

October 15, 2024

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington DC 20549-1090

Re: Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Expand its Co-Location Services (SR-NASDAQ-2024-054; SR-BX-2024-035; SR-GEMX-2024-34; SR-ISE-2024-45; SR-MRX-2024-36; SR-Phlx-2024-47) and Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Establish Fees for Its Expanded Co-Location Services (SR-NASDAQ-2024-056; SR-BX-2024-037; SR-GEMX-2024-36; SR-ISE-2024-47; SR-MRX-2024-37; SR-Phlx-2024-49)

Dear Ms. Countryman:

McKay Brothers LLC (“**McKay**”) and its affiliate Quincy Data LLC (“**Quincy**”) (collectively, the “**Firm**”)¹ appreciate the opportunity to provide comment on the above referenced rule changes (the “**Rule Changes**”)² by The Nasdaq Stock Market LLC and its affiliate exchanges (collectively, “**Nasdaq**” or the “**Exchanges**”) relating to the planned expansion to the NY11-4 data center space and assessing fees for such offering.

We appreciate the opportunity to comment on the Rule Changes, and we are somewhat encouraged to see Nasdaq has submitted a modestly amended rule filing with respect to the introduction of the NY11-4 colocation space.³ However, for the reasons explained below, Nasdaq has not met its burden to demonstrate that the Rule Changes are consistent with the requirements of the Securities Exchange Act of 1934 (“**Exchange Act**”). Consequently, the Rule Changes should be suspended by the Commission.

¹ Quincy is a market data distributor that provides equal access to low latency US equities market data that helps subscribers make tighter markets. McKay is a telecommunications service provider, affiliated with Quincy and using various technologies—often wireless—to offer low-latency data transport services, which likewise allow subscribers to manage risk more effectively and make tighter markets. We offer services on a level-playing field basis—meaning we make our best latencies available to all subscribers. We also provide mechanisms to support greater diversity of market participants with access to low latency market data.

² See, e.g., Securities Exchange Act Release No. [101078](#) (Sept. 18, 2024), 89 FR 77937 (Sept. 24, 2024) (SR-NASDAQ-2024-054), and Securities Exchange Act Release No. [101267](#) (Oct. 7, 2024), 89 FR 82666 (Oct. 11, 2024) (SR-NASDAQ-2024-056).

³ Nasdaq previously submitted a filing with respect to the NY11-4 colocation space on June 14, 2024, and withdrew that filing on August 13, 2024. See Securities Exchange Act Release No. [100440](#), 89 FR 55294 (July 3, 2024) (SR-NASDAQ-2024-026). The Firm has previously raised concerns relating to Nasdaq’s planned introduction of NY11-4 in three previous comment letters. See [McKay Letter 1](#) from Jim Considine, CFO, McKay Brothers LLC re: SR-NASDAQ-2024-007; [McKay Letter 2](#) re: SR-NASDAQ-2024-022; and [McKay Letter 3](#) re: SR-NASDAQ-2024-026. Several other commenters have expressed concerns regarding the NY11-4 expansion. See [comment file](#) to SR-NASDAQ-2024-007; [comment file](#) to SR-NASDAQ-2024-022; and [comment file](#) to SR-NASDAQ-2024-026. Nasdaq also submitted response letters on May 9, 2024, and August 12, 2024, related to NY11-4. See [Letter](#) from Katie Hopkins, Associate General Counsel, Nasdaq re: SR-NASDAQ-2024-007 (the “**Nasdaq May 9 Letter**”); [Letter](#) from Brett Kitt, Vice President, Deputy General Counsel, Nasdaq re: SR-NASDAQ-2024-026 (the “**Nasdaq Response Letter**”).

I. Introduction and Executive Summary

As we explained in our previous letter,⁴ Nasdaq's unequal connectivity in NY11 causes many colocation customers to acquire a second point of presence in NY11, and Nasdaq's plan to expand into NY11-4 before equalizing telecommunications (or "**telco**") connections across the colocation service space will compel many of these customers to establish a third point of presence. Nasdaq has not denied that its customers face this costly predicament,⁵ nor has it denied that it currently profits from maintaining unequal connectivity within NY11 and that it has a profit incentive to delay connectivity equalization at its data center. The situation perpetuates and expands an unjustified, inappropriate burden on competition and unfair discrimination in exchange access and connectivity in contravention of Section 6 of the Exchange Act.⁶ In our experience, many of these same colocation customers maintain only one point of presence at NYSE, a comparable exchange-controlled data center that is transparently well-equalized.

It is troubling that Nasdaq does not appear to view itself as having any obligation under the Exchange Act to justify the unequal connectivity that it maintains (and will exacerbate with NY11-4). Instead, it suggests that any efforts toward equalization would be "voluntary" and done on its "own initiative."⁷ Nasdaq seems to claim that it has no statutory obligations to comply with Exchange Act requirements regarding the connectivity infrastructure, which it controls, to and from the matching engine. It is unclear on what basis Nasdaq believes that this connectivity component of its exchange facilities are beyond the reach of the Exchange Act's requirements, or why Nasdaq has the discretion to determine at what point in time its Exchange Act compliance is necessary.

