

equity and ETF options trades.¹⁷ Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in November 2021, the Exchange had less than 8% market share of executed volume of multiply-listed equity and ETF options trades.¹⁸

The Exchange believes that the proposed rule change reflects this competitive environment because it modifies the Exchange's fees in a manner designed to continue to encourage Market Makers to direct trading interest to the Exchange, to provide liquidity and to attract order flow. Specifically, the Exchange believes that the modifications to the Sliding Scale would continue to offer a significant reduction in overall transaction rates for Market Makers, as well as additional reductions for Market Makers that participate in the Prepayment Program. To the extent that this purpose is achieved, all the Exchange's market participants should benefit from the improved market quality and increased opportunities for price improvement.

The Exchange also believes that the proposed change would promote competition between the Exchange and other execution venues, by encouraging additional orders to be sent to the Exchange for execution.

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

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)¹⁹ of the Act and subparagraph (f)(2) of Rule 19b-4²⁰ thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if

it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)²¹ of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

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

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-NYSEAMER-2022-07 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEAMER-2022-07. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://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 website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are

cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEAMER-2022-07, and should be submitted on or before February 23, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²²

J. Matthew DeLesDernier,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-94076; File No. SR-NASDAQ-2022-006]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change To Enable Exchange Members To Enter Midpoint Extended Life Orders and M-ELO Plus Continuous Book Orders With an Immediate-or-Cancel Time-in-Force Instruction

January 27, 2022.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 19, 2022, The Nasdaq Stock Market LLC ("Nasdaq" 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. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to enable Exchange members to enter Midpoint Extended Life Orders ("M-ELOs") and M-ELO Plus Continuous Book ("M-ELO+CB") Orders with an immediate-or-cancel ("IOC") Time-in-Force ("TIF") instruction.³

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, at the principal

²² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Citations herein to the Nasdaq Rule 4000 Series shall refer to Equity 4.

¹⁷ See *supra* note 13.

¹⁸ Based on a compilation of OCC data for monthly volume of equity-based options and monthly volume of ETF-based options, see *id.*, the Exchange's market share in multiply-listed equity and ETF options the Exchange's market share in equity-based options decreased from 9.09% for the month of November 2020 to 7.06% for the month of November 2021.

¹⁹ 15 U.S.C. 78s(b)(3)(A).

²⁰ 17 CFR 240.19b-4(f)(2).

²¹ 15 U.S.C. 78s(b)(2)(B).

office of the Exchange, and at the Commission's Public Reference Room.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV 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

The Exchange proposes to amend Rule 4702(b)(14) and (by implication) 4702(b)(15) to enable Exchange members to enter M-ELO and M-ELO+CB Orders with an IOC time-in-force instruction.

On March 7, 2018, the Commission issued an order approving the Exchange's proposal to adopt the M-ELO as a new Order Type.⁴ A M-ELO is a non-displayed order that is available to all members but interacts only with other M-ELOs and M-ELO+CBs. It is priced at the midpoint between the National Best Bid and Offer ("NBBO") and it does not become eligible for execution until at least 10 milliseconds elapse after its entry (the "Holding Period").⁵ Once the Holding Period elapses, a M-ELO becomes eligible for execution against other M-ELOs and M-ELO+CBs on a time-priority basis.⁶

A M-ELO+CB is an Order Type that has all the characteristics and attributes of a M-ELO Order, except that a M-

ELO+CB that satisfies the Holding Period is eligible to execute (at the midpoint of the NBBO) against other eligible M-ELO+CBs, eligible M-ELOs, and also eligible non-displayed Orders with Midpoint Pegging and Midpoint Peg Post-Only Orders ("Midpoint Orders") resting on the Exchange's Continuous Book.⁷

Presently, neither M-ELO nor M-ELO+CB Orders may be entered with a TIF of IOC. An Order with a TIF of IOC is one that is designated to deactivate immediately after determining whether the Order is marketable.⁸ In the Exchange's proposal to establish the M-ELO Order Type, the Exchange explained that it decided to exclude IOCs from M-ELOs since it deemed the IOC TIF, by its nature, to be "inconsistent with the Holding Period requirement of the proposal."⁹ That is, the Exchange designed M-ELO to provide a space where investors with longer time horizons, including institutional investors, can interact exclusively with each other—by virtue of a mutually-applicable Holding Period—without fear that aggressive order types could trade with M-ELOs or M-ELO+CBs to the detriment of such M-ELOs and M-ELO+CBs immediately upon entry and without waiting 10 milliseconds before doing so, such as immediately before a change in the NBBO for a particular security (*i.e.*, risk of adverse selection). Nevertheless, institutional investors—which again are the primary beneficiaries and users of M-ELO and M-ELO+CB—have approached the Exchange recently to request the ability to enter IOC instructions for their M-ELO and M-ELO+CB Orders as a means of assisting them in sourcing liquidity on the Exchange's M-ELO/M-ELO+CB Book so that they can minimize the opportunity costs of utilizing M-ELO and M-

ELO+CB Orders and thus render use of M-ELO and M-ELO+CB more efficient and productive for participants.

