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March 1, 2021

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Submitted via email: rule-comments@sec.gov

**Re: The Nasdaq Data Center Roof and Fair Market Access
(File No. 4-729)**

Dear Ms. Countryman:

Bloomberg L.P.¹ respectfully submits this letter to the U.S. Securities and Exchange Commission to identify and bring to your attention a potential issue related to the wireless connectivity services offered by The Nasdaq Stock Market LLC and its affiliated exchanges (collectively “Nasdaq” or the “Exchange”).

As detailed in a comment letter recently filed with the Commission by McKay Brothers, LLC,² Nasdaq apparently offers an exclusive package of wireless connectivity and market data services (the “Wireless Services”) from the rooftop of its datacenter. These Wireless Services receive a potential latency advantage in connecting to the Exchange as compared with the wireless services provided by competing providers. Moreover, these Wireless Services are potentially being offered in a manner that is inconsistent with description of the Wireless Services provided to the Commission at the time the Wireless Services were approved.³

¹ Bloomberg – the global business, financial information, and news leader – increases access to market data by connecting market participants of all stripes to a dynamic network of information, people, and ideas. The company’s strength – quickly and accurately delivering data, news, and analytics through innovative technology – is at the core of the Bloomberg Terminal. The Terminal provides financial market information, data, news, and analytics to banks, broker-dealers, institutional investors, governmental bodies, and other business and financial professionals worldwide.

² Letter from Jim Considine, Chief Financial Officer, McKay Brothers, LLC, dated December 10, 2020 (“McKay Brothers Letter”), available at <https://www.sec.gov/comments/4-729/4729-8131081-226476.pdf>.

³ *Id.*

The Nasdaq Wireless Services

Nasdaq received approval from the Commission to establish its exclusive rooftop Wireless Services and associated fees in 2013.⁴ At the time, Nasdaq acknowledged that the Wireless Services would offer lower latency to its customers. And third parties seeking to offer competing services would need to operate “on towers near the data centers...”⁵ Although Nasdaq was essentially reserving for itself the right to exclusive use of the data center roof, Nasdaq justified this, in part, with the rationales that selling roof rights to individual clients “would quickly result in a lack of physical space on the data center roof to accommodate all clients fairly and equally,” and space constraints and interference between dishes would impose limits on the number of networks that can be placed on the rooftop.⁶

According to the McKay Brothers Letter, since the Wireless Services were approved in 2013, Nasdaq has commenced offering services, as set forth in greater detail in the McKay Brothers Letter, that are either (i) not covered by the 2013 approval order, such as the Wireless Express Connect Service, or (ii) demonstrate that the representations made to the Commission in 2013 regarding limited space on the roof of the datacenter no longer apply.

Similarities to the NYSE Wireless Connections

The issues presented by the Nasdaq Wireless Services seem similar to those presented by an apparently comparable set of wireless connectivity services proposed last year by the New York Stock Exchange LLC (“NYSE”).⁷ NYSE initially proposed to establish a set of wireless connections that would facilitate the transmission of data, including NYSE market data, through a series of towers equipped with wireless equipment, including one tower located on NYSE data center property (the “Wireless Connections”). According to the Initial NYSE Proposal, the Wireless Connections would be operated by ICE Data Services, an affiliate of NYSE (the “NYSE Affiliate”). Only the NYSE Affiliate would be permitted to access the property and the pole, which is located in closer proximity to the NYSE data center than any commercial poles located off the NYSE data center property.

In the Initial NYSE Proposal, NYSE contended that the proposed wireless connections offered by the NYSE Affiliate were not facilities of the exchange within the meaning of the Exchange Act, and therefore the Wireless Connections did not need to be included in its rules.⁸ The significance of this claim, that the Wireless Connections offered at the location of the Exchange are not facilities of the Exchange, cannot be understated. If this interpretation of facility of the exchange were

⁴ Securities Exchange Act Release No. 68735, 78 FR 6842 (Jan. 31, 2013) (SR-NASDAQ-2012-119).

⁵ *Id.* at 6843.