As detailed in **Part II** of this Letter, Nasdaq has not met its burden to demonstrate that the Rule Changes are consistent with Exchange Act requirements and therefore the Rule Changes should be suspended by the Commission. In particular:

- A. ***Nasdaq Uses Misleading and Inaccurate Statements to Support the Rule Changes*** – Nasdaq's claim that it is similar to Cboe, IEX, and MEMX in maintaining unequal telco connectivity is a false and misleading analogy, as none of these exchanges operates a colocation business surrounding their exchange(s). Nasdaq's claim that it has provided sufficient information for customers to evaluate the latency advantage/disadvantage to colocating in NY11-4 is simply false. Customers cannot compare latency in NY11-4 to latency in NY11 without knowing their current latency advantage/disadvantage in NY11; information that Nasdaq has not provided to customers. Additionally, Nasdaq's stated connectivity lengths of 160 to 680 feet in NY11 and its claims that introducing uniform 590 foot connections in NY11-4 reduce inequality are highly problematic. On the upper end, it appears that Nasdaq has ignored the ~1,200 foot telco connection to the ATC tower, which connectivity Nasdaq controls. On the lower end, it remains unclear whether Nasdaq has included or excluded what we believe is a latency-advantaged connection to its own wireless services (the "**Nasdaq Wireless Services**"), or if it continues to view such services as excluded from the Commission's jurisdiction.⁸

⁴ See McKay Letter 3.

⁵ Nasdaq points to the fact that only 10% of current colocation customers have reserved space in NY11-4. As explained below, we believe this is a result of the uncertainty as to whether Nasdaq will proceed with expansion before equalization and the hope that Nasdaq may yet reverse course. See *infra* Section II.B.3.

⁶ 15 U.S.C. 78f(b)(5) and (8).

⁷ See SR-NASDAQ-2024-054, *supra* n.2, at 77938.

⁸ See *Intercontinental Exchange, Inc. et al v. SEC*, No. 20-1470 (D.C. Cir. 2022).

- B. *Nasdaq’s Claims That “Capacity” Needs Supersede the Need to Equalize Do Not Survive Scrutiny*** – Nasdaq claims that the Rule Changes are driven by capacity constraints in furtherance of Regulation SCI obligations. Nasdaq provides no evidence to substantiate this claim of a lack of capacity, nor does it address the fact that equalizing NY11 should free-up capacity as customers eliminate duplicate points of presence. Nasdaq also claims that delays in opening NY11-4 would jeopardize the “sound and orderly” operation of Nasdaq, with no substantiation. Many exchanges, such as Cboe, IEX and MEMX, do not have *any* colocation business, so it is unclear how a limitation on Nasdaq’s expansion would impact the sound and orderly operation of the Exchanges, particularly when resolving longstanding inequities in connectivity as we, and others, propose would both address Nasdaq’s capacity constraints and promote compliance with the Exchange Act. Additionally, we believe the reason only approximately 10% of customers may have reserved space in NY11-4 is because, although feeling compelled to establish space in NY11-4, many customers are waiting to see if Nasdaq may reverse course and eliminate the need to establish an additional point of presence in NY11-4.
- C. *18 to 24 Months Is Far Too Long to Equalize NY11*** – Nasdaq has knowingly maintained and profited from unequal connections in NY11 for many years and has chosen to do nothing to redress what seem to us as obvious Exchange Act violations. In doing so, Nasdaq has ignored its statutory obligations, the Commission’s directive to NYSE to equalize its campus in 2020, and a 2020 letter from McKay specifically calling on Nasdaq to “eliminate latency advantages in exchange connectivity arising from Nasdaq’s direct or indirect control of its data center (including with respect to the Nasdaq Wireless Services).”⁹ Nasdaq now seeks to justify expansion to NY11-4 by arguing that colocation customers need only endure a few more years of this unjustified (and unjustifiable) unfair discrimination and inappropriate burden on competition. Nasdaq should easily be able to equalize its colocation service within 4 - 6 months, and there must be motivational consequences for failing to do so given that Nasdaq receives windfall profits from clients’ duplicate (and now soon to be triplicate) colocation infrastructure.

We continue to believe that Nasdaq needs to equalize all connections within its existing NY11 data center before expanding to the NY11-4 colocation space in order to redress the ongoing inequities in connectivity that are plainly inconsistent with Exchange Act requirements. Notwithstanding the foregoing, to the extent Nasdaq is able to provide sufficient evidence to validate its capacity concerns and overcome its burden to justify that the Rule Changes are consistent with Exchange Act requirements, the Firm suggests in **Part III** of this letter certain minimum conditions the Commission should require of Nasdaq if it were allowed to expand to NY11-4 before equalizing NY11. These conditions are designed to prevent Nasdaq from profiting from the exacerbation of ongoing Exchange Act violations. **Part IV** of this Letter responds to the Nasdaq Response Letter, and is followed by a brief conclusion.¹⁰

Finally, we believe that the Rule Changes related to the establishment of NY11-4 have been inappropriately filed as immediately effective rule changes pursuant to Section 19(b)(3) of the Exchange Act and Rule 19b-4(f)(6) thereunder.¹¹ Proposed rule changes are permitted to be filed under these provisions only

⁹ See *infra* n.33 and accompanying text.

