

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51703; File No. SR-NASD-2004-033]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving a Proposed Rule Change and Amendment Nos. 1, 2, and 3 Thereto Seeking to Modify the Nasdaq Market Center Execution Service To Add an Optional Routing Feature

May 18, 2005.

#### I. Introduction

On February 25, 2004, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change seeking to modify the Nasdaq Market Center execution service to add an optional routing feature. On July 15, 2004, Nasdaq submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> On February 23, 2005, Nasdaq submitted Amendment No. 2 to the proposed rule change.<sup>4</sup> On April 7, 2005, Nasdaq submitted Amendment No. 3 to the proposed rule change.<sup>5</sup> The proposed rule change, as amended, was published for comment in the **Federal Register** on April 13, 2005.<sup>6</sup> The Commission received no comments on the proposal.

#### II. Description

Nasdaq has proposed to modify the Nasdaq Market Center execution service to create an optional outbound order routing feature that will route orders in Nasdaq-listed securities to other markets when those markets are displaying quotes at prices superior to those displayed on Nasdaq and that are accessible through the router.<sup>7</sup> Under the proposal, Nasdaq Market Center Participants will be able to choose on an order-by-order basis whether they want

an order routed outside the Nasdaq Market Center. Such routed orders will be executed pursuant to the rules and regulations of the destination market. If more than one market is at a price level that is superior to Nasdaq's displayed price, the computer algorithm of the Nasdaq Market Center router will determine the market, or markets, to which the order will be sent, based on several factors including the number of shares being displayed, response time, likelihood of undisplayed trading interest, and the cost of accessing the market. If an order (or a portion of the order) remains unfilled after being routed, it will be returned to Nasdaq where, if the order is marketable, it will be returned to the Non-Directed Order processing queue, where it can be executed in Nasdaq, or routed again, if Nasdaq is not at the best price when the order is next in line in the processing queue. Once a routed limit order is no longer marketable, whether it becomes non-marketable upon return to Nasdaq or while in the execution queue, it will be placed on the Nasdaq Market Center book, if consistent with the order's time in force condition. Once on the book, however, an order will not be routed out of the Nasdaq Market Center, even if it becomes marketable against the quotes of another market.

#### III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a self-regulatory organization.<sup>8</sup> In particular, the Commission believes that the proposed rule change, as amended, is consistent with Section 15A(b)(6) of the Act,<sup>9</sup> which requires, among other things, that NASD's rules be designed to protect investors and the public interest.

The Commission notes that the proposed routing functionality is an optional feature and that Nasdaq Market Center Participants will be able choose whether or not to participate in routing on an order-by-order basis. The Commission also notes that orders flagged for routing will only in fact route when a superior price is available in another market that is accessible through the router. Therefore, the Commission believes that the proposed outbound order routing feature should help investors to reach better prices available outside the Nasdaq Market

Center and thereby enhance the national market system.

#### IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>10</sup> that the proposed rule change (File No. SR-NASD-2004-033), as amended, be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51706; File No. SR-NYSE-2005-27]

### Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment No. 2 Thereto Relating to the Listing of PIES<sup>SM</sup> Issued by Sierra Pacific Resources Under Section 703.19

May 18, 2005.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 19, 2005, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. On May 16, 2005, the Exchange filed Amendment No. 1 to the proposed rule change. On May 18, 2005, the Exchange withdrew Amendment No. 1 and filed Amendment No. 2.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons and is approving the proposal on an accelerated basis.

<sup>1</sup> 15 U.S.C. 78s(b)(2).

<sup>11</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> In Amendment No. 2, the Exchange requested that the proposal, which had initially been submitted under section 19(b)(3)(A) of the Act, 15 U.S.C. 78s(b)(3)(A), and Rule 19b-4(f)(6) thereunder, 17 CFR 240.19b-4(f)(6), be approved pursuant to section 19(b)(2) of the Act, 15 U.S.C. 78s(b)(2) and Rule 19b-4(a) thereunder, 17 CFR 240.19b-4(a).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Amendment No. 1 replaced and superseded the originally filed proposed rule change.

<sup>4</sup> Amendment No. 2 replaced and superseded the originally filed proposed rule change, as amended.

<sup>5</sup> Amendment No. 3 replaced and superseded the originally filed proposed rule change, as amended.

<sup>6</sup> See Securities Exchange Act Release No. 51504 (April 7, 2005), 70 FR 19538 (April 13, 2005) (SR-NASD-2004-033).

<sup>7</sup> Under the proposal, Nasdaq will access the quotes of exchanges through its broker-dealer subsidiary, Brut. See Securities Exchange Act Release No. 51326 (March 7, 2005), 70 FR 12521 (March 14, 2005).

<sup>8</sup> The Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

<sup>9</sup> 15 U.S.C. 78o-3(b)(6).

