

March 17, 2020

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

Re: Notice of Filing of Proposed Rule Change to Amend the Schedule of Wireless Connectivity Fees and Charges to Add Wireless Connectivity Services (Release No. 34-88241; File No. SR-NYSENAT-2020-08)

Dear Ms. Countryman:

McKay Brothers LLC (“McKay”) and its affiliate Quincy Data LLC (“Quincy”) (collectively, the “Firm”)<sup>1</sup> appreciate the opportunity to comment on the above referenced proposed rule change (the “Proposal”) by NYSE National Inc. (the “Exchange”).<sup>2</sup> The Proposal would establish a schedule of fees for market data from the Exchange and two of its affiliates (New York Stock Exchange LLC and NYSE Arca Inc., collectively “Selected Market Data”) available through wireless connections in third party data centers located in (i) Carteret, New Jersey, (ii) Secaucus, New Jersey, and (iii) Markham, Canada (the “Third Party Data Centers”) that connect to the Exchange’s data center located in Mahwah, New Jersey (the “Wireless Connections”). Under the Proposal, the Wireless Connections through which Selected Market Data may be obtained are deemed to be “facilities” of the Exchange within the meaning of Section 3(a)(2) of the Securities Exchange Act of 1934 (“Exchange Act”), although the Exchange disputes this categorization.<sup>3</sup> We believe the Wireless Connections, and the Selected Market Data available through them, are facilities of the Exchange, but that the Proposal lacks key details and statutory justification, as described below.

The Proposal closely relates to a proposal currently under review by the Commission to establish the Wireless Fee Schedule and set forth the fees for the Wireless Connections (the “Wireless Connections Proposal”).<sup>4</sup> The primary difference between the two proposals is that the Wireless Connections Proposal sets forth connectivity fees for the Wireless Connections while the Proposal sets forth the fees for Selected Market Data available through the Wireless Connections.

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<sup>1</sup> 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 telecom service provider, using microwave and fiber technologies to offer low-latency data transport services, which likewise allows our 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 small firm discounts to support greater diversity of market participants with access to low latency market data.

<sup>2</sup> Securities Exchange Act Release No. [88241](#), 85 FR 10738 (Feb. 25, 2020).

<sup>3</sup> 15 U.S.C. 78c(a)(2).

<sup>4</sup> Proposal at n.4 (citing to SR-NYSENAT-2020-03, Exchange Act Release No. [88171](#), 85 FR 8930 (Feb. 18, 2020)).

We have separately commented on the Wireless Connections Proposal and incorporate the content of that comment letter here (the “McKay Comment Letter”).<sup>5</sup> Both proposals dispute the categorization of the Wireless Connections and services provided through them (*e.g.*, receipt of Selected Market Data) as facilities of the Exchange. As described in detail in the McKay Comment Letter, we believe that the Wireless Connections are facilities of the Exchange because, among other reasons, they connect to a private pole located on the premises of the Exchange’s Mahwah datacenter (the “NYSE Private Pole”).<sup>6</sup> It follows therefore that the use of the Wireless Connections for the distribution Selected Market Data would similarly constitute a facility of the Exchange.

As also detailed in the McKay Comment Letter, the Exchange has provided the Wireless Connections—and by extension the Selected Market Data distributed through the Wireless Connections—with an unjustified latency advantage relative to competing means of distribution. Specifically, Selected Market Data distributed via the Wireless Connections is able to exit the Mahwah data center facility faster than alternate means of distribution through the use of the NYSE Private Pole. The NYSE Private Pole is closer in geographic proximity to the Exchange’s systems than the public poles located outside the Mahwah datacenter through which market participants not using the Wireless Connections receive Selected Market Data.<sup>7</sup> The Exchange has also taken deliberate steps toward extending this latency advantage by seeking permission to place wireless equipment on its roof for its exclusive use, which would further reduce the geographic latency associated with receiving Selected Market Data available through them.<sup>8</sup>

In the Proposal, the Exchange neither explicitly describes this latency advantage nor explains why it is consistent with Exchange Act requirements, including why it does not allow for unfair discrimination or impose a burden on competition not necessary or appropriate in furtherance of the Exchange Act.<sup>9</sup> Additionally, Rule 603(a)(2) of Regulation NMS requires that any national securities exchange “that distributes information with respect to quotations for or transactions in an NMS stock” to a broker-dealer, the securities information processors, or other persons “shall do so on terms that are not unreasonably discriminatory.”<sup>10</sup>

The means of distribution of Selected Market Data via the Wireless Connections is discriminatory because it is distributed in a different manner than Selected Market Data obtained

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<sup>5</sup> See Letter to Vanessa Countryman, Secretary, Commission, from Jim Considine, Chief Financial Officer, McKay, re: SR-NYSENAT-2020-03 (Release No. 34-88171) (Mar. 10, 2020), <https://www.sec.gov/comments/sr-nysenat-2020-03/srnysenat202003.htm>.