¹⁰ See Nasdaq Response Letter, *supra* n.3.

¹¹ The Rule Changes establishing fees related to NY11-4 (*e.g.*, SR-NASDAQ-2024-056) should be suspended because the precursor Rule Changes establishing Nasdaq’s NY11-4 offering (*e.g.*, SR-NASDAQ-2024-054), which must be properly filed and approved prior to Nasdaq establishing any associated fees, were improperly filed as immediately effective rule changes and because the fee changes do not represent an equitable allocation of reasonable dues, fees, and other charges consistent with Section 6(b)(4) of the Exchange Act. For example, several of such fees are the same amount for customers colocated in

where, among other requirements, they do not impose any significant burden on competition and do not significantly affect the protection of investors or the public interest. As explained in detail in our previous letter, Nasdaq is creating a dynamic in which colocation customers will very likely need an additional point of presence to remain competitive (which also raises barriers to entry for new colocation customers to operate competitively).¹² These inappropriate competitive burdens preclude immediately effective treatment.¹³

II. Nasdaq Has Not Met Its Burden to Demonstrate Compliance with Exchange Act Requirements

Nasdaq's arguments in support of the Rule Changes are insufficient to address Exchange Act concerns because they do not address the unfair discrimination and inappropriate competitive burdens arising from maintaining unequal connectivity while expanding to NY11-4. Rather, Nasdaq argues that it should be permitted to proceed with its planned expansion on the unsecured promise that two years from now it will resolve these concerns—while at the same time acknowledging that “telco connectivity equalization would be in the best interests of the markets going forward.”¹⁴

The “burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change.”¹⁵ The Commission has similarly observed what the D.C. Circuit has mandated – that the Commission cannot “simply accept what [the self-regulatory organization] has done,” and cannot have an “unquestioning reliance” on a self-regulatory organization's (“SRO”) representations in a proposed rule change.¹⁶ Instead, the Commission must “critically evaluate the representations made and the conclusions drawn” by the SRO.¹⁷ For the reasons described below, a critical evaluation of Nasdaq's claims, at least as currently presented, cannot support a finding that the Rule Changes are consistent with the Exchange Act.¹⁸

A. Nasdaq Inappropriately Supports the Rule Changes Using Inaccurate, Misleading, and Unclear Claims

1. The Comparison to IEX, MEMX and Cboe Is Inaccurate and Misleading

Nasdaq states that IEX, MEMX, and Cboe operate through their Secaucus data center without equalized telco connectivity, suggesting that Nasdaq has no obligation to equalize telco connectivity at its data center. However, Nasdaq makes two convenient omissions. First, Nasdaq omits the critical distinction between itself and these other exchanges—none of these other exchanges control telco connectivity as none operate a colocation hosting business. Instead, IEX, MEMX and Cboe operate exchanges and, in fulfillment

NY11 and NY11-4 (*e.g.*, the monthly ongoing fee) even though such customers will not receive the same level of service or associated value as a result of the unequal connectivity maintained by Nasdaq. *See also* McKay Letter 3 at 6-7.

¹² McKay Letter 3 at 5.

¹³ A competitive disparity also exists with respect NYSE, a comparable exchange operating a colocation business, which was required by the Commission required to equalize its campus in 2020.

¹⁴ *See, e.g.*, SR-NASDAQ-2024-054, *supra* n.2, at 77938. Moreover, it is improper and misleading for Nasdaq to characterize the expansion to NY11-4 as part of the “Equalization Project” in the Rule Changes. Nasdaq first described the Equalization Project in its comment letter dated May 9, 2024, noting that it was “working on a plan” to equalize connections within its existing NY11 facilities. *See* Nasdaq May 9 Letter at 2-3. In the Rule Changes, Nasdaq now defines its Equalization Project to include the expansion to NY11-4 as “Phase 1” of the project. This is misleading because the expansion to NY11-4 will only exacerbate existing inequalities in exchange connectivity by compelling many colocation customers to establish an additional point of presence. If Nasdaq's goal is really to equalize its campus, it would do so (or have done so over the past 4 years) in NY11 rather than taking action (*i.e.*, expanding to NY11-4) that would worsen and delay equalization.

¹⁵ 17 CFR 201.700(b)(3).

¹⁶ *Susquehanna International Group v. SEC*, 866 F.3d 442, 446-47 (D.C. Cir. 2017).

¹⁷ *See* Securities Exchange Act Release No. 85121 (Feb. 13, 2019), 84 FR 5157 (Feb. 20, 2019) (SR-OCC-2015-02).