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to list and trade Premium Income Equity Securities (PIES<sup>sm</sup>) (the "New PIES"), each of which consists of a purchase contract issued by Sierra Pacific Resources ("SPR") that requires the holder to purchase a variable amount of SPR common stock and a 5% undivided beneficial ownership interest in a senior note of SPR with a principal amount of \$1,000 due November 15, 2007 (unless its maturity is extended as described below).

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, NYSE included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

**1. Purpose**

Under Section 703.19 of the NYSE Listed Company Manual (the "Manual"), the Exchange may approve for listing and trading securities not otherwise covered by the criteria of sections 1 and 7 of the Manual, provided the issue is suited for auction market trading.<sup>4</sup> The Exchange proposes to list and trade, under section 703.19 of the Manual, the New PIES, each of which consists of (1) a purchase contract ("Purchase Contract") issued

by SPR and (2) a 5% undivided beneficial ownership interest in a senior note of SPR with a principal amount of \$1,000 (the "Note", and collectively, the "Notes") due November 15, 2007.<sup>5</sup>

The New PIES are being offered pursuant to an exchange offer, the full terms of which are set out in the Registration Statement.<sup>6</sup> Specifically, SPR offers to exchange the New PIES and a cash payment of \$0.125 for each validly tendered and accepted currently existing Corporate PIES of SPR (collectively referred to as the "Old PIES"), subject to, among other things, the condition that the Old PIES remain listed on the Exchange.

Each Purchase Contract obligates the holder of a New PIES to purchase from SPR, no later than November 15, 2005 (the "Purchase Contract Settlement Date"), for a price of \$50, the following number of shares of SPR common stock, \$1.00 par value: (a) If the average of the closing prices of SPR's common stock over the 20-trading day period ending on the third trading day prior to the Purchase Contract Settlement Date (the "Applicable Market Value") is equal to or greater than \$16.62, 3.0084 shares; (b) if the Applicable Market Value is less than \$16.62 but greater than \$13.85, a number of shares determined by dividing the stated amount of \$50 by the Applicable Market Value; and (c) if the Applicable Market Value over the same period is less than or equal to \$13.85, 3.6101 shares. SPR will also pay New PIES holders a quarterly fixed amount in cash, called a contract adjustment payment, at a rate of 1.07% per year of the stated amount of \$50 per New PIES, or \$0.535 per year.

The Notes will constitute senior obligations of SPR. Prior to the Purchase Contract Settlement Date, the ownership interest in the Notes will be pledged to secure the New PIES holders' obligation to purchase SPR's common stock under

the purchase contract. SPR will appoint one or more remarketing agents to remarket, the Notes to third party investors at any time during the period for early remarketing, which is the period beginning the day following the consummation of the exchange offer on May 18, 2005 and ending on the ninth business day prior to the Purchase Contract Settlement Date in one or more three-day remarketing periods that consist of three sequential possible remarketing dates selected by SPR, or during a final remarketing period, which is the period beginning on the fifth business day, and ending on and including the third business day, preceding the Purchase Contract Settlement Date. New PIES holders may choose to opt out of the remarketing of the Notes to third party investors to satisfy their payment obligations on the Contract Settlement Date. A New PIES holder who opts out of the remarketing of the Notes would be required to settle each Purchase Contract for \$50.00 in cash.

Prior to a successful remarketing of the Notes, SPR will pay New PIES holders interest at a rate of 7.93% per year on the principal amount of the Note, payable quarterly. In connection with a successful remarketing of the Notes, certain terms of the Notes, including the interest rate (which may be reset to a rate greater or less than 7.93% per year), the maturity date (which may be extended to a maximum term of 11 years from the remarketing settlement date), the redemption provisions, the interest payment dates and the addition of covenants applicable to the Notes, may be modified to allow a remarketing of the Notes.

The material differences between the Old PIES and New PIES are illustrated in the table below.

	Old PIES	New PIES
Remarketing Date .....	The senior notes beneficially owned by each holder of Old PIES will be remarketed on August 10, 2005, unless the remarketing agent delays the remarketing to a later date.	The Notes associated with the New PIES may be remarketed <ul style="list-style-type: none"> <li>• at any time during the period for early remarketing, which is the period beginning the day following the consummation of the exchange offer and ending on the ninth business day prior to the Purchase Contract Settlement Date in one or more three-day remarketing periods that consist of three sequential possible remarketing dates selected by SPR, or</li> <li>• during the final remarketing period, which is the period beginning on the fifth business day, and ending on and including the third business day, immediately preceding the Purchase Contract Settlement Date.</li> </ul>

<sup>4</sup> Securities Exchange Act Release No. 28217 (July 18, 1990), 55 FR 30056 (July 24, 1990).

