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April 16, 2024

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

Submitted via email: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

**Re: Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Expand its Cabinet Proximity Option Program (SR-NASDAQ-2024-007; SR-BX-2024-007; SR-ISE-2024-07; SR-GEMX-2024-04; SR-MRX-2024-03; SR-PHLX-2024-06); and Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Cabinet Proximity Option Fee to Establish a Reservation Fee for Cabinets with Power Densities Greater Than 10kW (SR-NASDAQ-2024-013; SR-BX-2024-010; SR-ISE-2024-13; SR-GEMX-2024-08; SR-MRX-2024-09; SR-PHLX-2024-12)**

Dear Ms. Countryman:

Bloomberg L.P.<sup>1</sup> respectfully submits this letter in response to the above-referenced proposals filed with the U.S. Securities and Exchange Commission (“SEC” or the “Commission”) by the Nasdaq Stock Market LLC and its affiliate exchanges (collectively, “Nasdaq”) to amend its Cabinet Proximity Option program to offer the program for cabinets with power densities greater than 10kW and establish commensurate fees (collectively, the “Nasdaq Filing”).<sup>2</sup>

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<sup>1</sup> Bloomberg L.P. is a global leader in business and financial information, delivering trusted data, news, and insights that bring transparency, efficiency, and fairness to the markets. The company helps connect influential communities across the global financial system via reliable technology solutions that enable our customers to make more informed decisions and foster better collaboration.

<sup>2</sup> It appears that Nasdaq initially submitted a filing with the Commission on February 29, 2024 to expand its Cabinet Proximity Option program to allow for cabinets with power densities greater than 10 kW, then submitted the Nasdaq Filing on March 20, 2024, with updated information on the monthly fees to be assessed for reserving those cabinets. Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Expand its Cabinet Proximity Option Program (SR-NASDAQ-2024-007; SR-BX-2024-007; SR-ISE-2024-07; SR-GEMX-2024-04; SR-MRX-2024-03; SR-PHLX-2024-06) (Feb. 29, 2024), available at <https://www.sec.gov/files/rules/sro/nasdaq/2024/34-99633.pdf>; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Cabinet Proximity Option Fee to Establish a Reservation Fee for Cabinets with Power Densities Greater Than 10kW (SR-NASDAQ-2024-013; SR-BX-2024-010; SR-ISE-2024-13; SR-GEMX-2024-08; SR-MRX-2024-09; SR-PHLX-2024-12) (Mar. 20, 2024), available at <https://www.sec.gov/files/rules/sro/nasdaq/2024/34-99796.pdf> (the “Nasdaq Filing”).

## Overview

As detailed in a comment letter recently filed with the Commission by McKay Brothers LLC (“McKay Letter”), it appears the need for the expansion is prompted by an expansion of Nasdaq’s existing data center facility in Carteret, NJ (“NY11”) to include a new adjacent facility (“NY11-4”) constructed on the northside of NY11.<sup>3</sup> It is our understanding that Nasdaq provided certain preliminary information to potential data center customers regarding the configuration of the new facility.<sup>4</sup> If so, the Nasdaq Filing, as currently drafted clearly lacks sufficient information on the expansion of its facilities, the new services that will be offered in those facilities, and how the proposed fees and configurations comport with the requirements of the Securities Exchange Act of 1934 (“Exchange Act”) and rules and regulations thereunder. We are also generally concerned with the lack of transparency regarding this new co-location facility.

### **Nasdaq Filing Does Not Sufficiently Describe the Proposed New Facilities and Does Not Sufficiently Describe How the Proposed New Facility Will Provide Fair Access and Does not Unreasonably Burden Competition**

According to the Nasdaq Filing, Nasdaq seeks to expand its existing Cabinet Proximity Option program and establish a reservation fee for cabinets with power densities greater than 10kW. Nasdaq represents that its customers are currently assessed monthly fees for obtaining an option for future use on available, unused cabinet space in proximity to their existing equipment under the existing Cabinet Proximity Option program.<sup>5</sup> Nasdaq now seeks to charge \$3,000 per month for cabinets with power densities greater than 10kW under the expanded program.<sup>6</sup>

Notably absent from the Nasdaq Filing is any description, or even an indication, that Nasdaq is building an entirely new facility that will access the matching engine by a different path from the existing data center. The Nasdaq Filing therefore does not describe how it will ensure that the facility will provide fair access to the services of the exchange, how the new facility will impact or burden competition, and whether the fees for this new facility are designed to be reasonable, equitably allocated, not unfairly discriminatory, and do not unduly burden competition.