¹⁸ *See, e.g.*, SR-NASDAQ-2024-054, *supra* n.2, at 77938.

of their Exchange Act obligations, they do indeed equalize the connections within their control.¹⁹ A cursory glance at these other exchanges' fee schedules reveals this difference. Absent from IEX, Cboe and MEMX's fee schedules are references to "colocation services," "cabinets" or any mention of "telco," which are all found in Nasdaq's fee schedule.²⁰ Second, Nasdaq omits mention of one major NMS exchange, NYSE, which like Nasdaq operates a colocation business, but unlike Nasdaq transparently equalizes all (including all comparable) connections.

Nasdaq has chosen to engage in a for-profit business providing access to colocation services in its data center facilities. In so doing, Nasdaq's colocation business operates as a facility of the Exchanges, requiring Nasdaq to comply with Exchange Act requirements in such operation. Nasdaq has not so complied. As we stated in our previous letter, Nasdaq is unique among exchanges controlling their data centers in maintaining unequal access.²¹ Nasdaq's selective comparison to IEX, Cboe and MEMX is a false analogy.

2. Insufficient Transparency for Customers to Make an Informed Decision on Colocation in NY11-4

Contrary to its claims, Nasdaq has not provided market participants with sufficient information to evaluate the latency of NY11-4 cabinets relative to their current NY11 cabinet(s). Nasdaq claims the technical specification document "will allow customers to determine for themselves whether their current location in NY11 or alternative space in NY11-4 will optimize their latency profile."²² This is incorrect. The technical specification document may provide customers with information about the latency of a connection in NY11-4, but it does not provide information about their current connection length/latency in NY11.

Only by informing customers of their current NY11 connection's length and latency could Nasdaq's claim be true and allow for an informed decision about colocating in NY11-4. Nasdaq states that it "does not know the precise latency profiles of each of its colocation customers."²³ However, Nasdaq could readily determine these latencies. To the extent that Nasdaq continues to suggest customers can fully evaluate the relative performance of colocation space in NY11-4, Nasdaq should explain in detail exactly how colocation customers can do so without knowing the length or latency of their current connections in NY11.

3. Inaccuracies in Nasdaq's Reported Connectivity Lengths and Claims of a Reduction in Inequality

Nasdaq's description of the distances/latencies within NY11 and relative to NY11-4, and its claims of a reduction in inequality through the expansion to NY11-4, appear to be inaccurate. Nasdaq claims that the shortest current telco connection in NY11 is 160 feet while the longest is 680 feet, and that all connections in NY11-4 will be 590 feet. First, Nasdaq has not specified the distances to which such stated measurements relate, making it difficult to assess the ultimate impact to colocation customers. For example, while Nasdaq could be measuring from a customer cabinet to a telco cabinet, it is unclear if this is inclusive of any NIDFs and/or meeting rooms. Alternatively, Nasdaq's measurement could be from a NIDF to a customer cabinet. Nasdaq has not made this clear.

¹⁹ See, e.g., Cboe Latency Equalization (Secaucus, NJ), https://cdn.cboe.com/resources/membership/Cboe_LE.pdf ("Cboe/Equinix Latency Equalization Infrastructure, provides an equal optical length of fiber to customers connecting in the NY4, NY5, or NY6 Secaucus, NJ data").

²⁰ Nasdaq, in contrast, even charges a \$1,055 monthly fee for inter-cabinet telco connections *outside* of the Nasdaq space. See Nasdaq Rules, General 8, Section 1(b).

²¹ McKay Letter 3 at 2.

²² Nasdaq further states: "the technical specification document alleviates uncertainty that might otherwise compel customers to waste money to secure unnecessary space in NY11-4 as a defensive means of assuring themselves the most advantageous position available in the Exchange's data center campus." See, e.g., SR-NASDAQ-2024-054, *supra* n.2, at 77939.

²³ *Id.*

In addition, the longest existing telco connection to the Exchanges is managed by Nasdaq, connecting customer cabinets with telco equipment on the on-premises ATC tower, which length is approximately 1,200 feet. In light of this much longer connection to the ATC tower than Nasdaq's claimed longest connection of 680 feet, Nasdaq's estimate appears off by almost half. It is also unclear whether the connection supporting the Nasdaq Wireless Services available through the exclusive rooftop connection is included in the stated range of distances. If Nasdaq has excluded such connectivity lengths from its evaluation for some reason, this should be explained.