That is, the functionality would provide users with an indication as to whether eligible contra-side liquidity would be available to their M-ELO or M-ELO+CB Orders and allow these users to streamline their decision-making process of whether to send additional M-ELO or M-ELO+CB Orders to the Exchange or to seek liquidity elsewhere.¹⁰ It would also enable participants whose M-ELO or M-ELO+CB Orders do not satisfy the conditions for a Holding Period to commence upon Order entry to have those Orders cancel immediately rather than be held by the System until such time as the conditions are met, which would allow these participants to assess whether they wish to submit new M-ELO or M-ELO+CB Orders that would satisfy the conditions to commence a Holding Period upon entry.

To avoid introducing the risks of adverse selection associated with enabling IOC in these contexts (discussed above), brokers representing institutional investors requested that when they enter M-ELO and M-ELO+CB Orders (which are eligible to commence a Holding Period upon entry) with an IOC instruction, the IOC instruction should activate only at the expiration of the 10 millisecond Holding Period, rather than immediately upon Order entry. In other words, only after the 10 millisecond Holding Period elapses would the System check to see if a M-ELO or M-ELO+CB Order with an IOC TIF is able to execute immediately against contra-side resting liquidity; if so, the Order will execute as it would currently, but if not, the System will automatically cancel the Order rather than keep it on the Book. If the Order at the time of entry is unable to begin the Holding Period (because, for example, it is entered with a limit price that is not at or better than the midpoint of the NBBO, if there is no NBB or NBO at the time of entry, or the NBBO is crossed at the time of entry), then the Order will be automatically cancelled immediately.

The Exchange agrees with the participants that requested this IOC functionality that when modified in this manner, its use with M-ELO and M-ELO+CB would serve a beneficial purpose that is not inconsistent with the Exchange's intentions and designs for these Order Types. That is, it would

⁴ See Securities Exchange Act Release No. 34-82825 (Mar. 7, 2018), 83 FR 10937 (Mar. 13, 2018) (order approving SR-NASDAQ-2017-074).

⁵ In 2020, the Commission issued an order approving the Exchange's proposal to shorten the Holding Period for M-ELO and M-ELO+CB Orders from one half second to 10 milliseconds. See Securities Exchange Act Release No. 34-88743 (April 24, 2020), 85 FR 24068 (April 30, 2020) (order approving SR-NASDAQ-2020-011). If a member modifies a MELO or M-ELO+CB during the Holding Period, other than to decrease the size of the order or to modify the marking of a sell order as long, short, or short exempt, then such modification will cause the Holding Period to reset.

⁶ If a member modifies a M-ELO or M-ELO+CB after the Holding Period elapses, other than to decrease the size of the order or to modify the marking of a sell order as long, short, or short exempt, then such modification will trigger a new Holding Period for the order.

⁷ A M-ELO+CB is eligible to execute against a Midpoint Order if: (i) The Midpoint Order has the Midpoint Trade Now Attribute enabled; (ii) no other order is resting on the Continuous Book that has a more aggressive price than the current midpoint of the NBBO; (iii) the Midpoint Order has rested on the Exchange's Continuous Book for a minimum of 10 milliseconds after the NBBO midpoint falls within the limit set by the participant; and (iv) the Midpoint Order satisfies any minimum quantity requirement of the M-ELO+CB. A buy (sell) M-ELO+CB is ranked in time order at the midpoint among other buy (sell) M-ELO+CBs, buy (sell) Midpoint Extended Life Orders, and buy (sell) Midpoint Orders, as of the time when such Orders become eligible to execute. See Rule 4702(a)(15); see also Securities Exchange Act Release No. 34-86938 (September 11, 2019), 84 FR 48978 (September 17, 2019) (order approving SR-NASDAQ-2019-048).

⁸ Rule 4703(a)(1).

⁹ See Securities Exchange Act Release No. 34-81311 (August 3, 2017), 82 FR 37248 (August 9, 2017) (SR-NASDAQ-2017-074).