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<sup>3</sup> See Letter from McKay Brothers LLC to the SEC related to the Nasdaq Filing, (Mar. 22, 2024) (“McKay Letter”), available at <https://www.sec.gov/comments/sr-nasdaq-2024-007/srnasdaq2024007-449159-1150442.pdf>.

<sup>4</sup> *Id.*

<sup>5</sup> Monthly fees under the existing Cabinet Proximity Option program are \$1,055 for medium- or low-density cabinets and \$1,583 for medium/high or high density cabinets. Nasdaq Filing at p. 3.

<sup>6</sup> *Id.*

Nasdaq is a self-regulatory organization (“SRO”) subject to Commission oversight and required by the Exchange Act to establish rules that:

- Provide for the equitable allocation of reasonable dues, fees, and other charges;<sup>7</sup>
- Are not designed to permit unfair discrimination;<sup>8</sup> and
- Do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.<sup>9</sup>

Further, Exchange Act Section 19(b) of the Exchange Act and Rule 19b-4 thereunder require Nasdaq to file proposed rules, including any changes to any material aspect of the operation of its facilities.<sup>10</sup> The filing process and subsequent period for public comment is intended to obtain meaningful public feedback so that the Commission can determine whether the proposed changes – including those pertaining to fees – are consistent with the requirements of the Exchange Act and rules and regulations thereunder.<sup>11</sup> The Commission may approve an SRO’s proposed rule change only if it finds that such proposed rule change is consistent with provisions of the Exchange Act<sup>12</sup>

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<sup>7</sup> 15 U.S.C. §78f(b)(4).

<sup>8</sup> 15 U.S.C. §78f(b)(5).

<sup>9</sup> 15 U.S.C. §78f(b)(8).

<sup>10</sup> 17 CFR 240.19b-4(a)(6)(i). *See also* SEC Staff Guidance on SRO Rule Filings Relating to Fees at Section II (May 21, 2019), available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees> (“SEC Guidance on SRO Fee Filings”).

<sup>11</sup> Exchange Act Section 19(b) and Exchange Act Rule 19b-4. *See also* SEC Staff Guidance on SRO Rule Filings Relating to Fees at Section II (May 21, 2019), available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees> (“SEC Guidance on SRO Fee Filings”). The Commission may approve an SRO’s proposed rule change only if it finds that such proposed rule change is consistent with provisions of the Exchange Act. *See Susquehanna Int’l Grp., LLP v. SEC*, 866 F.3d 442 (D.C. Circ. 2017). *Accord*, Remarks of Brett Redfearn, SEC, before the SEC Roundtable and Market Access and Market Data, Oct. 26, 2018, available at <https://www.sec.gov/news/public-statement/statement-redfearn-102518> (stating that, in order for the Commission to “meet our obligations under the Exchange Act, we also need to ensure that the fees that are being charged for such important market services are fair and reasonable, not unreasonably discriminatory, and do not impose an undue or inappropriate burden on competition.”).