Nasdaq also claims its Rule Changes would “diminish the overall average latency differential among collocated customers’ telecom provider connections because NY11-4 introduces connections at a single latency value in between the slowest and fastest latencies.”²⁴ It's unclear why lowering the average latency differential matters. The introduction of NY11-4 would seem likely to increase both the median and average customer's connectivity length—meaning that the median and average customer would be at a greater disadvantage relative to the most advantaged customers in NY11.²⁵ Similarly, anyone with a connection longer than 590 feet in NY11 would be disadvantaged relative to anyone newly colocating in NY11-4. And, all NY11-4 customers would be disadvantaged—again, for two years—relative to anyone with a connection shorter than 590 feet.²⁶

4. It Remains Unclear Whether and How the Nasdaq Wireless Services Fit Under the Rule Changes

Nasdaq has not discussed how, if at all, the Nasdaq Wireless Services and its connectivity lengths are included in its analysis in support of the Rule Changes. For example, are the 160 foot connections those used by the Nasdaq Wireless Services and if not, why have such connectivity lengths been excluded? Or, does Nasdaq instead view the Nasdaq Wireless Services (and the separate connection to BSO's service also using the rooftop connection) as outside of its consideration here, just as it seems to view (inexplicably, in our view) such services as not subject to rule filing requirements, contrary to the D.C. Circuit's January 2022 decision?²⁷ We believe the connectivity lengths for the Nasdaq Wireless Services and parallel service offered by BSO are very likely shorter than 160 feet.

In addition, it remains unclear whether Nasdaq intends to include the Nasdaq Wireless Services as part of the Equalization Project or if these services would be excluded and continue to enjoy latency advantages unavailable to any other provider of connectivity services. At a minimum, the Rule Changes are incomplete without addressing these issues.

B. Nasdaq's Claims That “Capacity” Needs Require Expansion Before Equalization Do Not Survive Scrutiny

1. Unsubstantiated Capacity Constraint

Nasdaq has not presented any evidence to substantiate the need for additional capacity, such as by stating what NY11's current capacity is and what demand there is for additional capacity in NY11 that cannot be served by its current footprint. Nor does Nasdaq consider that equalizing connectivity within NY11 would allow colocation customers that maintain duplicate points of presence therein (as a result of the persistent

²⁴ See, e.g., SR-NASDAQ-2024-054, *supra* n.2, at 77939.

²⁵ Assume there are 50 colocation customers with an average and median connectivity length of 420 feet (which is the average of Nasdaq's stated range of NY11 lengths). If 20 new NY11-4 customers are introduced with a connectivity length of 590 feet, both the average and median connectivity lengths would increase.

²⁶ Even if a customer improves their connectivity length by moving to NY11-4 (e.g., going from 680 to 590 feet), such a customer still faces an insurmountable latency disadvantage relative to the customer with a 160 foot connection.

²⁷ See *Intercontinental Exchange, Inc. et al v. SEC*, No. 20-1470 (D.C. Cir. 2022).

unequal access conditions) to consolidate. By equalizing NY11, we expect many customers would reduce duplicative demand, opening up more space in NY11 for other firms.

The only support Nasdaq offers to substantiate its claim of capacity constraints is an unusual citation to a private letter from a single member firm claiming that such member urgently needs space “in NY11-4” to support its growing business.²⁸ It is unclear why this member has insight into Nasdaq’s capacity constraints. Based on Nasdaq’s description of the member’s letter, it is unclear if this member needs additional space generally, or space in NY11-4 specifically, and if the latter, whether this is because the member is unable to attain space in NY11 or because it believes it will have better connectivity in NY11-4 than connectivity offered in NY11 (perhaps because it drew the short straw with one of the longest connections in NY11). Nasdaq should clarify these points with sufficient explanation if it wishes to use this letter in support of the Rule Changes.

2. A Colocation Capacity Constraint Seems Unlikely to Impact the “Sound and Orderly Operation” of the Exchanges

Nasdaq claims that the additional capacity to be provided by NY11-4 is of such importance that its delay would “jeopardize the sound and orderly operation of the Exchange’s markets.”²⁹ As an initial matter, it is not clear why the capacity for colocation services—services that several exchanges do not even offer—would jeopardize the “sound and orderly operation” of Nasdaq. While Nasdaq has deployed a phrase we believe was selected to raise regulatory antennae, further explanation is necessary to describe how a colocation capacity constraint would substantively impact the “sound and orderly operation” of the Exchanges. Such constraint is unlike a capacity constraint on, for example, the Exchanges’ matching engines or market data distribution engines.

While it is certainly appealing that colocation services offer capacity for as many customers as there is demand, Nasdaq has not justified why resolving this constraint should take precedence over resolving unfair discrimination and inappropriate competitive burdens. This capacity argument appears to be more of a commercial concern than a regulatory one. And instead of attempting to provide justification, Nasdaq states summarily without explanation that “[s]uch a danger [to the sound and orderly operation of the Exchange’s markets] readily outweighs any concerns that some may have about the fairness of the Exchange’s plan to sequence the Equalization Project.”³⁰ This is not a conclusion on which the Commission can have “unquestioning reliance,” particularly when Nasdaq has made no attempt to explain it.³¹

Nasdaq might also consider the requirement that an SCI entity’s procedures be designed to ensure its “SCI systems operate in a manner that complies with the [Exchange] Act and the rules and regulations thereunder.”³² Nasdaq’s continued maintenance of unequal connectivity among SCI systems in NY11 would

²⁸ Nasdaq cites to a private letter from a customer, Old Mission Capital (“OMC”), in which OMC states that it urgently needs space “in NY11-4” to support its growing business. *See, e.g.*, SR-NASDAQ-2024-054, *supra* n.2, at 77939. To date, neither Nasdaq nor OMC have provided a copy of this letter to the public comment file for the Rule Changes.

