers are market professionals and (in most cases) customers are not, customers should generally be entitled to “legitimately rely on [a] dealer to use its market expertise to ensure that the customer’s price is reasonably related to market value.”<sup>4</sup>

By contrast, if a customer and a securities firm agree that the firm, rather than executing an order immediately as principal, will seek to purchase or sell a bond as agent for the customer, the Association agrees that it is the firm’s duty as agent to seek out the best price reasonably available for the security under prevailing conditions and in accordance with the customer’s instructions and expectations.<sup>5</sup> In the case of a firm acting in such an agency capacity, a “special relationship” is created upon which the law imposes fiduciary obligations.<sup>6</sup>

Where a customer has selected a securities firm to transact with, whether as principal or agent, the customer expects the firm that it has chosen to deal would act in accordance with these standards – but would not normally have the same expectations concerning a potentially infinite chain of unknown intermediaries.<sup>7</sup>

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<sup>3</sup> See NASD Rule 2440 and IM-2440. The Association notes that the SEC has recently published for public comment NASD’s proposal (the “Proposed Additional Mark-Up Policy”) to add to its rulebook IM-2440-2 (and simultaneously redesignate IM-2440 as “IM-2440-1”), Release No. 34-51338; SR-NASD-2003-141 (March 9, 2005). The Association is separately submitting a comment letter, of even date herewith, on the Proposed Additional Mark-Up Policy.

<sup>4</sup> See MSRB Notice 2004-3 (January 26, 2004). In general, the Association believes that the most significant factor for most customers and dealers as it relates to comparing instruments of comparable tenors and credit qualities is the relative yield of the instruments. According to a panel of bond market experts organized by the NASD to address a variety of regulatory issues involving the debt markets: “Yield (inclusive of any charges from the brokerage firm) was deemed to be a good measure of overall ‘price’ paid for a given bond and one that could be compared to the broader market to gauge the competitiveness of the price and quality of execution.” Report of the Corporate Debt Market Panel (NASD September 2004) at p. 8.

<sup>5</sup> See *e.g.*, MSRB Rule G-18.

<sup>6</sup> See, *e.g.*, Banque Arabe Et Internationale D’Investissement v. Maryland National Bank, 819 F. Supp. 1282 (S.D.N.Y., 1993).

<sup>7</sup> The ability of investors and regulators to police compliance with these obligations in the fixed-income market has been dramatically enhanced in recent years with the introduction of the TRACE system of post-trade price reporting. See Testimony of Douglas Shulman before the United States Senate Committee on Banking, Housing and Urban Affairs concerning “An Overview of the Regulation of the Bond Markets” (June 17, 2004) (“Shulman Testimony”). See also Report of the Corporate Debt Market Panel (NASD September 2004) (“NASD Corporate Debt Panel Report”) at 8

**(b) Practical Considerations**

Imposing the customer due diligence obligations on a “downstream” chain of dealers is particularly impractical in the bond market, where (in contrast to the equities and listed option markets) there is no pre-trade quote transparency,<sup>8</sup> no mandatory “firm quote” obligation,<sup>9</sup> and no uniform, regulated inter-market and inter-dealer linkage.<sup>10</sup>

It is simply unworkable to require a dealer (*i.e.*, a receiving firm) receiving an inquiry or indication of interest with respect to a bond from another securities firm (in this example, the introducing firm) to have the obligation to either (a) trade at a price quoted by yet a third dealer that is disseminating the highest indicative bid or lowest indicative offer for the bond that is known to the receiving firm (which indicative price may be neither “firm” nor accessible), or (b) endeavor somehow to “pass” the inquiring “introducing” securities firm and its customer to the third dealer – all on behalf of a customer with whom such receiving dealer has no relationship.

**(c) Fairness**

From the perspective of a dealer who is interacting with another securities firm, the Association concurs with the MSRB that:

“The responsibility present in dealer-customer relations does not necessarily extend to inter-dealer transactions. Dealers are entitled to expect that other dealer will act in a professional manner in pursuit of their own interests and in compliance with their own obligations under ... applicable laws, rules and regulations.”<sup>11</sup>

The Association believes that this is the proper standard whether the other securities firm is acting for its own account or representing a customer’s order as agent. Even in the case of a firm representing an order as agent, the agent is “in a far better position to facilitate best execution” of the customer’s order based on its knowledge of and relationship with the

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(“... the tools... to assess the quality of ... trade execution [in bonds] are increasingly available through public sources such as TRACE....”).