¹⁰ The Exchange understands that some participants representing institutional investor orders have developed methods that mimic the functions of IOC.

permit IOC users to check the M-ELO or M-ELO+CB Book for contra-side liquidity, but not in an aggressive or riskless fashion.¹¹ Users of the IOC functionality in this context would still need to endure the Holding Period before utilizing it, and then execute against contra-side interest if it is available upon expiration of that Holding Period. While the proposal would provide for immediate cancellation of M-ELO and M-ELO+CB Orders that do not meet the conditions for a Holding Period to commence upon entry, the cancellation of these M-ELOs and M-ELO+CBs would only indicate that such Orders are not eligible to enter the Holding Period (*i.e.*, the NBBO is crossed at the time of entry, there is no NBB or NBO at the time of entry, or the Order is entered with a limit price that is not at or better than the NBBO midpoint) and would not indicate whether there are available contra-side M-ELOs or M-ELO+CBs at the time of entry on Nasdaq. The Exchange also notes that, in other contexts, the use of IOCs is routine and recognized as a prudent way to seek liquidity in a fragmented market, and its use in this context, as modified, should not be controversial.

Accordingly, the Exchange now proposes to amend Rule 4702(b)(14) (and implicitly, Rule 4702(b)(15)), because it would incorporate amendments to Rule 4702(b)(14) to permit members to enter M-ELO and M-ELO+CB Orders with a TIF instruction of IOC, with the caveat that, when used for these Order Types, the IOC instruction will activate upon the expiration of the Holding Period, unless the Order is unable to begin the Holding Period upon entry, in which case it will cancel immediately.

As part of the surveillance the Exchange currently performs, M-ELOs and M-ELO+CBs with IOC would be subject to real-time surveillance to determine if they are being abused by market participants. In addition, as is the case for ordinary M-ELOs and M-ELO+CBs, the Exchange will monitor the use of M-ELOs and M-ELO+CBs with IOC with the intent to apply additional measures, as necessary, to ensure their usage is appropriately tied to the intent of the Order Types. The Exchange is committed to determining whether there is opportunity or prevalence of behavior that is inconsistent with normal risk management behavior, such as excessive cancellations. Manipulative abuse is

subject to potential disciplinary action under the Exchange's Rules, and other behavior that is not necessarily manipulative but nonetheless frustrates the purposes of the M-ELO or M-ELO+CB Order Types may be subject to penalties or other participant requirements to discourage such behavior, should it occur.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹² in general, and furthers the objectives of Section 6(b)(5) of the Act,¹³ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

The proposal will assist market participants in sourcing liquidity on the Exchange's M-ELO/M-ELO+CB Book so that they can minimize the opportunity costs associated with utilizing M-ELO and M-ELO+CB Orders and thus render use of M-ELO and M-ELO+CB more efficient and productive. At the same time, the proposal avoids exposing M-ELO and M-ELO+CB orders to the risks of adverse selection associated with aggressive IOC by proposing that, when used in the contexts of M-ELO and M-ELO+CB Orders, the IOC instruction will activate only at the expiration of the 10 millisecond Holding Period, rather than immediately upon Order entry, as orders with a TIF of IOC do in other contexts. The exception to this is if the M-ELO or M-ELO+CB Order with an IOC instruction is unable to begin the Holding Period upon entry, as will occur if the Market is crossed at the time of entry, there is no NBB or NBO at the time of entry, or the Order is entered with a limit price that is not at or better than the NBBO midpoint. In such cases, the Order will be cancelled immediately upon entry. Doing so is consistent with the spirit of the IOC instruction, in that the market participant is indicating a desire for their Order to persist for the minimum period possible, while a M-ELO or M-ELO+CB Order that is ineligible to begin the Holding Period upon entry could potentially persist in a held state until it is cancelled by the System at the end of Market Hours. Crucially, the immediate cancel of an Order that is ineligible to begin the Holding Period upon entry does not provide information to the participant about the underlying state of the M-

ELO/M-ELO+CB Book.¹⁴ When used in this context, IOC will not be useful to participants engaging in strategies that are time sensitive. Thus, this proposal will not frustrate the underlying design of M-ELO and M-ELO+CB Orders, which again is to provide investors, including institutional investors, with longer time horizons to safely interact with each other without interacting with aggressive or time sensitive orders.

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 not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the proposal will enhance the utility and efficiency of the M-ELO and M-ELO+CB Order Types, which in turn will render the Exchange a more attractive venue for market participants that stand to benefit from these Order Types. The proposed IOC instruction will not burden intra-market competition as it will be available for use by all market participants.

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

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

¹⁴ The existence of resting interest on the M-ELO/M-ELO+CB Book is not a prerequisite for the Order to enter the Holding Period. Therefore, the cancellation of these M-ELOs and M-ELO+CBs only indicate that such Orders are not eligible to enter the Holding Period (*i.e.*, the NBBO is crossed at the time of entry, there is no NBB or NBO at the time of entry, or the Order is entered with a limit price that is not at or better than the NBBO midpoint) and does not indicate whether there are available contra-side M-ELOs or M-ELO+CBs at the time of entry on Nasdaq. Consequently, the IOC instruction cannot be exploited to check the Book for liquidity in a riskless fashion (*e.g.*, by cancelling before the Holding Period expires).