²⁹ *See, e.g., id.*

³⁰ *Id.*

³¹ The Commission has also been clear in the context of an SCI entity’s backup systems that Regulation SCI “does not require an SCI entity to require members or participants to use the backup facility in the same way it uses the primary facility,” or in other words, the backup systems are not required “to be identical (e.g., same speed and efficiency) to the primary facility.” Exchange Act Release No. [73639](#) (Nov. 19, 2014), 79 FR 72252, 72419 (Dec. 5, 2014). Thus, colocation services were plainly not the Commission’s priority in contemplating Regulation SCI obligations and should not therefore take precedence over the prohibition against unfair discrimination and inappropriate burdens on competition.

³² 17 CFR 242.1001(b)(1).

appear to represent systems compliance issues reportable as SCI events (absent Nasdaq articulating a statutory justification for why maintaining unequal connectivity is consistent with Exchange Act requirements).

3. That Only 10% of Existing Colocation Customers Have Reserved Space in NY11-4 Is a Red Herring

Nasdaq has tried to cast doubt on whether colocation customers actually believe that it will be necessary to establish an additional point of presence in NY11-4 to remain competitive by noting that only about 10 percent of existing customers have requested space in NY11-4. This is because many colocation customers, while feeling compelled to establish space in NY11-4, are waiting to see if Nasdaq may reverse course, thereby eliminating the need to establish such additional point of presence.

C. **18 to 24 Months Is Far Too Long to Equalize NY11**

1. Nasdaq Has Had Years to Equalize

The proverbial “writing on the wall” has existed for at least four years as, in 2020, (1) the Commission staff required NYSE to neutralize latency advantages given to select market participants on its campus; (2) the Commission adopted Rule 603(b) requiring distribution of market data using the same methods of access; and (3) the Firm submitted a pointed letter calling for Nasdaq to “eliminate latency advantages in exchange connectivity arising from Nasdaq’s direct or indirect control of its data center (including with respect to the Nasdaq Wireless Services).”³³ Any thoughtful reflection by Nasdaq at any point during the past four years regarding whether it has been operating NY11 consistent with Exchange Act requirements would easily reveal that it has not. Maintaining unequal connections and creating an environment where colocation customers find it necessary to duplicate points of presence within NY11 (at double the profit to Nasdaq’s colocation business) runs directly contrary to Nasdaq’s statutory obligations.

In response, Nasdaq has taken no action to redress these Exchange Act violations. We see no objective beyond prioritizing its accruing profits from maintaining inequities in connectivity over its statutory obligations. Nasdaq has initiated the Rule Changes to expand to NY11-4 with full knowledge that doing so would compel certain colocation customers to establish yet another point of presence. The Firm believes that, but for its raising again these Exchange Act concerns, Nasdaq would continue to remain silent on NY11 connectivity and that an inquiry into when Nasdaq commenced serious consideration in furtherance of equalizing NY11 would be Q2 of 2024.³⁴

Even setting aside the length of time Nasdaq has been on notice of these issues, its current proposal of an 18 to 24 month Equalization Plan is simply an **unreasonable** amount of time for market participants to wait for Nasdaq to equalize NY11, particularly given that Nasdaq has willfully chosen to maintain its unequal connections over many years and operates under a profit incentive to delay such equalization as long as possible. 18 to 24 months is simply not the amount of time it would require Nasdaq, expending a reasonable effort, to equalize NY11.

To achieve equalization in NY11, the Firm understands that Nasdaq would rely on the data center operator’s personnel (*i.e.*, Equinix staff), which operate 24/7 “remote hands” services and typically employ more than one individual at a time. Equinix can flex their staffing up for the building, temporarily pulling on remote hands staff from their dense data center campus in the New Jersey geographic area. We estimate there are 2,000 circuits, needing 500 individualized cable runs (4 cables per effort) that each take, on average, 5 to 10 minutes in order to re-cable NY11 in an equalized manner. If Nasdaq were to appropriately staff by

³³ Letter from Jim Considine, CFO, McKay Brothers LLC, to Vanessa Countryman, Secretary, Commission, dated Dec. 10, 2020, at 1, <https://www.sec.gov/comments/4-729/4729-8131081-226476.pdf> (the “McKay 2020 Letter”).

³⁴ Nasdaq appears to admit this, as it noted in its May 2024 letter that it was, at that time, “working on a plan” to equalize NY11. Nasdaq May 9 Letter, *supra* n.3, at 2-3.

having, *e.g.*, 5 operators work 8 hour shifts, it could be reasonably done in two weekends. Even if it took 60 minutes per cable run, 500 hours of work across 5 operators is a two-week effort.