<sup>8</sup> In those other markets, quote and trade transparency are provided, among other things, through the Consolidated Tape Association Plan and the Consolidated Quotation Plan; the Reporting Plan for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis and the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information. The Association notes that, for the reasons stated in its comment letter, of even date herewith, concerning the Proposed Additional Mark-Up Policy, it does not support the creation of similar structures and related firm quote obligations in relation to the bond market.

<sup>9</sup> See Exchange Act Rule 11Ac1-1.

<sup>10</sup> See Intermarket Trading System Plan and the Options Intermarket Linkage Plan.

<sup>11</sup> MSRB Notice 2004-3(January 26, 2004) at 2.

customer, including the ability to evaluate the quality of another dealer's or market's quotations, than is a receiving/executing firm.<sup>12</sup>

Finally, the Proposal ignores the competitive landscape of the securities industry, and arguably turns securities firms into "common carriers." Some firms are more adept at pricing than others or have better technology, lower overhead, more capital or more diverse inventories. By permitting less adept firms acting as forwarding or introducing firms to "free ride" on the capabilities of more capable, larger or sophisticated firms (*i.e.*, by imposing on such "receiving brokers" the increased obligations contained in the Proposal), it alters competition among broker-dealers in a way that is wholly inconsistent with normal principles of free competition, and wholly unjustified by public benefit.

For these reasons, the Association believes that, at least insofar as it would be applied to the bond market, this aspect of the Proposal is inconsistent with Section 15A(b)(6) and (9) of the Exchange Act because it imposes an "undue burden on competition" that is "not necessary or appropriate in furtherance of" the purposes of the Exchange Act. Moreover, for the same reasons, approval of the Proposal by the SEC would be inconsistent with the Congressional mandate in Section 3(f) of the Exchange Act that the SEC, in approving proposed rules of self-regulatory organizations, consider whether approval will promote efficiency and competition.

## **II. Due Diligence with Respect to the "Best Market Center"**

Under the Proposal, an NASD member would be required to ascertain "the best market center" for a security so that "the resultant price to the customer is at least as favorable as possible under prevailing market conditions." The Association respectfully suggests that this language was proposed with a view towards the equities markets and without due consideration to the structure and operation of the bond markets.

In describing the rationale for this change, the NASD states merely that its intent is to "modernize the text of the rule" and to "clarify that member requirements to ascertain the best market for a security are not limited to 'inter-dealer' markets, but may include all 'market centers' on which a security is traded." This is meaningful terminology in the equities world – where, due to cross-listings and unlisted trading privileges trading, many equity issues are traded on multiple national securities exchanges as well as The Nasdaq Stock Market. However, the term "market center" does not have meaning in the context of the bond market.

The principal uses of the term "market center" are in the SEC's rules under Section 11A of the Exchange Act, concerning the "national market system." The term is defined in paragraph (a)(14) of Exchange Act Rule 11Ac1-5 (requiring monthly reporting by "market

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<sup>12</sup> See Letter dated September 9, 2002 from Subcommittee on Market Regulation of the Committee on Federal Regulation of Securities, Section of Business Law of the American Bar Association to Ms. Barbara Z. Sweeney, NASD, at 7, commenting on NASD Notice to Members 02-40 (in which the NASD requested comments from its members regarding, among other things, the responsibility of broker-dealers in respect of customer orders received from other broker-dealers).

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centers” in respect of “covered orders” in publicly traded equity securities) as: “any exchange market maker, OTC market maker, alternative trading system, national securities exchange or national securities association.”<sup>13</sup> None of these terms has the same relevance in regard to bond dealers.

In the equity markets, national securities exchanges, national securities associations and Nasdaq market makers have responsibilities concerning collection, consolidation and dissemination of quotations, “firmness” of quotations and reporting in respect of certain orders that the bond markets do not.<sup>14</sup> The Association concurs with the recent observations of the President – Markets, Services and Information of NASD: “Unlike equities, there is no centralized market structure for debt securities where quotes are published or transactions may be executed or facilitated.”<sup>15</sup>

The use of the term “market center” in the NASD’s rules and interpretive materials appears to be exclusively in reference to the “Nasdaq Market Center” or to national securities exchanges trading equity securities.<sup>16</sup> This applies as well to NASD’s prior

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<sup>13</sup> The Association notes that the fixed income market is, in fact, not a single market, but, in effect, several different markets – ranging from the U.S. Treasury market, where dealer quotations may be very representative of market prices and quotations on trading systems may be executable, through the corporate bond market, where large and active issuers may be actively quoted and where screens may provide good transparency for certain securities of active issuers (but not for other securities or issuers), to the market(s) for distressed and emerging markets paper and for derivative instruments, such as structured notes, where there may be limited trading, quoting or transparency. In none of these markets is the type of continuous 2-way quoting that is seen in the equities market a general feature. For these reasons, the Association would not support an interpretation that bond dealers in general should be regarded as “market centers.”