¹¹ Nasdaq reiterates that by design, spread-crossing orders do not interact with MELO or M-ELO+CB Orders.

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(5).

IV. Solicitation of Comments

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

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2022-006 on the subject line.

Paper Comments

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2022-006. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://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 website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2022-006 and should be submitted on or before February 23, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁵

J. Matthew DeLesDernier,
Assistant Secretary.

[FR Doc. 2022-02077 Filed 2-1-22; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-94091]

Order Granting Application by Nasdaq PHLX LLC for an Exemption Pursuant to Section 36(a) of the Exchange Act From the Rule Filing Requirements of Section 19(b) of the Exchange Act With Respect to Certain Rules Incorporated by Reference

January 27, 2022.

Nasdaq PHLX LLC ("Phlx" or "Exchange") has filed with the Securities and Exchange Commission ("Commission") an application for an exemption under Section 36(a)(1) of the Securities Exchange Act of 1934 ("Exchange Act")¹ from the rule filing requirements of Section 19(b) of the Exchange Act² with respect to certain rules of the Financial Industry Regulatory Authority, Inc. ("FINRA") that the Exchange seeks to incorporate by reference.³ Section 36 of the Exchange Act, subject to certain limitations, authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class thereof, from any provision of the Exchange Act or rule thereunder, if necessary or appropriate in the public interest and consistent with the protection of investors.

The Exchange has requested, pursuant to Rule 0-12 under the Exchange Act,⁴ that the Commission grant the Exchange an exemption from the rule filing requirements of Section 19(b) of the Exchange Act for changes to the Exchange's rules that are effected solely by virtue of a change to a cross-referenced FINRA rule. Specifically, the Exchange requests that it be permitted to incorporate by reference changes made to the FINRA rules that are cross-referenced in the Exchange's rules identified below, without the need for the Exchange to file separately similar

proposed rule changes pursuant to Section 19(b) of the Exchange Act:⁵

- General 9, Section 1(a) (Prohibition Against Trading Ahead of Customer Orders) cross-references FINRA Rule 5320 (except for FINRA Rule 5320.02(b) and the reference to FINRA Rule 6420 in FINRA Rule 5320).
- Options 10, Section 20 (Options Communications) cross-references FINRA Rule 2220 (except for FINRA Rule 2220(c)).

The Exchange represents that the FINRA rules listed above are regulatory rules and not trading rules.⁶ The Exchange represents that, as a condition to the requested exemption from Section 19(b) of the Exchange Act, the Exchange will provide written notice to its members and member organizations whenever FINRA proposes a change to FINRA Rule 2220 or 5320.⁷ The Exchange states that such notice will alert its members, member organizations, and associated persons to the proposed FINRA rule change and give them an opportunity to comment on the proposal.⁸ The Exchange further represents that it will inform members, member organizations, and associated persons in writing when the Commission approves any such proposed rule changes.⁹

According to the Exchange, this exemption is appropriate because it would result in the Exchange's rules pertaining to prohibition against trading ahead of customer orders and options communications being consistent with the relevant cross-referenced FINRA rules at all times, thus ensuring consistent regulation of joint members of Phlx and FINRA.¹⁰ The Exchange further states that, even if members are not joint members of Phlx and FINRA, the exemption is appropriate because it will permit its rules to remain consistent with FINRA's rules and ensure consistent treatment of industry members with respect to the aforementioned rules.¹¹

The Commission has issued exemptions similar to the Exchange's

⁵ See Exemptive Request, *supra* note 3, at 2.

⁶ See *id.* at 2, n.8. The Exchange also states that it is not "cherry picking" because the Exchange would be incorporating categories of rules. See *id.*

⁷ See *id.* at 2-3. The Exchange represents that it will provide such notice via a posting on the same website location where the Exchange posts its own rule filings pursuant to Rule 19b-4(l) within the time frame required by such rule. See *id.* at 3, n.9. The website posting will include a link to the location on FINRA's website where the applicable proposed rule change is posted. See *id.*

⁸ See *id.* at 3.

⁹ See *id.*

¹⁰ See *id.* at 2.

¹¹ See *id.*

¹⁵ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78mm(a)(1).

² 15 U.S.C. 78s(b).

³ See Letter from Angela S. Dunn, Principal Associate General Counsel, Phlx, to J. Matthew DeLesDernier, Assistant Secretary, Commission, dated August 26, 2021 ("Exemptive Request").

⁴ 17 CFR 240.0-12.