2. Illusory Claim of Fiber-Optic Cable Shortages to Justify Equalization Delays

Nasdaq claims in the Rule Changes as “support” for its lengthy Equalization Plan that “the fiber needed to re-cable NY11 is in short supply and orders are subject to substantial waiting periods.”³⁵ As a threshold matter, this would seem to be an issue of resource allocation. The cabling that is being used to set up NY11-4 could be used instead to equalize NY11. Nasdaq is instead choosing the approach more profitable to its colocation business (by allocating such cabling to NY11-4), rather than to the Equalization Project that could harm Nasdaq’s profit opportunity but support its compliance with Exchange Act requirements. In any case, this apparent scarcity appears to be illusory. The Firm reached out to multiple leading vendors of fiber optic cabling who each indicated that they would need a lead time of three to four weeks to supply 3,000 units of equalized cables (within a one foot tolerance), which should be more than enough to complete the equalization of NY11 well under Nasdaq’s proposed 18 to 24 month timeframe.

3. NY11 Should be Equalized Within Four to Six Months

The Firm is deeply concerned that Nasdaq will continue to delay the Equalization Project and drag its feet once eventually commenced, as doing so aligns directly with its profit interest. In particular, the Firm is concerned that Nasdaq’s unsubstantiated claims of supply chain issues for fiber optic cabling are setting the stage with excuses for prolonged delays, potentially even beyond the current 18 to 24 month estimate. At a minimum, Nasdaq needs to develop and submit a transparent, objective, and firm equalization plan to the Commission—a plan that is consistent with Exchange Act requirements and that sets forth a comprehensive timeline for equalization with clearly established deadlines consistent with the industry standards we have described.

The Firm believes that Nasdaq, exercising reasonable diligence, can and should equalize NY11 within four to six months and can implement equalization in one weekend (or, at most, two consecutive weekends). If Nasdaq truly believes that it needs more time, it should substantiate such delay with compelling, detailed evidence.

III. Minimum Conditions Nasdaq Must Satisfy to Proceed with Expanding to NY11-4 Before Equalizing NY11

The Firm strongly reiterates that Nasdaq should not be permitted to proceed with the expansion of NY11-4 before redressing unequal connectivity in NY11. The Firm also recognizes that Nasdaq has made substantial investments towards establishing NY11-4, notwithstanding that it has not appropriately addressed the Exchange Act implications of such an expansion plan. The Firm does not wish to unduly impede Nasdaq’s ability to expand its data center generally, and would not have had to do so here had Nasdaq taken appropriate action at any point over the past four years to equalize connectivity in NY11.

In light of these considerations, and notwithstanding the significant deficiencies that Nasdaq needs to address in the Rule Changes, to the extent that the Commission were to permit Nasdaq to proceed with expanding to NY11-4 before equalizing NY11, Nasdaq should be required to meet these minimum qualifying conditions:

1. Submit a comprehensive, immediately-effective rule filing to equalize its data center campus within four to six months, with implementation conducted over one long weekend (at most two consecutive weekends);
2. Commit to no unfair discrimination in the implementation of such equalization project;

³⁵ See, *e.g.*, SR-NASDAQ-2024-054, *supra* n.2, at 77938 n.14.

3. Provide all colocation customers with sufficient information that allows them to evaluate latency—*i.e.*, provide them with their current connectivity lengths/latency to allow for comparison against the details set forth in the NY11-4 technical documentation—to allow each to make an informed choice;
4. Allow customers electing to relocate one or more of their current NY11 points of presence to NY11-4 to terminate their NY11 points early (effectively transferring their contractual commitment from NY11 to NY11-4, rather than providing Nasdaq a windfall of additional profits);
5. Submit a rule filing with full transparency regarding the Nasdaq Wireless Services—a requirement made clear by the D.C. Circuit’s 2022 decision; and
6. Refile the Rule Changes explicitly committing to these requirements and addressing the other issues discussed in this Letter.

Fundamentally, the minimum qualifying conditions described above are intended to allow Nasdaq to address its (unsubstantiated) need for additional colocation capacity but without a financial incentive to drag its feet on equalization. The requirements would also limit Nasdaq’s ability to continue to profit from maintaining unequal connectivity on its campus.

IV. Responding to the Nasdaq Response Letter

The Firm would also like to take this opportunity to address a few points directed towards the Firm by Nasdaq in its most recent comment letter.³⁶ Nasdaq’s does not substantively address the Exchange Act concerns raised by the Firm in its letter. Instead, Nasdaq pursued an *ad hominem* attack, alleging that the Firm’s arguments are “self-serving” and “specious.”³⁷ For years, the Firm has consistently advocated for a level playing field in exchange connectivity in all areas over which an exchange exercises control, fully consistent with and in furtherance of the Exchange Act’s prohibitions against unfair discrimination and inappropriate burdens on competition.³⁸ We find it very troubling that Nasdaq views calls for a level playing field, and by extension fulfillment of Nasdaq’s statutory obligations, as “specious.” It is primarily because of Nasdaq’s continued refusal to act in accordance with its Exchange Act obligations that the Firm has had to expend significant resources to advocate that Nasdaq cease abusing its control over its data center by providing advantages to select market participants and its affiliates at the expense of others.