<sup>14</sup> Indeed, one of the apparent inconsistencies between the Proposed Additional Mark-Up Policy and the obligation (if the Proposal is to apply to the bond market at all) of a bond firm to check “the best market center” for a security, is that in the Proposed Additional Mark-Up Policy NASD, itself, recognizes that bond market quotations are not an especially reliable indicator of the current market price for a security, and for this reason, quotations may (under that Policy) only be used under limited circumstances as evidence of the prevailing market price. See discussion accompanying footnotes 11-15 of the release proposing the Proposed Additional Mark-Up Policy. The lack of “firmness” of quotations in the bond market (and the consequent limitations on their use in establishing the “current market” for a security) has been extensively noted in the context of actions involving best execution and related matters. See, e.g., Department of Enforcement v. SFI Investments, Inc., Kevin M. Smith and Jeffrey B. Bronfman (Disciplinary Proceeding No. C1097016), Amended Hearing Panel decision as to respondents Smith and Bronfman (March 28, 2000), at fn 103 and accompanying text, *citing, inter alia*, In re First Honolulu Securities, Inc., Exchange Act Rel. No. 32933, SI SEC685, 1993 LEXIS 2422 at \*13 (September 21, 1993), and Zero-Coupon Securities, 1987 SEC LEXIS 200S at \*7 (September 29, 1987).

<sup>15</sup> See Shulman Testimony.

<sup>16</sup> See, e.g., NASD Rules 4711 (Clearance and Settlement) and 5262 (Trade-Throughs); Notice to Members 95-43 (SEC Approves Expanded Limit-Order Protection Rules).

guidance to members concerning best execution obligations, which have focused almost exclusively on, and have used the term “market center” only in reference to, the equity markets and trading in equity securities and listed options.<sup>17</sup>

Unlike the equities market, the market for corporate debt and government securities is a decentralized telephone and screen market. In addition, the bond market utilizes a cornucopia of electronic transaction systems having widely diverse access arrangements, rule sets and functionalities.<sup>18</sup> But there is no market center in the sense that that term is used in the equity or listed options market.

There is no central source to consult for quotation information in the bond market. However, even if there were, would a dealer, in exercising its due diligence obligation as provided in the Proposal, be required to treat every other dealer (and the prices disseminated from each electronic trading system) as being “market centers” for purposes of the Proposal, regardless of firmness or accessibility?<sup>19</sup>

The Association respectfully submits that it would be irresponsible for the NASD to adopt (and for the SEC to approve) a rule change that, directly or by implication, purports to have application to the bond markets, without having given due consideration to what a bond dealer must do to satisfy its obligations under the rule, and without giving the bond market guidance regarding how to comply.

## **Conclusion**

The Association and its members stand ready to engage in a constructive dialogue concerning the creation of a workable framework for applying the

concept of best execution to the markets for corporate and government debt instruments. However, for the reasons stated above, the Proposal should not (and, indeed cannot, consistent with the Exchange Act) be approved by the SEC in its currently proposed form.

The Association appreciates this opportunity to address the issues raised by the Proposal. If you have any questions concerning these comments, or would like to discuss

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<sup>17</sup> See, e.g., Notice to Members 01-22 (NASD Regulation Reiterates Member Firm Best Execution Obligations and Provides Guidance to Members Concerning Compliance); *But see* NASD Government Securities Notice, and, more recently, Proposed Additional Mark-up Policy at footnotes 6 and 11, which advert to the application of best execution obligations in the debt market, but which do not use the “market center” concept nor give guidance regarding how a bond dealer is to discharge its “due diligence” obligations under NASD Rule 2320(a).

<sup>18</sup> See eCommerce in the Fixed-Income Markets: The 2004 Review of Electronic Transaction Systems (The Bond Market Association 2004).

<sup>19</sup> The Association notes that the Proposal includes “accessibility of the quotation” as a factor in determining whether a member has satisfied its due diligence obligations, but respectfully submits that this is inadequate guidance, at least for bond dealers.

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our comments further, please feel free to contact me at 646.637.9220 or via email at mdavid@bondmarkets.com.

Sincerely,

*/s/ Micah Green*

Micah S. Green  
President

*/s/ Michele David*

Michele C. David  
Vice President and  
Assistant General Counsel

cc: ***U.S. Securities and Exchange Commission***

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