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Administrative Office
c/o Professor George Kaufman
Loyola University Chicago
820 North Michigan Avenue
Chicago, Illinois 60611
Tel: (312) 915-7075
Fax: (312) 915-8508
E-mail: gkaufma@luc.edu

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For Information Contact:

Peter J. Wallison
(202) 862-5864

Statement of the Shadow Financial Regulatory Committee

on

Regulation NMS

February 14, 2005

On December 15, 2004, the Securities and Exchange Commission (SEC) reproposed Regulation NMS, a rule first proposed in February 2004 that would, among other things, restructure trading in equity securities. The reproposed rule addresses a number of current issues associated with securities trading. The most important provision of the reproposed regulation is the so-called "trade-through" rule, which attempts to give price protection to limit orders by prohibiting bypassing—or "trading through"—a better priced limit order. The trade-through rule is currently applicable to the New York Stock Exchange and other registered exchanges, but not to Nasdaq and the electronic trading venues known as electronic communication networks (ECNs).

In the reproposed rule, which would apply to all electronically accessible limit orders, the SEC offered a choice between two forms of a trade-through rule, both of which would cover registered exchanges like the NYSE, as well as Nasdaq and the ECNs. The first of these choices, known as depth-of-book, would give price protection to all limit orders that are publicly disclosed in any trading venue. This means that an offer to buy an NYSE security would have to interact with all offers to sell that security, anywhere in the market, that are priced better than the best offer on the NYSE, before it could interact with an offer on the NYSE. The second SEC choice, known as top-of-book, would only require that an order placed on the NYSE interact only with the best price offered at any other trading venue. The limit order with the second best price would not be protected, even if it is better than the best price on the NYSE. Thus, the trade could be brought back to the NYSE and the balance of the order executed there.

In its Statement on a Financial Services Agenda for the Second Bush Administration, issued on December 6, 2004 (Statement No. 212), the Shadow Financial Regulation Committee stated that "The Committee has always supported competition in markets, and in the absence of compelling evidence of market failure or a demonstration that the securities markets are a natural monopoly—or that the new SEC draft otherwise improves upon competition—the Committee believes that the Administration should support the complete elimination of the trade-through rule."

The Committee believes that neither of the SEC's choices improves upon competition. This was also the view of a large number of commenters—organizations as diverse as TIAA-CREF and Nasdaq—who noted that there was no need for any kind of trade-through rule. Their view was that the market would function best, as Nasdaq functions now, without any regulatorily required protection for limit orders. The reasons given were many including that: a trade-through rule will hinder competition among market centers and the innovation it brings; protection of limit orders, or even the encouragement of them—the purported purpose of the regulation—is not the fundamental purpose of a market regulation or a sufficient reason to impose a trade-through rule; lack of clarity about how either depth-of-book or top-of-book would work, raises the prospect of chaotic markets and years of SEC clarifications; best execution of orders is the responsibility of brokers, and should not be an objective of market structure regulation; the economic studies on which the SEC purportedly based its reproposed rule were flawed, and even if they were accurate they showed that trading through limit orders is a minor problem that should not drive the question of market structure.

All of these reasons seem valid. Accordingly, the Committee believes that the SEC should abandon its effort to impose a trade-through rule. Instead, the SEC should approve the NYSE's so-called hybrid plan. This plan, among other things, would remove the provisions in current NYSE rules that restrict the electronic accessibility of NYSE-listed stocks, making it possible for Nasdaq and the ECNs to trade NYSE stocks. This will enhance competition among market centers, promote innovation, and allow trading in securities to migrate to the markets where trading is most efficient, ultimately producing better prices for investors.