Four years ago, before any announcement of Nasdaq’s planned NY11-4 expansion, the Firm called on Nasdaq specifically to, among other things, **“eliminate latency advantages in exchange connectivity arising from Nasdaq’s direct or indirect control of its data center (including with respect to the Nasdaq Wireless Services).”**³⁹ Eleven years ago, the Firm protested the establishment of an exclusive rooftop connection providing an insuperable latency advantage over its competitors.⁴⁰ Nasdaq has repeatedly ignored these calls for a level playing field, and then claims in its comment letter that the Firm has raised “no prior complaints about inequality that currently exists in NY11”—as though Section 6 of the Exchange Act were subject to a statute of limitations or our concerns would be any less valid if only now raised for the first time.

³⁶ Nasdaq Response Letter, *supra* n.3.

³⁷ *Id.* at 1.

³⁸ See also, e.g., [Letter](#) from Jim Considine, CFO, McKay Brothers LLC re: proposed Market Data Infrastructure (Exchange Act Release No. 88216) at 2 (“*Level Playing Field* – An exchange should represent or be able to represent that the exchange and its affiliates have not directly or indirectly facilitated any advantage for certain market participants or imposed any limitation on competition over any leg of market data distribution . . .”).

³⁹ McKay 2020 Letter, *supra* n.33, at 1 (emphasis added).

⁴⁰ See [Letter](#) from Anthony Nuland, Partner, Seward & Kissel LLP, as counsel for Quincy, to Elizabeth M. Murphy, Secretary, Commission, re: SR-NASDAQ-2012-119 (Jan. 17, 2013).

Nasdaq also incorrectly alleges that the Firm claimed there would be a “land rush” for space in NY11-4. The Firm never referred to customer demand for NY11-4 space as a “land rush,” and it is not a “land rush” because of the latency uncertainty described herein. The Firm’s argument, more accurately described, is that colocation customers already in NY11 will need to also take space in NY11-4 in order to understand the latency impact of NY11-4. Nasdaq actually corroborates this point, noting that “most of the pending customer interest in NY11-4 involves expanding their existing footprint in NY11.”⁴¹

Nasdaq also states in its comment letter (and makes similar arguments in the Rule Changes) that it would be “risky and pointless” to delay expansion of NY11-4 while it equalizes NY11 because equalization will ultimately involve temporary disparities in connectivity lengths while equalization occurs. To the contrary, the point of equalizing before expanding should be obvious—colocation customers would not have to pay ~\$2.5 million to Nasdaq to establish an additional point of presence in NY11-4 if Nasdaq were to equalize NY11 first.⁴² As a secondary point, under our proposal, Nasdaq would bring its existing colocation facility into compliance with the Exchange Act sooner, rather than exacerbate unequal connectivity.

Finally, although the Firm’s interests in this matter (and those of the Nasdaq member customers the Firm serves) are wholly irrelevant to Nasdaq’s statutory obligations, the Firm is happy to clarify its interests. The Firm has invested in infrastructure in and around NY11 and would prefer not to invest in additional infrastructure near NY11-4. However, the relevant question to this matter is why Nasdaq (considering its Exchange Act obligations) should be permitted to exercise its control over its data center to provide more favorable access to some colocation customers than others, compelling customers to establish a second, and now a third, point of presence in NY11-4 (at double and triple the fees paid to Nasdaq). As the Firm has repeatedly stated, most of these same colocation customers find that they only need one point of presence at NYSE (a well-equalized data center).

* * *

For the reasons detailed above, we believe Nasdaq must accelerate its plans to equalize all connections under its control within NY11, remedying existing Exchange Act concerns, before proceeding with its planned expansion to NY11-4, which would otherwise exacerbate the concerns. The Rule Changes should therefore be suspended. Alternatively, if Nasdaq is permitted to proceed with expanding to NY11-4 before equalizing, we believe Nasdaq should be required to comply with the minimum conditions set forth in Part III of this Letter.

Thank you again for the opportunity to comment on these developments. Please contact us with any questions.

Sincerely,



Jim Considine
Chief Financial Officer
McKay Brothers, LLC

cc: The Hon. Gary Gensler, Chair

⁴¹ Nasdaq Response Letter, *supra* n.3, at 2.

⁴² See McKay Letter 3, *supra* n.3, at n.19 and accompanying text.

The Hon. Hester M. Peirce, Commissioner
The Hon. Caroline A. Crenshaw, Commissioner
The Hon. Mark T. Uyeda, Commissioner
The Hon. Jamie Lizárraga, Commissioner

Mr. Haoxiang Zhu, Director, Division of Trading and Markets
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