<sup>12</sup> Exchange Act Section 19(b) and Exchange Act Rule 19b-4. *See also* SEC Staff Guidance on SRO Rule Filings Relating to Fees at Section II (May 21, 2019), available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees> (“SEC Guidance on SRO Fee Filings”). The Commission may approve an SRO’s proposed rule change only if it finds that such proposed rule change is consistent with provisions of the Exchange Act. *See Susquehanna Int’l Grp., LLP v. SEC*, 866 F.3d 442 (D.C. Circ. 2017). *Accord*, Remarks of Brett Redfearn, SEC, before the SEC Roundtable and Market Access and Market Data, Oct. 26, 2018, available at <https://www.sec.gov/news/public-statement/statement-redfearn-102518> (stating that, in order for the Commission to “meet our obligations under the Exchange Act, we also need to ensure that the fees that are being charged for such important market services are fair and reasonable, not unreasonably discriminatory, and do not impose an undue or inappropriate burden on competition.”).

The introduction of a new co-location facility is a material aspect of the operation of Nasdaq's facilities and needs to be addressed in a rule filing submitted to the SEC for review. According to the McKay Letter, information Nasdaq shared with its customers about the new facility indicates latency concerns for different types of market participants co-locating in NY11-4 as compared to those in NY11 depending on the length of cross-connects between member cabinets and to members' telecom providers.<sup>13</sup> There may also be geographic advantages to NY11-4 relative to other locations.<sup>14</sup> This could all potentially lead to unfair discrimination among market participants and place inappropriate burdens on competition. Yet any steps to address these potential concerns are absent in the Nasdaq Filing.

The Nasdaq Filing also fails to discuss the relationship between Nasdaq wireless connectivity services operated from the rooftop of its datacenter ("Nasdaq Wireless Services") and NY11/NY11-4. As we noted in a prior comment letter submitted to the SEC,<sup>15</sup> we believe the Nasdaq Wireless Services may well be facilities of an exchange, and subject to the Exchange Act requirements. The US Court of Appeals for the District of Columbia Circuit found a comparable set of wireless connectivity services provided by the New York Stock Exchange LLC to be facilities of an exchange and the decision likewise applies to the Nasdaq Wireless Services.<sup>16</sup> If there are changes to the Nasdaq Wireless Services as a result of NY11-4, Nasdaq should address them.

## Conclusion

Nasdaq is statutorily obligated to make transparent and sufficiently detailed filings regarding changes to its rules and fees so that meaningful Commission and public review are possible. It has not done so in this instance. Based on the Nasdaq Filing, it is not possible for the Commission to determine whether what Nasdaq is proposing is consistent with the Exchange Act.

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<sup>13</sup> McKay Letter at p. 5. According to McKay Letter, Nasdaq notified its clients consisting of "members, telecom providers, and market data vendors" of its intent to begin to accept reservations for cabinet space in NY11-4 on March 1, 2024, and shared information pertaining to NY11-4. But it is not clear from the letter if all of Nasdaq's clients were notified and in which order, which leads to questions on whether any preferential treatment were given to some customers. *See id.* at p. 4.

<sup>14</sup> *Id.* at p. 6.

<sup>15</sup> Bloomberg L.P. Letter to the SEC on the Nasdaq Data Center Roof and Fair Market Access, dated Mar. 1, 2021, available at <https://www.sec.gov/comments/4-729/4729-8426150-229604.pdf>.

<sup>16</sup> *Intercontinental Exchange, Inc. et al v. SEC*, No. 20-1470 (D.C. Cir. 2022), [https://www.cadc.uscourts.gov/internet/opinions.nsf/83EBB6E695A3FAE0852587D100546647/\\$file/20-1470-1931643.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/83EBB6E695A3FAE0852587D100546647/$file/20-1470-1931643.pdf).

Ms. Vanessa Countryman, Securities and Exchange Commission  
Bloomberg L.P. Letter on File Nos. SR-NASDAQ-2024-007; SR-BX-2024-007; SR-ISE-2024-07; SR-GEMX-2024-04; SR-MRX-2024-03; SR-PHLX-2024-06; SR-NASDAQ-2024-013; SR-BX-2024-010; SR-ISE-2024-13; SR-GEMX-2024-08; SR-MRX-2024-09; and SR-PHLX-2024-12  
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We appreciate the Commission's willingness to consider our comments and would be pleased to discuss any question that the Commission may have with respect to this letter.

Thank you.

Very truly yours,

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

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