<sup>5</sup> SPR filed a Form S-4 relating to the New PIES (the "Registration Statement") on April 15, 2005. The information provided in this Rule 19b-4 filing

relating to the New PIES is based entirely on information included in the Registration Statement.

<sup>6</sup> In particular, the Registration Statement provides a detailed discussion and comparison of the Old PIES and the New PIES so that holders can

evaluate whether it is in their best interests to participate in the exchange offer.

	Old PIES	New PIES
Terms of the Notes Upon Remarketing.	In connection with the remarketing of the senior notes, the interest rate on all senior notes, whether or not a part of Old PIES, will be reset to an interest rate sufficient to allow a remarketing of the senior notes. The senior notes mature November 15, 2007.	In connection with the remarketing of the Notes, the interest rate on all Notes will be reset and certain terms of the Notes may be modified, including the interest rate, the maturity date (which may be extended to a maximum term of 11 years from the remarketing settlement date), the redemption provisions, the interest payment dates and the addition of covenants applicable to Notes. However, terms set forth in the indenture under which the Notes were issued, such as ranking and events of default, may not be modified in connection with the remarketing, except pursuant to the terms of the indenture.

The New PIES represent both an equity and fixed income investment in SPR. The equity investment is in the form of the Purchase Contract, which, unless earlier terminated, requires a New PIES holder to purchase a variable number of shares of SPR common stock on the Purchase Contract Settlement Date. The fixed income investment is in the form of the Notes, which are senior indebtedness of SPR.

The New PIES will conform to the issuer listing criteria under section 703.19 of the Manual and be subject to the relevant continuing listing criteria under section 801 and 802 of the Manual.<sup>7</sup> The Exchange will impose the issuer listing requirements of section 703.19 on SPR. Under section 703.19, among other things, if the issuer is an NYSE-listed company, it must be a company in good standing. SPR is an NYSE-listed company in good standing. The New PIES will also meet the equity listing standards found in section 703.19(2) of the Manual, except that the New PIES will not have the minimum life of one year required for equity listings. However, the Exchange does not believe that the New PIES will raise any significant new regulatory issues. Because the New PIES will meet or exceed the other equity listing requirements under section 703.19, the Exchange believes that the New PIES will have sufficient liquidity and depth of market, even if listed for a period shorter than one year. The Exchange also notes that the underlying SPR common stock from which the value of the New PIES is in part derived will remain outstanding and listed on the Exchange following maturity of the New

<sup>7</sup> Section 801.00 provides, in relevant part, that when an issuer that has fallen below any of the continued listing criteria has more than one class of securities listed, the Exchange will give consideration to delisting all such classes. Section 802.01D states, in relevant part, that delisting of specialized securities will be considered when the number of publicly-held shares is less than 100,000; the number of holders is less than 100; and aggregate market value of shares outstanding is less than \$1 million. The Exchange also notes that it may, at any time, suspend a security if it believes that continued dealings in the security on the Exchange are not advisable.

PIES on the Purchase Contract Settlement Date.

The Exchange's existing equity trading rules will apply to trading of the New PIES. The Exchange will also have in place certain other requirements to provide additional investor protection. First, pursuant to Exchange Rule 405, the Exchange will impose a duty of due diligence on its members and member firms to learn the essential facts relating to every customer prior to trading the New PIES.<sup>8</sup> Second, the New PIES will be subject to the equity margin rules of the Exchange.<sup>9</sup> Third, the Exchange will, prior to trading the New PIES, distribute a circular to the membership providing guidance with regard to member firm compliance responsibilities (including suitability recommendations) when handling transactions in the New PIES and highlighting the special risks and characteristics of the New PIES. With respect to suitability recommendations and risks, the Exchange will require members, member organizations, and employees thereof recommending a transaction in the New PIES: (1) To determine that such transaction is suitable for the customer, and (2) to have a reasonable basis for believing that the customer can evaluate the special characteristics of, and is able to bear the financial risks of, such transaction.

The Exchange represents that its surveillance procedures are adequate to properly monitor the trading of the New PIES. Specifically, the Exchange will rely on its existing surveillance procedures governing equity, which have been deemed adequate under the Exchange Act.

## 2. Statutory Basis

The Exchange states that the basis for the proposed rule change is the

<sup>8</sup> NYSE Rule 405 requires that every member, member firm or member corporation use due diligence to learn the essential facts relative to every customer and to every order or account accepted.

<sup>9</sup> See NYSE Rule 431.

requirement under section 6(b)(5)<sup>10</sup> that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

### B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

## III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2005-27 on the subject line.

### Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number SR-NYSE-2005-27. This file number should be included on the subject line if e-mail is used. To help the

<sup>10</sup> 15 U.S.C. 78f(b)(5).

Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro/shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2005-27 and should be submitted on or before June 15, 2005.

#### IV. Commission Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful consideration, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder, applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b)(5) of the Act.<sup>11</sup> The Commission notes that the proposal is substantially similar to approved instruments currently listed and traded on the NYSE.<sup>12</sup> Accordingly, the Commission finds that the listing and trading of the Units is consistent with the Act and will promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and, in general, protect investors and the public interest consistent with section 6(b)(5) of the Act.<sup>13</sup>

As described more fully above, the Exchange proposes to list and trade the New PIES, which represent both an equity and fixed income investment in SPR. The equity investment is in the form of the Purchase Contract, which, unless earlier terminated, requires a New PIES holder to purchase a variable number of shares of SPR common stock on the Purchase Contract Settlement Date. The fixed income investment is in the form of the Notes, which are senior indebtedness of SPR. As set forth above, the New PIES are being offered pursuant to an exchange offer, the full terms of which are explained in the Registration Statement.<sup>14</sup> The Registration Statement contains a comparison of Old PIES and New PIES so that holders can evaluate whether it is in their best interests to participate in the exchange offer.

The Commission notes that the Exchange's rules and procedures address the special concerns attendant to the trading of certain types of hybrid securities. In particular, by requiring the New PIES to comply with the initial listing standards under section 703.19 of the Manual and the continued listing standards under section 801 and 802 of the Manual, as well as the equity trading rules, suitability standards, and disclosure requirements described above, the Commission believes the Exchange has addressed adequately the potential problems that could arise from the hybrid nature of the PIES. The Commission also notes that the Exchange will distribute a circular to its members regarding member firm compliance responsibilities when handling transactions in the New PIES and highlighting the special risks and characteristics of the New PIES.

The Exchange's "Other Securities" listing standards in section 703.19 of the Manual provide that issuers satisfying earnings and net tangible assets requirements may issue securities such as the New PIES, provided that the issue is suited for auction market trading. The Exchange has represented that the New PIES will meet all of the relevant listing standards found in section 703.19 of the Manual except that they will not have the minimum life of one year.<sup>15</sup> Because the New PIES are being offered in connection with an exchange offer, the Commission believes that the New PIES

will have sufficient liquidity and depth of market, even if listed for a period of shorter than one year. Further, because the issuer of the New PIES is SPR (the Purchase Contract issued by SPR and the Note issued by SPR and guaranteed by SPR), the Commission does not object to the Exchange's reliance on SPR to meet the issuer listing requirements of section 703.19 of the Manual.

The Commission also notes that the Exchange's existing equity trading rules and equity margin rules will apply to trading of the New PIES, and, as discussed more fully above, the Exchange will also have in place certain other requirements to provide additional investor protection. The Commission notes that the Exchange will rely on its existing surveillance procedures governing equity, which the Exchange represents have been deemed adequate under the Act.

The Commission finds good cause, consistent with sections 6(b)(5) and 19(b)(2) of the Act,<sup>16</sup> to approve the proposal prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. Accelerating approval of the proposal will enable the Exchange to accommodate the listing of the New PIES on or shortly after May 18, 2005, the expiration date of the exchange offer pursuant to which the New PIES are being offered. The Commission notes that it has previously approved a substantially similar proposal involving another listed company.<sup>17</sup> The Commission believes that permitting the expeditious listing of New PIES will serve the interests of investors and the public interest. Accordingly, the Commission finds that it is appropriate to approve the proposed rule change on an accelerated basis.

#### V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that the proposed rule change (SR-NYSE-2005-27) is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>18</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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<sup>16</sup> 15 U.S.C. 78f(b)(5) and 78s(b)(2).

<sup>17</sup> See Securities Exchange Act Release No. 49112 (January 21, 2004), 69 FR 4196 (January 28, 2004) (SR-NYSE-2003-40).

<sup>18</sup> 17 CFR 200.30-3(a)(12).

<sup>11</sup> 15 U.S.C. 78f(b)(5).

<sup>12</sup> See, e.g., Securities Exchange Act Release No. 49112 (January 21, 2004), 69 FR 4196 (January 28, 2004) (SR-NYSE-2003-40) (approving the listing and trading of Premium Equity Participating Security Units issued by PPL Corporation).

<sup>13</sup> 15 U.S.C. 78f(b)(5). In approving this rule, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>14</sup> See *supra* note 6.

<sup>15</sup> Specifically, the Exchange has represented the following in accordance with the listing standards of section 703.19 of the Manual: (1) SPR is an NYSE-listed company in good standing; (2) there will be at least 1 million securities outstanding; (3) there will be at least 400 holders; and (4) at least \$4 million from which the value of the New PIES is in part derived will remain outstanding and listed on the Exchange following maturity of the New PIES.