<sup>6</sup> McKay Comment Letter at 4-7. The Wireless Connections are also used for effecting or reporting transactions on the Exchange and use the Exchange’s intangible property. *Id.*

<sup>7</sup> As the Commission has noted, “[l]ight travels slower through fiber than microwaves travel through the air.” Exchange Act Release No. [88216](#) at 160 (Feb. 14, 2020) [Federal Register publication pending] (“Market Data Infrastructure Proposal”). By exiting the Mahwah datacenter via the NYSE Private Pole rather than traversing a longer distance via fiber to the public pole outside the Mahwah data facility, Selected Market Data obtained through the Wireless Connections receives a latency advantage.

<sup>8</sup> McKay Comment Letter at 9-11.

<sup>9</sup> 15 U.S.C. 78f(b)(5) and (8).

<sup>10</sup> 17 CFR 242.603(a)(2).

otherwise than via the Wireless Connections. We believe that this discrimination is both unfair and unreasonable, and is therefore inconsistent with the Exchange Act. The timely receipt of market data is essential to trading competitively in today’s markets. The Commission acknowledged ten years ago that “[s]peed matters both in the absolute sense of achieving very small latencies and in the relative sense of being faster than competitors, *even if only by a microsecond.*” (emphasis added).<sup>11</sup> Market participants that use the Wireless Connections to receive Selected Market Data receive a latency advantage in the initial distribution of that data from the Mahwah datacenter. There is no reasonable or fair basis for providing such an advantage to the exclusion of all other wireless service providers other than to benefit the Exchange’s Wireless Connections (and Selected Market Data available through them) over competitors. The latency advantage provided to Selected Market Data therefore imposes an inappropriate burden on competition, inconsistent with Section 6(b)(8) of the Exchange Act.<sup>12</sup>

It is precisely this type of exchange practice that must fall within the protection of the Exchange Act’s prohibition on inappropriately burdening competition, among other provisions.<sup>13</sup> The exclusive use of the NYSE Private Pole (and any further use of the datacenter roof) is manifestly designed to advantage the Exchange’s services (offered through its affiliate) in the provision of Selected Market Data over competitors. Notably, the Commission has just proposed a prohibition on this exact type of practice in the recent Market Data Infrastructure proposal. Under proposed Rule 603(b) an exchange would be required to provide market data to competing consolidators and self-aggregators “in the same manner and using the same methods, including all methods of access and the same format” as it provides that information to any other person.<sup>14</sup> Pursuant to this requirement, an exchange could not provide market data “in a faster manner to any affiliate exchange, a subsidiary or other affiliate that operates as a competing consolidator or a subsidiary or affiliate that competes in the provision of proprietary data.”<sup>15</sup> Consistent with this approach, the Commission should prohibit the Exchange’s unfair latency advantage in the distribution of Selected Market Data.

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Both the Proposal and the related Wireless Connection Proposal lack essential details describing the latency advantage provided to the Wireless Connections (and Selected Market Data available through them) as well as the statutory justification for such advantage. The Exchange’s actions toward cementing this exclusive latency advantage using the roof of the Mahwah datacenter is of great concern as well. As further detailed in the McKay Comment

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<sup>11</sup> Exchange Act Release No. [61358](#), 75 FR 3593, 3610 (Jan. 21, 2010). *See also* Market Data Infrastructure Proposal, *supra* note 7, at 89 and 163 (Feb. 14, 2020) [Federal Register publication pending] (“Over the past several years, market participants have increasingly raised concerns about these various forms of latency and how they affect their ability to participate competitively in today’s markets . . . nearly all trading now occurs on fast, electronic markets (where even small degrees of latency affect trading strategies) and is dispersed among a wide range of competing market centers.”).

<sup>12</sup> 15 U.S.C. 78f(b)(8).

<sup>13</sup> *Id.*

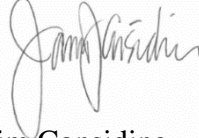
<sup>14</sup> Market Data Infrastructure Proposal, *supra* note 7, at 564.

<sup>15</sup> *Id.* at 176.

Letter, while we support the Commission's conclusion that the Wireless Connections and Selected Market Data are facilities of the Exchange, we believe the aforementioned latency advantage is inconsistent with Exchange Act requirements.

Please feel free to contact us with us with any questions at (312) 948-9188.

Sincerely,



Jim Considine  
Chief Financial Officer  
McKay Brothers, LLC

cc: The Hon. Jay Clayton, Chairman  
The Hon. Hester M. Peirce, Commissioner  
The Hon. Elad L. Roisman, Commissioner  
The Hon. Allison Herren Lee, Commissioner

Mr. Brett Redfearn, Director, Division of Trading and Markets  
Mr. Christian Sabella, Deputy Director, Division of Trading and Markets  
Ms. Elizabeth Baird, Deputy Director, Division of Trading and Markets  
Mr. David S. Shillman, Associate Director, Division of Trading and Markets  
Mr. John Roeser, Associate Director, Division of Trading and Markets

S.P. Kothari, Director, Division of Economic and Risk Analysis