⁶ Securities Exchange Act Release No. 68085, 77 FR 65596, 65597 (October 29, 2012).

⁷ *See e.g.*, Securities Exchange Release No. 88168 (February 11, 2020), 85 Fed Reg. 8938 (February 18, 2020), available at <https://www.sec.gov/rules/sro/nyse/2020/34-88168.pdf> (the “Initial NYSE Proposal”).

⁸ *See* Initial NYSE Proposal at 8939.

accepted, none of the regulations and customer protections, which are meant to apply to all exchanges in providing exchange services, would apply to NYSE in providing these core exchange services. The implications of this position are profound. The Commission would have no ability to oversee these services, and the comprehensive regulatory framework, that has been put in place by Congress and has served the market well since 1934, would be completely circumvented.

At the time, the Staff of the Commission disagreed with NYSE's analysis, and "advised the Exchange that it believes the Wireless Connections are facilities of the Exchange and so must be filed as part of its rules."⁹ Bloomberg fully supported the Staff's position and filed several comment letters to voice its support for the Staff. At the time, Bloomberg noted the importance of treating these services as facilities of the exchange:

As a matter of statutory interpretation, the Wireless Services fall squarely within the definition of facilities under the Exchange Act. As noted above, the definition of a facility of an exchange is quite broad and includes the premises, tangible or intangible property whether on the premises or not, and any right to use such premises or property or any service thereof, including any system of communication to or from the exchange. The Wireless Connections are physically located on the property of the data center. Under any interpretation of the word "premises," including NYSE's, the Wireless Connections would fall within this term. Likewise "services" are expressly covered. As to the third prong, it is clear that this is a system of communication to or from the exchange for "effecting or reporting a transaction of the exchange."¹⁰

After receiving a number of comment letters in opposition to the Initial NYSE Proposal, NYSE amended its proposal several times, ultimately accepting the Staff interpretation that the services should be included within the facilities of the Exchange, and committing to provide the services in a manner consistent with the requirements of the Exchange Act. The Commission recently approved NYSE's rule filing, affirming that the proposed services were facilities of the Exchange and offered on terms that were consistent with the requirements of the Exchange Act.¹¹

Nasdaq Should Provide the Commission with Sufficient Information to Allow the Commission to Ensure Consistency with the Exchange Act

For the reasons set forth above, we believe these Nasdaq Wireless Services may well be facilities of the exchange, and the Commission needs to be provided with information to permit that determination. Changes to the Wireless Services, or material deviations from the already-approved description, should be subject to the rule filing process and Commission review. Accordingly, the

⁹ *Id.*

¹⁰ Letter from Gregory Babyak, Global Head of Regulatory Affairs, Bloomberg L.P. (March 10, 2020), at 4.

¹¹ Securities Exchange Act Release No. 90209, 85 FR 67044 (Oct. 21, 2020). Despite approval of the NYSE proposal, NYSE has filed a petition seeking judicial review of the Commission's approval order. *See Petition of Intercontinental Exchange et al. v. SEC*, Case No. 20-1470 (D.C. Cir.) (Nov. 25, 2020).

changes to the Nasdaq Wireless Services, as set forth in greater detail in the McKay Brother Letter, and all associated fees charged in connection with these services should be filed with the Commission. The Commission should be afforded the opportunity to review the services and fees to ensure that they are offered in a manner consistent with the provisions of the Exchange Act.

We appreciate the Commission's efforts in reviewing the numerous exchange filings that cross the Commission's desk, and we appreciate the careful and consistent interpretation of the definition of "facility." We urge the Commission to consider requiring Nasdaq to provide more information regarding the Wireless Services. To the extent these services constitute a facility of the exchange, appropriate measures should be taken to ensure the requirements of the Exchange Act are applied to the services. We would be pleased to discuss any question that the Commission may have with respect to this letter. Thank you again for the Commission's efforts.

Very truly yours,

A handwritten signature in black ink, appearing to read "Gregory R. Babyak". The signature is written in a cursive, slightly slanted style.

Gregory Babyak
Global Head of Regulatory Affairs, Bloomberg L.P.