

# BDA Bond Dealers of America

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Washington DC 20001

September 15, 2010

James L. Eastman  
Chief Counsel and Associate Director  
Division of Trading and Markets  
Securities and Exchange Commission  
100 F St., NE  
Washington, DC 20549

**Re: Request for Securities and Exchange Commission Guidance re Fixed-Income Dealers as Market Makers**

Dear Mr. Eastman,

The Bond Dealers of America (BDA)<sup>1</sup> is writing to request additional guidance with respect to the ability of dealers to qualify under certain circumstances as “market makers” in the debt markets. Similar issues were most recently touched upon by the Securities and Exchange Commission (“SEC”) in Release No. 34-55638 (April 16, 2007) (the “Release”). In the Release, the SEC approved an interpretation proposed by the National Association of Securities Dealers, Inc. (“NASD”), also referred to as an Additional Mark-Up Policy for Transactions in Debt Securities, Except Municipal Securities (File No. SR-NASD-2003-141). However, in the more than three years since the date of the Release, fixed-income dealers have struggled continually with the uncertainty that stems from the currently available guidance, such as the announcement by the SEC in the Release that “merely because the dealer takes risk positions or devotes substantial capital to provide liquidity,” it is not necessarily a market maker.<sup>2</sup>

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<sup>1</sup> The BDA is the Washington, DC based organization that represents national, middle-market dealers active in the U.S. domestic fixed income markets. The BDA is the only organization representing the unique interests of national, middle-market dealers. In addition to federal advocacy, the BDA hosts a series of meetings and conferences specific to domestic fixed income. For more information, please visit our web site: [www.bdamerica.org](http://www.bdamerica.org)

<sup>2</sup> Securities Exchange Act Rel. No. 34-55638, at 18, n.60 (Apr. 16, 2007) (Approving Release).

Clarity in the definition of market maker for fixed-income securities is important primarily because a clearer rule will encourage more dealers to take the risks associated with making a market and thus provide investors with greater liquidity. That greater liquidity will, in turn, foster a more efficient market and better allocation of resources.

Both the SEC and the NASD have acknowledged that a dealer meeting the standards of Section 3(a)(38) of the Securities Exchange Act of 1934, as amended (the “Act”), would qualify as a market maker.<sup>3</sup> Section 3(a)(38) of the Act defines the term “market maker” as “any specialist permitted to act as a dealer, any dealer acting in the capacity of a block positioner, and any dealer who, with respect to a security, holds himself out (by entering into quotations in an inter-dealer communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis.” However, in the Release, the SEC stated specifically that to be a market maker, “a dealer must meet the legal requirements set forth in the Act, which provides, in relevant part, that a dealer must hold itself out as being willing to buy and sell a security for its own account on a regular or continuous basis.”<sup>4</sup> The SEC did not explain in the Release its focus on only the third prong of the Section 3(a)(38) definition, nor did it address the point made by several commenters that the statutory definition includes a dealer acting as a block positioner.<sup>5</sup> In addition, much of the interpretation of the statutory definition of market maker has developed in the context of equity securities. Consequently, current guidance does not clearly address what steps a fixed-income dealer might take to satisfy the “holding out” standard of Section 3(a)(38).

In 1998, the NASD issued a proposed interpretation of the definition of market maker that fit the debt markets and was responsive to two of the three prongs of the Act’s definition: “In the debt securities markets, a market maker is a dealer who, with respect to a particular security, furnishes bona fide competitive bid and offer quotations on request and is ready, willing, and able to effect transactions in reasonable quantities at his or her quoted prices with other brokers or dealers.”<sup>6</sup> This proposed interpretation clarified how, with respect to debt securities, a dealer may qualify as a market maker by holding itself out as willing to commit capital or act as a block positioner to execute transactions.

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<sup>3</sup> Approving Release, at 16, n. 56 and 18, n.60.

<sup>4</sup> Approving Release, at 18, n.60.

<sup>5</sup> See Letter from William C. Caccamise, Banc of America Securities LLC, to Jonathan G. Katz, SEC, at 5 (Apr. 14, 2005); Letter from Micah S. Green and Michele C. David, Bond Market Association, to Jonathan G. Katz, SEC, at 11 (Apr. 5, 2005).

<sup>6</sup> See Notice of Filing of Proposed Rule Change and Amendments Nos. 1 and 2 by the National Association of Securities Dealers, Inc., Relating to the Application of NASD’s Mark-Up Policy to Transactions in Government and Other Debt Securities, Exchange Act. Rel. No. 40,511 (Sept. 30, 1998), 63 Fed. Reg. 54,169 (Oct. 8, 1998).

A return to the NASD's proposed 1998 interpretation of the definition of market maker would provide welcome certainty for dealers striving to comply with the mark-up policy and would be more consistent with the Act's definition in Section 3(a)(38). We urge the SEC to address the uncertainty that currently plagues the debt markets on this point.

Thank you for this opportunity to present our views. Please do not hesitate to call if you have any questions.

Sincerely,



Mike Nicholas  
Chief Executive Officer

cc: Mark Menchel  
Executive Vice President and General Counsel for Regulation  
Financial Industry Regulatory Authority

Ernesto A. Lanza  
General Counsel  
Municipal Securities Rulemaking Board